

REPUBLIC OF NAMIBIA



**IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: CC 32/2018

In the matter between:

THE STATE

Versus

ALEXANDER KRYLOV

ACCUSED 1

ANNA ENGELBRECHT

ACCUSED 2

Neutral citation: *S v Krylov (CC 32/2018) [2023] NAHCMD 48 (13 February 2023)*

Coram: CLAASEN, J

Heard: 3 – 7 February 2020, 10 – 14 February 2020, 16 March 2020, 08 June 2020, 09 – 12 June 2020, 28 September – 1 October 2020, 11 – 13 November 2020, 3 – 9 December 2020, 25 – 29 January 2021, 15 March 2021, 18 March 2021, 28 April 2021, 28 May 2021, 2 July 2021, 16 August 2021 and 17 August 2021, 18 October 2021, 26 October 2021, 1 – 2 November 2021, 22 – 30 March 2022, 23 –

24 May 2022, 19 August 2022, 17 October 2022 and 19 October 2022.

Delivered: 13 February 2023

Flynote: Criminal Law – Contravention of s 15 of the Prevention of Organized Crime Act, 29 of 2004 (POCA) – Trafficking of minors for sexual exploitation – Committed on multiple occasions – The first accused transported them in his vehicle to his dwelling and engaged in sexual acts in exchange for money and/or cigarettes – Such conduct constitutes offence of trafficking of persons for sexual exploitation.

Criminal Law – Contravention of s 2 (1)(a) and (b) of the Combating of Rape Act 8 of 2000 in respect of the accused persons – Court considers criteria to expand coercive circumstances – Complainants exceptionally vulnerable by virtue of their age – Court reiterated sentiments expressed by full bench decision in *Veira vs Prosecutor General and Others* that s 2(2) of CORA was designedly broad to cover wide extent of coercive circumstances and alike circumstances – Discretion to be exercised judiciously – Court held that the circumstances herein, cumulatively considered, amounts to coercive circumstances.

Criminal Law – Contravening s18 (1)(a) read with s 18(4) of the Tobacco Products Control Act, 1 of 2010 – First accused supplied minors with cigarettes on diverse occasions – Such conduct constitutes an offence.

Summary: The accused persons are a major Russian male and major Namibian female, respectively. The duo faced multiple charges under the Prevention of Organized Crime Act 29 of 2004, the Combating of Rape Act, 8 of 2000, alternatively the Combating of Immoral Practices Act 21 of 1980 and contravening s18 (1)(a) of the Tobacco Products Control Act, 1 of 2010. The accused postulated defences such as that the minors voluntary went to accused 1's dwelling, that the

complainants' evidence was riddled with contradictions and that it was a concocted case. Having evaluated the evidence, the court was satisfied that the State proved some of the instances beyond any reasonable doubt. Court afforded the accused persons the benefit of the doubt in instances wherein it found that the State has not discharged that onus. The court also found accused 1 not guilty on certain counts, which in the court's view, would amount to a duplication of convictions.

Held that accused facilitated and transported the minor complainants to dwelling of accused 1 for sexual exploitation in instances wherein court found credible evidence as to the incident, which amounts to trafficking.

Held further that, some of the discrepancies in evidence adduced by the complainants are inconsequential, others are not. For those that are not, the accused persons were afforded the benefit of the doubt.

Held further that, considering how close the respective ages were to the age limit in the CIPA; that this was not a once-off sexual act but devolved into an organised scheme in which the sole motive was to exploit minor children for sexual purposes; which stretched over several months with more than one perpetrator and as many as five children; who were mostly from single parent households where money was not freely available; against the severity of a child trafficking milieu, makes this a compelling case to expand the list of coercive circumstances.

Held further that, it would be a travesty of justice if this court does not exercise its discretion in favour of finding that the circumstances herein, cumulatively considered, amounts to coercive circumstances.

Held further that, contradictions such the sequence of the complainants', namely who was first and who was last or the specific amounts, as well as omissions about the flavour of the condoms used amount to peripheral issues. These are

inconsequential. That can however, not be said throughout. Where evidence in respect of a certain instance was found to be unreliable and the court doubts the incident itself, the benefit of the doubt accrues to the accused.

Held further that it is imperative that court officials be mindful that children may find court formalities intimidating and that these difficulties may become more pronounced in cases that involve sexual offences. It thus, calls for an approach that is flexible and within the parameters of the law. Courts have a duty to ensure that children receive the necessary support to ensure a fair trial and in line with their growth and development, without detracting from the need for proper testing of evidence as a fundamental principle in our adversarial system.

Held further that children may not necessarily realise the weight of the initial statement and that every word therein will be tested afterwards in court. In a matter such as this, dealing with a sizable scope of allegations being of intimate nature involving five minor complainants, more care should have been taken in the recording of the witness statements. It will go a long way to remove the pitfalls that awaits a child witness during cross-examination in court.

Held further that, although two distinct sexual acts were committed, accused acted with the single intention to have sexual intercourse and to convict him for both such acts will amount to a duplication of convictions.

ORDER

Count 1 Contravening s 15 read with s 1 of the Prevention of Organized Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Guilty

Count 2 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 3 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1. Not Guilty

Count 4.Contravening s 2(1)(b) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 2: Guilty

Alternative count Contravening s 14(c) of the Combating of Immoral Practices Act 21 of 1980 – Soliciting or enticing a child to commit a sexual act or an immoral or an indecent act.

Accused 2: Not Guilty

Counts 5 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Guilty

Count 6 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape

Accused 1: Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 7 Contravening s 2(1)(b) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 2: Guilty

Alternative count Contravening s 14(c) of the Combating of Immoral Practices Act 21 of 1980 – Soliciting or enticing a child to commit a sexual act or an immoral or an indecent act.

Accused 2: Not Guilty

Count 8 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Not Guilty

Accused 2: Not Guilty

Count 9 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 10 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 11 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Guilty

Count 12 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 13 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 14 Contravening s 2(1)(b) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 2: Guilty

Alternative count Contravening s 14(c) of the Combating of Immoral Practices Act 21 of 1980 – Soliciting or enticing a child to commit a sexual act or an immoral or an indecent act.

Accused 2: Not Guilty

Count 15

Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Not Guilty

Count 16

Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 17 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Guilty

Count 18 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 19 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Not Guilty

Count 20 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

COUNT 21 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Not Guilty

Accused 2: Not Guilty

COUNT 22 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

1st alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

2nd alternative count Contravening s 14(b) of the Combating of Immoral Practices. Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 23 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Not Guilty

Count 24 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

Count 25 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

Count 26 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Not Guilty

Accused 2: Not Guilty

Count 27 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

Count 28 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Guilty

Count 29 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 30 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 31: Contravening s 15 read with s 1 of the Prevention of Organised Act 29 of 2004 – Trafficking in persons.

Accused 1: Not guilty

Accused 2: Not Guilty

Count 32 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 33 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 34 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Not Guilty

Count 35 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1. Not Guilty

Count 36 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Not Guilty

Count 37 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

1st alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

2nd alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 38 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Not Guilty

Accused 2: Not guilty

Count 39 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

Count 40 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Not Guilty

Accused 2: Not Guilty

Count 41 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 42 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 43 Contravening s18 (1)(a) read with s 18(4) of the Tobacco Products Control Act 1 of 2010 read with s 94 of the Criminal Procedure Act 51 of 1977 as amended – Supplying of tobacco products to a person under 18 years.

Accused 1: Guilty.

JUDGMENT

CLAASEN J:

Introduction

[1] This case concerns a Russian marine pilot, a Namibian lady that he befriended and five teenage girls from one of the harbour towns in Namibia. These teenagers, the State contends, were trafficked, sexually violated and supplied with cigarettes whilst they were underage during the course of 2017. As such, the State charged the two accused with forty three counts in total.

The indictment

[2] a) Sixteen counts of child trafficking in contravention of s 15 read with s 1 of the Prevention of Organized Crime Act 29 of 2004 (POCA) against both accused which were allocated as follows:

- i) Count 1, 11, and 34 were in respect of JU on 3 occasions;
- ii) Count 5, 36 and 40 were in respect of RT on 3 occasions;
- iii) Count 8, 15 and 31 were in respect of SG on 3 occasions;
- iv) Count 17, 21 and 28 were in respect of SN on 3 occasions;
- v) Count 19, 23, 26 and 38 were in respect of UR on 4 occasions.

b) Twenty three counts of rape under coercive circumstances in that the complainants were exceptionally vulnerable by virtue of age in contravention of s 2(1)(a) of the Combating of Rape Act 8 of 2000 (CORA) against accused 1 (with alternative counts under the Combating of Immoral Practices Act 21 of 1980 (CIPA) with exception of one complainant) which were specified as follows:

- i) Count 2, 3, 12, 13, and 35 in respect of JU on various dates;
- ii) Count 6, 37, 41 and 42 in respect of RT on various dates;
- iii) Count 9, 10, 16, 32 and 33 in respect of SG on various dates;
- iv) Count 18, 22, 29 and 30 in respect of SN on various dates;
- v) Count 20, 24, 25, 27 and 39 in respect of UR on various dates.

c) Three counts of rape under coercive circumstances in that the complainants were exceptionally vulnerable by virtue of age in contravention of s 2(1)(b) of CORA against accused 2 (with alternative counts under the CIPA) which were distributed as follows:

- i) Count 4 and 14 in respect of JU;
- ii) Count 7 in respect of RT.

d) One count against accused 1 of supplying tobacco to minors in contravention of s 18(1)(a) as read with s 18(4) of the Tobacco Products Control Act 1 of 2010, read with s 94 of the Criminal Procedure Act 51 of 1977 as amended (the CPA) in respect of all the complainants.

Plea explanations

[3] Both accused pleaded not guilty to the charges respectively and advanced plea explanations. Accused 1's plea statement indicated that accused 2 contacted him and said that a lady (SN) wants to meet him. He met SN and she agreed to have sexual intercourse with him in exchange for money. Thereafter, SN contacted him whenever she needed money which he provided in exchange for sexual intercourse. During June 2017, SN brought along some of her friends who also agreed to have sexual intercourse against payment. The activities included blow jobs, fingering, kissing and caressing their breasts. This arrangement continued for two to five occasions with SN and her friends, who did not look like children, until July 2017 at which time he left to Russia.

[4] Accused 1 made the following admissions in terms of s 115(2)(b) of the CPA:

- a) He admitted that accused 2 contacted him once in respect of SN;
- b) that he had sexual intercourse with all the complainants on various dates at his flat situated at 176 Hage Geingob street Walvisbay;
- c) that he would give cigarettes to the complainants whenever they asked; and
- d) that he admits the birth dates of four of the complainants.

[5] Accused 2's plea explanation indicates that she told accused 1 that SN wanted to meet him and he collected the two ladies. They had voluntary sexual intercourse and accused 1 paid them N\$100 each. She stated that SN told them that she was 17 years old. Accused 2 denied that she had any agreement with accused 1 for the recruitment of persons for sexual purposes. She referred to a

time when SN, JU and RT visited her and joked about blackmailing accused 1 because he paid them too little. She admitted in terms of s 115(2)(b) of the CPA that she contacted accused 1 in respect of SN once.

Procedural issues

[6] After plea, the erstwhile counsel for the defence Mr Scholtz, requested that the court calls certain police officials as court witnesses. The court declined as s 186 of the CPA dictates that not only is it the court's prerogative, but also that it can only be done if it is essential to the just decision of the matter, which assessment can hardly be made at the beginning of the trial. Ultimately, it is something that is not to be done lightly.

[7] As far as procedures peculiar to the case are concerned, the prosecutor, Mr Khumalo had applied that the evidence of the complainants be done in terms of s 158(A) of the CPA and in camera, which applications were granted. Their evidence was given by means of a closed circuit television system. For the most part, their evidence was also given in the presence of a social worker as a support person.

[8] As a result of the invasive nature of sexual allegations and the youthful ages of the complainants, the court had to tread a careful balance to accommodate the interests of the vulnerable child witness without detracting from the proper testing of evidence as a fundamental principle in our adversarial system. That made the cross-examination of the five complainants a complex exercise, with the court regularly intervening to guard against convoluted, discourteous, oppressive or misleading questions. Additionally, at numerous junctures during the trial, the defences' questions wanted to venture into the previous sexual experiences of the complainants. That had to be curtailed, in the absence of a successful application in terms of s 227(A) of the CPA.

[9] It is imperative that court officials be mindful that children may find court formalities intimidating and that these difficulties may become more pronounced in cases that involve sexual offences. It thus, calls for an approach that is flexible and within the parameters of the law. I echo what was said in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*¹ that children are special members of society, therefore, any law that affects them must take into consideration their vulnerability and need for guidance. It was also noted that courts have a duty to ensure that children receive the support and assistance essential to ensure a fair trial and in line with their growth and development.

[10] The matter was also plagued by many adjournments. Not only was COVID-19 in our midst, but many times the complainants became too distressed to continue. The graphic information also took its toll on the mothers of the complainants, so much so that on two occasions we feared that one of the mothers might suffer a cardiac arrest in court. In the same vein, accused 1 also, of own accord, apologized for the sordid details, which is something that all court officials, be it presiding officers, prosecutors or defence counsel, have to take in their stride.

[11] In addition, at the end of the state's case, after an unsuccessful s 174 application and bail cancellation, the accused and their erstwhile legal practitioner parted ways. That required time to instruct new counsel. Once the new counsel, Mr Velikoshi, came on board he needed time to acquaint himself with the voluminous record before the trial could proceed. The record itself presented an obstacle as it had not been fully transcribed at the time of closing submissions and it was completed shortly before delivery of judgment.

¹ *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) (3 October 2013).

[12] Before proceeding to the evidence, I find it necessary to briefly set out the elements required to be proven by the State in the respective charges.

Trafficking in persons in Namibian Law

[13] Namibia passed the Combating of Trafficking in Persons Act 1 of 2018, which commenced on 14 November 2019. The objectives of the legislation are to:

- (a) give effect to Namibia's obligations relating to the trafficking of persons in terms of international agreements binding on Namibia, especially the Palermo Protocol;
- (b) prevent and combat trafficking in persons;
- (c) provide for the prosecution of persons who commit offences in terms of this Act and appropriate penalties, and;
- (d) provide measures for the protection and assistance to victims of trafficking.

[14] This matter relates to charge allegations that arose during the course of 2017, therefore, it was prosecuted under s 15 of POCA. The definition of trafficking in POCA stipulates it to be the recruitment, transfer, harboring, or receipt of persons by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or of a position of vulnerability or of the giving or receiving of payment or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation and includes any attempt, participation or organizing of any of these actions. Exploitation includes at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

[15] Namibia has ratified the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol) and in this regard Article 3(a) of Annexure 11 reads as follows:

'For the purposes of this Protocol:

- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practice similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d)'

[16] What the prosecution needs to allege and prove is (a) the fact of trafficking and (b) the fact of sexual exploitation. When children are involved, it is not a requirement for the alleged perpetrator(s) to have engaged in any of the means as set out paragraph (a) of the previous paragraph. Thus, if it can be established, beyond reasonable doubt, that the complainants were under 18 years at the relevant time and were recruited, transported, harboured or received for purposes of exploitation, consent becomes immaterial. It will only bolster the prosecution's case if that is also proven.

-

Rape

[17] Section 2(1)(a) of CORA stipulates that any person who intentionally under coercive circumstances commits a sexual act with another person shall be guilty of rape. CORA in s 2(1)(b) went further and provides that a person who causes another person to commit a sexual act with the perpetrator or with a third person is just as guilty of rape under coercive circumstances as the actual rapist.

[18] Section 1 of CORA defines a 'sexual act' as:

- (a) the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person; or
- (b) the insertion of any other part of the body of a person or of any part of the body of an animal or of any object into the vagina or anus of another person, except where such insertion of any part of the body (other than the penis) of a person or of any object into the vagina or anus of another person is, consistent with sound medical practices, carried out for proper medical purposes; or
- (c) cunnilingus or any other form of genital stimulation.'

[19] As far as coercive circumstances are concerned, the preamble to the coercive circumstances as enumerated in s 2 of CORA makes it clear that it is not an exhaustive list. The full court in *Veira v Prosecutor General and Others*² held that the phrase 'but is not limited to' in s 2 (2) of CORA is designedly broad and that an expansion of coercive circumstances was necessary to cover the wide extent of coercive circumstances and alike circumstances. It held that it serves a legitimate purpose of dealing with grave societal mischiefs, namely the scourge of rape cases and perpetrators that evade punishment under the cloak of the law. That being said, the court is also mindful of the caution sounded in *S v BM*³ that:

'Where the court in respect of the Act is given a discretion under s 2 (2) to include 'coercive circumstances' whereby certain conduct is deemed unlawful without that conduct being defined by the legislature, the court should be slow in the exercise of its discretion in favour of the inclusion of new coercive circumstances. In my view, only when found to be compelling and where the exclusion thereof would be against the interest of justice should the court lean in favour of its inclusion.'

²*Veira v Prosecutor General and Others* (HC-MD-CIV-MOT-REV-2021-000315) [2022] NAHCMD 659 (6 December 2022).

³ *S v BM* 2013(4) NR 967 (NLD).

[20] Before this court could convict the accused of 'new' coercive circumstances the State still bears the onus of proving that the accused knew his acts were unlawful and acted with *mens rea*. That is the framework wherein the court should consider the contention by the State that the complainants are exceptionally vulnerable by virtue of their age. I will return to that later.

[21] Thus, before the State can secure convictions on the rape charges, they will have to prove beyond reasonable doubt that the accused (a) committed or caused another to commit; (b) a sexual act with another person; (c) under coercive circumstances; (d) with intent; and (e) such act was unlawful.

Alternative counts: sexual or indecent acts or solicitation of a child to such acts

[22] In the event that the evidence fails to establish rape, the elements to be proven for the alternative counts are evident in s 14 of CIPA. It stipulates that

'any person who –

- (a) Commits or attempts to commit a sexual act with a child under the age of sixteen years; or
 - (b) commits or attempts to commit an indecent or immoral act with such child; 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 a child (whether under the general law or customary law),
- shall be guilty of an offence...'

Supplying of Tobacco Products to minors

[23] Under this charge the court will have to consider whether it has been proven whether the accused has supplied tobacco products to a person under the age of 18 years.

Summary of the Evidence

[24] Apart from the five complainants and their mothers, the State also called four police officers whilst the defence called five witnesses which included the two accused. The parties also tendered quite a substantial number of documentary evidence, which for the most part, was admitted by consent. These covered the birth certificates of the complainants that were available, a few print-outs of purported cell communication between accused 1 and some of the state witnesses, witness statements, warning statements and J-88s of the complainants. In turning to the evidence, the focus will be on the salient parts

Complainant RT

[25] RT testified that she was 15 years in February 2017 and was schooling. Later during evidence she testified that she left school during the holiday after the first trimester. She recalled having gone to a certain flat in town three times during the year 2017. In what I will label as her first occasion, she related that it was on Valentines' day. One of the other complainant's, JU said that accused 2 told JU that they should go visit accused 2's friend and that they should prepare themselves. JU and RT styled their hair, put on some shorts and they went to accused 2's place. Accused 2 sent an sms to accused 1 who collected them in a white sedan behind !Nara School.

[26] At the flat, she and JU went to shower whilst accused 2 went into a room with accused 1. She and JU went into the room after accused 2 was finished. Accused 1 asked her to suck his penis, which she did. He also played with JU's breasts and told JU to suck his testicles. She said she agreed to this because it

was said he will give them money and she wanted the money. Accused 1 put on a condom, told her to lie on the bed and he put his penis in her vagina, which she said was painful to her. Thereafter, accused 1 had vaginal sexual intercourse with JU. Upon completion he asked her and JU to kneel and he ejaculated on their breasts. They showered, put on their clothes, accused 1 gave them money and dropped them halfway to town. According to her, he gave her N\$ 200. At the flat accused 1 said he wanted to sleep with them because he likes young ladies. She denies him asking her exact age.

[27] She proceeded to what I will call her second occasion. This time the visit was initiated by another complainant, SN who has used RT's mother's cellphone to send a sms to accused 1. He was amenable to a visit and collected herself, SN and another complainant, UR at Tataleni. She recalled that he asked them to bow upon reaching the flat's gate, so that the people in the main house do not see them. Once inside the flat, accused 1 handed them Savlon to shower. They entered the room and after asking them to suck his private parts and breasts, he took out a strawberry condom. He had sexual intercourse (vaginal) with SN, then with her and lastly with UR, thereafter he ejaculated on their breasts and in UR's mouth. Again, they showered and dressed. He gave each of them N\$100 plus a packet of cigarettes and dropped them off at Woermann Brock store in Kuisebmund.

[28] RT explained that one other incident took place approximately two weeks thereafter. I will refer to this as her third occasion. At that time it was her and the other four complainants namely, SG, JU, SN and UR that sent a text message to accused 1 and he fetched them in the same white vehicle. Once at the flat they showered with Savlon and some of the girls were asked to suck accused 1 on the genitals and nipples. According to her, he had vaginal sexual intercourse with SG and whilst doing that told the other girls to play with one another's vaginas. Then he had vaginal sexual intercourse with JU, SN, RT and UR respectively. Accused finished by ejaculating on their breasts. Thereafter, he paid each of them N\$100,

taxi fare as well as a packet of cigarettes. The girls showered, dressed, walked halfway and got a taxi. She was asked why did she agree to these acts and she answered that she wanted money to braid her hair. When asked about plotting to blackmail accused 1, she denied being involved in that.

[29] Cross-examination revealed that the witness made four witness statements over different dates. She was confronted with why her birth date on the first statement was indicated as 21 October 2001, whereas in the others it was 2 July 2001. She attributed that wrong birth date to her being shocked that the story had come out. As for the date in the subsequent statements, she said that the police did not actually ask her birth date when those statements were made. After going back and forth, it emanated that she told the prosecutor in consultation she thinks it is 28 January 2002.

[30] RT also admitted to have been smoking at that stage, but denies asking cigarettes from accused 1 during her first encounter. Counsel postulated that it was SN that first took RT to accused 1 and not accused 2, but she held her ground on that. Her memory of the date of her first occasion was doubted in view of JU's recollection that it was during January month, but she kept to it being the month of February. She was also told that JU's statement portrays that they told accused 1 that they are 14 years of age and she said JU is lying and she does not recall saying she was 14.

[31] He also enquired about messages transmitted from a certain cellphone, represented by exhibit 'K' to accused 1, which inter alia portrays the sender as SN's friend and asked N\$200. Another sms was sent later saying the sender will inform her mother to go to the police. In re-examination she pointed out that the document is unclear as it only shows the messages and the times it was sent.

Mother AT

[32] She testified that her daughter, RT, would use her cellphone to listen to music. She subsequently learnt from social workers that the girls had used her cellular mobile to contact accused 1 and had gone to his place where he would have sexual intercourse with them, including RT. She confronted her daughter who was not forthcoming initially but later on divulged she had sexual intercourse with accused 1 in exchange for money. She said she was not present when RT made her first statement and could not recall who between her and RT signed RT's statements.

[33] It was her evidence further that RT was in Grade 9 at the time of the allegations. She said RT left school around August 2017, because she was teased at school when the allegations came to light and she did not want to return to school. In amplification, she said that usually the school notified the parents via sms or a phone call if the child is absent and she did not receive such communication from the school.

[34] Ms AT testified that she bought food to feed RT and her four siblings. If anything urgent was lacking, she would borrow money from her employer. She therefore, did not know why RT said that she had sexual intercourse with the first accused for money to buy toiletries and food. Nor did she understand that RT held a view that she did not provide for RT's needs, as she even gave RT and her siblings N\$50 monthly to save in their piggy banks.

[35] She gave evidence that RT was born on 7 March 2002. She emphasised that she is aware of when she gave birth to RT. Furthermore, that she is the one who gave that date to the Ministry of Home Affairs and it was contained in RT's birth certificate which got lost. She confirmed that they did not obtain the duplicate birth certificate yet because she does not have the money to pay for one.

[36] According to the witness, she never had disciplinary issues with RT, apart from RT befriending the other girls, especially after the incident was revealed. She was asked about SN's impression that it was her who went to the police after RT told her and she denied doing so, saying that was not true. Further, the version of UR that she at some point stayed at AT's place even bought beer for her, was denied by the witness.

[37] During re-examination, the witness confirmed that RT would lie when she did something wrong such as when she slept with accused 1 and used her phone to contact him. When asked whether she was certain that RT told her all of her needs, the witness could not confirm that with certainty.

Complainant JU

[38] She introduced herself as being born 19 April 2003 and that in 2017 she was in grade 6 in primary school. She testified that she was brought to accused 1 by accused 2, who resides in the same location. On a date in January 2017, she and RT were walking from school and accused 2 called JU. Accused 2 told her to change her school uniform and go to her place. JU and RT did that. Accused 2 proposed that they should go to her friend in town who will come and collect them. They walked up to !Nara School and embarked into a white car.

[39] Accused 2 introduced them to accused 1. He asked their names and their ages. The girls gave their names and ages as being 14 at the time. They drove and upon reaching a certain house's gate in town, accused 1 said they should bend down so that the people cannot see he is with young ladies. The place was empty apart from a room with a bed and dustbin. Accused 2 pointed them to the toilet and directed them to use Savlon to shower. Thereafter, they entered the room and sucked the penis of accused 1, one after the other. Accused 1 had sex with accused 2, then with JU and thereafter with RT. She added that whilst he was busy with accused 2, she and RT were playing with his testicles and kissed him.

Thereafter, accused 1 told them to lie on the bed and ejaculated on their breasts. When asked to describe the sexual act with her she testified that accused 1 put his penis in her vagina. Afterwards accused 1 gave N\$300 to accused 2 which she divided equally amongst the 3 ladies and accused 1 gave each of them a packet of cigarettes.

[40] She related that she saw accused 2 again and found complainant SN there. JU had a cellphone and accused 2 used it to send a text message to accused 1. JU continued that accused 2 told them that they must just go to the school. Accused 1 collected the three of them in the same white car and drove to the house. At the gate he told them to bend down. They got out of the car and he told them to wash themselves, which they did. She also testified that on that day, accused 1 only wanted to have sexual intercourse with JU and SN, to the exclusion of accused 2. JU told him to have sex with accused 2 as well, as she needs the money for her children and he agreed.

[41] Inside the room accused 1 asked them to suck his penis, which they did. Thereafter, he had sexual intercourse, first with accused 2, then SN and then JU. When asked to describe the intercourse she said it was vaginal penetration in respect of each of them. She also testified that when it was her turn, she was hurting and told him that he is moving too fast. Accused 2 advised JU to get up as she was laying down for too long. Accused 1 ejaculated on the breasts of the girls and they went to shower and dress themselves. He gave N\$500 to accused 2 which was divided and each girl got N\$150. They used the rest for a taxi.

[42] JU continued to talk about another instance, on a Saturday in the same year, though she could not recall the specific date. She explained that UR sent a sms from a certain boys' cellphone and told JU that accused 1 will come. Accused 1's car was parked at Tataleni Primary school and herself, RT, UR and SG that went there. The girls got into the vehicle and it was driven to the same place. At the gate accused 1 told them to bow down. Inside the room they showered with

Savlon. She described that the girls licked the accused's penis one after the other and he had vaginal sexual intercourse with them, one after the other. They showered, dressed and got into the car. At Shoprite he said that he only has N\$200 now and that he will give the rest later. They divided the money and each got N\$50 and they separated.

[43] It was put to her that accused 2 heard a group of girls, which included this witness, speaking of blackmailing accused 1 because he gave too little money. The witness denied that. As for a description of the car, she said it was a white Chevrolet Spark.

[44] During cross-examination, her recollection of the date of the first encounter was tested. The gist of her answer was that there was nothing specific that stuck out about the month of January. She mentioned that she was suspended somewhere in February for a certain period. She clarified that she and RT do not attend the same school but resided in the same location. That day as they walked, she told RT to stand aside whilst she was talking to accused 2. She denies putting on makeup that day. Counsel also questioned her about the amount given that day and said based on RT's version it was N\$200. She denied that, but added that he always gave N\$50 for taxi. She was then interrogated about drinking alcoholic beverages and that she frequently visited bars. She admitted to have started consuming alcoholic beverages after she left school and she was smoking at the time.

[45] Counsel for the defence pointed out to her that she lied about her age when she told accused 1 she was 14 whilst she was 13 years at the time. She answered that she was turning 14 years old in May of that year. She was also told that accused 2 denies ever taking her to accused 1, as she knew JU's mother and knows that JU is young. JU agreed that she basically grew up in front of accused 2 but remained solid in her answer that accused 2 took her to accused 1.

[46] She was asked about her relationship with her mother and she said it was not good at times. She explained that her mother decided not to support her because and she was not getting the things she wanted. In her understanding it was because she started smoking and she did not want to return to school. She confirmed that: 'I was staying at home but I did not get the things I wanted because I was smoking.'⁴

[47] Counsel then posed questions that relate to UR's evidence about a time when they were in a group of five girls namely UR, JU, RT, SN and SG. This witness said the instance she recalls is one where SN was not present and it was UR who sent a sms from the boy's phone. Counsel put further details based on UR's story such as that on that occasion the five girls were looking for money under the mattress and instead, found a lot of condoms and a fake penis, which this witness denied.

[48] Counsel also asked her about accused's version which will be that accused 2 heard this witness saying that she and SN are going to blackmail accused 1 because he paid too little. She denies having uttered such words and said that she did not have accused 1's number. She was then confronted with exhibit 'K', purportedly showing a message received by accused 1's phone that asks for N\$200 and ends with a message that the sender will tell their mother to go ahead with the police. She answered she does not know the number of the sender and said it was not her.

Mother DU

[49] She testified that she is JU's biological mother and she gave birth to her on 19 May 2003. She related how one evening, Detective Sergeant Haoseb paid her a visit and said she should go to the Ministry of Gender-based Violence Unit the next day with JU's birth certificate, because JU was involved with a certain Alex. She did that and met the investigating officer, who informed her that accused 2

⁴ Record P 817 lines 24-26.

took JU and other children to accused 1 where they had sexual intercourse. JU cried and confirmed that it was indeed so.

[50] During cross-examination, the witness testified that JU went to school until August or September 2017. She confirmed that JU was suspended for two weeks in February 2017, but she returned to school after the suspension period. She explained that she is a domestic worker and they resided at her mother's yard in a structure made out of strong cupboards, comprising of 3 rooms.

[51] When asked if she was aware that JU was drinking alcohol and smoking cannabis in 2017, the witness testified that she was not aware of such. Her view was that she looked after her children with the little income she earned. JU's testimony that she longed for money to buy toiletries was put to the witness. She replied JU was not without toiletries throughout any given month. They also had an understanding that if JU needed something and the witness could not provide it that month, she would provide it the following month. She also said there was always food, even if it was just bread.

Complainant SN

[52] SN introduced herself as being 17 years old now and in grade 9. Her birth date was 3 September 2002. According to her she met accused 1 through accused 2. She explained that on her first encounter accused 2 sent her younger sister to tell her that accused 2 was waiting for her outside school. Accused 2 said there is someone who wants to see SN. SN was still in school uniform. She left her school bag at accused 2's place and accused 1 picked them up in his car. He drove to a flat and he asked them to hide so that they are not visible from outside. Accused 2 told SN that each of them was going to be given N\$100 each. SN knew what the money was for as she heard about accused 1 who has sex with ladies and pays them.

[53] Once inside the flat the accused undressed, and accused 2 asked her to do the same. Accused 2 proceeded to suck accused 1's penis and he invited SN closer. He kissed her and played with her breasts. He also asked SN to suck his penis and she did so. He put on a condom and proceeded to have vaginal sexual intercourse with accused 2. During that stage, he handed SN a 'dummy penis' and told her to use it but she declined. Once he was finished with accused 2, he proceeded to have sexual intercourse with SN, by inserting his penis into her vagina. He asked them to kneel, with their torso's upright. He ejaculated on their breasts. They went to wash off the ejaculation. Thereafter, he gave them each N\$110 and cigarettes.

[54] He dropped them at a certain place, which she thinks was called Seapoint, where they bought drugs. As for the reason why she took the money, she said it was because she wanted to buy things for herself such as a mathematics set, a calculator and chocolates. She was also asked whether she told the accused persons that she was aged 17 to 18. She replied that she said she was aged between 15 and 16 years.

[55] She testified that there was a second time that she went to the same flat, , with accused 2. At the time accused 1 had anal intercourse with accused 2 and vaginal intercourse with SN. For that, accused 2 received money on their behalf and cigarettes. It was SN's understanding that accused 2 received N\$160 for herself and N\$110 for SN, which SN did not receive because accused 2 wanted to go and buy drugs.

[56] She also related a third incident at which time she went with accused 2 and complainant JU. She said upon arriving at the flat, they undressed and then the vaginal sexual acts took place. She cannot recall who amongst the three ladies first sucked the penis of accused 1 nor can she recall the sequence of the sexual intercourse. She stated that after accused 1 rubbed his sperm off on her breast she went to shower and went to the car, and was given N\$110. The three of them

went to a drug merchant in Seapoint, where accused 2 bought drugs and SN smoked crack cocaine. Later they went home and SN slept at accused 2's place.

[57] SN testified that there were many more instances, estimating it to ten, where she and her friends went to accused 1 for the purpose of having sexual intercourse and being paid in monetary terms by him. She was told that according to accused 1's plea statement he admits sexual activities, but denies anal intercourse. She answered that he had anal intercourse with accused 2 and SG once. SN also admitted to having smoked cannabis, but denies to have spoken about blackmailing anyone. As for how the matter got to the police, she said she does not really know.

[58] Cross examination commenced with questions about whether her clothes size and weight were the same since 2017. She answered to effect that her body structure was essentially the same, though her bra and panty size had gone up one size. Furthermore, it turned out that she 'deposed' to three witness statements. The content of the first one was tackled, although she said it was not read back to her at the time she made it. SN testified that she told the police what she could remember at a given point in time. She then pointed out certain aspects which she regarded as correct and others which were incorrectly written down. As regards her second statement she pointed out that the 'ten' times in the previous statement is incorrect and that it was about six visits to accused 1's place. As for the number of times that she contacted accused 1 she estimated it to have been between fifteen and sixteen times. Counsel then showed her exhibit 'O' which printout shows that from 8 June 2017, through to 21 June 2017 there were 45 instances of contact between her and accused 1's cellphone numbers. She answered that she was referring to the number of days she had contacted him and that she could not remember the number of individual text messages. She was also confronted with exhibit 'P', a printout of cell phone contact between accused 1 and RT's mother's cellphone with the information that RT testified that it was SN

who used the phone. She said she cannot that she sent many messages from this phone.

[59] Questions were also posed, which were aimed at showcasing certain negative character traits, such as her being ill disciplined and using cannabis and cocaine. SN said that it is true that she was using cannabis, but not cocaine. Counsel also put to SN that before she met the accused persons, she ran away from home and had stayed at the shack of a grown man. SN denied that and said that at times she had gone out on a Friday night and if it became too late she would sleep over.

[60] Counsel confronted her with accused 2's version, that a certain Maherero and SN wanted accused 1's number in December 2016. She answered that accused 2 did not want to give the number. Accused 2 also knew of a second time when SN wanted accused 1's phone number, at which time she portrayed herself as 17 to 18 years to accused 2 and that she was not in school anymore. She denied saying she was 17 or 18 years old, but conceded that it is possible that she told accused 2 that she was not in school anymore. She was told that she was the one who contacted accused 2 to introduce her to accused 1 for sexual intercourse and accompanying payment. She denied that. It was put to her apart from that time when she slept at accused 2's place, accused 2 never went with SN to accused 1's place again. SN firmly denied that. The witness was informed that at some point she started initiating visits to accused 1's place with some of the other complainants and she agreed to that.

[61] Counsel also contended that according to accused 1's version, he only gave cigarettes at the request of SN. She answered that he usually gave the cigarettes himself, but there was one instance when she asked for it. It was also put to her that accused 1 denies asking them to hide in his vehicle, but she insisted that he did that. She was also asked to comment on accused 1's recollection of time periods, and that it was four times that he was with SN and one other girl, namely that it was during the first trimester (he estimated end April or

beginning of May) that he had sex with SN and accused 2 and she said she cannot remember the month. Further, the second sexual encounter that accused 1 remembers that involves SN was around the month of May when it was her and RT. She again said she cannot remember the month. Then, in his recollection (his third time involving SN) it was around June when it was SN and JU and around July when it was SN and SG (his fourth instance involving SN). She denied that to have been the third and fourth times, but she remembers going with SG.

[62] Counsel for the State during re-examination revisited the questions about her body structure and underwear sizes. She clarified that the sizes had gone up slightly since 2017 at which time she wore panties for the age group of 11 to 12 years. She was also asked why she told accused 1 that she was 15 years if she was only 14 years at the time. She replied she was turning 15 years old within that year. She also persisted with her evidence that she definitely wore school uniform the first time she went to accused 1's place.

Mother JN

[63] She testified that she had seen accused 2 as they stayed in the same neighbourhood. She testified that she heard rumours that SN was staying with accused 2 and that accused 2 was selling the girls to a white man. She interrogated her daughter, who initially denied but later admitted that she was taken there by accused 2, which is the night SN did not sleep at home. The witness went to the police the next day for them to warn accused 2 and they were given SN's school bag, though she was unable to recall if it was accused 2 or her boyfriend who gave the bag. Once she went home SN was already at home. She explained that SN did not sleep at home during certain periods of time. Though she asked SN why, SN did not say why she was not sleeping at home.

[64] She stated that SN was attending school before the Corona virus outbreak, and that at times she was not at school, which led to the institution calling her. She

estimated it to have been during May to June 2017. She spoke with her daughter and she returned to school. She was asked about SN's behaviour and if it was necessary to discipline her. She said apart from ordinary mischief there was not much to discipline her for, though she did not know that SN was smoking at the time nor that she was using drugs. She heard about the drugs when the story came out, but SN denied using drugs.

[65] She testified that apart from SN, she has two other children and was able to provide for them as she had a tuck shop at home and was a registered bottle collector. She said the business was doing good, though there were also dry spells during the month. She was told that SN testified that she had used some of the money paid by accused 1 to buy a mathematical set and chocolate. The witness said SN never told her that she needed those items. She was asked about the built of her daughter's body and she said that at the time SN was 14 years old and tiny, thin and short and that one could not have mistaken her to be 17 to 18 years old.

[66] During cross-examination it became clear that she could not recall which came first i.e. if she had first gone to the police to warn accused 2 or whether she first went to get the bag and thereafter went to the police. She was asked to comment to accused 2's instruction that the only bag she knew off was a black backpack that SN had when she first approached accused 2 to take her to accused 1, but SN took it along in the morning. She answered that she is unable to answer for that and that she knew about the bag that she got, but was unable to say for certain whether it was black.

[67] A further aspect of accused 2's version was put to her, that on the day this witness came with the police to search for SN, that accused 2 referred them to a certain Potox's house, that SN and Potox were not there and that this witness told Potox's mother that accused 2 was selling the children to a white man. The witness said she cannot recall any of that. She was asked if SN was a problem

child and she answered in the negative. Counsel then asked about SN not staying at home and whether she (as a mother) did not have problems with that. She replied that SN started giving her problems only after she met accused 2. Counsel then put it to her that a witness will come and testify that there were times that the police had to search for SN who ran away from home. The witness said that she can recall only one such incident. A proposition was put to her that SN had a pattern of running away from home for two to three months at a time and the witness said she cannot remember that. She was also asked if she had given SN hidings or took her to the Police when she did wrong to be disciplined and she said that she could recall.

[68] She was then asked to which police station she went to and she said she cannot recall. It was also proposed to her that the reason why she did not report this problem to the Women and Child Abuse Unit, was because the police did not want to help her because of the problems they have with the witness and SN. She disagreed with that contention.

[69] She was also interrogated if she ever gave pocket money to the children and the witness said that she gave N\$10 each Friday and N\$40 to SN once she started high school, but that it also depends on the number of Fridays in a month. She was questioned whether SN ever asked money and the reply was that if SN wanted something SN asked. Counsel also put to her how could she as a mother not notice when SN was not going to school and that SN was essentially deceiving her mother about attending school and she answered yes. Court enquired from this witness about her repeated answers that she does not remember, and she just said it was merely her nerves.

Complainant UR

[70] She gave her date of birth as 19 January 2001 and she was 16 years at the time of the allegations and the eldest in the group. She testified that she came to

know accused 1 through SN who introduced them. She described an incident wherein she and SN got into accused 1's white car and he drove to his place, an old house with only a bed in a room. According to her, she did not know beforehand that sexual intercourse would take place, because SN informed her that they are going to have a good time. Upon arrival accused 1 went to bath and told them to bath too, which they did. SN then said that they should enter the room one by one. SN then started to suck accused 1's penis whilst accused 1 drew UR nearer and kissed her. Accused 1 then had vaginal sexual intercourse with her and thereafter with SN. Accused 1 asked her to suck him again and ejaculated in her mouth. She moved away and she went to rinse her mouth. After it all the girls were given N\$220. SN told her that they were given money because he had sex with them. She bought food and toiletries as she was not living at home anymore.

[71] She spoke about her second occasion and this time she was with SN and RT. SN initiated it and accused 1 collected them. At his flat, the girls undressed and entered the bedroom. SN played with his penis, UR with his breasts and RT kissed him. They had vaginal sexual intercourse, UR first, followed by RT and lastly SN. After that, accused 1 asked her to suck him again as he likes the way she does it. He ejaculated in her mouth and when she pulled away he pressed her head down, but she told him not to do so. She ran to the toilet, vomited and washed her mouth. Then the other girls came. They dressed and went to wait for accused 1 in the car. He came and gave N\$330 to them. They went to Shoprite where she bought food and toiletries again. As to why she did not stay at home she acknowledged that she was naughty and that her mother and stepdad quarrel at home.

[72] She also testified that about three days thereafter, she as well as SN, SG and RT phoned accused 1 again. He came to fetch them at the shops. At his flat, they undressed and went to the room where he had also undressed. SG started playing with his penis, SN's vagina was sucked by accused 1, and UR was playing with his breasts. Accused 1 started having vaginal sexual intercourse with SG. He

did the same with SN, thereafter UR and then RT. Once that was done, he ejaculated on their breasts, the girls went to bath and got dressed. Each of the girls got N\$100 and they returned to their respective houses.

[73] Her last visit was about a week thereafter. She gave testimony that the girls phoned accused 1 again and this time they were all five, namely herself, RT, JU, SN and SG. He collected them. Once at the flat they undressed and he gave them two packets of cigarettes which they smoked. Whilst accused 1 was still in the car, the girls lifted the mattress, looking for money. They discovered a lot of condoms, some used, others were un-used and 'fake penises.' Once he came into the room they dropped the mattress. He started by having vaginal sexual intercourse with SG, then SN, then herself, followed by JU and finally RT. Once done, they all went to the bathroom where they smoked and bathed and went to the car. Once he came he said he did not have sufficient money and only had N\$350 which he said they should divide amongst themselves. He dropped them off at Seapoint, they divided the money and walked to their homes.

[74] She was asked whether her mother knew the story. Her reply was initially she did not, as she was afraid that her mother will beat her if she finds out. But her mother questioned her and said that the other girls talked at the police station and only then she started telling her mother about it. Her mother took her to the police station where the police said they are minors and their mothers were also not happy with the situation. They were taken to the hospital. She cannot recall specific dates but it happened during the course of the year 2017. She used to bathe with something yellow, but forgot the name.

[75] She was asked to comment on accused 1's version that someone tried to blackmail him. She deduced that JU and SN were planning that, as JU once made mention that the man was paying them little.

[76] During cross-examination she explained that she and RT grew up together, and that SN and RT did not attend school in January 2017. She was asked about her recollection of the date being during the month of May and she accepted that the holiday of the second semester falls closer to the month of June to July. She repeated that it was SN who took her there, and said they must just have sex and be paid as the man will be angry, which is why she complied. She was pressed as to why she did not tell SN she does not want to participate. She accepted that she acted foolishly at the time. It was also put to her, according to accused 1, the door was not locked, meaning she could have left anytime. She said she was not looking for that.

[77] This witness did not spare herself. She accepted that she had gone for sexual intercourse, money and cigarettes and elaborated that with her being naughty she did things such as overnight at a friend or boyfriend's place. She said her mother expected her to take her books and learn and locked their house at 17h00. She admitted that it caused problems between her and her mother and at times she told the truth to her mother and other times she did not.

[78] Counsel proceeded to test her on the various encounters, such as the sequence and whether the encounter of four girls that she spoke of ever happened. She said the encounter definitely happened. Counsel asked why her witness statement does not mention an instance wherein all 5 of them were at accused 1's place, yet she testified to that effect in court. She replied that she does not know why but that she gave her statement to the best of her ability.

[79] In re-examination the issue of the date was revisited, as she did not dispute it when counsel for defence put to her that the school holiday normally ends in June/July. She was asked about the school calendar, if she knows the specific dates for the terms. She said she does not know that. She was also asked about the sequence of the girls during these encounters. She answered that if they went two or three she can recall, but that she cannot recall if all of them had gone

there. It was followed up by whether her inability to remember the sequences is indicative that no sexual intercourse took place. She answered in the negative and supported that by saying the sexual intercourse happened, because after the intercourse they received money.

Mother LR

[80] She testified that UR's birth date is 09 January 2001. She narrated a certain occasion, when UR did not return home from school. In her search for UR, she was informed by some of UR's friends that UR and SN had been looking for transport to Swakopmund. She went to the police, who advised her to wait for 24 hours and return if the child does not show up after that. She continued her search and solicited her sister's help in Swakopmund. They managed to get information and when they got to that house, they were told UR had recently left the house. She had to go back to work the next day. Thereafter she was contacted and informed that UR and SN were brought to the Walvis Bay Police Station. The police told her the girls were doing very bad things such as going to the house of accused 1 and that the matter will be referred to Detective Sergeant Haoseb in the Women and Child Unit.

[81] Back at home she interrogated her child, who informed her that SN said there would be a party which was why she went there, but that she would tell the police everything. The next day Detective Sergeant Haoseb took them to the police station and questioned them separately. The police informed the witness that the girls slept with the first accused and they had to be taken to the hospital for them to be examined by a doctor.

[82] She also testified that UR did not want to return to school as she was ashamed and said the other learners would tease her. She said that as far as she was concerned, she provided UR with money, based on how much she had, and when she did not provide UR with money to buy toiletries, the witness would buy

them for her. She reiterated that she does not know why UR would have sexual intercourse in exchange for money because the witness gave her what she needed, according to her capacity and ability.

[83] During cross examination, she said that she was seated outside when UR's statement was taken. Further, UR's version that she was a bad and naughty child was put to the witness and she refuted it and responded that she never experienced that from her. The witness responded that UR's version that she was afraid of her mother may have been because the witness always spoke to her about life's happenings and on one occasion she gave UR and her younger brother a hiding. That may have been the reason UR ran away from home.

Complainant SG

[84] She divulged that she came to know accused 1, through SN who invited SG under the auspices that accused 1 was having a party. Accused 1 came to fetch them in a white car. At the house SN told her to go take a shower. SG enquired why but SN told her that accused 1 will become angry if she does not do so. After the shower, SN started to suck his penis and thereafter SG did the same. The accused took a flavoured condom and put it on. By then SN was on the bed and he inserted his penis into her vagina. Thereafter, he proceeded to put his penis into SG's vagina. The girls then got dressed, went to the car and SN received N\$110 from him. Apart from saying it was 2017, she cannot recall the date of her first encounter. She elaborated that at the house SN told her to move into the house quickly so that they cannot be seen and that they should wash their vaginas with Savlon.

[85] She spoke about a second time during the holidays of the second semester. SN came to SG's house and used SG's mother's phone to send a text message to accused 1. He collected them and drove to his place where she bent and moved quickly into the house. They undressed, showered and then each of

them sucked his penis, where after he put on a condom and proceeded to have vaginal sexual intercourse with SN. SN then enquired about the price of anal intercourse and he said it is N\$300. SN then offered to do that, but after attempting it, did not want to proceed, saying it was painful. Thereafter, accused 1 did the same with SG, who testified although it was painful, she did not inform him. She was asked to clarify the sexual acts and she said he first put his penis in her vagina, then in her anus. Once done, they went to the car and SN was given N\$320 to share. They went to buy sweets, food and toiletries at Shoprite.

[86] She also conveyed a third incident in respect of herself, wherein they were five girls, namely herself, JU, SN, RT and UR, that went to accused 1's flat. The girls were staying at one of the girl's ex-boyfriend's house and they sent an sms though she cannot recall who exactly sent the message. She was asked why she stayed at that house and said that her mother was not giving her the things that she wanted. Accused 1 picked them up in his car at Tataleni Primary School. They had to bend as the vehicle approached the house. He opened the door and they showered with Savlon. Thereafter, they were asked to suck his penis, though she cannot recall whom amongst them started. She confirms that she sucked him and he ejaculated in her mouth and she spat it out. He then had sexual intercourse with all of them, one after the other. She could not recall where they were dropped off or how much money they were given, only that they indeed bought things from the shop.

[87] As for how the story came to light, she testified that a certain officer Haoseb collected them, took them to the hospital for examination and took their statements afterwards. When giving her statement, she was afraid of the officer and gave it just for the sake of giving a statement. She was asked whether she was aware as to why her mother could not provide the things she wanted. She replied that her mother was not employed, she merely had an ironing job at Langstrand and that she grew up without her father. She also confirmed that she on all occasions received cigarettes in addition to money from accused 1.

[88] Cross-examination explored her school career in the preceding years and she said that in 2017 and 2018 she was going a bit, meaning she went one week and not the other. She agreed to a proposition that she did not like her mother's authority, and that she went to stay at her sister's place after she quit school. There, she and her friends UR and SN would go and drink beer once her sister went to work and would sleep out sometimes.

[89] She then had to face information that her mother works at fishing factory as a clerk. She explained that because of her mother's good work at the laundry she later got employed at the factory. She was then asked why she did not ask her mother for clothes and shoes as she wanted to dress like other kids. She answered that that her mother tried to satisfy her, but did not have the means.

[90] She was also confronted about the fact that she made four witness statements, of which she admitted that some things were not correct in the first one as she was frightful. She did not read it and neither was it read to her before signing. She also acceded that the further statements were made to clear up issues in the first statement. Exhibit 'N' was shown to her, flanked by a proposition that it shows 6 calls and one sms on 19 June 2017 which was made from her mother's cellphone to accused 1. She replied that she was not sure if the paper reflects the true story but what she can recall is that it was SN and UR that used SG's mother's phone.

[91] In re-examination she was asked about the four statements made on different dates and whether she spoke only one language. She said that at the Women and Child unit they were only using English and she chose to speak English. It was then pointed to her that in her evidence she said that her English was not so good and whether she told the officers. She answered in the negative.

Mother LN

[92] She testified that she gave birth to her daughter on 10 December 2001. She was approached at her workplace by police officers, who introduced them as being from the 'Women and Child Office.' She enquired from SG and she said that she would reveal everything at the Office. They went to the Office, and SG disclosed that SN took her to accused 1, they would have sexual intercourse with him and be paid between N\$100 and N\$120. She testified that SG had access to her phone. It was further her evidence that she was the sole breadwinner to her six children and she provided as she was able to. She said that the father of SG's younger siblings contributed to the common household by paying rent and buying food. The witness did not rule out that SG may have desired more than she could provide. The witness further confirmed that there were instances when SG would ask for either toiletries, clothing or shoes similar to what her friends had and she would provide for her as she was able to. The witness further confirmed that if SG asked for something that she was unable to provide, she would tell SG to ask her father.

[93] During cross examination the witness stated that SG was influenced negatively by her friends SN and UR. She confirmed that the police informed her that her mobile phone was used to contact accused 1 and that SG admitted to her that the complainants used that phone. The witness also testified that SG was staying with her and she would go and stay with her older sister for a week or two and then return home.

[94] Ms LN confirmed that she would give SG a hiding when she would stay away from home but it did not help, so she stopped. She said that she was unaware that SG was drinking beer when she went with her friends. In re-examination, the witness confirmed that despite SG having lied to her before, she has also told the truth. In relation to the instant matter, SG stated that the first accused had sexual intercourse with her. The witness clarified that the purpose of

her giving SG a hiding was to ensure that SG remains in school and become somebody in future. She confirmed further that she struggled to provide for SG and SG's father was also struggling financially to support her.

Police Investigations

Police Officer, Valerie Geingob

[95] Officer Geingob testified that on Sunday, 12 August 2017 whilst at hospital she was waiting for the nurses to complete X-rays on her baby. She was dressed in her police tracksuit. An unknown women starting talking to her. The lady disclosed that her teenage daughter ran away from home and is being picked up by a white guy in a white sedan. The man would give her daughter and the other girls money after having sexual intercourse with them and they would then buy drugs with that money. The lady also said that she reported it several times at the Tataleni Police Station and at the Gender Based Violence Unit but the staff has not assisted her. She and the women exchanged contact numbers.

[96] A few days later, once she was back at work, Officer Geingob called the number and the lady informed her that she was at Metro. Officer Geingob and Detective Sergeant Haoseb drove there and the lady introduced herself as JN. JN reported that SN had been missing since that Monday. The three of them then drove to RT, looking for SN, but RT did not know of her whereabouts. They took RT to the police station and whilst the four of them were in an office, JN received a telephone call and the caller told JN that SN and UR were living recklessly in the DRC location in Swakopmund. The caller took the girls to Mondesa Police Station and they were brought to Tataleni Police Station. The girls then went to their respective homes. The next morning, Officer Geingob left JN, SN, UR and RT with Detective Sergeant Haoseb in his office. She testified her only other involvement in the matter was that she was involved when accused 2 was arrested.

Detective Sergeant Harold Haoseb

[97] He testified that he has worked in the Gender Based Violence Unit of the Namibian Police for about 10 years. He met accused 1 in that Unit and got to know accused 2 when she was arrested. He confirmed the evidence of Officer Geingob that led him to JN, that JN disclosed certain facts to them and that SN and UR were brought to Tataleni Police Station in Walvisbay. He related that they also collected some of the complainants and posed questions about the story of being sold to a white man. UR admitted and said that she was taken to the white man by accused 2. UR then called the other girls and they had similar interactions with the man. After he interviewed the girls one by one, he started taking their statements that same day.

[98] He relayed that all the girls spoke in Damara Nama, which he is conversant with and he translated it into English. He was asked whether, after he wrote down the statements, the girls read their statements. He answered in the affirmative. He also asked them if they understood the content thereof and once they did, they accepted it, and then it was signed. He said he assumed that the girls understood English too, based on their responses. He also took them to the State Hospital to be examined. Upon their driving back one of the girls saw accused 2 and accused 2 was arrested. He did not bear knowledge as to who arrested accused 1.

[99] In cross-examination counsel criticised him about the witness statements and that several of the complainants said that their statements were not read back to them and that he did not put everything in the statements. He said that he wrote down what was said to him at the time. He was also asked about SG who said that this witness made her afraid. He said there was no reason for her to be afraid.

[100] He was questioned about why he as a training officer decided to take the case of JN, without directing her to Gender Based Violence Protection Unit. He answered that he was not limited to that work and he decided to help because

Sergeant Geingob told him that JN reported not to have been assisted by the Gender Based Violence Protection Unit.

[101] During re-examination, he stated that he was trained on child witnesses in 2007 or 2008 by officials from the Ministry of Gender Equality. He also opined that there was nothing that prevented him from dealing with a case even if he is not in that unit.

Warrant Officer Stepfanus Ndinomupya

[102] He is the investigating officer in the matter and has been employed in the Gender Based Violence Protection Unit of the Police for 10 years. He testified that when the docket was allocated to him by the Unit Commander, some statements were already taken. He continued with statements of the mothers respectively and what he termed clarification statements. He testified that the girls spoke about messages between them and SN gave him accused 1's cellphone number. He obtained a search warrant to verify if there had been contact and he compiled extracts of the communication between the relevant numbers, which was admitted in evidence.

[103] He furthermore testified that accused 1 reported himself to the police and an identification parade was held. He was not present at the parade, but was informed that accused 1 was identified by the girls and on that basis accused 1 was arrested. A photo plan was also compiled of the place where accused 1 took the girls and handed to the investigating officer. He also referred the complainants to a social worker in the same building as that is a common practice for these type of cases. As regards accused 2, he testified that she was arrested by Detective Sergeant Haoseb.

Detective Inspector John Gaeseb

[104] He is employed at the serious crime unit in the Namibian Police in the Erongo region. He was familiar with accused 1 as accused 1's ex wife or girlfriend was a friend to the Inspector. He knew accused 2 as the lady that he warned in this case. He elaborated that on 13 June 2017 JN reported to him that her daughter SN was not attending school and spent her time with accused 2, who is a drug user and sells school girls to men. On 14 June 2017 he, Constable Viljoen and JN went to the house of accused 2. Vicious dogs in the yard prevented them from entering and a man came out. The man was instructed to call accused 2, and she came out. He told her of the allegations and asked her about the whereabouts of SN. She then said that SN left her school bag there and left.

[105] Then the man, whom he assumed was accused 2's boyfriend said in Damara Nama language that '....yes this is the thing which I am telling you, I told you to stop bringing young ladies or underage ladies to this house.'⁵ Accused 2 replied that the ladies come on their own and she was not inviting them. The inspector cautioned accused 2 not to entertain school children at her house and he left his contact number there. He further informed her that something serious could happen if the kids come again and she fails to report it to the police.

[106] He was asked if he knew JN before the case. He replied that he came across her during meetings with that community, where he was the station commander for two years. He was also asked whether JN told him that she went to Tutateni Police Station, but the staff there did not help. The gist of his response was that it was the reason why he stepped in to help.

⁵ Page 1629 line 32 P1630 lines 1-2.

[107] During cross examination he was asked to elaborate on complaints from JN in connection with any of her daughters. He recalled that on a certain day JN brought SN to the Police Station as SN was heavily drunk in school uniform and was not cooperative with the mother. He detained SN for the night to sober up. Accused 2's instructions were put to the officer, namely that the day he came to her house she told him that SN was there in the morning, but that she left with Potox. The witness replied that accused 2 had said SN left her house but that accused 2 then brought SN's school bag and gave it to the mother. He was unable to recall the colour of the bag.

[108] It was put to him that accused 2's version will be that that there was no bag of SN at her house. The witness answered that accused 2 is not truthful about the bag as a backpack was handed to JN. Furthermore, that the boyfriend did not refer to underage girls in his comment to accused 2, but only to SN in singular form and the witness answered that he does not agree with that.

[109] In addition, accused 2's version will be that she went to show the witness where Potox resides and he said that was not true. It was also put to the witness that accused 2 never supplied drugs to school girls and he said he cannot comment on that. He was also asked whether he can remember that at Potox' house, JN told accused 2 to get a good lawyer as she will put her in jail. This witness denied that. He explained that the only time when JN talked to accused 2 was when she was handed the school bag and JN became angry and she said words to the effect that here is the evidence that SN was there instead of going to school.

Defense Case

Mr Alexander Krylov

[110] Accused 1 introduced himself as having been born on 25 January 1961 in Russia. He is married with three children and moved to Namibia in July 2002. He has been employed as a marine pilot for the past twenty years and became accustomed to the way of seafarers' lifestyle. One of the perks is that once you are on land, you go to a seaman's club for enjoyment and sex in exchange for money. Walvisbay has such a club.

[111] He admitted in broad terms that he had multiple sexual encounters, which covered oral sex, as well as anal sex and vaginal penetration. He also admitted that during those occasions he would spoil the girls with cigarettes and money for having had sex with him. It was his evidence further that he took them to his flat to have sexual intercourse because he regards sexual intercourse as private.

[112] As regards the number and frequency of the encounters, he attested that he met the second accused with SN once and had sexual intercourse with them, but thereafter he met all the other complainants through complainant SN. He gave testimony that he met SN alone for sexual intercourse one or two times. Thereafter, he met her with UR and they had a threesome. Then he met her with RT and UR (probably in June) and they had sexual intercourse simultaneously, which he termed a 'foursome.' It was further his evidence that he then met SN and SG whom he had sexual intercourse with together. He then met SN and JU and had sexual intercourse with them together. Lastly, he met all the victims, excluding SN in June/beginning July. It was his evidence that he did not sexually exploit any of the victims.

[113] He testified that he met SN through accused 2. In his recollection, it was during May 2017 that accused 2 told him about a lady that wants to meet him. It was his evidence that accused 2 contacted him and he went to pick her up in Kuisebmund, she was with another lady. Though the other lady was short and skinny she also looked like a developed woman with small breasts and hips, who he came to know as SN. His first impression of SN was that she was dressed

properly, did not look poor or ask for food or anything, other than cigarettes. SN informed him that she was in need of money. In the car he told her that he does not give money for free and would only give her money in exchange for sexual intercourse. SN agreed and they proceeded to his flat where SN started to smoke. Upon enquiring her age, she informed him that she was 17 years old, turning 18 and done with school.

[114] When she finished smoking, accused 1 went to the bedroom and SN followed him. He locked the main door of the two bedroom flat and he and SN undressed and she started sucking his penis. They then had sexual intercourse by insertion of the penis into her vagina. Thereafter, he proceeded to have vaginal sexual intercourse with accused 2 who had also entered the room and undressed. Once they were done and dressed, he gave the second accused and SN N\$200. Although he could not recall specifically who he gave the N\$200 to, it was for them to share as he pays N\$ 100 per person. They asked him for some cigarettes, which he gave them before dropping them off in town. These cigarettes were a gift from his employer as a gratuity for a job well done. He gave the cigarettes to anyone that smoked.-

[115] Accused 1 testified that he met SN alone, for sexual purposes one or two times. Based on his evidence he could tell from their previous sexual encounter that SN was quite experienced. He testified that she contacted him asking if they could meet 'for sex like the last time' to which he agreed and he then went to pick her up. They drove to his place where they had sexual intercourse by insertion of his penis into her vagina, after she sucked his penis. When they were done, he washed himself. The first accused testified that he had a disinfectant liquid, Savlon, in his flat that the ladies could use to either bath or shower before and after having sexual intercourse, if they felt like it. Further, it was his evidence that SN, on this occasion, told him that her mother was beating her and therefore, she was staying with her boyfriend. As such he deduced that SN had sexual

experience. The first accused then gave SN N\$100 and an additional N\$10 for taxi fare.

[116] He was contacted by SN in May 2017 and when he went to pick her up, she was with another lady. They got into his car and he introduced himself and the lady said her name was UR. Whilst driving to his place, UR and SN conversed the entire way in a language he did not understand. Upon arrival at his flat he went to the bedroom and the girls continued the conversation in the other room. SN then asked him if they could take a shower and he advised them to use Savlon, as he did not have soap. When SN and UR had finished taking a shower, they entered the bedroom naked. Accused 1 undressed. SN started sucking his penis and asked UR to do the same, which she did. He then had sexual intercourse with both of them by inserting his penis in their vaginas, one after the other. When he was done, he ejaculated on their breasts and in UR's mouth. He then washed himself and they all got dressed. The first accused gave both SN and UR N\$100 each and N\$10 taxi fare. It was his evidence that SN asked him to drop them off at certain shops in town where they were going to use the money to buy chips and sweets.

[117] His initial impression of UR was that she appeared to be older than SN, was dressed in tight fitting clothes which accentuated her body. For that reason he did not ask for her age, and he assumed she was between 19 and 20 years of age. Furthermore from this encounter with UR, he gathered that she was sexually experienced.

[118] On the next occasion, it was the first accused's evidence that SN contacted him stating that she wanted to see him to have sexual intercourse. When he arrived at Kuisebmund, he found SN, UR and another lady. They all entered his car and he introduced himself and learned that the new lady's name was RT. They drove off to his place and they asked for cigarettes, which he gave them and they smoked outside. The first accused entered his bedroom and the ladies followed him and SN asked if they could take a shower. When they were done taking a

shower, they all entered the bedroom naked and started kissing and touching the first accused and sucking his penis simultaneously. Some touched his testicles before he eventually took turns having sexual intercourse with each one of them by inserting his penis in their vaginas. Once he had finished, he ejaculated on their breasts and SN, UR and RT washed themselves, got dressed and went to sit in the car. The first accused also got dressed, went to the car and gave them N\$300 and taxi fare.

[119] It was the first accused's evidence that his initial impression of RT in comparison to SN was that she was taller with bigger breasts and hips. She was more developed and looked like an adult, not a teenager. It was his evidence further that she appeared to be between 19 and 20 years old.

[120] He testified that SN on different occasion, contacted him to pick her up and when he arrived, he found SN with another lady who he came to know as SG. His initial impression of SG was similar to his impression of RT, in that she was more developed with bigger breasts and hips. He drove to his flat where they entered the bedroom and undressed. SN then started sucking the first accused's penis and asked SG to do the same. He then had sexual intercourse with SN by inserting his penis in her vagina. It is his evidence that he then asked SN if they could have anal sex, to which SN agreed but later changed her mind when she felt uncomfortable after he attempted to insert his penis into her anus.

[121] Based on his evidence SN then proposed that SG have anal sex with accused 1. SG wanted to know how much it was to have anal sex, and SN responded that it was N\$150. SG then moved to the bed, bent over and accused 1 inserted his penis into her anus. When he was done, he ejaculated on their breasts and washed himself in the sink. SN and SG then went to shower. When they were done, they all got dressed and headed to the car where the first accused gave them N\$150 each as well as taxi fare.

[122] Accused 1 also related that sometime in June 2017, SN contacted him and informed him that she was with a friend and wanted to see him. He then drove to Kuisebmund where he found SN with another lady unknown to him. They entered the car and he introduced himself to the unknown lady who responded that her name was JU. They then drove off to his place and when they arrived, SN and JU went to shower and the first accused entered his bedroom. He undressed and SN and JU entered the bedroom naked. SN then sucked his penis and when she was done, JU also sucked the first accused's penis. The three then had sexual intercourse by insertion of the first accused's penis in their vaginas, one after the other. When they were done, the first accused washed himself, they all got dressed and went to the car where the first accused gave them N\$100 each as well as N\$20 for taxi. He then drove them to town where it was easier to get a taxi. His initial impression of JU was that she had bigger breasts compared to all the others and she appeared to be within the age range of 20 to 21 years old.

[123] It was the first accused's evidence that he did not ask JU, SG and RT about their ages because they all looked more mature than SN, who had already told him how old she was.

[124] According to the first accused, the final sexual encounter occurred towards the end of June and beginning of July 2017. He was contacted by the ladies and asked whether they could meet up and he agreed. He then drove to Tataleni High School and found JU, RT, SG and UR. He informed them that he only had N\$200 and as such, only two ladies could accompany him. They however, informed him that they did not mind and all of them would go with him. They then entered the car and he drove to his place. Upon arrival, they asked him for some cigarettes and they smoked outside while the first accused went to wait for them in the bedroom. Once they were done smoking, they entered the flat and asked the first accused if they could take a shower. He agreed and advised them to use the Savlon. When they had finished taking a shower, they entered the bedroom

naked. They then all sucked the first accused's penis, one after the other. The first accused then had sexual intercourse with all of them, one at a time, by inserting his penis into their vaginas. When they were done, he washed himself and they went to the car where he gave them N\$200. Before he drove off, he overheard the conversation JU, RT, SG and UR were having, which included them using drugs and one of them having been involved in a housebreaking. This conversation brought the first accused to the realisation that these ladies would bring him in trouble and as such, he decided to cease contact with them and ignore them when they call him.

[125] The first accused testified that he left for Russia on 12 July 2017 for holidays and returned towards the end of August 2017. After his return, SN contacted him and said that she needed to talk to him as he was going to have 'problems'. When they met she told him that one of her friends who he knows was missing for a few days and when the police found her in Swakopmund, she mentioned the name of accused 1.

[126] On 03 October 2017, a local newspaper published an article with the headline "Serial rapist lurking in town" wherein it was stated that the police were looking for a certain "Mr Alex." He was surprised as SN had already told him that the police were looking for him and knew where he lived. He suspected that the investigating officer, Detective Sergeant Haoseb was the person who provided the information to the media. Later that month, on 12 October, accused 1 received an SMS, (exhibit 'K') and the content was blackmailing him to send N\$200. If he did not send the money, the sender would tell her mother to proceed with the matter.

[127] He explained that he met the girls either at Tataleni High School or the police station. He was never at their residential addresses and does not know the circumstances under which they live. He denies that he ever asked SN to recruit anyone and he never lured any of the ladies to him. It was the first accused's evidence that SN told JU, RT, SG and UR about him and introduced them to him.

Further, he was not aware that giving cigarettes to persons under the age of 18 years was an offence.

[128] During cross examination, the first accused agreed that most of the alleged offences occurred in the year 2017 and that the complainants involved are SN, JU, UR, SG and RT. He agreed further that the last sexual act he had with SN and JU occurred in June/July 2017 when both SN and JU were 14 years old. Further, the first accused agreed that UR and SG were 16 and 15 years old on their last sexual encounters with him, respectively. He agreed further that RT was 15 years old on his last sexual encounter with her and that all the complainants were below the age of 18 years and as such, minors at the time. Upon being questioned on why he believed the girls were older because their breasts and hips were developed and they were dressed sexily, the first accused emphasised that what he meant by sexily dressed was that the girls wore body fitting clothes revealing the shape of their bodies.

[129] His notion about being misled about the ages of the teenagers was tested and he remained persistent that none of the girls looked like minors to him. He said though SN appeared to be too young to smoke, there was no red flag that she was a minor because one can be old but short and skinny too. Further, the evidence from SN's testimony that she buys her panties from the children's section in the sizes of 11 – 12 years, meant nothing because if a lady is skinny, she buys and dresses in what fits her, regardless of her age. He denied JU's testimony that she had told him that she was 14 years old and did the same with being asked about SN's evidence that she went to him in her school uniform on one occasion.

[130] In as far as RT was concerned, he repeated that she looked more mature than SN. When confronted with RT's testimony that accused 2 approached her and JU and said accused 1 wants to sleep with them because he likes young girls, he responded that a certain Maherero, who was the first one to tell SN about accused 1 was the one who said he likes young girls. However, his version of

"young" ranged from 19 years and above. It was put to the first accused that according to RT's testimony, he likes children that are below 18 years old and school attending. He refuted the allegation. He was confronted with the photo plan of the girls, and conceded that that they looked poor and like school children, but said that was completely different from how they looked when they came to him.

[131] A proposition was put to him about the ostensible blackmail theory, that the sender believed that N\$200 was a lot of money either because they did not have money or because it was a child. He answered that his guess was that the message was sent by JU based on their last encounter when he had to pay them N\$400, but only had N\$200. So according to him, it could have been either her mother or the police.

[132] Accused 1 reiterated that he used to take the girls to a flat at the back of a house he used to rent out and never asked them to hide in his car. He said he has no reason to do so because nobody would see them as his car's windows are tinted. Upon being questioned, the first accused responded that he never took the girls to his place of residence out of respect of his private dwelling and family. It was put to the first accused that the only reason he never took the girls to his place of residence was because he knew they were minors and he did not want to be seen with them. He responded that he never admitted that they were minors.

[133] Upon being asked about his relationship with the second accused, the first accused stated that he knew her since 2016 and they were sexual partners. He would pay her N\$100 after every sexual encounter. He was then questioned regarding what instigated accused 2 to bring SN to him. The gist of his answer was that it was not the first time that she brought someone to him, as she could tell her friends that he pays for sex and then her friends would be interested. He however, could not speak for her regarding why she brought SN to him because he did not ask her to bring anyone to him. He further indicated that he never

discussed with the second accused that he would like other girls to join them nor did he ask her to find him young girls.

[134] Accused 1's stance is that he did not go looking for the complainants as they came to him for sexual intercourse in exchange for money. Counsel for the State however, rejected his contention and contended that he controls the situation with his rules in place as to what he pays for and what he does not pay for. The first accused rebutted the state's contention and insisted that the girls already knew what they came for. He however, conceded that he had a set price of N\$100. When it was put to him that the complainants got used to knowing that if they went to the him, they would get money, he responded that it was their choice, not his. It was put further to the first accused that children cannot think straight, they are not used to money and it becomes a habit. He responded that the complainants have been having sexual intercourse for money, cigarettes and drugs before him, he did not create their habit. He admitted that he would ask the complainants to take a shower before committing any sexual acts because he likes clean bodies and that the Savlon was there for washing his hands after having worked on the car.

[135] The first accused admitted that the sex deeds included the complainants sucking his penis, him stimulating their clitoris and licking their vaginas. He was surprised that all of these acts amounted to rape. RT's version that the first time she went to see the first accused she was with JU and the second accused and he licked her vagina and inserted his penis into her vagina was put to him. He responded that RT never went to see him with the second accused and JU and he never committed those sexual acts. He however, conceded to RT's testimony that the second time she went to his place she was with SN and UR and RT sucked his penis before he had sexual intercourse with her by inserting his penis into her vagina. RT's third sexual encounter with the first accused that she went with SN, UR, JU and SG and he inserted his penis into her vagina was put to the first

accused. His response was that although he did have sexual intercourse with RT by inserting his penis into her vagina, SN was not present at this encounter.

[136] SN's testimony was also put to the first accused and he conceded that in their first encounter she was with the second accused and they had vaginal sexual intercourse. He denied that she again came with the second accused on the second encounter and that he inserted his penis into her vagina on that occasion. He further denied that accused 2 came with SN and JU on the third encounter or fourth encounters. It was further put to the first accused that this encounter with her friends was the encounter that the first accused had anal intercourse with SG to which he responded that on the occasion of anal intercourse SN was alone with SG.

[137] As far as UR was concerned, the first accused conceded that her first encounter with him was when she came with SN and that he had asked her to suck his penis and penetrated UR vaginally on that occasion. He further confirmed UR's evidence about her second encounter, specifically that vaginal penetration took place, that she sucked him and that he ejaculated in her mouth and apologised but it was because she did it 'like a professional' and he could not control himself. He denies UR's evidence about her third encounter and said that it was not correct because SN was not present. UR's testimony was further put to the first accused that on the third occasion he just inserted his penis into her vagina without her sucking his penis. The first accused responded that he could not recall but it was possible because she did not like sucking his penis the previous time.

[138] UR's testimony was further put to the first accused that the last time she went to his place it was all five of the complainants and he said it cannot be as the five of them could not fit in his car. UR's testimony further was that on this final occasion, they lifted the mattress of his bed and found plenty of condoms,

including used condoms and a fake penis. The first accused responded that it may have been possible that they found condoms under the mattress, but there was no artificial penis present. UR's testimony was further put to the accused that on that occasion, the first accused informed the 5 complainants that he did not have enough money to give them and he gave them N\$350. The first accused responded that he informed them beforehand that he did not have enough money to give the four of them and only gave them N\$200.

[139] SG's testimony was put to the first accused and he confirmed that he had three sexual encounters with her and she was with SN on her first encounter with him. He confirmed that she sucked his penis on her first encounter with him and he had sexual intercourse with her by inserting his penis into her vagina. According to SG's testimony, the second time she encountered the first accused was during the second semester holidays in 2017 and she was with SN. The first accused responded that that was not correct because he only had two sexual encounters with SG, the first time with SN and the second time with the four girls. He denied that she sucked his penis or that he inserted his penis in her vagina on the second occasion. He clarified that he had anal intercourse with SG on his initial sexual encounter with her but did not mention it in his s.115 plea because he did not have the record at the time and could not recall. The first accused further stated that SG's version that all five complainants were present at the third sexual encounter was inaccurate because they were all present, excluding SN. He however, confirmed that he had sexual intercourse with SG on this occasion by inserting his penis in her vagina.

[140] JU's testimony was put to the first accused and he responded that her version that she was with RT and the second accused during her initial encounter with him was not true because she went to him for the first time with SN sometime in June or beginning of July 2017. He emphasised further that JU's testimony that she sucked his penis and he inserted his penis into her vagina on the alleged first encounter was not true because it did not happen. He further stated that JU's

testimony that the second sexual encounter occurred between him, her, SN and the second accused as well as all the sexual acts surrounding this encounter was untrue because he recalls that the second time she was with RT, UR and SG. He confirmed that during the second encounter JU sucked his penis and they had sexual intercourse by insertion of his penis into her vagina. It was on this second encounter that he gave them N\$200.

[141] It was put to the first accused that he knew that the complainants were all minors of 16 years and below, that he took advantage of them. He denied knowing their ages or that he took advantage of them. Further, it was put to him that he kept paying them money so that they would come back to him and thus, groomed them to expect money for sexual intercourse. Again, he denied that saying they came to him with the knowledge of what they wanted and he just paid them. It was further put to the first accused that because the complainants were children, they could not think properly and were overwhelmed by the money that he gave them. He responded that he did not know their background or living conditions. He however, agreed that he knew that every time they called, it was for sexual intercourse in exchange for money. It was put to him that every time he collected the complainants and took them to his flat to have sexual intercourse, such actions amounted to trafficking. He responded that he was surprised at that explanation of trafficking. It was also contended that the girls' minds were clouded by the money and so he could perform any sexual acts as he pleased, which included ejaculating in their mouths or breasts. Furthermore, that because these girls were not thinking well, it amounts to coercion and that he actually raped them. He denied that, repeating that the girls were not forced at all and they came by themselves.

[142] As far as the cigarettes are concerned, that by giving the minors cigarettes was a way of further corrupting them. He responded that he would give the cigarettes to anyone, not just the complainants. It was further his response that he

was not the one who taught them how to smoke upon it being put to him that he was giving them a deadly present of cigarettes.

[143] During re-examination accused 1 reiterated that the girls did not come to him dressed like on the photo-plan but would be dressed sexily in shorts, short dresses, tights and tops. SN contacted him mostly, with the exception of the last time when it was UR, JU and RT, he said. With regards to the trafficking offence, accused 1's stance was that regardless of whether the victims would have walked or flown to his place, it does not change the fact that there was consensus to have sexual intercourse at his place and they knew what they were coming for. When asked when he found out that the girls were prostitutes, the first accused responded that he only came to know after the article in the newspaper that people commented that these girls are known as 'small prostitutes.'

Warrant Officer Dennis Skrywer

[144] He testified that he is employed as a police officer at Tataleni Police Station Criminal Investigation Unit, as a unit commander. It was his evidence that he knew SN because her mother would always ask him for help when she would report that SN and SN's older sister were skipping school and ran away from home. The witness testified about an occasion where he found SN intoxicated at a residence with 5 or 6 older boys and cannabis was found on scene. At another time SN had disappeared from home for a week, and he found her, smelling of alcohol, in a shack with twin brothers. As far as SN's socio economic status was concerned, it was Warrant Officer Skrywer's evidence that she was not extremely poor. She lived in a house, not a shack, with a tuckshop.

[145] On another occasion in 2017, SN's mother approached Warrant Officer Skrywer requesting that he assists her to find SN. He was busy at the time and could not assist her. She then asked for Detective Sergeant Haoseb's number and

shortly thereafter Warrant Officer Skrywer observed that this case had been opened and Detective Sergeant Haosab, was the complainant.

[146] During cross examination, Warrant Officer Skrywer agreed that he could tell from looking at SN that she was a child. He also agreed that there was nothing peculiar about SN's mother requesting for Detective Sergeant Haoseb's number, nor was there anything wrong with him recording the witness statements as all the complainants and their mothers speak Damara Nama.

[147] It was further put to Warrant Officer Skrywer that RT was being considered by the school to be a prefect meaning she was a good student who was just being led astray. Warrant Officer Skrywer agreed to the proposition. He further clarified that UR was brought to him by her parents for him to talk to her and he did not find her smoking marijuana or drinking. He further stated that the victims' conduct was that of adults because they were not afraid of the dangers around them. He agreed that children can start doing wrong things at home because they are getting sweets, money or any sort of drink and that we have laws to protect children because they may not know the difference between right and wrong.

Ms Maria Garoes

[148] Ms Garoes testified that she came to know the first accused though the incident in the newspaper and through his lawyer. She knows accused 2 from the location where she lived. She is actively involved in a church group that encourages young girls. Ms Garoes stated that she and SG resided in the same yard and she at times would look after SG and her brother when the mother would work at night. She said that she had a conversation with SG after she read a newspaper article that was published on 3 October 2017. SG told her that accused 1 did not force her, that she was already sexually active, that she did it to get money for toiletries and observed this behaviour from her older sister. That

prompted her to talk with the police and when they gave her a cold shoulder, she contacted the defence lawyer.

[149] Ms Garoes also knew of a time when SG was away from home and or school for a month and was eventually found at a certain Tate Tangeni's house with other girls. When they got home, SG's mother and stepfather beat her with a belt. Thereafter, SG had gone to live with her boyfriend. It was the witness' evidence that SG did not lack food and neither was she hungry because everyone in that yard worked. What she needed was warm motherly love because her mother did not have time for her.

[150] It was her evidence further that Detective Sergeant Haoseb used to visit SG on a regular basis and because he was a pastor, the witness thought it was to read the Bible. On one occasion however, Mr Haoseb asked SG to come to him but she refused. This witness asked why and SG responded that he wanted to sleep with her.

[151] During cross examination, the witness stated that her understanding of rape was the use of physical force to have sexual intercourse with someone without their consent. She further stated that the victims were not raped because they agreed to have sexual intercourse.

Ms Justine Tsowases

[152] Ms Tsowases testified that she is SN's cousin and knows accused 2 from their neighbourhood. She testified that SN once told her about a plan to blackmail accused 1 to give her more money and if he refused, she will go to the police and tell them that he had forced sex with her. The witness testified that she knew about SN's doings, that she would disappear from home for weeks and her mom would go looking for her and find her in drug houses or houses of elder men.

[153] During cross examination, the witness admitted that she decided to testify because of the rumours that were going around about SN. It was put to her that she was lying about SN telling her that she was going to blackmail the first accused because that version was never put to SN. She insisted that SN told her that.

Ms Anna Engelbrecht

[154] Accused 2, a 32 year old Namibian lady, is an unemployed mother of 3 children. She testified that on occasion she does domestic chores for persons. She testified that she only knew SN because during December 2016 SN and a certain Maherero came to her house wanting the contact details of accused 1. Maherero shared a cigarette with SN, which prompted accused 2 to ask whether SN was not too young to smoke because SN's body size is short and she has a tiny body structure.⁶ Maherero then responded saying that though SN looks young she does big things. Accused 2 said that at the time she forgot to give the number and the girls left.

[155] During the first school holiday in 2017, SN returned to accused 2's house. SN requested her to send a text message to accused 1 and tell him that SN wants to make contact with him as she needs money. She complied and accused 1 picked her and SN up in the vicinity of Tataleni High School. When they met accused 1 told SN that he does not just give money like that as he first has to have sexual intercourse and then pays afterwards. It was asked how accused 1 knew that SN needed money and accused 2 replied that by approaching accused 1 it was obvious that it is an exchange transaction of sex for payment. SN agreed and they drove to the flat, where accused 2 asked for a cigarette. SN also asked for a

⁶ Record P 2495 line 9 -14.

cigarette. Accused 2 overheard accused 1 asking whether she is not a minor and too young to smoke but SN said that she was 17 years old going on 18.

[156] Accused 2 went into the toilet and once she came out SN was naked and sucking accused 1's penis. He then put a condom on and with SN laying on her back on the bed, had vaginal sex with her. Thereafter, accused 1 removed the used condom, put on a fresh condom and he and accused 2 had sexual intercourse. Once done, they were given money which she said she thinks was N\$120 each and they went to their homes respectively.

[157] She testified about a time that SN came to her house with RT and JU. At the outset of her evidence in chief, she said it was during the first school holiday of 2017 during April/May. She later changed the date to between June and July 2017. During this visit the girls rolled a 'zol' with cannabis in a paper which they smoked. She heard the girls having a conversation wherein it was said that other guys pay N\$400 for sexual intercourse and accused 1 pays too little which is why they were planning on blackmailing him. Then the girls left.

[158] After a few months, SN's mother and 2 police officers came to look for SN at accused 2's house. She recalled that prior to this, around 8h00, SN had come to accused 2's place with a person named Potox. Potox asked that accused 2 should hide SN in her house but accused 2 refused and they left. The police and SN's mother came around 10h00. Accused 2 took them to Potox' house, but SN and Potox were not there. SN's mother told Potox' mother that accused 2 was selling SN to men and that accused 2 better get a good lawyer as she was busy sending her to jail. She then walked home.

[159] After some months, one evening a police officer, Detective Sergeant Haoseb, came to her house and told her to go sign maintenance forms at the Tataleni Police Station. Whilst in the vehicle, Detective Sergeant Haoseb asked

her whether she was aware that she sold five girls, but she denied that. They then drove to the Police Station, where she was told that she was being arrested for being involved in human trafficking.

[160] She denied that there was an instance when a certain Police Officer John Gaeseb came to look for SN at accused 2's place. She admitted to have taken SN only once to accused 2's place, but testified that she made no promises to SN as SN already knew the reason why she came. She was asked if she was rewarded for the sexual activity between SN and accused 1. She replied in the negative. When asked if she ever took the other four complainants to accused 2's place, she denied that to have been the case. She also testified that neither SN or any of the other girls ever spent the night or stayed at her place. She was also asked about the evidence of SN and RT that accused 2 supplied them with drugs or cocaine and she said that that never happened.

[161] During cross-examination she explained that a friend of hers, whom she told about her financial problems, told her that accused 1 pays for sex. She has been going to accused 1 since 2015 when she was in need of cash. She related that he gives N\$100 and other times he helped her with N\$150 or even N\$200. Counsel then moved on to her testimony that when she met SN for first time, she looked tiny like a minor, she answered that she does not accept that and that all she meant was that SN was someone with a medium body, not too chubby and not too skinny. It was then put to her that it does not make sense for her to initially say SN was tiny. The witness answered that when she looked at SN, she did not expect her to smoke.

[162] Counsel then interrogated her about the text message that she said SN asked her to transmit, as accused 1 said it was a 'call me' request. She answered that it happened a long time ago and that she might not recall precisely. It was put her that by contacting accused 1 she was facilitating for accused 1 to have sex

with SN. The witness said that she does not regard it as that, as she merely assisted to send a call me request. It was followed up with why then did accused 2 go with SN to accused 1's place. She replied it was because SN asked her to go along and once accused 1 and SN were finished with intercourse accused 2 also felt the need as she was also in need of money. It was put to her that her version does not make sense that if SN knew what to do and so forth why would she need a chaperone to accused 1's place. She explained that she also wanted a turn to have sexual intercourse and be paid.

[163] She denied that SN wore school uniform and had a school back pack that day and said that SN wore leggings and a t-shirt. It was also put to her that SN's mother asked about the back pack and the witness responded that though SN's mother was at her place, she did not ask anything about a back pack. She was asked whether she knew SN was a school going girl at the time. She said no and referred to a conversation between Maherero and SN to the effect that SN was either in grade 10 or that she had completed school. She said SN learnt about accused 1 from Maherero and not from accused 2.

[164] She was asked further about SN's evidence that there was a second time when she and accused 2 went to accused's 1's place for sex, but she denied it saying that SN was lying about that. SN's evidence that there was a third instance that included her, accused 2 and JU was put to accused 2 and she denied that to have been the case. More details from SN's version about this incident was put to accused 2 and she denied it. It was further put to her that according to RT's evidence she was approached by JU who in turn said that accused 2 wanted to see them and they needed to prepare. She denied ever telling them to come to her place. She denied ever taking them in that combination to accused 1. It was further put to her that accused 1 said in the presence of accused 2 that he likes school children under the age of 18 and that based on the girls story it sounded like accused 2 was recruiting them. She said that it was a lie and she did not take them to accused 1's place.

[165] As regards to complainant JU, it was put to her that JU said that accused 2 called her and requested her to remove her school uniform and told JU and RT that she has nice things for them. Accused 2 denied calling JU, or asking her to remove her school uniform or promising them nice things. It was put to her that JU confirms RT's story that the three of them went to accused 1's place, but she said that they were lying.

[166] In addition she was confronted with JU's evidence that there was another instance wherein JU, SN and accused 2 went to accused 1 and that it was confirmed in SN's evidence. Again she answered that the girls were lying.

[167] She was also asked about her evidence that JU, SN and RT spoke about blackmailing accused 1, which in accused 1's estimation happened between April to May and if she told accused 1 about that before October 2017. She answered in the negative. When asked why did she not disclose it to him, she responded because she did not think that they would carry out the blackmail. She also confirmed that she knew the defence witnesses Ms Maria Garoës as well as Ms Justine Garoës.

[168] Cross-examination was concluded by telling her that she knew accused 1 wanted young girls and that based on that knowledge she sought young girls for him. She said she was never asked by accused 1 to do such. It was postulated that if she did not do it for him, then she did it of her own initiative. She denied recruiting girls and said that she had nothing to gain from that as she even had a younger sister and would not do so. She motivated her answer by referring to accused 1's evidence that these girls went to his place, without accused 2 taking them there. It was also put to her that her presence on one of the instances when she was there with the girls, intimidated them and caused them to participate with accused 1 because both accused 1 and accused 2 were adults and that the girls

had no choice but to do what accused 2 was doing. She denied this and stated that she did not force or intimidate any of the girls to have sexual intercourse with accused 1.

[169] In re-examination she was asked whether she could have intimidated the complainants into having sex with accused 1 if she was not with them and she answered no. She was asked about JU and RT and the allegation that she called them. She repeated her evidence that she did not do that. She was also asked if JU was school going at the time and she responded in the negative. She was asked about the evidence that SN came to her a second time during the school holiday and whether SN would put on a school uniform during holidays. She replied that it was during exam time but SN was not attending school at that stage. She was also asked about the additional money she asked on occasion from accused 1 and whether she regards that as payment and she answered in the negative.

Closing Submissions

[170] Both counsel for the State and the defence filed written closing submissions. This court would like to express its gratitude for that, especially in respect of the specific issues raised by the court. Mr Khumalo argued that the evidence has proven the offence of trafficking. He stated that when accused 2 invited SN, RT and JU with the directive that they should look pretty, it was because she knew it was for the purpose of taking them to accused 1. Thus, she recruited and transferred the minors to accused 1. Accused 1, he argued, recruited the other complainants through SN and RT when he asked them to find other young girls for him. In respect of the other instances he transferred them to his flat and harboured them there for the purpose of sexual exploitation.

[171] He also argued that the rape charges were also proven. He submitted that the sexual acts were admitted by accused 1 and what remained for the court to

decide is whether the complainants being exceptionally vulnerable by virtue of their youthful ages can be regarded as a coercive circumstance. In the event that the court is not in agreement with that contention, he submitted that the alternative charges under CIPA were proven. In respect of the last count of supplying of tobacco to minors, he says, the accused himself admitted to having given cigarettes to the complainants.

[172] Counsel for the defence argued that the State has not proven trafficking nor have they proven rape, in particular that coercive circumstances do not exist in this matter. He also submitted that essentially the complainants were not credible witnesses. That was evident in the multiple witness statements, deviations from one another, omissions in the statements, deficits in the memory of some events etc. Furthermore, these complainants did not behave like children, nor did they look like children which is why the accused could not have known that they were minors, as they smoked and some even used drugs. Most of these children were ill disciplined, skipped school and did not sleep at home on several occasions. So much so that the police in Walvisbay did not take a complaint seriously when the mother of one of the complainants wanted to seek intervention to discipline her child. Furthermore, that Detective Sergeant Haoseb concocted the case as it appeared that none of the children or their mothers made a criminal case about this.

Applicable law of evidence and evaluation of evidence

[173] The point of departure is that the onus of proof lies squarely on the shoulders of the State to prove a factual matrix to sustain the elements of the offences respectively. There is no onus on an accused to prove anything. In assessing whether the State has discharged that onus, the court must consider the whole conspectus of the evidence. It is inevitable that parts of the evidence may be found to be false or unreliable or only possibly false or unreliable,⁷ but

⁷ *S v Van der Meyden* 1999 (1) SACR 447 (W) at 450.

regardless of that, it has to be considered in totality.

[174] The law of evidence also has cautionary rules in place for certain classes of witnesses. It requires from the trier of fact to treat that evidence with caution because of an amplified risk of blindly accepting such evidence. Children and complainants in cases of sexual offences were historically included in these categories. Namibia has made strides insofar as s 5 of CORA provides that:

'No court shall treat the evidence of any complainant in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature with special caution because the accused is charged with any such offence.'

[175] In the same vein, the CPA was amended⁸ to abolish the cautionary rule that pertained to children. In this regard s 164(4) of the CPA stipulates that a court shall not regard the evidence of a child as inherently unreliable and shall therefore, not treat such evidence with special caution only because that witness is a child. Notwithstanding that, the evidence of the complainants remains subjected to the cautionary rule in respect of single witnesses, which in short requires that it has to be credible i.e. clear and satisfactory in all material respects. However, it need not be perfect, that is clear from what was said in *S v Sauls and Others*⁹ that:

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

[176] One of the defences in the defence's arsenal was that the complainants' evidence is riddled with contradictions which renders it incredible and incapable of sustaining any conviction. Thus, this court will also have to consider the judicial approach to contradictions between various complainants and contradictions between versions of the same complainant. In this regard *S v Mafaladiso and*

⁸ Amendment Act 24 of 2003.

⁹ *S v Sauls and Others* 1981 (3) SA 172 (A).

*Others*¹⁰ provides guidance and it stated that contradictions between two witnesses and contradictions between versions of the same witness is in principle identical. In neither case is the aim to prove which of the version is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural difference between the witness and the persons taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affect the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory version must be considered and evaluated on a holistic basis. The circumstances under which the version were made, the proven reasons for the contradictions, the actual effect of the contradiction with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions- and the quality of the explanations – and the connection between the contradictions and the rest of the witness's evidence, amongst other factors, to be taken into consideration and weighed up.

[177] I now turn to evaluate the evidence. There was no shortage of anecdotes from witnesses in this case. Evidently, not all of the witnesses could say, on their own awareness, whether the acts that form the subject matter of the charges took place or not, but they nevertheless had a contribution to make. For instance, the evidence of the mothers of the complainants was mainly to paint a picture of the

¹⁰ *S v Mafaladiso and Others* 2003 (1) SACR 583 (SCA) at 593e-594h.

socio-economic circumstances of these children. That is with the exception of RT's mother, whose evidence also conclusively resolved the uncertainty that pertained to RT's date of birth. It must also be said that it was not smooth sailing all the time. For instance, SN's mother did not answer many of the questions posed to her, which questions, in the court's view, were simple and capable of being answered. When asked about it, she attributed it to being nervous about testifying in court.

[178] The erstwhile defence counsel used the opportunity to remind the mothers that their children were no angels. They did not diligently attend school, they did not sleep at home, they smoked, used drugs, consumed beer and even had pre-marital sex, presumably to get the mothers to admit that their children had disciplinary problems. That was an idle hope.

[179] This line of attack continued with the evidence of the defence witnesses, other than the two accused. The thrust of Warrant Officer Skrywer's evidence was to illustrate the wayward nature of some of these minors, such as that he found SN intoxicated on two occasions and in the company of older boys. Similarly, the gist of Ms Tsowases' testimony was to paint a negative picture of SN as someone who would sporadically disappear from home and would be found in a drug house. She also testified that SN once told her about a plan to blackmail accused 1. The same sermon came from the concerned member of the community, Ms Garoes, who approached the defence with her knowledge about SG's loose morals. The nub of her evidence was that SG was already sexually active at the time. She also opined that since the girls were not physically forced to have sexual intercourse, they were not raped. The defence basically did all they could to pile the dirt on the complainants, as if the protection of the law does not extend to these children because they were unruly. Whether that amounts to a valid defence, will be seen further down the line.

[180] As said earlier, the defence also went all out to attack the complainants' witness statements in cross-examination. It is perhaps prudent to start with that.

Cross-examination on witness statements 'deposed' to by children

[181] It is a common sight in criminal trials that much time is devoted to cross-examination about statements made by the police. The same happened in this trial. The aim is largely to point out inconsistencies between the oral evidence and the written statement, in order to discredit the witness. Not only must the authenticity of the statement be proven, which is usually not a problem, but the content of the statement must also be proven before the catching out can begin. It is the latter requirement that turned out to be an issue herein, and it appeared that the erstwhile counsel did not appreciate the need for that.

[182] This component is usually fulfilled in court once the witness answers in the affirmative to questions which show that he or she read the statement or that it was read by the police or interpreter and that the deponent was satisfied that the content of the statement is correctly recorded. My emphasis. In this case the children almost always said the witness statement was not read to them, nor did they read it before a signature was affixed. Despite that, their responses to the question of whether they were satisfied about the content were in the affirmative. Indubitably, that cannot be so, as one cannot be satisfied that the content of the statement is correct unless you read it yourself or it was read to you.

[183] The complainants' evidence provided insight into their rationale for that belief. In the case of RT, in response to a question posed about this, she replied: 'Yes I was satisfied my lady because that police officer would not lie.'¹¹ Complainant JU, who was 13 years old at the time, had the same impression that she was satisfied that the statement is correct merely because a police officer wrote it down and so did SN. At the end of the day, the efficacy of the strategy did not pay off for the aforesaid reason.

¹¹ Record P 99 lines 14 –16.

[184] Then there is the oath and its formalities, which were supposedly taken by the children, as their witness statements bore certificates to that effect. The authors Hoffmann and Zeffert¹² state that a child must understand the meaning and religious sanction of the oath. It implies that a child must be able to distinguish between truth and lies and also subscribe to religious beliefs. In *S v N*¹³ it was said that it is axiomatic that unless a witness understands the meaning and the religious sanction of the oath, any oath administered to him or her is ineffectual as the purpose of administering the oath cannot be achieved.

[185] One of the complainants, RT, was asked whether she understood the purport and nature of taking the oath or merely went through the motions because the police say so. She answered that she merely did it because the police said she should do so. It appears that from UR's evidence that she too was uncomfortable and 'afraid' when making the statement. She said that it was not read to her and she just signed. She explained the formality of the oath as that:

‘He said to us that we should stick to the truth because the police is involved. Okay so did he tell you that you must tell him the truth, nothing else but the truth so help me God? – That I was not told.’¹⁴

[186] It is vital to determine the competency and ability to understand the oath before a child testifies in court. My emphasis. The same goes for a police officer who records the child's statement, if an oath is practicable in the situation. If that is not done, uncertainty creeps in as to whether the children indeed understood the nature and meaning of the oath when they made the statements. It is observed that the officer, when asked about the formalities of taking the statement, was silent as to how or what he did to check this aspect.

[187] Language abilities is another factor that may have affected the accuracy of some of the witness statements. According to the complainants they conveyed

¹² Hoffmann and Zeffert, *The South African Law of Evidence*, 4th ed. (1988) Butterworths p 376.

¹³ *S v N* 1996 (2) SACR 225 (C) at 230.

¹⁴ Record P 541 line 31, P 542 line 1.

their stories in Damara Nama, English and a bit of Afrikaans, respectively. One of the complainants (SG) was taken to task about her statement not specifying 'anal' sexual intercourse, and she then attributed that to her not understanding English so well. She also said that the people at the Women and Child Protection Unit could only speak English. The police officer who recorded the initial statements, testified that he was conversant in the Damara Nama language and that he wrote the statements in English. When he was specifically asked about the complainants' abilities in English, he said that based on their responses he assumed that they understood, which insinuates a possibility of some miscommunication.

[188] Finally, it was also hard to ignore the multiple statements that were made and the confusion it caused. Two of the minors made four witness statements each, one made three and another one made two statements. In as much as it is unavoidable at times that an additional statement is required by the circumstances, it needs to be understood that it adds to the complexities that a child witness has to face in court. The subject matter of the allegations herein covered various combinations of the girls and multiple instances with some overlapping in dates. It was an arduous task to keep track of the details of each alleged incident, not only for the children, but for all of us to correlate it to the multiple charges.

[189] This struck me as one of those cases wherein the gathering of the initial statements could have benefitted from a more methodical approach. I have already alluded to the sizable scope of the allegations amongst the five complainants. If one adds the intimate nature of the sexual acts, and that in many cultures it is a taboo to talk about, especially for a child, it requires specialised skill to take an effective witness statement for this type of case. Furthermore, children may not necessarily realise the weight of that initial statement and that every word therein will be tested afterwards in court. As such, more care needs to be taken in the recording of these witness statements. It will go a long way to remove the

pitfalls that awaits the child witness during cross-examination in court.

Inconsistencies in the evidence of the complainants

[190] The most prevalent inconsistencies that counsel for the defence pointed out in cross-examination was that of the sequence of the sexual acts i.e. which girl was first, second, third, fourth or fifth, as applicable to the alleged incidents and the amount of money received for that occasion. In instances where complainants had mentioned a sequence and an amount and that differed with the sequence and or amount of another complainant, that girl was accused of lying. In other instances, if the witness answered that she cannot recall the sequence anymore, it was proposed that she was lying about it. The same was said if the complainant said she was no longer sure of the amount paid for that instance. It was evident in their testimonies that many a times the witnesses could no longer independently recall the sequence at that juncture.

[191] The defence, in their heads of argument, make a bald assertion that the state's case contains several fundamental discrepancies, yet they cite no single shred of what specifically these crucial contradictions are. On the other hand, the state in its heads of argument contends that the sequence of who was first and who was last, are not material or relevant, because the sexual acts were not disputed. Having regard to the *Mafaladiso* criteria, issues such as who was first and who was last or the specific amounts are peripheral issues. These discrepancies are inconsequential. That however, cannot be said throughout. It is evident that there may have been multiple instances, so much so, that it is almost to be expected that some of the witnesses may have conflated some of the instances or worse, even have forgotten or blocked out some of the memories, which put them in a different category. If it falls into the latter category it stands to detrimentally affect the credibility of that complainant, in which case the accused persons may be afforded the benefit of the doubt.

Omissions and imperfections in the witness statements

[192] Most of the complainants either did not include some details that they referred to in oral evidence or admitted that there were some mistakes in the statements. For instance, RT outright said that she was afraid and was not speaking correctly when making the statement. Another complainant, SN was asked, in respect of her first statement, whether she told the police everything. She replied that she only told him what she remembered at the time and that some of the things in the statement were incorrect. She then had to answer as to why she was unable to remember things that happened 3 months prior to making the statement, and then miraculously remember it three years later. She explained that during the time at home, she was able to reflect on what had happened to her. She was also asked whether she told the investigating officer and the prosecutor about it and why these mistakes were not corrected in her statement before she testified. This question was repeated with some of the other complainants.

[193] This, was not a question that the witness could realistically be expected to answer. It is not clear by whom such an ‘after the fact’ amendment will be commissioned before court and whether defence counsel will appreciate the surprise of amended witness statements, moments before the witness stands to testify. The position as far as sworn statements are concerned is that changes made thereto can only be done before the oath or affirmation is administered and it requires both the deponent and the police officer to sign or initial such amendment. Suffice to say, it is not something this court will endorse.

[194] One of the other girls were taken to task about the statement which does not contain an averment that she was asked to bend down when the vehicle approached the gate of the flat, or that it was ‘strawberry’ condoms that were used. JU gave a similar explanation to that of SN, that when her statement was written she did not remember everything, but as time passed she remembered more details. She gave a plausible explanation for that, namely:

'The reason why I did not, the reason why I cannot, I do not remember or think about these things is because there are certain things that I have put behind my back. I did not want this thing to be bothering me or to hold me back, that was the reason why I did not think about it or why I did not remember things.'¹⁵ (sic).

[195] The same complainant had however, forgotten an entire incident (wherein they were five girls) in her witness statement. She had not read her statement and thus, could not have confirmed the accuracy thereof, which essentially means the exercise of wanting to discredit her through that was futile. This was not the end of her evidence about this instance and I will deal with the rest during my evaluation of the counts that relate to that instance.

Trafficking of the complainants

[196] Upon his own admission and on the evidence of the complainants the first accused collected the complainants and transported them to his flat. He also testified that he considers sexual intercourse as private which was why he took them to a private place. It just cements that the purpose for taking them to his flat was for sexual activities. Apart from showering and smoking, they literally did nothing else there but engage in sexual intercourse.

[197] The first accused contended that driving the complainants does not amount to transporting. The Concise Oxford English Dictionary¹⁶ defines the meaning of transport as to take or carry from one place to another by means of a vehicle, aircraft or ship. The evidence has also established that these complainants were all under 18 years of age. Finally, the evidence need not have proven the means, but in this case the evidence has established that the complainants were enticed with the prospects of earning money, which they received from the first accused. That was what motivated them to participate in the sexual acts. In respect of those

¹⁵ Record 868 line 19-25.

¹⁶ A Stevenson and M Waite *The Concise Oxford English Dictionary* 12th ed (2011) at 1534.

instances in which I find credible evidence as to the incident, I have no doubt that the accused persons have facilitated and transported the minor complainants to the flat of accused 1 for sexual exploitation, which amounts to trafficking.

Coercive circumstances not listed in CORA

[198] The refrain of sexual intercourse dominated the narrative of the trial. The stance of the State was that it amounts to rape and that all the complainants were exceptionally vulnerable by virtue of their respective ages, which constitutes a coercive circumstance. It is of course subject to them satisfying the burden of proof in all respects. The argument was that the accused took advantage of the young ages of the children who were immature and incapable of making informed decisions about these sexual acts. The State also emphasised that the immature child minds were swayed and they were enticed with money, and furthermore, that the accused abused his knowledge about the children's drug habits by giving them money to support it.

[199] The defence argued that the element of coercive circumstances does not present itself in this case and therefore, his clients cannot be convicted on any of the rape charges. Counsel submitted that the legislature was specific in their intention that the only coercive circumstance in respect of age is the one which refers to a child under the age of 14 years and the perpetrator being three years older. He construed that as the 'age of consent' as far as CORA is concerned. Thus, the State cannot enter through the backdoor and say that it constitutes coercive circumstances for children who are 14 years old and older than that. He stated that if the legislature wanted that, they would not have set a limitation of 14 years in respect of children.

[200] The inclusion of the phrase 'but is not limited to' in the definitions clause of coercive circumstances in s 2(2) of CORA makes it clear that coercive

circumstances are not limited to the ones enumerated in the Act. It leaves no doubt that this court has been afforded a discretion in this regard, which is to be exercised judiciously. I thus, proceed to contemplate if this is a compelling case where the exclusion of the coercive circumstance proposed by the State would be against the interest of justice, as proposed in *S v M* supra.

[201] One of the pertinent issues raised by the coercive circumstance that the State proposes is that of when is a child old enough to give meaningful consent to sexual activity? There is no simple answer. Though some countries expressly set an age of consent, our rape legislation, CORA has not done so. However, one of the categories of coercive circumstances listed in s 2(2)(d) of CORA is where the complainant is under the age of fourteen years and the perpetrator is more than three years older than the complainant. Also of relevance is the CIPA, which in s 14 criminalises sexual acts with children under the age of sixteen years where the offender is more than three years older than the complainant and they are not married. My emphasis.

[202] In the matter at hand we have one complainant who was 13 years of age, one who was 14 years of age, two that were 15 years of age and one 16 year old at the time of the alleged offences, who, as the evidence shows, were immature and susceptible to negative influences in the community around them. Moreover, their ages are bordering on 16 years, being the cut-off age legislated to be statutory rape, where the perpetrator is more than three years older. These children have not reached the age of majority which is now 18 years as per s 10 of the Child Care and Protection Act 3 of 2015.¹⁷

[203] Considering how close the respective ages were to the age limit in the CIPA; that this was not a once-off sexual act but devolved into an organised scheme in which the sole motive was to exploit minor children for sexual purposes; which stretched over several months; with more than one perpetrator and as many

¹⁷ Child Care and Protection Act, 3 of 2015.

as five children; who mostly were from single parent households where money was not freely available; against the severity of a child trafficking milieu; makes this a compelling case. As such, I am convinced that this is an instance where the definition of coercive circumstances should be extended to include instances of this nature.¹⁸ It is my view that it would be a travesty of justice if this court does not exercise its discretion in favour of a finding that these circumstances, cumulatively considered, amounts to coercive circumstances. I thus, do so.

[204] In any event, in the case of JU, she was 13 years old at the time and the coercive circumstances circumscribed under s 2(2)(d) of CORA would find application to the alleged sexual acts that relate to her.

[205] For the most part, it was common cause between the parties that indeed accused 1 had sexual intercourse with the complainants on multiple occasions and in other instances the court will have to turn to the evidence of the complainants to assess if the evidence can sustain the incidences. To the extent that the evidence does sustain the various incidences, the above finding that the sexual acts took place under coercive circumstances are indicative that the behaviour of the accused persons were unlawful. As for the element of intention, the evidence leaves no doubt that each time when accused 1 collected the complainants and each time that accused 2 connected and took the complainants to the flat of accused 1 it was with the intention of committing the sexual acts that ensued. In view of my finding about it being coercive circumstances in this case, I do not find it necessary to venture into the alternative counts under CIPA.

[206] I must also say that I do not find the assertions by the accused persons that they did not know the tender ages of the complainants convincing at all. Their appearances as depicted on the photo plan speaks for itself and it does not support the defence's contentions. Accused 2 for instance referred to SN as having a 'tiny body structure' which can be regarded as what is known as a slip of

¹⁸ In *S v Lukas* (CC 15/2013) [2015] NAHCMD 124 (2 June 2015) this form of coercive circumstances formed the basis of the convictions of the rape charges.

the tongue. Much was made of SN making herself one year older than the 14 years which she was, or even if we believe the contention that he believed she was 17 going for 18 years, it does not detract that she was still a minor. Even the defences' own witness, Warrant Officer Skrywer testified that he could tell just by looking at SN that she was a child and that the laws have to protect children because they might not know wrong from right.

[207] Furthermore, two of these complainants have testified about accused 1 expressing his predilection for young girls. JU also attested that during her second incident, that accused 1 only wanted to have intercourse with her and SN, excluding accused 2, who is a major. Accused 2 in her evidence contends she would not have introduced JU to accused 1 as she knew she was a child, but JU credibly refuted that. These complainants have no reason to fabricate details such as that. Clearly the complainants were from disadvantaged backgrounds and not living opulent lives. Almost all their mothers testified about what they gave their daughters and that it was within their means. All the complainants testified about them not getting what they wanted at home, which made them easy prey for predators.

Duplication of convictions

[208] The possibility of duplication of convictions had been on the table as many incidents had the same time periods in respect of the same complainants. It was also noted that the state had charged accused 1 separately for having had the complainants suck his penis, before or after insertion of his penis in their vagina or anus. The court thus, invited the parties to make submissions on that.

[209] Counsel for the defence lamented in his heads of argument that the state charged the accused with all conceivable offences in the hope of proving a conviction in one or two of them and that they did so in an attempt to close the loopholes.

[210] Counsel for the State argued that an overlap in date does not necessarily amount to a duplication, with which I am inclined to agree. As for the case of setting out separate offences he argued that the legislature has distinguished between the mouth, vagina and anus in the law. Thus, when the accused inserted his penis in the mouth of a complainant it amounted to a separate and different intention than when he wanted to insert his penis into another orifice.

[211] The Supreme Court in *S v Gaseb and Others*¹⁹ approved two recognised tests which the court should apply when determining whether or not there is a duplication of convictions, and cited with approval these tests as summarised in the Full Bench decision of *S v Seibeb and Another; S v Eixab*²⁰ where the following appears at 256E-I:

‘The two most commonly used tests are the single intent test and the same evidence test. Where a person commits two acts of which each, standing alone, would be criminal, but does so with a single intent, and both acts are necessary to carry out that intent, then he ought only to be indicted for, or convicted of, one offence because the two acts constitute one criminal transaction. See *R v Sabuyi* 1905 TS 170 at 171. This is the single intent test. If the evidence requisite to prove one criminal act necessarily involves proof of another criminal act, both acts are to be considered as one transaction for the purpose of a criminal transaction. But if the evidence necessary to prove one criminal act is complete without the other criminal act being brought into the matter, the two acts are separate criminal offences. See Lansdown and Campbell South African Criminal Law and Procedure vol V at 229, 230 and the cases cited. This is the same evidence test. Both tests or one or other of them may be applied and in determining which, or whether both, should be used the Court must apply common sense and its sense of fair play. See Lansdown and Campbell ((supra)) at 228.’

[212] The question of whether the first sexual act is preparatory and part of the

¹⁹ 2000 NR 139 (SC).

²⁰ 1997 NR 254 (HC).

same intent or not, has been considered by the appeal court in *Both v S*.²¹ That court held that although the appellant committed two acts, it was done with the single intention of having sexual intercourse and that the actions were in preparation of penetrating the private parts of the complainant. The situations with reference to two separate acts, such as sucking of the penis before penetration are similar to those in that case and it was also closely connected in time. To that end, I hold that in applying the single intent test, it will amount to duplication of conviction if I convict for both counts in the counts as applicable.

Argument that it was a falsely concocted case

[213] One of the defences postulated was that the accused was blackmailed by the complainants and that the police concocted the case as the complainants did not lay criminal charges. In this regard the cellphone print-out that contains a message wherein the sender asked for N\$200 and if not sent, the sender will tell his/her mother to go ahead with the police, unfortunately, bears no contact details of the sender. Thus, that evidence is unable to link it to any of the complainants or the police.

[214] The contention by accused 2 that she overheard a conversation of blackmailing amongst some of the girls, was denied by each and every one of them. The only other person, Maherero, who supposedly had knowledge about it, was not called. Though Ms Tsowases testified that she knew about a plan by SN to blackmail accused 1, that was never put to SN when she was cross-examined. Thus, I am not convinced about these theories. The fact that four of these mothers and the minor complainants did not lay criminal charges rather points to them having no ill feelings towards the accused persons. As for Detective Sergeant Haoseb, he merely did his job. It is unfathomable to expect him to turn a blind eye to a number of minor children being sexually exploited in his community.

²¹ *Both v S* (CA 83/2016) [2018] NAHCMD 239 (10 August 2018).

[215] That being said, I disagree with the contention by defence that in totality the evidence of the complainants' are of such poor quality that they cannot sustain a single count. *In S v Trainor*²² it was stated that evidence that is reliable should be weighed alongside such evidence that may be found false. Independently verifiable evidence, if available, should be weighed alongside the evidence to see if it supports the evidence. In considering whether the evidence is reliable, the cogency thereof must be evaluated, as must be corroborative evidence, if there is any. It goes without saying that evidence must be evaluated against the onus of any particular issue or in respect of the entire case.

[216] In some instances, the complainants' evidence have been corroborated by another complainant, in some instances it was corroborated by evidence from the accused themselves, especially accused 1. In other instances the court found enough of a hallmark of trustworthiness to substantially reduce the risk of wrong reliance on the evidence. In instances where the court finds that not to be the case and that the evidence is not safe to rely on, the benefit of the doubt accrue to the accused persons.

[217] The charges appear to have been grouped in accordance with identifiable incidents and I will now shift my focus to the specific counts in respect of JU, secondly that in respect of RT, thirdly that of SG, fourthly that of SN and finally that of UR.

Counts 1, 2, 3 and 4 in respect of JU

[218] These series of counts relates to JU's first instance. Briefly, it was her evidence that she, RT and accused 2 had gone to accused 1's place where he had sexual intercourse with accused 2 first. She also gave evidence that he put his penis in her mouth to be sucked and had vaginal sexual intercourse with her as well as RT. Furthermore, that the incident took place at the behest of accused 2

²² *S v Trainor* 2003 (1) SACR 35 SCA.

who said that they should go to her friend in town, who turned out to be accused 1. JU was very clear that accused 1 collected them and transported them in his vehicle to his flat where the sexual acts took place and thereafter, he paid them for that.

[219] Both accused 1 and accused 2 deny that it happened. JU was extensively cross-examined about accused 2's presence or absence at this incident. Counsel for the defence proposed that accused 2 would not introduce accused 1 to JU as JU practically grew up in front of her and she knew JU was a little girl. JU responded that indeed she grew up in front of accused 2, but that '... she was the one who brought me to this man', referring to accused 2.²³ Earlier during cross-examination, JU also confirmed that she would not have known accused 1 if it was not for accused 2 who introduced her to him.²⁴ JU thus successfully refuted accused 2's denial of having introducing JU to accused 1. Furthermore, CORA is clear insofar as it provides that a person who causes another person to commit a sexual act with a perpetrator or with a third person shall be guilty of rape.

[220] Finally, RT provided corroborative evidence of this account on all material respects, namely that accused 2 initiated the visit by sending a sms and accused 1 collected them. At his place, both complainants had sucked his penis and he had vaginal sexual intercourse with them, one after the other. This included accused 2, who both complainants say was present.

[221] JU, when tested about the accuracy of the date, was unable to recall anything peculiar about it and left the court with the impression that she is not sure of the date. The court is inclined to accept the date given by RT regarding this incident. This is in accordance with s 92(2)(a) and (b) of the CPA, to cure the imperfection herein.

[222] All things considered, the court is satisfied that the bare denials of both

²³ Page 823 of record lines 5 to 7.

²⁴ Page 777 of record lines 18-27.

accused are false beyond any doubt in the face of the overwhelming evidence given by these two complainants on this incident. The accused persons stand to be convicted on these counts. That is with the exception of count 3 which the court regards as a duplication of convictions and therefore, accused 1 will not be convicted thereon.

Count 11, 12, 13 and 14 in respect of JU

[223] The material parts of JU's evidence was that she found SN at accused 2's place. Accused 2 phoned accused 1 who came and drove them to his place. Once they were at the flat, the accused asked that the complainants to suck his penis, which they did. He also had vaginal sexual intercourse with them, one after the other. It included accused 2. He paid them afterwards and they took a taxi.

[224] Accused 1 in his evidence admitted an incident in June 2017 wherein he drove JU and SN to his place, he admitted that they had sexual intercourse (vaginal) and that he paid them N\$ 100 plus taxi money. Based on his evidence accused 2 was not present and similarly accused 2 denies being involved in this incident.

[225] Complainant SN's evidence validates that of JU on all the relevant parts, that accused 1 drove them to his flat, that accused 1 had vaginal intercourse with her and JU and paid them for that. Though SN was unable to remember the sequence, and the girls differed as to whether it was N\$110 or N\$150, these are not material. In an attempt to discredit JU, she was questioned as to why SN did not mention in her evidence the part about JU experiencing vaginal soreness when accused 1 was moving too fast. JU properly countered this notion by saying it was not SN that was hurt.

[226] JU also knew that afterwards they went to Seapoint and bought drugs, which information emanated from SN's cross-examination. JU explained that she

herself bought cannabis to the value of N\$ 20 and the others bought other drugs. JU's evidence was very detailed as she even recalled that initially accused 1 did not want to have sexual intercourse with accused 2 during that incident, but only with JU and SN. However, JU told accused 1 that accused 2 also needs money for her children. He then acceded and also had sexual intercourse with accused 2.

[227] JU as a witness had no motive to falsely implicate accused 2, as she even came to accused 2's rescue when faced with SN's evidence that accused 2 influenced them to use drugs. She answered that accused 2 did not force them to purchase drugs, as by then, SN had already used drugs. As for the discrepancy as to whether it was crack cocaine or 'rocks' that SN smoked at that time, JU clarified why she thought it was 'rocks.' She explained that she asked SN what it was and SN told her that she was smoking a rock.

[228] Finally, in respect of the date, being given as during March 2017 in the charge, whereas accused 1 in his evidence indicates it to have happened June 2017, the imperfection in the date is resolved by virtue of s 92(2)(a) and (b) of the CPA which essentially provides that the court may accept proof that the incident occurred 3 months before or after the date in the charge. In this case, it is the accused himself that provided proof of the date.

[229] JU did not testify about the allegation of a finger being inserted in her vagina, as averred in count 13 and the court is in any event not inclined to convict on a second charge for the sexual acts on the basis of duplication of the convictions. When considering this collectively against the denial by accused 2 that she was present and that of accused 1 insofar as his evidence does not implicate accused 2, these denials are rejected as false beyond any reasonable doubt and the court is satisfied that the state has proven these counts, save for count 13.

Count 34 and 35 in respect of JU

[230] Complainant JU also testified of an instance where they were four girls, namely JU, UR, RT and SG that went to accused 1's flat. JU explained that UR initiated the contact with accused 1 and he collected them at Tutaleni High School. Once at his flat they did the 'pre-sex shower with Savlon' where after they licked his penis and then he had vaginal sexual intercourse with them, one after the other. Once the sexual acts were completed, they showered and he dropped them at Shoprite. He gave them N\$50 each, saying he only has N\$ 200 now and will give the rest later.

[231] During cross examination, counsel for the defence suggested to her that this may have been the instance wherein they were five girls and found a dummy penis and condoms in accused 1's flat. The witness remained steadfast about her evidence that it was only these four girls that had gone on a Saturday.

[232] Accused 1 in his evidence in chief admits an instance which occurred during June to July of 2017 wherein it was the four girls that JU mentioned that he collected and drove to his flat. According to him, once at the flat the girls smoked cigarettes, which he gave them upon their request. He categorically admits that each of the girls sucked his penis and he had sexual intercourse with them by inserting his penis into their vaginas, one after the other. He also admits that the amount given to them collectively at that time was N\$ 200, as he told them earlier upon picking them up that it was all he had at that point in time.

[233] Accused 1 basically admits all the elements of the offences in respect of these two counts. Therefore, I do not deem it necessary to have regard to the other complainants' evidence in respect of these two charges. The court is satisfied that the state has discharged the burden of proof on these counts in respect of accused 1. Accused 2 was not mentioned anywhere by the complainant JU in respect of this incident.

Count 5, 6 and count 7 in respect of RT

[234] The evidence about RT's first instance relates to these counts. It was her testimony that she and RT went with accused 2 to accused 1's flat. The visit was initiated by accused 2. At the flat not only did he ask them to suck his penis, which she did, but he also had sexual intercourse with her and JU. Based on her account, he had sexual intercourse with accused 2 before he had sexual intercourse with the two complainants and paid them all before dropping them off. It also cannot be ignored that towards the end of cross-examination counsel for the defence said the following to this complainant:

'I wish you to understand that we do not deny that sexual intercourse took place with you, between you and accused 1, Alex.'

-Yes I know.

It is your sequence of events, it is in reference to your memory, you do not remember well.

- Some of it.²⁵

[235] RT's evidence is corroborated by JU's evidence on all material parts, that accused 1 drove them to his flat, instructed them to suck his penis, had sexual intercourse with both of them by inserting his penis into their vaginas and ejaculating on their breasts in exchange for monetary payment. In JU's recollection, it happened during January 2017 whereas RT said it happened on Valentine's Day in February 2017. She firmly held her position on that date. This court is more inclined to accept RT's recollection as it is in relation to a date celebrated globally and therefore, a more significant date to remember.

[236] Considering the bare denials by both accused and the credible corroborative evidence by both complainants who were involved in this incident, the court rejects the denials as false beyond doubt. In the premises, both accused persons stand to be convicted on these charges.

²⁵ Page 154 lines 19 to 23.

Counts 36 and 37 in respect of RT

[237] I will only refer to the incident in cryptic terms as it was already captured under the summary of evidence. This relates to the incident wherein RT testified that SN told RT about a man that will pay N\$ 100 if they sleep with him and used RT's mother's phone to contact the man. It was RT, UR and SN. Upon the man's collection of them RT realised that she knows the man. It was accused 1. Once they reached the flat, they smoked and used Savlon to shower. Thereafter, he proceeded to have sexual intercourse with them and he eventually ejaculated in UR's mouth. Once the deeds were completed, each of them received N\$100 and a packet of cigarettes. They were dropped off at a store in Kuisebmund. She elaborated on her rationale for agreeing to participate in these acts as the record will show:

'When he put his penis into your vagina did you agree to do that ?

--- Yes I agreed to that.

And what made you agree to that?

--- Because I wanted the money. '²⁶

[238] Accused 1 admitted that he transported these three girls to his flat, that he had sexual intercourse (vaginal) with each of them, respectively. He also admitted that he gave them cigarettes, when they asked, and paid them N\$100 each plus taxi fare. In respect of the date, he estimated it to have been probably during June 2017. As far as accused 2 is concerned she was not implicated by this witness at all. On that basis the court is satisfied that the evidence proves the guilt of accused 1 beyond any reasonable doubt, whereas accused 2 stands to be acquitted.

Count 40, 41 and 42 in respect of RT;

[239] RT also related a third incident to the court wherein all five complainants

²⁶ Record P 74 lines 5-8.

were involved. She was unable to recall who, amongst them, initiated the contact with accused 1 and she is unable to place a date on the incident. Both accused persons deny that such an incident occurred.

[240] Needless to say, the evidence of the remainder of complainants are important in this regard. SG also testified about an incident wherein all five of them went to the place of accused 1, but as with RT, SG is also unable to say when it actually happened. On the other hand, JU denied an incident wherein they were five girls, she only referred to an incident wherein they were four complainants at the flat of accused 1. In the same vein SN's evidence is totally silent about an instance wherein all of the complainants were at accused 1's flat at the same time. As for UR's evidence about such an instance, it appeared from cross-examination by counsel for the defence that she made no mention in her witness statement about an instance wherein all five of them were at the accused's flat. When asked about it, she had no explanation for that, she simply said she does not know why. That makes her evidence on this incident insecure to some extent. In re-examination she confirmed that she was unable to clearly remember details of an incident that involves all five complainants.

[241] If I consider all the evidence about this group of charges cumulatively, the impediments that emanated from UR, SG and JU, who were supposedly present, it creates doubt as to the incident. In view of that, the accused persons will be afforded the benefit of the doubt on these charges.

Count 8, 9 and 10 in respect of SG

[242] These charges relate to the first incident mentioned by SG. Her testimony was that she was invited by SN who said that accused 1 was having a party. Once they were at the flat, both her and SN sucked accused 1's penis and then he had sexual intercourse with them and paid them. Apart from saying it was somewhere in 2017, she cannot recall the date at all, which makes her recollection rather

vague.

[243] The accused persons deny knowing about such an incident. Based on SG's evidence SN was involved in this incident. By implication, SN should be able to know something about this incident, yet she was mum about it. It does not bode well that a fellow participant, who initiated the excursion, has nothing to say about it.

[244] That makes SG a single witness, who should be able to testify clearly and satisfactory on all material respects. In my view she does not satisfy the test of a single witness. As such the court ought to give the benefit of the doubt to the accused persons.

Count 15 and 16 in respect of SG

[245] Complainant SG testified about an occasion wherein SN used SG's mother's cellphone to contact accused 1. He collected them and drove to his flat. They showered and the two complainants sucked his penis. He took out a flavoured condom. Whilst accused 1 and SN were busy with sexual intercourse (vaginal), SN asked the price of anal sexual intercourse and was informed that it will be N\$ 300. SN then attempted it but it was painful, so they aborted it. Accused 1 moved on to SG and they had sexual intercourse (vaginal and anal penetration). She testified that it was painful but she did not inform him. He paid them N\$320.

[246] Accused 1 admitted to an incident wherein SN contacted him and when he collected her, she was with RT. At his place they sucked his penis where after SN tried anal sexual intercourse but she became uncomfortable with that. He then proceeded to have anal sexual intercourse with SG and paid them N\$ 150 each plus taxi fare. Therefore, I am satisfied that the evidence proves the guilt of accused 1 in respect of these two counts. There was no evidence about accused 2 being involved in this incident.

Count 31, 32 and 33 in respect of SG

[247] SG also testified about an instance wherein all five complainants were at the place of accused 1. With that in mind, the expectation is that the remaining four complainant's evidence can shed light on the incident. However, when I turned to consider that, I found one of the complainant's evidence on this incident a bit shaky and two others did not testify about such an incident at all. It is not for this court to speculate as to what the reasons might be for that. The relevant evidence and reasoning of the court was set out earlier, as applicable, and it serves no purpose to regurgitate it. In view of that, the court has a degree of doubt as to this incident and the accused persons will be afforded the benefit of the doubt.

Count 17 and 18 in respect of SN

[248] Given that the evidence was already summarised, I will refer to it in in cryptic format. This is the first instance that SN related to court. Basically, it amounted to accused 2 inviting SN to go with her to accused 1's place and he collected them. At the flat he had sexual intercourse with accused 2 and then with SN. He paid them, gave cigarettes and then dropped them off. In respect of this incident SN provided clear and satisfactory evidence in all respects.

[249] Moreover, both accused admits to an incident wherein accused 1 collected accused 2 and SN, drove to his place where the girls smoked, accused 1 had vaginal sexual intercourse with both females and paid them. The assertions by the accused persons about SN' age is rejected as false. In the premises, the accused persons are convicted on their own evidence as well as SN's credible account of the incident.

Count 21 and Count 22 in respect of SN

[250] SN spoke of a second time that she was with accused 2 at which time accused 1 had anal sexual intercourse with accused 2 and vaginal sexual intercourse with SN. In exchange for that he paid them money. Accused 1 admits to second incident where SN came alone 'for sex like the last time' and they had sexual intercourse. Accused 2 totally denies that there was a second incident wherein she and SN had been at the place of accused 1.

[251] In the absence of any other evidence to corroborate SN's account regarding a second sexual encounter with the first accused and given that her evidence on this incident is very cryptic with no recollection of the date, the court is of the view that she does not meet the criteria required of a single witness on these counts. As such the accused persons should be afforded the benefit of the doubt.

Count 28, 29 and 30 in respect of SN

[252] SN also testified about an instance wherein she and JU went with accused 2 to accused 1's flat. She testified that they sucked accused 1's penis and then vaginal sexual intercourse took place with all three females. Afterwards they were given money and the complainants and accused 2 ended up in Seapoint where they bought drugs. According to SN, she eventually slept at accused 2's place that night.

[253] Accused 1 admits an incident wherein it was him SN and JU. He further admits that he transported them to his flat where they had sexual intercourse by insertion of his penis in their vaginas respectively and that he paid them afterwards. Similar to accused 2, he denies her presence at this incident.

[254] In looking at JU's evidence on this in respect of the corresponding counts, it corroborates SN's account in all material respects. According to SN, she spent the night at accused 2's place. Detective Inspector Gaeseb, testified that he and JN

went to look for SN at accused 2's place one morning. Furthermore, he testified that a man, who he assumed was accused 2's boyfriend, made a remark to the effect that accused 2 should stop bringing underage girls to sleep at their place. This adds credence to SN's testimony that she slept there. At the end of the day, the court is satisfied that SN and JU provided credible evidence on this instance and the denial by accused 2 as well as accused 1's denial of accused 2's involvement is rejected as false beyond any doubt. Therefore, the accused persons stand to be convicted on this series of counts, save for count 30, on the basis that it will amount to a duplication of convictions.

Count 19 and 20 in respect of UR

[255] The gist of UR's testimony was that she was introduced to accused 1 by SN, who invited her there. Accused 1 collected them and drove them to his flat, where he had sexual intercourse with each of them. It included him inserting his penis in their vaginas respectively and him inserting his penis into their mouths respectively, to be sucked. He gave them N\$220. UR asked SN what it was for and SN said it was because they had sexual intercourse with him.

[256] Accused 1 admitted under oath that on one occasion SN contacted him and when he went to fetch her, she was with a lady that he came to know as UR. He explained that at his flat they showered. Subsequent to that, they sucked his penis and he had sexual intercourse by inserting his penis into their vaginas, one after the other. Based on his evidence, it occurred during May 2017, whilst the indictment alleged it to have been during April 2017. This defect in the date is resolved by s 92(2)(a) and (b) of the CPA which caters for a three month latitude in the date. Therefore, I find these charges to have been proven beyond any reasonable doubt as far as accused 1 is concerned. Complainant UR was unequivocally clear in her evidence that SN took her there and not accused 2, which means that the State has not proven her involvement in count 19.

Count 23, 24 and 25 in respect of UR

[257] Complainant UR gave evidence of her second encounter with accused 1. In this regard she related that it was SN who contacted accused 1, and he collected her, SN and RT. He drove to his flat where they played with his penis, and he had vaginal sexual intercourse with her, RT and SN, respectively. She also testified that he paid them N\$ 330 for the sexual intercourse.

[258] Accused 1 gave evidence under oath wherein he admitted to an occasion where he drove UR, SN and RT to his place. He admitted to have had sexual intercourse with each of them by inserting his penis in their vaginas respectively and paid them afterwards. On that basis, the court is satisfied with all the elements of the offences under these counts in respect of accused 1, save for count 25. I have earlier explained my view that if convicted on this count, it will amount to a duplication of convictions. I regard the involvement of accused 2 in the count of trafficking as unproven because none of the witnesses gave evidence to that effect.

Count 26 and 27 in respect of UR

[259] UR testified about a sexual encounter when she was with SN, SG and RT at accused 1's place for sexual intercourse and that they had called him. Accused 1 denied UR's evidence about her third encounter.

[260] Given that UR testified that they were a group of three complainants. As such I scrutinised the evidence of SN and RT and these two complainants, who supposedly were present, did not testify about such an instance. That means that UR is a single witness on this incident. All things considered, UR's evidence on this instance does not meet the criteria of being clear and satisfactory in all material respects, which it should be. As a result, the benefit of the doubt should accrue to accused 1 and accused 2 who was not implicated at all by UR.

Count 38 and 39 in respect of UR

[261] UR also testified that a third incident took place wherein all five complainants were involved. The nub of her evidence is that they called accused 1, who collected them and he had sexual intercourse with all five of them one after the other. The baseline of evidence and criteria that was set out in respect of charges 40, 41 and 42 equally applies here, except that count 38 and 39 relates to another complainant in the group. Given that the evidence, cumulatively considered, created doubt, the accused persons will be afforded the benefit of the doubt on these two charges.

Count 43 in respect of all complainants on diverse occasions

[262] It was common cause that the first accused gave cigarettes to the complainants whenever he had it available during their visits. That fulfils the term of supplying of tobacco. The court is also satisfied that it was proven that all the complainants were below 18 years of age at the relevant time. As such the elements of the offence were proven beyond reasonable doubt.

[263] In the result I make the following orders:

Count 1 Contravening s 15 read with s 1 of the Prevention of Organized Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Guilty

Count 2 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 3 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1. Not Guilty

Count 4.Contravening s 2(1)(b) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 2: Guilty

Alternative count Contravening s 14(c) of the Combating of Immoral Practices Act 21 of 1980 – Soliciting or enticing a child to commit a sexual act or an immoral or an indecent act.

Accused 2: Not Guilty

Counts 5 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Guilty

Count 6 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape

Accused 1: Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 7 Contravening s 2(1)(b) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 2: Guilty

Alternative count Contravening s 14(c) of the Combating of Immoral Practices Act 21 of 1980 – Soliciting or enticing a child to commit a sexual act or an immoral or an indecent act.

Accused 2: Not Guilty

Count 8 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Not Guilty

Accused 2: Not Guilty

Count 9 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 10 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 11 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Guilty

Count 12 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 13 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 14 Contravening s 2(1)(b) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 2: Guilty

Alternative count Contravening s 14(c) of the Combating of Immoral Practices Act 21 of 1980 – Soliciting or enticing a child to commit a sexual act or an immoral or an indecent act.

Accused 2: Not Guilty

Count 15

Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Not Guilty

Count 16

Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 17 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Guilty

Count 18 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 19 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Not Guilty

Count 20 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

COUNT 21 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Not Guilty

Accused 2: Not Guilty

COUNT 22 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

1st alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

2nd alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 23 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Not Guilty

Count 24 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

Count 25 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

Count 26 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Not Guilty

Accused 2: Not Guilty

Count 27 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

Count 28 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Guilty

Count 29 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 30 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 31: Contravening s 15 read with s 1 of the Prevention of Organised Act 29 of 2004 – Trafficking in persons.

Accused 1: Not guilty

Accused 2: Not Guilty

Count 32 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 33 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 34 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Not Guilty

Count 35 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1. Not Guilty

Count 36 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Guilty

Accused 2: Not Guilty

Count 37 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Guilty

1st alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

2nd alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 38 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Not Guilty

Accused 2: Not guilty

Count 39 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

Count 40 Contravening s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 – Trafficking in persons.

Accused 1: Not Guilty

Accused 2: Not Guilty

Count 41 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 42 Contravening s 2(1)(a) read with s 1, 2(2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 – Rape.

Accused 1: Not Guilty

First alternative count Contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit a sexual act with a child below 16 years.

Accused 1: Not Guilty

Second alternative count Contravening s 14(b) of the Combating of Immoral Practices Act 21 of 1980 – Committing or attempting to commit an indecent or immoral act with a child.

Accused 1: Not Guilty

Count 43 Contravening s18 (1)(a) read with s 18(4) of the Tobacco Products Control Act 1 of 2010 read with s 94 of the Criminal Procedure Act 51 of 1977 as amended – Supplying of tobacco products to a person under 18 years.

Accused 1: Guilty.

C Claasen

Judge

APPEARANCES:

COUNSEL FOR THE ACCUSED: I Velikoshi
Ileni Velikoshi Inc.
Windhoek

COUNSEL FOR THE STATE: P Khumalo
Office of the Prosecutor-General
Windhoek