

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT ON SENTENCE

Case No: CC 20/2017

In the matter between:

**THE STATE**

v

**BERTUS KOCH**

**ACCUSED**

**Neutral citation:** *S v Koch* (CC 20/2017) [2018] NAHCMD 318 (11 October 2018)

**Coram:** DAMASEB, JP

**Heard:** 27 September 2018

**Delivered:** 11 October 2018

**Flynote:** **Sentence** – Accused found guilty of five counts of Child trafficking and 5 counts of committing or attempting to commit sexual acts with children below the age of 16 years – Appropriate sentence – Factors to be considered: prisoner’s personal circumstances, the seriousness of the offences, and the general interest of society – Complainants’ ages an aggravating factor – Nature of indecent exposure having a lasting effect on complainants – Personal circumstances of the accused warranting mercy on sentence to be imposed - Interest of society demands substantial term of imprisonment – Emphasis made that courts will not look kindly

upon such abominable behaviour – Period of pre-trial incarceration considered – Prison terms ordered to run concurrently.

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### ORDER

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1. In respect of the child trafficking convictions (counts 1, 3, 5, 7, 9): 5 (five years) imprisonment for each count, of which one year is suspended for a period of five years on condition that the accused is not convicted of child trafficking or committing or attempting to commit sexual acts with a child under the age of 16, committed during the period of suspension. The sentences imposed in respect of counts 5, 7 and 8 will run concurrently with the sentence imposed on count 1.
2. In respect of the five (5) convictions under the Combating of Immoral Practices Act (being the alternatives to counts 2,4,6,8, and 10): (one) year imprisonment on each count, to run concurrently with the sentence imposed on count 3.

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### JUDGMENT ON SENTENCE

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DAMASEB, JP:

[1] I found Mr. Koch guilty on 5 counts of trafficking children<sup>1</sup> on divers occasions. In addition, I found him guilty on 5 counts of committing or attempting to commit sexual acts with children below the age of 16 years.<sup>2</sup> It is now my duty to impose a sentence on him.

[2] In imposing sentence I must have regard to the prisoner's personal circumstances, the seriousness of the offences, and the general interest of society.

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<sup>1</sup> In contravention of s 15 read with s 1 of the Prevention of Organised Crime Act 29 of 2004.

<sup>2</sup> In contravention of s 14(c) of the Combating of Immoral Practices Act 21 of 1980 ('CIPA').

### Seriousness of offences and factors in aggravation

[3] The complainants were aged between 9 and 13. The prisoner was 39 years old at the time he committed the crimes. The oldest of the complainants (at 13 years) is about the same age as the prisoner's own minor child. As counsel for the state correctly submitted, that is a weighty aggravating factor.

[4] Mr Koch, what you exposed these young girls to will be forever etched on their memories and will most likely define their futures - not in a positive way, but negatively. So, I want you to understand that although I found that you did not commit contact sexual crimes against the complainants, the conduct which I found you guilty of is no less reprehensible.

[5] I am still puzzled by the regularity with which the complainants visited the home of the prisoner if one considers the horrible things they attributed to him. The morally harmful pornographic pictures displayed on the walls of his bedroom seems to me to be one possible attraction why the minors kept going to his home time and time again and it was during those visits that he at times indecently exposed himself to them and demanded to have sex with them.

[6] Mr Koch, in the manner you exposed the young victims to such morally deplorable and harmful material and lewd conduct, you betrayed the community's trust. Society expects of adults to look out for the vulnerable and not to exploit them. Your betrayal of that trust aggravates the offences you committed.

[7] For the state, Ms Nyoni argued that the prisoner's conduct is aggravated by the fact that he had, whilst knowing that he is infected with the HIV virus, made one of the complainants lick his male genital whilst in a plastic bread wrapping. Lest I was misunderstood, I had abundantly made clear in my judgment on the merits that I was not satisfied on the evidence that the prisoner committed a contact sexual crime with the complainants. In context, what I found to have a ring of truth, is that the accused exposed himself before two minor complainants and wrapped the plastic on his male genital. That is the basis for the conviction under the CIPA in so far as it was relevant.

[8] I had accepted the prisoner's version that he did not use force to make the complainants frequent guests at his home and to return there, time and time again. The flipside is that there certainly was something that they found fascinating or irresistible being in his presence and in his dwelling - in circumstances which exposed them to harm. He had thus abused their innocence and betrayed society's trust that adults will not abuse children.

#### Did prisoner show remorse?

[9] Mr. Koch testified on his own behalf in mitigation of sentence but chose not to accept responsibility for his actions and to show remorse. That may be so because he feels embarrassed and conflicted given his denial of the crimes during his trial. The fact remains though that he has not shown contrition for his conduct – a relevant factor in aggravation of sentence.

#### Prisoner's personal circumstances

[10] Mr. Koch has no previous convictions and is afflicted with the HIV virus. Although the prisoner is afflicted by the HIV virus, with proper management of it he should be able to live long both during and after incarceration. That said, evidence was led that he is already on ARV treatment, an indication that his blood count is not normal. It must follow that the affliction potentially will reduce his lifespan. Those factors must be weighed in the scale in his favour in the court's consideration of the severity of the sentence.

[11] He is a poor man on whom life has not been kind. He makes ends meet in very trying and unenviable circumstances, but that cannot excuse the conduct I found him guilty of.

[12] The chances that he will be homeless and still unemployed when he regains his freedom are great given the kind of dwelling he made his home; and the fact that he does not have any meaningful professional qualification to his credit. Considerable mercy is therefore called for in view of his personal circumstances.

[13] Another weighty mitigating factor is that he has been in prison since 1 May 2016 - a period of over two years.

#### Balancing

[14] The interest of society demands that Mr Koch serve a substantial term of imprisonment. Those men and women in our community who are minded to abuse children in the manner he has done must know that the courts will not look kindly upon such abominable behaviour. To temper the harshness of the sentence with mercy and especially because of the rather lengthy period of pre-sentence incarceration, I will (a) make certain parts of it run concurrently, and (b) suspend a small portion of it as a disincentive for him to engage in such conduct in the future.

#### The sentence order

[15] In respect of the child trafficking convictions (counts 1, 3, 5, 7, 9): 5 (five years) imprisonment for each count, of which one year is suspended for a period of five years on condition that the accused is not convicted of child trafficking or committing or attempting to commit sexual acts with a child under the age of 16, committed during the period of suspension. The sentences imposed in respect of counts 5, 7 and 8 will run concurrently with the sentence imposed on count 1.

[16] In respect of the five (5) convictions under the Combating of Immoral Practices Act, (being the alternatives to counts 2,4,6,8, and 10), the accused is sentenced to (one) year imprisonment on each count, to run concurrently with the sentence imposed on count 3.

[17] Mr Koch, you are therefore sentenced to an effective term of 8 (eight) years imprisonment.

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P T Damaseb  
Judge-President

## APPEARANCES:

STATE:

Ms. I Nyoni

Office of the Prosecutor-General, Windhoek

ACCUSED:

Mr. Dube

Directorate of Legal Aid, Windhoek