REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGEMENT

Case No: CC 06/2019

In the matter between:

THE STATE

v

HELENA KAUPITWA	**ACCUSED 1**
SEBRON SHILONGO	**ACCUSED 2**
PETRUS SHILONGO	**ACCUSED 3**
MEDULETU SHILONGO	**ACCUSED 4**

Neutral citation*: S v Kaupitwa* (CC 06/2019) [2023] NAHCNLD 117 (3 November 2023)

Coram: SMALL AJ

Heard: **30 August 2021, 1, 2, 3, 6, 7, 8, 9, 10, 13, ,14, 15, and 16 September 2021, 14, 16, 17, 18, 21, 22, 23, 24, 25, and 28 February 2022, 1, 2, and 22 March 2022, 1, 2, 3, 4, 5, 8, and 9 August 2022, 5 and 8 September 2022, 13, 14, 17 and 17 February 2023, 11 and 12 April 2023,14 April 2023 and 31 July 2023.**

Delivered: 31 October 2023

Reasons: 3 November 2023

Fly note: Criminal Procedure – Section 158A(2)(e) of the Criminal Procedure Act 1977- vulnerable witness handed anatomically correct dolls to use while giving evidence.

Criminal Procedure – Section 164(4) of the Criminal Procedure Act 1977- 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-but principles relating to a single witness may still apply.

Summary: The four accused were arraigned before the court on various charges in respect of two minor children. After accused one and two were discharged of several charges in terms of section 174 of the Criminal Procedure Act, 1977 the trial proceeded against the four accused on the remainder of the charges. None of the four accused gave evidence and closed their respective cases without presenting any evidence. The accused were subsequently acquitted of some charges, convicted of competent verdicts in others and convicted in others.

ORDER

1. Accused 1 is found guilty and convicted on:
   (a) Count 2-Contravening Section 56(a) Immigration Control Act 7 of 1993-Aidind abetting a foreigner in entering and remaining in Namibia in contravention of the Act,
   (b) Count 9-Contravening Section 77(1)(g) of the Education Act 16 of 2001-Habouring a child who is subject to compulsory school attendance during school hours,
   (c) The alternative charge on Count 10-Kidnapping.
   (d) On Count 6 of the competent verdict of Common Assault.

And acquitted on Count 13-Contravening Section 77(1)(g) of the Education Act 16 of 2001-Habouring a child who is subject to compulsory school attendance during school hours.

2. Accused 2 is convicted of

   (a) Count 15-Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape,

   (b) Count 16-Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape,

   (c) Count 17-Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape, and

   (d) Count 20-Attempting to defeat or obstruct the course of justice, and

   acquitted on Count 14Contravening Section 15 of the Prevention of Organised Crime Act 29 of 2004-Trafficking in persons for sexual exploitation.

3. Accused 3 is acquitted on Count 21 of Attempted Murder but convicted on Count 22-Assault with the intent to do grievous bodily harm.

4. Accused 4 is convicted of Count 22- Assault with the intent to do grievous bodily harm.

JUDGMENT

SMALL AJ

Introduction

[1] Accused 1 was originally arraigned before this Court on thirteen counts. Two charges covered contraventions of s 15 of the Prevention of Organised Crime Act 29 of 2004.[1] One of these also has an alternative charge of Kidnapping.[2] Four charges respectively averred contraventions of ss 56(a), 56(d), 56(3) and 54(a) of the Immigration Control Act 7 of 1993.[3] Two charges alleged a contravention of s 3(2) of

[1] Count 1 and Count 10.
[2] Count 10.
[3] Count 2, 3, 4 and 7.

the Labour Act 11 of 2007.[4] Two charges averred contraventions of s 18(2) of the Children's Act 33 of 1960.[5] Two charges averred contraventions of s 77(1)(g) of the Education Act 16 of 2001.[6] One charge alleges that the accused, on various occasions, assaulted Ndalimbilwa Nghilishelwa, intending to do her grievous bodily harm.[7]

[2] Accused 2 originally appeared before Court on seven counts. One count alleged a contravention of s 15 of the Prevention of Organised Crime Act 29 of 2004.[8] Three counts respectively aver contraventions of s 2(1)(a) of the Combatting of Rape Act 8 of 2008 read with certain provisions of the Combating of the Domestic Violence Act 4 of 2003.[9] These three charges also each have an alternative charge under the Combating of Immoral Practices Act 21 of 1980, as amended, and read with certain provisions of the Combating of the Domestic Violence Act 4 of 2003. Two charges averred contraventions of s 18(2) of the Children's Act 33 of 1960[10] and one further charge alleged that he attempted to defeat or obstruct the course of justice. [11]

[3] Accused 3 was arraigned on two charges, one being attempted murder[12] and the other being assault with the intent to do grievous bodily harm.[13] Accused 4 was arraigned on one charge of assault with the intent to do grievous bodily harm. [14]

[4] The State was at various stages represented by either Mr Matota, Ms Nyoni, and Ms Petrus and at times by all three and at times by two of them. Accused 1, 2, 3 and 4 were respectively represented by Mr Shipila, Mr Nyambe, Mr Mukasa and Mr Tjirera.

Accused 1's Plea Explanation

[5] Accused 1 pleaded not guilty to all charges against her as per Exhibit D and put the State to proof of all its allegations.

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[4] Counts 5 and Count 12.
[5] Counts 8 and 11.
[6] Counts 9 and 13.
[7] Count 6.
[8] Count 14.
[9] Counts 15, 16 and 17.
[10] Counts 18 and 19.
[11] Count 20.
[12] Count 21.
[13] Count 22.
[14] Count 23.

[6] In amplification of her plea, she admitted that she travelled to Angola for medical treatment and, while there, met a lady with whom she spoke about the education system in Namibia. The lady seemed interested in the Namibian education system. She asked accused 1 to take her daughter, Marta Ndalimbililwa, along to Namibia when she returned so that she could come and attend school here as, according to her, her daughter was very gifted and would benefit much from attending school in Namibia. The lady requested accused 1 to take care of her daughter and enrol her in a school in Namibia.

[7] The lady assured accused that she would obtain all the necessary documents authorizing the accused to return to Namibia with her daughter and accompanied them to Xangongo. The accused admitted returning to Namibia with little Marta and accommodated her at her homestead at Omanyoshe, where she also enrolled her at a local school. She denied that she coerced or deceived Marta or her mother in any manner to facilitate the movement of Marta to Namibia. She further denied knowingly causing Marta to enter Namibia or to remain here in contravention of any immigration laws. She averred that while moving between Namibia and Angola, she used designated points of entry and complied with the directives of the officials there, which she assumed were given in furtherance of the immigration laws of both countries.

[8] She denied bringing Marta to Namibia to employ or exploit her in any manner. She further denied employing or exploiting Marta in any form. She further denied employing Marta during hours when she was supposed to be in school and facilitated or caused the exploitation of Marta sexually or otherwise by any other person.

[9] The accused admitted bringing a girl, Ndahambelela, to her homestead from Ongula ya Netanga village in 2015. The girl came to the accused's homestead after an agreement with her mother and grandmother requesting that the accused take her to her homestead for the holidays. Although initially hesitant to do so, she eventually conceded to their request. The accused denied that she took Ndahambelela to their homestead to employ or exploit her and that she coerced or deceived either Ndahambelela, her mother or her grandmother to facilitate or cause her movement to her homestead. She denied employing or exploiting Ndahambelela

or employing Ndahamelela during hours she was supposed to be at school. She denied neglecting either of these children or leaving them without adult supervision and food. She stated that during the time they were in her care, she tried her best within her means to provide adequate care and supervision for them or to cause the same to be done.

[10] In terms of section 220 of the Criminal Procedure Act 1977, accused 1 admitted the identities of both children referred to as the survivors in the State's allegations and that both these children were at their homestead at various times during the year 2015. She brought Marta to their homestead from Angola and Ndahambelela from Ongula ya Netanga Village.

Accused 2's Plea Explanation

[11] Accused 2 pleaded not guilty to all charges preferred against him as per his written plea explanation. Exhibit 'A' explained his not-guilty pleas. Regarding Count 14 being a contravention of s 15 of the Prevention of Organised Crime Act 29 of 2004, the accused denied wrongfully and unlawfully by deception of coercion, harbouring the complainant, and subjecting her to sexual exploitation. He averred that he did not know how she came to his homestead and only found her there when he returned from his work at Ruacana.

[12] In respect of Counts 15, 16 and 17, respectively averring contraventions of s 2(1)(a) of the Combatting of Rape Act 8 of 2008, read with specific provisions of the Combating of the Domestic Violence Act 4 of 2003, he admitted that he was older than the complainant as he was in his 40s during the alleged period. He alleged that he did not know her age and denied committing any sexual act with the complainant under coercive circumstances or otherwise.

[13] In respect of the alternative charges to counts 15, 16 and 17 under the Combating of Immoral Practices Act 21 of 1980, as amended and read with specific provisions of the Combating of the Domestic Violence Act 4 of 2003, he denied wrongfully and unlawfully committing or attempting to commit a sexual act with the complainant and denied having intercourse with the complainant at any time or circumstance.

[14] In respect of Counts 18 and 19 alleging contraventions of s 18(2) of the Children's Act 33 of 1960, he denied being liable to maintain the two respective victims. He stated that he provided the two girls with the same resources he availed to all his dependents residing in his house.

[15] Regarding Count 20, alleging that he attempted to defeat or obstruct the course of justice, he denied telling Shikongo Anna Naapandili to give false evidence as alleged or at any time.

Accused 3's Plea Explanation

[16] Accused 3 pleaded not guilty on count 21 of attempted murder and Count 22 of assault with the intent to do grievous bodily harm and denied attempting to murder the complainant on 1 December 2017 or any other day and further denied assaulting the said victim in any way or manner as alleged in the charge and that he intended to cause the said victim grievous bodily harm.

Accused 4's Plea Explanation

[17] Accused 4 pleaded not guilty on Count 23 alleging assault with the intent to do grievous bodily harm. He denied assaulting the complainant on 1 December 2017 or any other date. He denied having the intention of causing anyone any bodily harm.

Reasons for Interlocutory Rulings

[18] Before dealing with the applicable legal principles and the evidence I will provide reasons for four rulings I made during the cause of the State's case.

Ruling in terms of section 158A of the Criminal Procedure Act in respect of the use of anatomically correct dolls by vulnerable witness

[19] On 9 September 2021, the Court granted the State's application to hand the vulnerable witness Ndalimbililwa Nghilikeshelwa anatomically correct dolls to use while giving evidence. What follows are the reasons for that ruling.

[20] It needs mention that the State on 6 September 2021 applied to lead the evidence of the two minor witnesses in the victim friendly court situated at Ondangwa Regional Court as the similar facilities at the Northern Local Division were not operational. The victim-friendly facilities allow a witness giving evidence in a room outside the court but linked to the court by audiovisual means. The witness hears the Court and the parties but cannot see into the court while the parties, the accused and the Court can observe and hear the witness while the latter gives evidence. No objection was raised to this application, and the minor witness Ndalimbililwa Nghilikeshelwa commenced giving evidence in the Ondangwa Court on 7 September 2021 assisted by a support person.

[21] It is common cause that the witness Ndalimbililwa Nghilikeshelwa was a vulnerable witness as defined in s 158A (3)(a) and (b) as she is a child under the age of eighteen years against whom an offence of a sexual or indecent nature has been committed. [15]

[22] It is also common cause that the witness at the time gave evidence in another room which is connected to the courtroom through closed-circuit television with the assistance of a support person.[16] It is further common cause that when the witness at the time of the application gave evidence in another room, the accused, their legal representatives, the prosecutors in the case and the presiding officer were able to hear the witness and could observe the witness while she gave evidence in compliance with s 158A (6) of the Criminal Procedure Act, 1977 as amended.

[23] In the context of this type of case, an anatomically correct doll or anatomically precise doll is a doll that depicts some of the primary and secondary sex characteristics of a human. These dolls were placed before the Court during the argument without the witness being present. The Court observed that the dolls wear removable clothing and had anatomically correct and similarly scaled body parts. These dolls have detailed depictions of all the primary and secondary sexual characteristics of a human. It includes oral and anal openings, ears,

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[15] *State v Van Der Westhuizen* (CC 11/2018) [2019] NAHCMD 267 (2 July 2019); *State v Madjiet* (CC 26/2018) [2021] NAHCMD 152 (8 April 2021)

[16] The constitutionality of section 158A will be heard by a Constitutional Bench of three Judges of the High Court on 9 November 2023 in *Kennedy v The Prosecutor-General and Others* [HC-MD-CIV-MOT-GEN-2022/00266]

tongues, nipples, and hands with individual fingers. The female dolls have a vagina, and the male dolls have a penis and testicles.

[24] The State's application to hand the vulnerable witness Ndalimbililwa Nghilikeshelwa anatomically correct dolls to use while giving evidence was clearly based on s 158A (2)(e)[17] that allows any further special arrangements to be made for the giving of the evidence by a witness.

[25] In considering the State's application and while contemplating whether I should grant the order under this section, I considered the interest of the State in adducing the complete and undistorted evidence of a vulnerable witness concerned, the interests and well-being of the witness concerned, her age, the fact that these anatomically correct dolls were available, and the interests of justice in general. I granted the application as any potential evidence or demonstrations elicited while using the dolls could adequately be questioned in cross-examination.

Statement by Third Accused Petrus Shilongo

[26] On 5 August 2022 the Court, after a trial-within-a-trial ruled that Accused 3 Petrus Shilongo made his statement to Sergeant Fillemon Natangwe Paulus freely and voluntarily and that the statement is admissible. What follows are the reasons for that ruling.

[27] When the State through a witness Sergeant Fillemon Natangwe wanted to tender into evidence a statement containing an admission made by the third accused Mr Mukasa objected because he alleged the said statement was not made freely and voluntarily. The admissibility of the statement containing the admission was referred to a trial-within-a-trial in which the police officer mentioned hereinbefore gave evidence as well as accused three.

[28] The State witness essentially gave evidence that he warned the accused as per the normal warning statement used by the police which sets out all the required explanations and warnings to be given to a suspect and an accused. After the warnings were given the accused elected to give a statement which he wrote down

[17] (e) the taking of any other steps that in the opinion of the court are expedient and desirable in order to facilitate the giving of evidence by the vulnerable witness concerned.

and the accused signed it. In cross-examination it was put to the witness that he brought the accused under the impression that he had to provide the police officer with his version of the events. This was denied by the witness. It was provisionally and marked TT Exhibit ‘A’ Warning Statement A20. The page containing the full details of the statement was taken out at this stage.

[29] The third accused Petrus Shilongo also gave evidence in the trial-within-a-trial. He agreed that the state witness collected him from the cells on 7 February 2018. According to him he was taken to an office where the police officer identified himself and showed him his appointment certificate. Then the police officer told him to say that he assaulted the child. He denied that the police official informed him of his rights as contained in the warning statement. He stated that the officer pushed him against the wall. When he was shown his signature on the statement, he stated that the police officer said he must sign it. He signed blank pages. He denied making any statement at all. When asked by the court about his home address, ID number and cell phone number he said he gave it to the aforesaid police officer but after the day of the statement.

[30] As was agued by Mr Matota, accused 3 clearly elected to change his evidence between the original objection that it was not freely and voluntarily given as he was not properly advised of his constitutional rights to him being assaulted, signing blank pages, and not giving a statement at all. This is clearly a recent fabrication and without merit. The Court therefore ruled the statement as admissible as it was freely and voluntarily made by the accused after being properly advised of his constitutional rights.

Ruling on the admissibility of answers given on questions posed to First Accused or any statement made, or explanation given by First Accused.

[31] On 11 August 2022 and after a trial-within-a-trial the Court ruled any admission or explanation given by accused one Helena Kaupitwa made to Constable Heita and or Mr Nathaniel Tshilex Junias during December 2017 inadmissible.

[32] While the State lead the evidence of an Immigration officer Mr Nathaniel Tshilex Junias in August 2022, Counsel for first accused Mr Shipila objected to evidence the State intended leading through one Natanael Chellyx Junias to what accused one allegedly said when she was approached and questioned at Onandjokwe hospital by members of the Namibian Police and members of Immigration Control as she was not appraised of her rights as per the judges' rules prior to questioning her.

[33] The evidence of Mr Nathaniel Tshilex Junias then continued in a trial-within-a-trial. He alleged that Constable Ndamona Heita did warn the accused before their questioning. He however said Constable Heita wrote down what the accused said, and it was not read back to the accused afterwards. It became clear that he was uncomfortable with the questions directed to him in cross-examination concerning any rights explained and he denied warning her himself at that stage.

[34] The State after his evidence applied for a postponement to 5 September 2022 to lead the evidence of Constable Heita. The witness was not at Court even though the matter was set for a week to finalize the evidence. It appeared that the witness underwent an operation shortly before the matter was set to continue and was booked off and unable to give evidence at the time. She was in Court with the previous postponement and after receiving a subpoena to attend Court. No indication was given why the operation could not have been done at another time. The State could also not guarantee that the witness will then be available to give evidence on 5 September 2022.

[35] As the incidents happened between 2015 and 2018 and since it involved serious allegations against the accused and the case had been pending for almost four years the Court refused the further postponement. The State then called no further witnesses and the First Accused gave evidence in the trial-within-a-trial.

[36] The first accused denied that any rights were explained to her when the immigration officer and the investigating officer approached her at Onandjoke hospital. She said the first time any rights were explained to her was after she was arrested, formally charged and a warning statement obtained from her. She essentially suggested that the two officials approached her and started questioning

her without any warning given. She was not shaken from this version in cross-examination and the Court subsequently ruled any statement given or answers provided in that regard inadmissible.

Section 174 of the Criminal Procedure Act, 1977 ruling

[37] On 14 April 2023, after a successful application for a discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977 the Court found Accused 1 not guilty and discharged her in respect of Count 1, Count 3, Count 4, Count 5, Count 7, Count 8, the main charge in Count 10, Count 11 and Count 12. Accused 2 at the same time after a similar application was found not guilty and discharged on Count 18 and Count 19.[18] In respect of Accused 1, 2, 3 and 4 the application for a discharge respect of charges in Count 2, Count 6, Count 9, the alternative charge of Kidnapping in Count 10, Count 13, Count 14, Counts 15 to 17 and the alternative charges, Count 20, Count 21, 22 and 23 was refused.

[38] The remaining counts are Counts 2, Count 6, Count 9, the alternative charge in Count 10, Count 13, Count 14, Counts 15 to 17, Count 20, Count 21, Count 22, and Count 23.

[39] Count 2 alleging a contravention of s 56(a) of the Immigration Control Act 7 of 1993 was formulated as follows:

'In that upon or about July 2015 and at or near Oshikango Border Post in the district of Ohangwena, the accused did wrongfully and unlawfully aid or abet Ndalimbililwa Nghilikeshelwa in entering or remaining in Namibia in contravention of this Act, knowing that Ndalimbililwa Nghilikeshelwa is prohibited from entering or remaining in Namibia.'

[40] Count 6 alleging a charge of Assault with Intent to do grievous bodily harm on diverse occasions was formulated as follows:

[18] *S v Kaupitwa* (CC 06/2019) [2023] NAHCNLD 31 (14 April 2023)

'In that upon or during the year 2015 to 2018 and on diverse occasions at or near Omanyoshe village in the district of Ohangwena the said accused did wrongfully, unlawfully, and maliciously assault Ndalimbililwa Nghilikeshelwa by kicking her with booted feet giving to her then and thereby certain wounds, bruises or injuries with intent to do the said Ndalimbililwa Nghilikeshelwa grievous bodily harm.'

[41] Count 9 being contravening s 77(1)(g) read with section 77(2)(b) of the Education Act 16 of 2001 was formulated as follows:

'In that on or about the period stemming from June 2015 to January 2018 and at or near Omanyoshe village in the district of Ohangwena the said accused, did wrongfully and unlawfully during the normal hours of school attendance employ, whether for remuneration or otherwise, or harbour a child under the age of 16 who is subject to compulsory school attendance to wit Ndalimbililwa Nghilikeshelwa.'

[42] The alternative charge to Count 10 of Kidnapping was formulated as follows:

'In that upon or about April 2017 and at or near Ongula-Netanga village, the district of Ohangwena, the accused did wrongfully and unlawfully deprive Ndhambelela Linus of her liberty of movement by detaining her at a secluded, unfamiliar village impeding her ability to return home.'

[43] Count 13 alleging a contravention of s 77(1)(g) read with s 77(2)(b) of the Education Act 16 of 2001 was formulated as follows:

'In that on or about the period stemming from April 2017 to May 2017 and at or near Omanyoshe village in the district of Ohangwena the said accused, did wrongfully and unlawfully during the normal hours of school attendance employ, whether for remuneration or otherwise, or harbour a child under the age of 16 who is subject to compulsory school attendance to wit Ndhambelela Linus .'

[44] Count 14 alleging a contravention of s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 - Trafficking in persons was framed as follows:

'In that during the month of July 2015 and at or near Omanyoshe village in the district of Ohangwena, the Accused Seblon Shilongo, did wrongfully and unlawfully

harbour the complainant, Ndalimbililwa Nghiliskeshelwa, by means of coercion, deception, abuse of power or of a position of vulnerability with the intent that the said Ndalimbililwa Nghilikeshelwa is subjected to sexual exploitation by the accused, being an adult male.'

[45] Counts 15,[19] 16 and 17 relating to the alleged rape by the second accused of the complainant Ndalimbililwa Nghilikeshelwa and the alternative to these charges alleging that he committed or attempted to commit a sexual act with a child Ndalimbililwa Nghilikeshelwa uses identical wording in its averments. The only difference is that in Count 18 and its alternative the charges contain an additional reference of s 94 of the Criminal Procedure Act 51 of 1977.

[46] Count 20 attempting to defeat or obstruct the course of Justice was formulated as follows:

'In that whereas one Shikongo Anna Naapandili was to be a state witness to testify in a court of law in a criminal matter in respect of which Seblon Shilongo was also an accused, and whereas Shikongo was to the knowledge of the accused to

[19] Contravening Section 2(1) (a), read with sections 1, 2(2), 2(3) 3, 4, 5, 6, 7 and 18 of Combating of Rape Act 8 of 2000- read with sections 1, 3 and 21 of the Combating of Domestic Violence Act, 4 of 2003.

In that upon or about the period stemming from June 2015 to January 2018 and at or near Omanyoshe village in the district of Ohangwena, the accused person Seblon Shilongo, hereinafter called the perpetrator, did wrongfully, unlawfully, and intentionally commit a sexual act under coercive circumstances with, Ndalimbililwa Nghilikeshelwa, hereinafter called the complainant, by inserting his penis into the vagina of the complainant and the coercive circumstances are that:

The perpetrator applied physical force to the complainant and/ or the complainant was affected by helplessness and/ or the complainant is under the age of fourteen years, in that she was years of age and the perpetrator was more than three years older than the complainant, as he was about 47 years of age.

Alternative to count 16:

Contravening section 14 (a} of the Combating of Immoral Practices Act 21 of 1980 as amended-commit or an attempt to commit a sexual act with a child under the age of sixteen years read with sections 1, 3 and 21 of the Combating of Domestic Violence Act, 4 of 2003.

In that on or about the period stemming from June 2015 to January 2018 and at or near Omanyoshe village in the district of Ohangwena, the accused did wrongfully and unlawfully commit or attempt to commit a sexual act with a child under the age of sixteen years to wit Ndalimbililwa Nghilikeshelwa and the perpetrator was more than three years older than the complainant, who was aged thirteen years and the perpetrator about 47 years of age.

be a witness at his trial, the said accused did on or about 1st June 2018 at Ongula Yanetanga village in the Ohangwena region, unlawfully and with intent to defeat or obstruct the course of justice, request the said Shikongo Anna Naapandili to change her evidence as contained in a statement given to the police dated 15 February 2018, to what was to the knowledge of the accused false, to wit, that his wife Helena Kaupitwa facing a charge of having trafficked Shikongo's daughter, had taken Shikongo Anna Naapandili's daughter with her parental consent, the act of trafficking and child neglect of which the said Helena Kaupitwa and Seblon Shilongo was to be tried as aforesaid.'

[47] Count 21 a charge of Attempted Murder was formulated as follows against Accused 3:

'That on or about the 1st December 2017 and at or near Omanyoshe village in the district of Ohangwena the said accused did unlawfully assault Ndalimbililwa Nghilikeshelwa with intent to murder her.'

[48] Count 22 a charge of Assault with intent to do grievous bodily harm against accused 3 was formulated as follows:

'In that upon or during the 1st December 2017 and at or near Omanyoshe village in the district of Ohangwena the said accused did wrongfully, unlawfully and maliciously assault Ndalimbililwa Nghilikeshelwa by hitting her with a pipe giving to her then and thereby certain wounds, bruises or injuries with intent to do the said Ndalimbililwa Nghilikeshelwa grievous bodily harm.'

[49] Count 23 alleging the crime of Assault with intent to do grievous bodily harm against accused 4 was formulated as follows:

'In that upon or during the 1st December 2017 and at or near Omanyoshe village in the district of Ohangwena the said accused did wrongfully, unlawfully and maliciously assault Ndalimbililwa Nghilikeshelwa by hitting her with a stick giving to her then and thereby certain wounds, bruises or injuries with intent to do the said Ndalimbililwa Nghilikeshelwa grievous bodily harm.'

[50] What is immediately apparent is that main counts 16, 17 and 18 allege that the offences were committed over a period from June 2015 to January 2018. It is

also glaringly apparent that in the alleged coercive circumstances, the State alleged that the complainant was under the age of fourteen but did not insert the alleged age of the complainant. In the alternative charges to counts 16, 17 and 18, however, the State did allege that the complainant was thirteen years of age at the time of the alleged incidents. The charges, however, allege a period of at least two-and-a-half years in which accused two allegedly committed these crimes. Even if the Court accepts that the main counts alleged that the complainant was under thirteen years of age at the time of the alleged crimes' commission, it is impossible that the complainant remained thirteen years of age and thus younger than fourteen for the whole period.

[51] It is also clear that the State averred that the contravention of s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004 - Trafficking in persons for sexual exploitation was committed in July 2015 and not over the period alleged in most of the other charges.

Specific relevant provisions of the Criminal Procedure Act, 1977

[52] Section 83 of the Criminal Procedure Act, 1977 provides that if because of any uncertainty as to the facts which can be proved or if, for any other reason, it is doubtful which of several offences is constituted by the facts, the State may charge an accused with the commission of all or any of such crimes, and the Court can try any number of such charges at once. The State may also charge an accused in the alternative with the commission of any such offences.

[53] Section 84 of the Criminal Procedure Act, 1977 provides what essentials any charge should contain. It was summarized as follows in *S v Mateus* [20]

‘There can be no doubt that a properly drawn charge sheet is part and parcel of a fair trial in criminal matters. Such a charge contains particulars as to the time on and place at which the offence allegedly was committed as well as the person against whom the crime has been committed. It furthermore informs the accused of the fundamentals of the charge.[21] The

[20] *S v Mateus* (CR 16/2022) [2022] NAHCNLD 39 (19 April 2022) para 14.

[21] In *S v Nghixulifwa* 2018 (4) NR 1027 (HC) paragraph 11 it was stated as follows: ‘Though the section makes plain what should be contained in the charge, I find the commentary of Hiemstra's *Criminal Procedure* at 14 – 9 illuminating when stating that: “The heart and soul of a charge is that it has to inform the accused of the case the state wants to advance against him or her”, while also

description of any statutory offence in the words of the law creating the crime, or in similar words, shall be sufficient.'[22]

Where any of the particulars referred to in the subsections are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

[54] Section 88 of the Criminal Procedure Act, 1977 provides that where a charge is defective because the State left out an averment of an essential ingredient of the relevant offence, the defect shall, unless brought to the court's notice before judgment, be cured by evidence at the trial proving the matter which the prosecution should have made in the charge.

[55] Section 92(2) of the Criminal Procedure Act, 1977 provides that if the State alleges any particular day or period in any charge to be the day on which or the period during which the accused committed any act or offence, and if time is not of the essence of the crime, the State will be entitled to prove that accused committed the act or offence on any other day or during any other period not more than three months before or after the day or period alleged therein.

[56] Section 94 of the Criminal Procedure Act, 1977 provides that where the State alleges that an accused on diverse occasions during any period committed an offence in respect of any person, the accused may be charged in one charge with the commission of that offence on diverse occasions during a stated period.

The Evidence

[57] The Court will now summarize the evidence led in this matter insofar as it is considered to be relevant to the remaining charges being, as it was set out hereinbefore, Count 2, Count 6, Count 9, the alternative charge in Count 10, Count 13, Count 14, Counts 15 to 17 and the alternative charges to each of these counts, Count 20, Count 21, Count 22, and Count 23.

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referring to *S v Hugo* 1976 (4) SA 536 (A) at 340E-F; See also *S v Kapia and Others* 2009 (1) NR 52 (HC) paragraph 15, *S v Nakare* 1992 NR 99 (HC) at 100J-101A and *S v Campbell and Others* 1990 NR 310 (HC) at 313F-H.

[22] See section 84 of the Criminal Procedure Act, 1977 for essentials of a charge.

[58] Just before the Court deals with the evidence of the two victims on the remaining charges it is necessary to mention that the charges originally preferred against mainly accused 1 and accused 2 in respect of Ndalimbililwa Nghilikeshelwa covers a period of more than three years. It *inter alia* alleges that the offences were committed from June 2015 and others in a period from June 2015 up to January 2018. The offences insofar as Ndahambelela Linus is involved allegedly occurred between April and May 2017. The charges against third and fourth accused is alleged to have happened on 1 December 2017. None of the two complainants and even some of the witnesses were able to provide specific dates for most of the incidents that led to the accused being charged.

[59] Regarding Count 6, the complainant, Ndalimbililwa Nghilikeshelwa, stated that while Ndahambalela was staying with them and while they were collecting water, the first accused came to them and kicked the complainant on her back with booted feet. She fell and rolled into the water (well). She swam to the other side, and both she and Ndamhabelela hid away until they were sure that accused one was asleep. Then they went home to sleep.

[60] The next day, they left the home together to go to Engula-Netange village, where the mother of Ndahambelela was residing. They encountered adults who took them to the police station beside the road. They agreed to say they were sisters and that both came from Engula-Netange village. When the police took them there, Ndamhabelela's mother denied knowing her. Ndamhambelela stayed behind, but the police took her to Accused 1's mother-in-law and left her there.

[61] The witness Ndahambelela Linus confirmed the kicking of the complainant although she stated that she did not see where the kick struck the complainant. She further confirmed that they left the homestead to go back to her residence the next day and that they pretended that both were from that area and that she stayed behind while Ndalimbililwa went with the Namibian Police.

[62] Michael Petrus Taapopi is a police officer stationed at the Gender based Violence Unit of Ohangwena Police Station. On 17 May 2017 he was called to a roadblock about two children travelling to Ongula ye Netanga. At the roadblock he found a girl Martha who was eleven years old and a girl Ndahambelela who was nine

years old. The children indicated that they were from Ongula ye Netanga. He took them there where Ndahambelela indicated her home was. Ndahambelela's mother and grandmother identified her but denied knowing Martha. He left Ndahambelela with her mother and took Martha back to Omanyoshe Village. He spoke to the first accused telephonically who said the child was given to her while she was still young. He left the child at first accused's mother-in-law. This witness was not cross-examined.

[63] From this evidence it is apparent that the aforesaid assault alleged against first accused must have taken place a day or two before 17 May 2017.

[64] The complaint Ndalimbililwa Nghilikeshelwa also testified that the First Accused beat her with a red and black pipe all over her body. She had marks and was swollen after this assault. She also alleged that accused one stabbed her with a screwdriver on her left upper leg. She did not mention any of these assaults in her three statements handed in as Exhibits L, M, and N. Nor did the allegations form part of the allegations in Count 6, alleging assaults on diverse occasions. Nor did the State apply to amend the charge sheet in line with these allegations in terms of section 86 of the Criminal Procedure Act, 1977. When confronted with the fact that none of the other alleged assaults were mentioned in her three statements in cross-examination, she said it had happened, but she could not remember whether she told the police when they took her statements.

[65] The evidence in chief of the complainant Ndalimbililwa Nghilikeshelwa in relation to counts 14 and 15 to 17 and their respective alternative charges are summarized for purposes of this judgement.

The First Incident

[66] She testified that she was at the home of the second accused when he came from work during the evening. He brought her what she called fat cakes and apples to eat. He returned later to the room where she used to sleep and told her to follow him to the room where he slept. This was the room the first and second accused used when they were both at this house. She did not comply with his instructions. The first accused was at Onanjokwe at the time. The Second accused returned and asked her if she was not instructed to follow him to his room. He took her hand and

led her to his room. Inside his room, he told her to remove her clothes. She was wearing a skirt and a T-shirt. When she did not remove her clothes, the accused undressed her and took off his clothes.

[67] She was still standing, and the accused pushed her onto the bed. She fell on the bed facing downwards. The accused then forced his penis into her vagina. She said she closed her legs, but he continued. She told him she was experiencing pain, and he said she should not complain or cry as he would chase her out of his house, as this house did not belong to the first accused. He threatened to beat her. She became tired and allowed him to insert his penis into her vagina.

[68] She said she wanted to urinate and left. She stated that she then urinated blood and went to her own room. The blanket on his bed had blood on it, but the accused washed it before his wife came. When accused one arrived, the witness was limping, and when accused one asked the witness why she was walking like that, accused two intervened and said she (the witness) was pretending.

[69] When State counsel Ms Nyoni asked her about the words vagina and penis used in her evidence, she indicated that girls have vaginas and boys have penises and that it is between their legs. The State brought the application to allow the State to hand the witness anatomically accurate dolls to demonstrate what happened between her and the accused. The Court granted the application, and the witness used the dolls to show what happened between her and the second accused.

[70] When the State requested her to identify the vagina and penis on the dolls, the complainant removed the clothes of both the female and male dolls and pointed to the respective dolls' penis or vagina. When asked to demonstrate what happened between her and the second accused on this occasion, she placed the naked female doll face down with the male doll, with its penis exposed, on top of the female doll.

[71] She did not report these happenings to anyone or Accused One as she was afraid of being chased out of the house of Accused Two.

The Second Incident

[72] The second occasion she mentioned that both accused one and two arrived at the house in Omanyoshe Village but that accused one went to the neighbours. Accused two came to her room when the sun was about to set and told her remove her clothes and when he returns to her room, he must find her without her clothes on. She did not comply with this instruction and the accused removed her clothes when he returned. She could not remember what clothes she was wearing prior to it being removed by the accused but stated that he was wearing short trousers without a shirt.

[73] The accused removed his pants and underwear while she was seated on the bed. She then related that the accused removed all her clothing that she was wearing and told her to lie down. She lied down as she was scared that he will beat her if she does not. The accused told her to open her legs. When asked in what position she was she said: “I was laying down with my stomach.” She stated when she did not open her legs the accused used his hands to open her legs.

[74] She said she became tired and allowed the accused to force his penis into her vagina. She told the accused that she was experiencing pain and he put Vaseline at her vagina. Afterwards the accused left her room she remained inside. She checked her blankets. She saw that it was wet but saw no blood. She remained in her room until the morning and accused 2 went to his work. She said that the room had no door.

The Third and Fourth Incident

[75] She further related that the accused arrived on another day during the night while she was sleeping and found her in her room in what she called the new house. He wanted her to open the door, and she initially didn’t want to. He was alone. She later opened the door, and he once again gave her fat cakes and apples that he brought for her.

[76] The accused entered the room and threw her on the mattress she was sleeping on. After he removed his clothes, he told her to remove her clothes. When she did not, the accused removed all her clothes. He told her to sleep upside down.

The accused was on his knees and forced his penis into her vagina. When she demonstrated their positions using the dolls, she indicated that she was on her knees, bending forward with her head down, and the accused was behind her, also on his knees. The witness continued and stated that afterwards, they both slept on the mattress. She was only wearing her underwear at the time.

[77] The following day, the accused told her to remove her underwear. He pulled off her underwear and told her to sleep on her back and to open her legs. The accused pushed her legs apart and forced his penis into her vagina. She was again experiencing pain but was afraid to tell him as she was scared that he would again threaten to beat her.

[78] During the cross-examination of Mr Nyambe on behalf of the second accused it became apparent that the complainant could not assist as to when she came to Namibia and for how long she resided in the house of the second accused before she was accommodated by the Namibian Police. She confirmed that the accused was not at his residence for most of a given month as he was working elsewhere and only returned during weekends at month ends. Some months he did not visit his home.

[79] The evidence in chief of the complainant Ndalimbililwa Nghilikeshelwa regarding Counts 21, 22 and 23 against the third accused, Petrus Shilongo and fourth accused, Meduletu Shilongo, can be summarized as follows.

[80] She testified that while she was alone at the second accused's house in Omanyoshe village, the third accused, the elder brother of the second accused, arrived and started beating her with a black and red pipe because she allegedly brought other kids to play with the first accused's property. She said she later gave the pipe to the investigating officer, Ndamona.

[81] Accused 3 beat her on her back and the back of her legs and told her to put her head on a brick with her in an upside-down position while he lifted her legs and pushed her into a wall, where she injured her shoulder. The third accused also told her to remove her T-shirt, although she did not mention if she removed it. She reiterated that the third accused beat her on her back and all over her body, excluding her face.

[82] She tried to run away, but the fourth accused and another unidentified male started beating her. According to her, the fourth accused was using a wild (fresh) stick. He also beat her all over the body except for her face. She packed her belongings and told them she was leaving and returning to Angola. She found one Elizabeth on the road. When she got to Tate Upinyati's mother's house, the latter told her that she must go home because the second accused would be arriving that night. She went back home.

[83] She stated that after the assault by the third and fourth accused she ran to the neighbour and the police came and fetched her from the neighbour's house.

[84] Accused three properly warned made a warning statement to Sergeant F.N Paulus on 7 January 2018. This statement was admitted after a trial within a trial as Exhibit X. In the statement part thereof, the accused admitted that he during 2017 beat a girl Martha (Ndalimbilwa) at Omanyoshe Village where she was staying alone at his brother's house with a green plastic while interrogating her about a cellphone he left on the charger and which he suspected she took.

[85] Vincent Hipunyati Ndinyenge testified that on 1 December 2017 while on his way to Endola market from Omanyoshe Village met a girl on the road. She was on her way to Angola but was going South instead of going North. He estimated her age between 9 and 11. He then handed her over to Rosalia Haimbodi. His statement was handed in as Exhibit O after cross-examination as he did not mention the date in his statement. When confronted with this in cross-examination the witness explained that he got the date from his aunt Rosalia Haimbodi.

[86] The witness Rosalia Haimbodi testified that she was a pensioner residing in Omanyoshe Endola. On 1 December 2017 Vincent came back with a child. The child was taken back home by Elizabeth. The next day she saw the child running and called her. The complainant was swollen on the left part of the face and legs and her left arm on the left shoulder and had bruises on her back on the left side near the ribs. The police took her on 4 December 2017.

[87] These two witnesses clearly identified and referred to the complainant Ndalimbililwa Nghilikeshelwa also known as Martha Shilongo. Her alleged assault by accused three and four thus probably took place shortly before or on 1 December

2017. In her evidence the complainant indicated that the assaults by both accused 3 and accused 4 took place on one day. In her police statements dealing with these assaults, she spread the assault by accused 3 over two days and indicated that the assault by accused 4 happened on the second day. From 4 December 2017 onwards the complainant no longer resided in Omanyoshe village and were under the custodianship of the Namibian Police.

[88] The mother of the complainant Ndalimbililwa Nghilikeshelwa the witness Ndemutila Hamukwaya also gave evidence. The witness is the biological mother of the complainant Ndalimbililwa Nghilikeshelwa and lives in Angola. She and the child's father Nghilekhelwa Nghifindakwa are separated, and the child resided with her father. The witness had almost no formal education and was unable to assist as to when the first accused visited her second husband for medical treatment. She said accused one was looking for a child to reside with her in Namibia to assist taking her own younger daughter to pre-schooling each day as this was interfering with the accused's daily working schedule.

[89] She went to her daughter's father to get permission for the child to stay with her, but he refused. She wanted the child to come to her house so that she can send the child with first accused to Namibia as the latter said she would also enroll the complainant in a Namibian school. The child did not attend school in Angola as the schools there were far from their home. First accused approached the child who came to fetch water and after the witness identified her, to run from her father's home and come to her mother's house as she would take her to Namibia to go to school.

[90] When she later saw the first accused and her daughter walking to go to Namibia, she told first accused that the child had no papers to cross the border. Accused one replied that she will just try herself.

[91] She stated that after about three weeks first accused came with documents that had to go to the headman to sign. This evidence wrongly dates this visit by first accused as somewhere later in 2015 while the documents created on these occasion Exhibits Q1-Q3 are dated 16 March 2017. The accused left but returned after a few days and ask the witness to go with her to Namibia. They went to the first

and second accused's house at Endola where she saw her daughter. She wanted to take her daughter back to Angola but did not have enough money and had to leave her behind in Namibia when she left. She said after two months the police came and she returned with them to Namibia where she again saw her daughter at Oshikango under the care of the Namibian Police.

[92] Nghilekhelwa Nghifindakwa the biological father of the complainant Ndalimbililwa Nghilikeshelwa also gave evidence. He is an Angolan citizen and resides there. He stated that the complainant was his daughter, was born in Angola in December 2006. In July 2015 accused 1 and his ex-wife the mother of the complainant came to visit him to seek permission to take complainant to Namibia. He refused and they left. Later he realized that his daughter was missing.

[93] His evidence in respect of the time of the visit and the month and year of birth of the complainant was not challenged in cross-examination by either the counsel of accused one and that of accused two. This means complainant was still 8 at the time the first accused took her from Angola and only tuned 9 in December 2015. In December 2016 she would have turned 10, December 2017 she would have turned 11. This age corresponds with the age mentioned in the statement marked Exhibit M but not that of statements marked Exhibits L and N. It also corresponds with the younger age of 11 mentioned in Exhibit E the Age Estimation dated 7 March 2018 by Dr Daniel Uutoni.

[94] Paulus Nghidipohamba is a pastor in Endola Elcin Church. In the beginning of 2017, he was approached by a member of his congregation Helena Nataniel. in relation to a baptism of an 8-year-old child. They then registered the child for baptism classes. The child was identified as Martha Shilongo. Helena Nataniel was presented as the mother of the child and Sebulon Shilongo as the father. The child took classes from early 2017 and was baptised on 16 June 2017. Her date of birth is indicated as 2 November 2008. A copy for the church's baptism book was handed in as Exhibit O.

[95] In cross-examination by counsel for the first accused it was not put to the pastor that this baptism did not relate the complainant and was not requested by the first accused. Nor did counsel for second accused dispute that the second accused

was unaware of the baptism that listed him or someone with a similar name as the child's father.

[96] The witness Riberata Hamakali is from the same village as first and second accused. She testified that she was approached by the first accused to become the godmother of the child Martha Shilonga. Her Elcin church card was requested by first accused to arrange for the child's baptism. She attended the baptism of Martha Shilongo on 16 July 2017. It was only the first accused and the child and the witness and another godparent that attended Martha's baptism. The second accused was not there.

[97] The child according to the witness was baptised in Edola Church and the pastor who conducted that baptism was Paulus Nghidipohamba in the front of the altar. The two godmothers Riberata Amakali and Fiina Haipinge were there. This witness's name appears on the baptism document marked Exhibit P as one of the godparents. The date of birth of the child is indicated as 2 February 2008 which would mean the child would have been 8 at the time of the baptism if the date of birth was correct. Mr Shipila the counsel for first accused did not dispute her evidence.

[98] It needs to be mentioned that the documents prima facie generated on 16 March 2017 in Angola Q1, Q and Q3 indicate the birth date as 2 November 2008. This date of birth is also the same as the one on the letter of the headman issued on 11 March 2017 marked Exhibit S and S1. These are the documents referred to by the biological mother of the complainant when first accused came back to Angola.[23] The date of birth of the complainant of 2 November 2008 is also the date of birth used during the complainant's baptism.

[99] The witness Jolokeni Ngenokesho stays in Omanyoshe village and runs a pre-school facility she called a kindergarten. The school is open from 8:00 till 12:00. She knows both accused one and two and said there are two girls from their household that attended her kindergarten. One is Helena Shilongo and the other is Martha Shilongo. Helena is younger than Martha. Martha brought the younger one to school and waited under a tree for the school to finish to take the younger one home after school closed. She took pity on the older girl and invited her to attend the

[23] See footnote 25.

kindergarten as well. The younger girl Helena attended the kindergarten in 2015 to 2016 while the older one Martha attended from 2015 to 2018. She however did not provide specific months or dates for the attendance of the two girls.

[100] Dr Bernard Shikombe examined the complainant Ndalimbililwa Nghilikeshelwa on 8 January 2018 and compiled the J88 handed in as Exhibit G. He found that the complainant's hymen was absent and concluded that it is indicative of vaginal penetration. He testified that a girl's hymen that had no sexual intercourse or vaginal penetration would be intact. He also testified that the vaginal examination was easy where given the age of the complainant it should have been extremely painful. He stated that the reason why the vagina would open for an easy examination is because of repeated vaginal penetration essentially enlarges the vagina and takes away the pain of a vaginal examination. He also found a purulent vaginal discharge. This is a sexually transmitted infection that usually occurs because of sexual intercourse with an infected person. He also stated that the aforesaid condition fits with the time and circumstances of the incident.

[101] The complainant Ndahambelela Linus, her mother Anna Naapandili Shikongo and her grandmother Albertina Shikongo gave evidence in respect of the alternative charge of Kidnapping to Count 10 and in respect of Count 13. Although the plea explanation of the first accused admitted bringing Ndahambelela, to her homestead from Ongula ya Netanga village in 2015 this is clearly a mistake as the evidence shows it was in 2017 and specifically between April to 17 May 2017.[24] That the 9-year-old complainant was taken from her home to the home of first and second accused is common cause. It is also common cause that accused visited the witnesses' homestead at Ongula-Netanga village because the mother of the complainant owned her money. Accused one alleges is her plea explanation that she took the child to Omanyoshe Village in Endola on the request of the mother. The mother denies that the child was taken with her permission. The complainant also alleges that accused one instructed her to get in the car as the accused will buy her shoes/sandals. When the mother of the complainant went to the house of accused

[24] See the evidence of *inter alia* Michael Petrus Taapopi hereinbefore.

one at Onanjokwe to look for the child and repay accused one, neither of the two were there.

[102] The evidence of the state witnesses, although disputed in cross-examination was not contradicted by evidence in the defence case as accused one's case was closed without the leading of any evidence.

[103] It is however important for purposes of Count 13 that the first accused alleged that she took the complainant during the school holidays. The complainant herself on a question by Ms Petrus of how long she stayed at Endola stated that she does not know but that she left Endola when the schools were about to start. It goes without saying that school attendance is not compulsory during school holidays.

[104] In respect of Count 20 Anna Naapandili Shikongo related that the second accused approached her to change her evidence that her child was taken without her permission. She travelled with him to the police station on his instruction and for this purpose. Several who are police officers placed the two of them at the police station.

Applicable legal principles and application to the facts

[105] It is trite law that the State carries the onus of proving an accused's guilt beyond a reasonable doubt. There is no onus on an accused to prove his innocence.[25]

[106] No onus rests on the accused to convince the Court of the truth of any explanation he gives. If he explains, even if that explanation is improbable, the Court is not entitled to convict unless it is satisfied not only that the explanation is unlikely, but that beyond any reasonable doubt, it is false. If there is any reasonable possibility of his explanation being true, he is entitled to his acquittal.[26]

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[25] *Woolmington v Director of Public Prosecutions* [1935] 1 AC 462 at 481 – 482 as followed in *S v Koch* 2018 (4) NR 1006 (SC) paragraph 10

[26] *S v Haileka* 2007 (1) NR 55 (HC) in paragraph 7 approving and applying *R v Difford* 1937 AD 370 at 373; *R v Vlok and Vlok* 1954 (1) SA 203 (SWA) at 207B – D

[107] The following passage in *R v Mlambo*[27] approved and applied in *S v Van Wyk*[28] has become a trite principle in Namibian law:

'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.
An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.'

[108] The absence of evidence by the accused creating such a reasonable and solid foundation for such reasonable doubt does not necessarily result in the conviction of the accused. This is because I still must, without speculation, give the accused the benefit of the doubt if such reasonable doubt can be gathered from reasonable inferences which are not in conflict with, or outweighed by, the proven facts of the case.

[109] The informal admissions contained in the accused's plea explanation stand on the same footing as extra-curial admissions in that they are items of evidence against the party who made them. Exculpatory parts in such plea explanation must, as a rule, be repeated under oath in the witness stand to have any value.[29]

[110] The accused all closed their cases without presenting any evidence in rebuttal of the prosecution's case. In terms of Articles 12(1) (f) and 12(1) (d) of the Namibian Constitution, an accused cannot be compelled to give evidence against himself and has the right to be presumed innocent until proven guilty according to law. Those rights do not mean that an accused's election to remain silent in the face of

[27] *R v Mlambo* 1957 (4) SA 727 (A) at 738A-C
[28] *S v Van Wyk* 1993 NR 426 (SC) at 438H-439A
[29] *S v Shivute* 1991 NR 123 (HC) at 127A-B approving and applying *S v Malebo en Andere* 1979 (2) SA 636 (B) and *S v Sesetse en 'n Ander* 1981 (3) SA 353 (A) at 374A-376H.

incriminating evidence is without consequence in the court's overall assessment of the evidence. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk.

[111] The fact that an accused must make such an election is not a breach of the right to silence. The exercise of this right, like any other exercise, must involve the appreciation of the risks that may confront any person who must make an election. There is no sound basis for reasoning that no inference can be drawn against him if he elects to remain silent. Unless the accused's silence is reasonably explicable on other grounds, the prima facie evidence becomes conclusive of his guilt.[30]

[112] It is also important to refer to what has been said by the Supreme Court in *S v Teek* :[31]

'These salutary principles were adopted by Hannah J in *Mpuka.*[32] In *S v V*[33] somewhat similar sentiments were echoed by Zulman JA that '(i)n view of the nature of the charges and the ages of the complainants it is well to remind oneself at the outset that, whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution'. This court, per Maritz JA, in *Vivier*[34] affirmed the consistent application of the cautionary rules in Namibia not —

> as a formalistic procedural requirement to which mere lip service must be paid, but as an intrinsic part of a broader logical and reasoned inquiry into the substance of the evidence against the accused: after due appreciation and assessment of the peculiar and inherent dangers of convicting the accused on the evidence of the single/child witness who testified at the trial, is the evidence of that witness, when considered in the context of and together with all other evidence adduced at the trial, sufficiently credible and reliable to prove the guilt of the accused beyond reasonable doubt''.

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[30] *S v Katari* 2006 (1) NR 205 (HC) at 209I-210I, See also *Osman and Another v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC) (1998 (2) SACR 493 at 501b-d); *S v Sidziya and Others* 1995 (12) BCLR 1626 (Tk) at 1648I-1649B; *S v Scholtz* 1996 (2) SACR 40 (NC); *S v Tusani and Others* 2002 (2) SACR 468 (Tk) at 481a and *S v Van Wyk* 1993 NR 426 (SC) at 434D.

[31] *S v Teek* 2019 (1) NR 215 (SC) para 72.
[32] *S v Mpuka* 2005 (4) NCLP 94 at 102.
[33] *S v V* 2000 (1) SACR 453 (SCA) para 2.
[34] *Minister of Basic Education, Sport and Culture v Vivier NO and Another* 2012 (2) NR 613 (SC) para 17.

[113] It is however also important to consider what was recently stated in *S v Krylov and Another* [35]

'In the same vein, the CPA was amended[36] 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 ie 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*[37] 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 or defects or contradictions in the testimony, he is satisfied that the truth has been told."'

Evaluation of the evidence

[114] In respect of the rape allegations against second accused I find it unlikely that it happened during the second part of 2015 and parts of 2016 when little Helena resided in the same home as the complainant and still attended the kindergarten. This would be similarly unlikely to have happened when Ndahambelela was at the same homestead during April till 17 May 2017. As the complainant was under the custodianship of the Namibian Police from 4 December 2017 the period of 2017 thereafter and 2018 can safely be excluded. This still leaves a substantial portion of the period alleged by the State for the commission of the offences.

[115] Count 14 alleges Human Trafficking and sexual exploitation of the complainant for the month of July 2015. Section 92(2) (CPA) cannot assist the State here as three months before the date mentioned the complainant was still resident in Angola. The month July 2015 and the three-month period afterwards can also not assist the State because there is simply nor evidence whatsoever on record when the second accused visited his homestead, was aware of complainant's presence

[35] *S v Krylov and Another* 2023 (1) NR 229 (HC) at paragraph 175.
[36] Criminal Procedure Amendment Act 24 of 2003.
[37] *S v Sauls and Others* 1981 (3) SA 172 (A) at 180F.

there and sexually exploited the complainant in July 2015 or within a period of three months afterwards. [38]

[116] In the result, and applying the principles set out hereinbefore, I make the following orders:

1. Accused 1 is convicted on:

   (a) Count 2-Contravening Section 56(a) Immigration Control Act 7 of 1993-Aiding or abetting a foreigner in entering and remaining in Namibia in contravention of the Act,

   (b) Count 9-Contravening Section 77(1)(g) of the Education Act 16 of 2001-Habouring a child who is subject to compulsory school attendance during school hours,

   (c) The alternative charge on Count 10-Kidnapping.

   (d) On Count 6 of the competent verdict of Common Assault.

   And acquitted on Count 13-Contravening Section 77(1)(g) of the Education Act 16 of 2001-Habouring a child who is subject to compulsory school attendance during school hours.
2. Accused 2 is convicted on:

   (a) Count 15-Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape,

   (b) Count 16-Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape,

   (c) Count 17-Contravening Section 2(1)(a) of the Combatting of Rape Act 8 of 2000-Rape, and

   (d) Count 20-Attempting to defeat or obstruct the course of justice, and

   acquitted on Count 14-Contravening Section 15 of the Prevention of Organised Crime Act 29 of 2004-Trafficking in persons for sexual exploitation.
3. Accused 3 is acquitted on Count 21 of Attempted Murder but convicted on Count 22-Assault with the intent to do grievous bodily harm.

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[38] *S v Koch* 2018 (4) NR 1006 (HC) [17] Thus, the accused can only be convicted of trafficking the complainants if the evidence proves beyond reasonable doubt (a) that he either recruited, transported, transferred, harboured or received the complainants; (b) for the purpose of exploitation. In terms of para (a) of C Annex II of the Protocol, exploitation can take one of the following forms: (i) prostitution of others; (ii) sexual exploitation, forced labour, slavery or similar practices; and (iii) the removal of organs.

4. Accused 4 is convicted of Count 22- Assault with the intent to do grievous bodily harm.

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D. F. SMALL

Acting Judge

APPEARANCES

FOR THE STATE:	L Matota assisted by Ms I Nyoni and Ms S Petrus Office of the Prosecutor General, Oshakati
FOR THE 1st ACCUSED:	L P Shipila Directorate of Legal Aid Oshakati
FOR THE 2nd ACCUSED:	M Nyambe Mukaya Nyambe Inc Ongwediva
FOR THE 3rd ACCUSED:	G M Mukasa Directorate of Legal Aid Oshakati
FOR THE 4th ACCUSED:	N B Tjirera Directorate of Legal Aid Opuwo