



REPORTABLE

CASE NO: SA 3/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE

Appellant

and

BERTUS KOCH

Respondent

Coram: SHIVUTE CJ, MAINGA JA and SMUTS JA

Heard: 16 November 2021

Delivered: 14 February 2022

Summary: As accused, the respondent was charged in the court *a quo* on five counts of child trafficking and five counts of rape. In the alternative to the rape charges, he was charged with committing or attempting to commit sexual acts with children below the age of 16 years. The counts on child trafficking dealt with the allegation that he had on several occasions, wrongfully and unlawfully recruited and/or received and/or harboured five female complainants for sexual exploitation. As to the rape charges, it was alleged that he had committed sexual acts with the complainants under coercive circumstances. The respondent pleaded not guilty to

the charges but he was subsequently convicted on child trafficking charges as well as on the competent verdicts to the rape charges. The trial court acquitted the respondent on the rape charges. The respondent was sentenced to an effective eight years imprisonment.

The appellant had been granted leave to appeal by this court against the acquittal of the respondent on rape charges as well as against the sentence. With respect to the acquittal, it is contended that the trial court erred in concluding that the State had not discharged its onus beyond reasonable doubt in respect of the rape charges. The appellant contended that the complainants' statements and testimonies in court were sufficient to sustain a conviction. The respondent to the contrary supported the findings of the trial court on his acquittal. It is contended on his behalf that there were several internal contradictions and inconsistencies in the evidence of the complainants and of other State witnesses. It is further contended that the evidence of the complainants was undermined in certain respects by the medical evidence. It is accordingly argued that acceptance of the respondent's version must result in the respondent's acquittal.

As to the sentence, the appellant contended that the cumulative period of the sentences imposed on the charges the respondent was convicted of is startlingly lenient, disproportionate to the crimes and did not take into account the interests of society. The respondent endorsed the sentence and submitted that the sentences imposed by the trial court were appropriate in the circumstances of the case and as such should not be interfered with.

This court endorsed the trial court's findings on the rape charges. It found that the (rather significant) contradictions in complainants' statements and their testimonies are evident on the record, and also undermined in certain respects the medical evidence. Therefore, the evidence cannot sustain a conviction of rape. The court held that the evidence of the State as a whole failed to establish the guilt of the respondent beyond reasonable doubt. The acquittal of the respondent on rape charges was confirmed. Regarding the sentences imposed, the court was in agreement with the contention by the appellant that they were inappropriate in the

circumstances and had to be increased. The appeal succeeds only against the sentence but not against the acquittal on rape charges.

APPEAL JUDGMENT

SHIVUTE CJ (MAINGA JA and SMUTS JA concurring):

Introduction

[1] The respondent was convicted in the High Court on five counts of child trafficking (counts 1, 3, 5, 7 and 9)¹ and on five counts of committing or attempting to commit sexual acts with children below the age of 16 years² (being competent verdicts to counts 2, 4, 6, 8 and 10 in the indictment). He was sentenced to an effective eight years imprisonment. The respondent was also charged with five counts of rape (counts 2, 4, 6, 8 and 10).³ At the end of the trial, he was acquitted on all the rape counts.

[2] The appellant - the State - made application in the High Court for leave to appeal, which was declined. The appeal against conviction and sentence is thus with leave of this court.

Background

[3] In respect of the five counts of child trafficking, it was alleged that on diverse occasions during the period November 2015 to May 2016 and at or near DRC residential area in the district of Swakopmund, the respondent wrongfully and

¹ In contravention of s 15 read with s 1 of the Prevention of Organized Crime Act 29 of 2004 (POCA) read with s 94 of the Criminal Procedure Act 51 of 1977 as amended (CPA).

² In contravention of s 14(c)(i)(ii) of the Combating of Immoral Practices Act 21 of 1980 (as amended) (CIPA) read with s 94 of the CPA.

³ Contravening s 2(1)(a) of the Combating of Rape Act 8 of 2000 (CORA) read with s 94 of the CPA.

unlawfully recruited and/or received and/or harboured five female complainants for sexual exploitation. On the rape charges, he was accused of having committed sexual acts with the complainants under coercive circumstances. In the alternative to the rape charges, he was charged with committing or attempting to commit sexual acts with children below the age of 16 years.

[4] The respondent pleaded not guilty to all the charges. He denied having recruited and/or received and/or harboured the complainants for sexual exploitation. He also denied having had sexual intercourse or any other physical relationship with any of the complainants. As noted in the introductory paragraph above, he was ultimately convicted on the child trafficking charges and on the competent verdicts to rape and acquitted on all the rape charges.

[5] In respect of the child trafficking convictions (counts 1, 3, 5, 7, 9), the respondent was sentenced to 5 (five years) imprisonment on each count, one year of which was suspended for a period of five years on the usual conditions. The court directed that the sentences imposed on counts 5, 7 and '8' should run concurrently with the sentence imposed on count 1. The reference to count '8' is an obvious typographical mistake. The correct count in the context is count 9. On the competent verdicts to rape (being the alternatives to counts 2, 4, 6, 8, and 10), the respondent was sentenced to 1 (one) year imprisonment on each count. The sentencing court directed that the sentences on the competent verdicts should run concurrently with the sentence imposed on count 3.

The trial court's judgment

[6] The State led the evidence of several witnesses, including the complainants and certain members of their families, investigating officers as well as medical doctors who examined the complainants. The respondent in turn testified in his defence and called no witnesses.

[7] In respect of the child trafficking offences, after considering the elements of the offence and assessing the evidence adduced, the trial court concluded that the State had proved the guilt of the respondent beyond reasonable doubt. The court held that the evidence before it established beyond reasonable doubt that the respondent had created an environment in which he could, in the comfort of his room, on diverse occasions, have access to minor girls of 13 years and below with whom he had no blood relationship and without any oversight of their parents.

[8] The court also found that the complainants either alone or as a group frequented the respondent's dwelling. The complainants were on each of these visits exposed to pornographic materials displayed at prominent places in the respondent's room. The court was of the view that had the complainants' parents known of the presence of the pornographic materials in the respondent's room, they would certainly not have sanctioned their visit to his dwelling. The court concluded that it was proved beyond reasonable doubt that the respondent had harboured or received the minor complainants within the meaning of POCA.

[9] The court thereafter referred to two occasions the respondent was in a state of undress in the presence of some of the complainants and to a further incident

when the complainants observed the respondent ejaculating into a condom and reasoned that the respondent had a sexual motive for associating with the girls. It is in this context that the respondent was found guilty of child trafficking.

[10] As to the rape charges, after assessing the evidence, the trial court concluded that the State had not discharged its onus beyond reasonable doubt in respect of these charges. The respondent was accordingly acquitted.

[11] In coming to the acquittal, the court reasoned that there were several internal contradictions and inconsistencies in the evidence of the complainants and external contradictions and inconsistencies in the evidence of the complainants and of other State witnesses, particularly the reports made to the police officers investigating the case and the versions told in court.

[12] As to the internal contradictions and inconsistencies, the court correctly held that the versions by complainants NG and CB that the respondent wielded a knife in the presence of all the five complainants was contradicted by the three other complainants. The court found that there were also inconsistencies in the complainants' evidence as to the number of incidents of alleged sexual assault where they were allegedly all together in the respondent's room.

[13] The trial court further held that the medical evidence relating to complainant RH did not corroborate her evidence that she was sexually assaulted on more than 30 occasions. This factual finding was made on the basis of a medical report in respect of the said complainant in which it was stated that the complainant had

not been exposed to penetrative sex. Additionally, the court held that contrary to the evidence of complainant MB, it was impossible for the respondent to have had sexually molested the complainants a day after NG's aunt had observed complainant MB knocking at the respondent's room, because it was on that day that the respondent was arrested and on all accounts none of the complainants visited the respondent's room on that day.

[14] The court found that there was a real risk that complainants, especially NG, could have been coached in some form by an adult. It reasoned that one could not rule out the possibility that NG's mother and NG's aunt in effect conspired to cast the respondent in bad light, especially when viewed in the context of the speculated strained relationship between the two sisters and the respondent.

[15] The court also stated that an additional reason for not rejecting the possibility that NG might have been coached by an adult was that she could not, on her own, have known of her aunt's suspicion that she was heading to the respondent's house on the day the sexual allegations surfaced. The court had difficulty accepting NG's evidence that she formed a view of her aunt's suspicion on her own as the conversation between her mother and her aunt regarding the complainant's suspected sojourn to the respondent's residence took place in her absence. The court was thus of the view that she could only have formed such suspicion after hearing it from either her mother or aunt. The court concluded that apart from the child complainants' mere say-so, there was no physical evidence to prove that the respondent committed sexual acts with them.

[16] Regarding alternative charges to rape, the court held that in light of its finding that the respondent solicited the complainants to have sexual intercourse with him, the same must hold true for the offence of solicitation in terms of s 14(c) of the CIPA. It was satisfied that in contravention of that section, the respondent solicited each one of the complainants to commit sexual acts with him for his gratification. As earlier noted, the respondent was then convicted on five counts of committing or attempting to commit sexual acts with children below the age of 16 years in contravention of s 14(c) of the CIPA.

Grounds of appeal

[17] The appellant filed numerous grounds of appeal, which are essentially premised on the following three broad bases:

- (a) That the trial court erred in law and/or on the facts to acquit the respondent on the rape charges in that;
 - (i) it disregarded or paid insufficient regard to the evidence where the minor complainants corroborated each other in material respects, and
 - (ii) there was medical evidence corroborating the evidence of the complainants that the respondent had committed sexual acts with them.
- (b) That the trial court failed to find that there was sufficient and compelling evidence proving the rape of the complainants by the respondent.

(c) As regards sentence, that the sentences imposed on the respondent were inappropriate and startlingly lenient when viewed against the seriousness of the offences and the circumstances in which they were committed.

Appeal against acquittal

Issue for determination

[18] The issues for decision are relatively straightforward. The first question for determination is whether the trial court erred in finding that the State had not established the respondent's guilt beyond reasonable doubt on the rape charges.

The parties' submissions in brief

[19] The legal practitioner for the appellant made several contentions and submissions in her criticism of the judgment of the High Court. It was contended that the trial court erred in finding that complainants, particularly NG, might have been coached by an adult. It was submitted that in so doing, the court paid no regard or paid insufficient regard to the consideration that the evidence of this complainant contained more details than the evidence of her mother and aunt who were essentially suspected of having coached her.

[20] It was also submitted that although the respondent attempted to suggest a theme of fabrication by NG's mother and her sister – based on a purportedly strained relationship between himself and the two sisters – such suspicion is not borne out by the evidence.

[21] We were referred to pieces of evidence, which in the submission of the appellant, dispel such suspicion. According to the appellant, such evidence included the following: the respondent would first apply baby oil before sexually assaulting the complainants; he inserted his finger into NG's genitalia after he had failed to penetrate her; and he licked her genitalia.

[22] The appellant further argued that the evidence of NG on pertinent allegations against the respondent, was in many respects corroborated by the evidence of the other complainants, such as the assertion that the respondent placed a condom on his penis and started 'shaking it' until he ejaculated. The evidence by the complainants that the respondent would first undress and thereafter instruct them to do the same and then proceed to apply baby oil on his genitals before sexually assaulting them also constituted corroboration. It was thus contended that the trial court erred in dismissing all this evidence.

[23] It was further the appellant's contention that the trial court misdirected itself in failing to find that the complainants' testimonies were corroborated by the medical evidence. It was argued that the presence of baby oil in the respondent's room – an objective fact confirmed by the scene of crime officer who compiled the photo plan – constituted an unassailable corroboration. The appellant thus argued that viewing the evidence in this context, the trial court should have found the respondent guilty on the rape charges as well.

[24] The legal practitioner for the respondent, on the other hand, supported that part of the judgment acquitting the respondent on the rape charges. He submitted

that the trial court was mindful of the cautionary rules pertaining to youthful witnesses such as the present complainants and correctly found that the State had failed to establish the guilt of the respondent beyond reasonable doubt. The legal practitioner argued that the trial court had the advantage of observing witnesses testifying, which advantage the appeal court did not have. He has thus urged us to leave the findings of the trial court undisturbed.

Applicable legal principles

[25] In considering the appeal, it will be useful to remind ourselves of the approach by an appeal court to the factual findings of the trial court as summarised in the headnote of the oft-quoted *Dhlumayo*⁴ case. The departure point is that an appellant is entitled to a limited right of re-hearing. This is a matter of law and must not be rendered illusory. A court of appeal will not disturb the findings of the trial court unless the latter had committed a misdirection. Where there has been no misdirection on the facts or the law, the presumption is that the trial court's findings are correct. The appeal court can only disregard or reverse those findings if the evidence shows them to be wrong. It is also a trite principle that this approach does not relieve an appeal court of its obligation to carefully consider the evidence. This is so, because the appeal court has other advantages that the trial court does not have. A court of appeal is in a better position to evaluate the secondary facts from the evidence as the case is laid out thoroughly before it.

⁴ *R v Dhlumayo & another* 1948 (2) SA 677 (A).

[26] As noted above, an issue for determination is whether the State proved the guilt of the respondent beyond reasonable doubt. Before examining the factual matrix, the legal principles applicable to the nature of proceedings and the offences in question will be examined first. It is important to restate that in a criminal trial the onus to prove the guilt of an accused person lies on the State and this the State must prove beyond reasonable doubt. Suspicion, however strong it may be, remains suspicion and cannot equate proof beyond reasonable doubt. In the event of doubt as to an accused person's guilt, the accused should be given the benefit of the doubt, however unpalatable it may seem to do so from a lay person's point of view.

[27] The starting point in the consideration of the offences preferred against the respondent is s (1) of CORA which defines 'sexual act' as meaning –

- '(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;'

[28] In the context of the statutory scheme, s 2(1) provides that:

'(1) Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances –

- (a) commits or continues to commit a sexual act with another person; or
- (b) causes another person to commit a sexual act with the perpetrator or with a third person, shall be guilty of the offence of rape.'

[29] Section 2(2) sets out some of the circumstances considered to be coercive for the purposes of s 2(1). These include:

- '(a) the application of physical force to the complainant or to a person other than the complainant;
- (b) threats (whether verbally or through conduct) of the application of physical force to the complainant or to a person other than the complainant;
- (c) threats (whether verbally or through conduct) to cause harm (other than bodily harm) to the complainant or to a person other than the complainant under circumstances where it is not reasonable for the complainant to disregard the threats;
- (d) circumstances where the complainant is under the age of fourteen years and the perpetrator is more than three years older than the complainant.'

[30] As can be seen from the above provisions, CORA represents a paradigm shift from the traditional common law crime of rape of which penetration of a penis into a vagina was an essential element to an approach where a sexual act can be committed even in the absence of penetration as long as 'coercive circumstances' are found to exist. A significant feature of the provisions is that 'sexual act' and 'coercive circumstances' are defined in very broad terms. For example, a 'sexual

act' may include the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person while 'coercive circumstances' include circumstances where the complainant is under the age of fourteen years and the perpetrator is more than three years older than the complainant.

[31] The legal practitioner for the appellant criticised the High Court's general approach to the evidence. It was submitted in the first place that the High Court erred in rejecting the complainants' evidence as a group instead of considering the pieces of evidence pertaining to a particular complainant. Secondly, the trial court was criticised for allegedly focusing predominantly on the evidence proving penetration. It was contended that in the process of doing so, the court disregarded the evidence relating to cunnilingus, the insertion of the respondent's fingers in the complainants' vaginas and the insertion of the respondent's penis in the complainants' mouths. In the submission of the appellant, such individual acts amounted to the commission of a 'sexual act' as that term is defined in CORA. The appellant vigorously argued that the court erred in finding that the complainants could have been coached by adults, in effect, to falsely implicate the respondent.

[32] In the analysis that follows, an endeavour will be made to first determine if the evidence proved penetrative sexual assault. If the answer to this question is in the negative, the analysis will then proceed to determine if there is evidence of the commission of a sexual act constituting rape as defined in subsecs 1(b) and (c) read with s 2(1) of CORA.

[33] Before that is done, however, the criticism levelled against the court below regarding its approach to the evidence, particularly its finding of possible coaching on the part of the complainants should be tackled first. In my respectful view, there are merits in the criticism of the court *a quo*'s approach to reject the complainants' evidence as a group as opposed to individuals. Also, the argument that the trial court erred in finding that the complainants had been coached to, in effect, present a false narrative against the respondent is well-founded.

[34] Starting with the approach to the evidence, instead of analysing individual pieces of evidence relating to an individual complainant, the court appears to have approached the matter by looking at the pieces of evidence implicating the respondent in respect of all the complainants and then rejected that evidence. Although the offences were alleged to have been committed against the complainants in some instances as a group, the right approach is to consider the pieces of the evidence as they implicate the respondent in respect of individual complainants.

[35] As to the finding of possible coaching, I consider that if there was an element of coaching on the part of NG, then one would have expected the evidence of NG's mother and NG's aunt, for example, to have been tailor-made to sound identical or similar, which position cannot be a correct characterisation of their evidence. Also, the detailed account given by complainant NG regarding the nature of the alleged sexual incidents dispels any suspicion that she was coached by an adult. Moreover, any suspicion of a fabrication by the complainants was put to bed by the respondent's own evidence describing his relationship with the

complainants and their parents as healthy. He testified that he would share drinks with the complainants' mothers and that he was a close friend to a grandfather to one of the complainants. The grandfather in turn confirmed their cordial relationship which he spoke of in glowing terms.

[36] The possibility of coaching can also be excluded on the basis of an objective fact that one of the complainants who was in Khorixas at the time the sexual assault allegations surfaced told her mother a version of events similar to that told by the rest of the complainants. She was confronted by her mother before she returned to Swakopmund where the rest of the complainants were residing at the time the allegations of abuse surfaced. Therefore, the possibility that there could have been a conspiracy on the part of NG's family to falsely implicate the respondent is not supported by the evidence and can safely be excluded.

[37] The overarching question is therefore whether, even on the approach of the absence of evidence of coaching, on the consideration of the evidence as a whole, the appellant's evidence established the respondent's guilt beyond reasonable doubt. In the section of the judgment that follows, a summary of the evidence of each complainant and of the pieces of the evidence introduced to corroborate her version will be presented first, focusing momentarily on the issue of penetration. This brief summary is necessary to facilitate the analysis of the evidence in its proper context.

Summary of the evidence and its analysis

[38] Turning for a moment to the evidence, it is not the intention to deal with the already too traumatising-to-read evidence of the State in any detail. On the contrary, a concerted effort will be made to give a crisp summary of otherwise lengthy evidence. As it has by now become apparent to the reader, the minor complainants have been anonymised and are referred to only by their initials.

[39] Starting with complainant NG, she is one of the five complainants who testified. The witness stated that on the first encounter, it was only her and CB who were sexually assaulted. On NG's version, the respondent on this occasion first applied baby oil to his genitals and thereafter made attempts to penetrate their genitalia but failed to do so.

[40] The witness further testified that the respondent on the second occasion, put a condom on his penis and started 'shaking' it until he in effect ejaculated in the condom. The respondent then attempted to deposit what the witness referred to as the white substance in the condom in their genitals but he did not succeed as the complainants closed their legs.

[41] It was the witness' further testimony that the respondent on the third occasion also attempted to insert his penis into the genitalia of the four complainants except MB, but again failed to do so. I digress somewhat to point out that complainant MB did not testify that the respondent attempted to assault the rest of the complainants other than herself on the third occasion.

[42] The medical doctor who examined NG testified that the inner layer of the complainant's genital organs, the vestibule, was inflamed and reddish instead of being pink in colour. According to the doctor, this observation was consistent either with forced penetration, trauma or infection. The complainant's hymen was not intact and bruising on the outside parts of her genital organ was observed. The complainant reacted to the tenderness of her genital organ. The doctor concluded that sexual penetration was likely to have opened the hymen since no other trauma had been reported.

[43] The medical evidence showed that there was possible sexual penetration on NG. The difficulty, at least from the point of view of the appellant, is that this medical evidence was severely undermined by the complainant herself. The complainant's evidence was that on all the four occasions, despite several attempts, penetration never occurred. This was also confirmed by complainants MB, RH and RS who all testified that the respondent tried to insert his penis into their private parts, including that of NG, but that he did not succeed. CB was the only complainant, out of the five, who testified that NG was sexually assaulted by the respondent by the insertion of his penis into her genitals. However, as noted earlier, NG herself testified that no such penetration occurred, thus undermining the potential corroboration of her evidence by CB.

[44] Taking all of these factors into account, I consider that the trial court correctly found that the appellant had not proved the respondent's guilt beyond reasonable doubt as regards the rape of complainant NG on the basis of penetration. He was correctly given the benefit of the doubt.

[45] Turning to the evidence of CB, her evidence may be summarised as follows. On the first occasion, the respondent made several attempts to insert his penis into the genitalia of all the five complainants but failed to do so. On the second encounter while in the presence of NG, she observed the respondent placing a condom on his penis and subsequently shaking it until a white substance was discharged. He attempted to deposit the white substance in the complainants' genitalia but also failed to do so. The respondent on the third occasion sexually assaulted her and NG by inserting his genitalia into their private parts and that it was only the two of them who were present at the respondent's place. On the fourth encounter, the respondent made her and NG take an alcoholic drink and no sexual assaults occurred on this occasion.

[46] The medicolegal report in respect of CB revealed bruising or abrasions on the vestibule. The examination revealed no vaginal discharge and the hymen was found to be intact. The doctor, rather confusingly, concluded that there might have been non-penetrative sexual contact and that penetration could not be ruled out.

[47] As noted earlier, CB testified that the respondent only penetrated her on the third encounter. According to her, she was with NG when this assault occurred. The evidence of NG, on the contrary and as noted above shows that on all occasions that she visited the respondent's place in CB's company, no penetrative sexual assault occurred. Unlike in NG's case, the medical evidence in relation to this complainant although not ruling out the possibility of penetration shows that there might have been non-penetrative sexual contact. As the trial court correctly

observed, this is a contradiction compounded by other inconsistencies in the evidence of CB and NG. At best for the appellant, the medical evidence was inconclusive on the issue of penetration. I am of the respectful view that given these material internal contradictions and inconsistencies as well as the non-conclusive medical evidence on the issue of penetration, the trial court correctly found that the guilt of the respondent on the evidence of penetration had not been proved beyond reasonable doubt. I proceed to assess the evidence of the next complainant.

[48] Complainant MB testified that the first time the respondent committed sexual acts on the complainants was a day after they had attended to an errand buying cigarettes for him. According to MB, while inside the respondent's room, he forcefully undressed NG and also undressed himself. It was her testimony that the respondent first applied baby oil on his penis and then attempted to insert it in NG's genitals but failed to do so. The witness testified that the respondent repeated the same deeds on the other complainants but also without success. According to MB, on the second and third occasions, all the complainants were subjected to the same treatment.

[49] The doctor who examined MB did not observe any signs of a vaginal discharge or infection. The gynaecological report also revealed that the hymen was not intact and was rugged, torn in several places and the vagina was stretched as it allowed two fingers. The doctor explained that a torn hymen was an indication of an exposure to more than one sexual encounter.

[50] On the complainant's own version of the alleged sexual encounters, despite several attempts to do so, the respondent failed to insert his penis in her genitalia. Under cross-examination, the doctor testified that objects other than a penis may also cause the hymen to be rugged. When asked by the court whether any incident of sexual contact could cause the hymen to be rugged, the doctor answered in the negative.

[51] In view of the complainant's evidence that penetration did not occur, the possibility that causes other than sexual contact might have been the source of the rugged hymen cannot be excluded. On the assessment of the appellant's evidence as a whole, the trial court's factual findings and conclusions on the rape charges on the basis of a lack of penetration in relation to MB can also not be faulted.

[52] Proceeding to complainant RS' evidence, she testified that on the first encounter she was in the company of NG, MB and CB. On this occasion, the respondent attempted to insert his genitals into that of CB's but failed to do so. After this failed attempt, the respondent opened the door and the complainants then exited his room. Nothing untoward happened on the second occasion. On the third encounter, the respondent first forcefully undressed NG but RS could not state with certainty what he did to NG. She further testified that CB was next to be subjected to the same treatment, but again could not with certainty state what was done to CB. She also testified that the respondent repeated the same deeds to MB, but the witness could not say what he did to her either. The witness further stated that the respondent tried to insert his penis into her genitals, but failed to do

so. After this incident, she never returned to the respondent's house despite several invitations by him to do so. Unlike the evidence of complainants NG and CB who said that the respondent on one occasion wielded a knife, the witness testified that she never saw the respondent with a knife on any of their visits to his room.

[53] The doctor who examined RS observed that the inner layer of her genital organs, the vestibule, was inflamed and her hymen was absent. The complainant reacted to the insertion of two fingers during the examination, which according to the doctor is an indication of possible penetration. When asked in cross-examination whether the history presented to her prior the medical investigation of the complainant might have influenced the outcome of her examination, the doctor readily conceded that the history had a bearing on her findings.

[54] The medical evidence is inconsistent with the evidence of the complainant herself as to the alleged sexual assaults perpetrated on her. The complainant testified that the respondent only attempted to insert his penis in her vagina on the third occasion but did not succeed and that there were no further attempts on her on other occasions. The complainant in fact testified that on all the encounters, no penetration on any of the complainants occurred. Her testimony in that respect is also corroborated by the evidence of NG, CB and RH. The evidence of RS on penetration was not satisfactory at all. In my respectful view, the court *a quo* was correct in finding that the rape charges had not been proved beyond reasonable doubt.

[55] The fifth and last complainant to testify was RH. She informed the court that the first sexual act took place after RS and MB had returned from an errand buying cigarettes for the respondent. It was her testimony that in the absence of RS and MB, the respondent instructed NG to undress and thereafter he licked her genitals. According to RH, the respondent subjected CB, RS, MB and herself to the same treatment.

[56] The witness also testified that on the second and third encounters the respondent made several attempts to insert his genitals into their genitalia but did not succeed. On each attempt, the respondent would first apply baby oil on his genitals before proceeding with his attempts. Although there were knives at the house of the respondent, this witness stated that she was never threatened with a knife.

[57] The medicolegal report in respect of this complainant revealed a creamy normal discharge. No bruises were observed and the hymen was intact. The doctor's conclusion was that there was 'no suggestion of sexual penetration'.

[58] The complainant testified that on all the sexual assault occasions, the respondent did not penetrate her. This evidence was consistent with the findings of the medical examination. The trial court's factual findings in respect of this complainant can also not be faulted and the respondent was, in my view, correctly acquitted on the basis of the lack of penetration. It is important to emphasise that the complainants did not equivocate on the issue of penetration. They emphatically denied it.

[59] Some of the complainants testified that when the respondent tried to insert his penis in their genitals, it slid. The obscure phraseology repeatedly used in the record is that the penis 'went through the buttocks'. The evidence of the penis 'sliding' or 'going through the buttocks' was left hanging in the air as no attempt was made to establish the precise contours of these expressions or to have the witnesses explain how it had slid so as to establish whether there was slight penetration or not for it to constitute a sexual act. One is left with a distinct impression that the State appeared to be too cautious to explore this aspect of the evidence without appearing to be asking the child witness leading questions and it was obviously not in the interests of the respondent to pursue this potentially crucial piece of evidence. In the absence of the clarification of this aspect, all that remained was that there was no penetration. It is thus clear that the medical evidence on the possible penetration has been greatly undermined by the evidence of the complainants and the lack of clarity on the precise attempts made by the respondent to penetrate the complainants.

Was there evidence *aliunde* establishing a sexual act short of penetration?

[60] It was submitted on behalf of the appellant that even if the evidence of the complainants failed to establish penetration, there was still evidence proving the commission of a sexual act as defined in subsecs 1(1)(a) and (c) of CORA. In the further submission of the appellant's legal practitioner, such evidence included the insertion of a finger into the complainants' genitals as well as evidence of cunnilingus, which also constituted sexual acts. The legal practitioner also submitted that the age difference between the respondent and the complainants

constituted 'coercive circumstances'. It is against this background that we were urged to reassess the evidence in light of the practitioner's submissions and to find that the State had proved the respondent's guilt beyond reasonable doubt.

[61] The legal practitioner for the appellant is undoubtedly correct that if the evidence of the insertion of a finger into the complainants' genitals or of any form of genital stimulation had been established beyond reasonable doubt, then the respondent should have been convicted of rape. As noted earlier, the respondent was charged with the offence of rape in that he had intentionally and under coercive circumstances committed a sexual act with the complainants. To recap, 'sexual act' means, amongst other things the insertion of a penis or *any other part of the body* of a person into the vagina or anus of another person. It also means cunnilingus or any other form of genital stimulation. It is therefore necessary to carefully consider the evidence and to establish whether the offence of rape on the bases of the insertion of a finger and/or genital stimulation had been proven.

[62] Starting with the evidence of the insertion of a finger, complainant NG was the only witness who testified about the insertion of a finger into her private parts. She said that the same was done to CB as they were the only ones present in the respondent's room on that occasion. CB, on the other hand did not mention the insertion of the finger incident at all. The evidence of the child and single witness NG was thus not corroborated by any other evidence.

[63] On the allegation of genital stimulation, NG stated that on one occasion she and CB went to the respondent's room where they were made to undress and

made each one of them sit on his head and then 'licked' the two complainants' private parts. CB on her part did not testify that she was subjected to the same sexual treatment. NG further stated that on the fourth occasion of the sexual assault, the respondent placed his penis in a 'bread plastic' and at knife point forced her to lick his penis. The only other complainant who testified about genital stimulation is RH, who stated that the respondent licked all the five complainants on their private parts. However, her evidence in this respect was not corroborated by CB, MB, NG or RS. These witnesses did not mention any incident of genital stimulation where all the five complainants were present in the respondent's room.

[64] The complainants' evidence on the aspects of the insertion of parts of the body other than the penis and of genital stimulation was inconsistent. Where one incident was said to have taken place in the presence of two complainants, the other complainant did not mention it and where the entire group was said to have been subjected to the same treatment, only one out of the five complainants testified to the incident. I am alive to the fact that the complainants were children of tender age and therefore the power of memory and their ability to narrate events accurately and consistently may not be the same as that of an adult. However, the evidence is too tenuous to meet the standard of proof in a criminal case. It simply does not constitute proof beyond reasonable doubt. The trial court was entitled to give the respondent the benefit of the doubt.

[65] As to the age difference, counsel for the appellant is no doubt correct in her submission that such a circumstance constitutes 'coercive circumstances' as defined in s 2(2) of CORA. However, the presence of coercive circumstances

alone is not sufficient to constitute the offence of rape. This is so, because s 2(1) of CORA says that coercive circumstances must co-exist with the commission of a sexual act. The elements of the offence consist of the intentional commission of a sexual act with another person under coercive circumstances.

[66] In light of the above conclusions, the appeal against the acquittal of the respondent on the rape charges must be dismissed. The respondent's convictions on competent verdicts to rape are not on appeal. Therefore, those convictions remain undisturbed. It remains to consider the submissions regarding the appeal against sentence.

Appeal against sentence

[67] The ultimate question for decision in the appeal against sentence is whether the sentences imposed on the respondent were appropriate in the circumstances of the case. It is a trite principle that sentencing is pre-eminently a matter left to the discretion of the trial court and that a court on appeal will interfere with a sentence imposed by the trial court only if there has been a material misdirection on the facts or the law or where the sentence is startlingly inappropriate or where there exists a striking disparity between the sentence imposed by the trial court and the sentence the appeal court would have imposed.⁵

[68] It was submitted on behalf of the appellant that the cumulative period of the sentences imposed on the charges the respondent was convicted of is startlingly

⁵ *S v Shikunga & another* 1997 NR 156 (SC) at 173B–E; *S v Shapumba* 1999 NR 342 (SC) at 344I–J and 345A–B.

lenient, disproportionate to the crimes and did not take into account the interests of society.

[69] The appellant argued that the respondent would only serve a sentence of four (4) years on a conviction of four (4) counts of trafficking children for sexual exploitation on diverse occasions. In the submission of the appellant, the concurrent sentence imposed on the respondent on competent verdicts to rape meant that he remained unpunished on all his convictions in respect of those charges.

[70] The appellant contended that the respondent not only committed very serious offences against minor children, but also perpetrated those heinous offences on diverse occasions. We were thus urged to re-assess the facts and to impose fresh sentences in accordance with the guiding principles on sentencing.

[71] On trafficking charges, the appellant urged us to impose a sentence of five (5) years imprisonment on each count (ie 1, 3, 5, 7 and 9). We were additionally urged to direct that the sentences on counts 7 and 10 run concurrently with the sentence to be imposed on count 5.

[72] The legal practitioner for the respondent, on the contrary, submitted that the sentences imposed by the trial court were appropriate in the circumstances of the case and as such should not be interfered with. He contended that the sentencing court gave full consideration to all factors relevant to sentencing which included the well-known triad.

[73] Section 15 of POCA provides that a person convicted of trafficking in persons is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 50 years. This penalty undoubtedly reflects the serious light in which the Legislature views the offence of trafficking in persons for sexual exploitation. The offence is regarded as a heinous crime that attracts a severe sentence.

[74] There are several aggravating factors in the present case necessitating an increase in sentence on trafficking charges. Those factors include the tender age of the complainants and the fact that the respondent was in a position of trust in relation to the complainants. Residing in a residential area where the circumstances of life are less than ideal, the respondent was relatively better off than some of the residents. A man whose own station in life is piteous, the respondent scavenged recycled materials for a living. On a good day, he would bring discarded food and other materials which he would share with the complainants. He would also shower the complainants with recycled gifts, penalising those complainants who resisted to his demands for sexual exploitation by exclusion from his supposed largesse. The respondent took advantage of the complainants' unfortunate circumstances to groom them for sexual exploitation. It was a cowardly and deeply distressing targeting of the most innocent and vulnerable in a community, children.

[75] As to his other personal circumstances, the respondent was 39 years old at time of the commission of the crimes and 43 years at the time of sentencing. A

father of one but who had lost contact with his son who was being cared for by the child's mother, the respondent was a first offender. He spent over two years in custody awaiting trial, a consideration described by the trial court as a 'weighty mitigating factor.' I am of the considered view that the sentencing court had given more weight to the personal circumstances of the respondent and his pre-trial detention at the expense of other factors relevant in sentencing, such as the seriousness of the offences and the interests of society. There remains a striking disparity between the sentences imposed by the trial court and the sentence I would have imposed had I sat as the trial court. I therefore consider that the sentences imposed on the respondent ought to be set aside and replaced with increased ones.

[76] Regarding the sentences imposed on competent verdicts to the charges of rape, I agree with the appellant that it is inappropriate in the circumstances for the respondent to, in effect, remain unpunished on these crimes. A factor which weighs heavily with me is that these offences were perpetrated on very young children who are still in their formative years.

[77] In the result, I would propose that the appeal against acquittal be dismissed and that the sentences imposed on the respondent for his convictions be set aside and replaced with increased sentences of 18 years in total.

[78] The following order is accordingly made:

(a) The appeal against the acquittal of the respondent on rape charges is

dismissed.

(b) The sentences imposed on the respondent for his convictions on counts 1, 3, 5, 7, 9 and in respect of the competent verdicts to counts 2, 4, 6, 8 and 10 are set aside and replaced with the following sentences:

- (i) In respect of counts 1, 3, 5, 7, 9, the respondent is sentenced to five (5) years imprisonment on each count. The sentences imposed on counts 7 and 9 are to run concurrently with the sentence imposed on count 5.
- (ii) In respect of the competent verdicts to counts 2, 4, 6, 8 and 10, the respondent is sentenced to 1 (one) year imprisonment on each count, two (2) years of which is suspended for five (5) years on condition that the respondent is not convicted of committing or attempting to commit a sexual act with a child under the age of 16, committed during the period of suspension.
- (iii) The sentences are antedated to 11 October 2018.

MAINGA JA

SMUTS JA

APPEARANCES

APPELLANT:

I M Nyoni

Prosecutor-General

RESPONDENT:

G Bondai

Legal Aid