



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 14/2017

THE STATE

versus

TUUFILWA NDAWINA JONAS

ACCUSED

Neutral citation: *S v Jonas* (CC 14/2017) [2019] NAHCMD 262 (31 July 2019)

Coram: SHIVUTE J

Heard: 4-14 June 2018, 23 March 2019, 24 April 2019, 27 May 2019 and 10 June 2019.

Delivered: 31 July 2019

Flynote: **Criminal law** — Prevention of Organised Crime Act - Trafficking of persons for sexual exploitation read with the United Nations Convention Against Transnational Organised Crime — Accused recruited, transferred and received the complainant by means of fraud, deception, the abuse of power or position of vulnerability — Purpose of recruiting complainant was to facilitate her sexual exploitation for money - Consent of a victim of trafficking is irrelevant and not a defence — Accused found guilty as charged

Criminal procedure - Evidence — Evidence of single witness — Sufficiency of — Court may convict on evidence of single witness — Evidence may have shortcomings , defects or contradictions — However court must be satisfied that truth was told.

Criminal law – Combating of Rape Act, 2000 — duplication of charges — Accused charged with rape committed on unknown date during 2012 in terms of Rape Act , Accused further charged with rape committed on different occasions in terms of Rape Act read with section s 94 of the Criminal Procedure Act – Evidence test applied — duplication of charges if the evidence required to prove count 7 would be the same evidence required to prove count 8 — Accused acquitted on count 7 and convicted on count 8

Criminal Law – Attempted rape – Combating of rape Act read with s 18 of the Riotous Assemblies Act 17 of 1956 – Rape Act does not create offence of attempted rape – s 18 Riotous Assemblies applicable – Attempted rape — What constitutes — to prove an attempt ,court should be satisfied that wrongdoer at time of interruption intended to complete the crime - Only acts immediately connected with the consummation of completed crimes amount to attempts — walking towards the complainant while half naked ,only wearing boxers, with a condom on and his penis sticking out of the boxers does not amount to attempted rape but a mere act of preparation- Accused acquitted of attempted rape

Summary : The accused stands trial on an indictment containing three counts of – Trafficking in persons in contravention of section 15 read with section 1 of the Prevention of Organized Crime Act 29 of 2004, two counts of rape contravening s 2 (1) (b) read with sections 1, 2 (2), 3, 5, 6 and 18 of Act 8 of 2000, 2 counts of rape contravening section 2 (1) (b) read with sections 1,2 (2), 2 (3),5,6,7 and 18 of Act 8 of 2000 – further read with section 94 of the Criminal Procedure Act 51 of 1977, and one count of rape contravening section 2 (1) (b) read with section 1, 2 (2), 3,5,6 and 18 of Act 8 of 2000, further read with section 18(1) of the Riotous Assemblies Act 17 of 1956.

The accused pleaded not guilty to all the counts and did not disclose the basis of her defence.

The accused was alleged to have unlawfully recruited the complainant by means of coercion, deception, abuse of power or of a position of vulnerability with the intent to sexually exploit her. The accused was also alleged to have coerced the complainant to commit sexual acts with various men. The complainant was a single witness in some material respects of the trial. In considering her evidence, the court held that single witness evidence may have shortcomings, defects or contradictions however, the court may convict an accused on such evidence if satisfied that the truth was told. The accused was found guilty on counts 1, 2,3,4,6 and 8.

In respect of count 5 the accused was charged with attempted rape in Contravention of the Rape Act read with section 18 of the Riotous and Assemblies Act. The Court held that the Rape Act does not create an offence of attempted rape however section 18 of the Riotous Assemblies Act finds applicability. Further that to prove an attempt, the court should be satisfied that the wrongdoer at the time of interruption in committing the offence, intended to complete the crime. Only acts immediately connected with the consummation of completed crimes amount to attempts .Further that Phillip walking towards the complainant while half naked ,only wearing a boxer and having his a penis sticking out of the boxer whereby his penis is covered with a condom does not amount to attempted rape but a mere act of preparation. The accused was acquitted of attempted rape

In respect of count 7 , the court considered the fact that the accused, in charge 7 was charged with rape committed on an unknown date during 2012 in terms of the Rape Act ,and in charge 8, she was charged with committing rape on different occasions in terms of Rape Act read with section s 94 of the Criminal Procedure Act .The court found that this was a duplication of charges because the evidence required to prove count 7 would be the same evidence required to prove count 8. Accused was acquitted on count 7

VERDICT

1st count:

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

Guilty as charged

2nd count:

Contravening section 2(1) (b) as read with sections 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – RAPE.

Guilty as charged

3rd count:

Contravening section 2(1) (b), read with sections 1, 2(2), 2(3) 3,5,6,7 and 18 of Act 8 of 2000 – RAPE, further read with section 94 of the Criminal Procedure Act 51 of 1977

Guilty as charged

4th count:

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

Guilty as charged

5th count:

Contravening section 2(1) (b) as read with sections 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000, further read with section 18 (1) of the Riotous Assemblies Act 17 of 1956.

Not guilty and acquitted.

6th count:

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

Guilty as charged

7th count:

Contravening section 2 (1) (b) as read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – RAPE.

Not guilty and acquitted

8th count:

Contravening section 2(1) (b), read with sections 1, 2(2), 2(3) 3,5,6,7 and 18 of Act 8 of 2000 – RAPE, further read with section 94 of the Criminal Procedure Act 51 of 1977.

Guilty as charged

JUDGMENT

SHIVUTE, J

[1] The accused pleaded not guilty to an indictment containing three counts of – Trafficking in persons in contravention of section 15 read with section 1 of the Prevention of Organized Crime Act 29 of 2004, two counts of rape contravening s 2 (1) (b) read with sections 1, 2 (2), 3, 5, 6 and 18 of Act 8 of 2000, 2 counts of rape contravening section 2 (1) (b) read with sections 1,2 (2), 2 (3),5,6,7 and 18 of Act 8 of 2000 – further read with section 94 of the Criminal Procedure Act 51 of 1977, and one

count of rape contravening section 2 (1) (b) read with section 1, 2 (2), 3,5,6 and 18 of Act 8 of 2000, further read with section 18(1) of the Riotous Assemblies Act 17 of 1956.

[2] The particulars of offences are as follows:

1st Count

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

In that during the month of May 2012 and at or near Okahandja, in the district of Okahandja, the Accused did wrongfully and unlawfully recruit the complainant, Maria Epafra, by means of coercion, deception, abuse of power or of a position of vulnerability with the intent that the said Maria Epafra is subjected to sexual exploitation by John Puariune, an adult male.

2nd Count

Contravening section 2(1) (b) as read with sections 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – RAPE.

In that during the month of May 2012 and at or near Okahandja, in the district of Okahandja, the Accused, hereinafter called the perpetrator, caused John Puariune, an adult male, to commit or to continue to commit a sexual act with the complainant Maria Epafra, by inserting his penis into the vagina of the complainant under coercive circumstances and the coercive circumstances were that:

- (a) Threats made (whether verbally or through conduct) to cause harm (other than bodily harm) to the complainant under circumstances where it is not reasonable for the complainant to disregard the threats, and /or
- (b) The complainant was affected by helplessness.

3rd Count

Contravening section 2(1) (b), read with sections 1, 2(2), 2(3) 3,5,6,7 and 18 of Act 8 of 2000 – RAPE, further read with section 94 of the Criminal Procedure Act 51 of 1977.

In that on diverse occasions, during the month of May 2012 up to July 2012 and at or near Okahandja, in the district of Okahandja, hereinafter called the perpetrator, caused John Puariune, an adult male, to commit or to continue to commit a sexual act with the complainant, Maria Epafra, by inserting his penis into the vagina of the complainant under coercive circumstances and the coercive circumstances were that:

- (a) Threats made (whether verbally or through conduct) to cause harm (other than bodily harm) to the complainant under circumstances where it is not reasonable for the complainant to disregard the threats, and /or
- (b) The complainant was affected by helplessness.

4th Count

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

In that during 2012, unknown month and date and at or near Okahandja, in the district of Okahandja the accused, did wrongfully and unlawfully recruit the complainant, Maria Epafra, by means of coercion, abuse of power or of a position of vulnerability with the intent that the said Maria Epafra is subjected to sexual exploitation by one Phillip, an adult male.

5th Count

Contravening section 2(1) (b) as read with sections 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000, further read with section 18 (1) of the Riotous Assemblies Act 17 of 1956.

In that during the year 2012, unknown month and date and at or near Okahandja, in the district of Okahandja, the Accused, hereinafter called the perpetrator, caused Philip, an adult male, to attempt to commit a sexual act with the complainant, Maria Epafra.

6th Count

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

In that during the year 2012, unknown month and date and at or near Okahandja, in the district of Okahandja, the Accused, did wrongfully and unlawfully recruit the complainant, Maria Epafra, by means of coercion, abuse of power or of a position of vulnerability with the intent that the said Maria Epafra is subjected to sexual exploitation by one Nico, an adult male.

7th Count

Contravening section 2 (1) (b) as read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – RAPE.

In that during the year 2012, unknown month and date, and at or near Okahandja in the district of Okahandja, the Accused, hereinafter called the perpetrator, caused Nico, an adult male, to commit or to continue to commit a sexual act with the complainant, Maria Epafra, by inserting his penis into the vagina of the complainant under coercive circumstances and the coercive circumstances were that:

- (a) Threats made (whether verbally or through conduct) to cause harm (other than bodily harm) to the complainant under circumstances where it is not reasonable for the complainant to disregard the threats, and /or
- (b) The complainant was affected by helplessness.

8th Count

Contravening section 2(1) (b), read with sections 1, 2(2), 2(3) 3,5,6,7 and 18 of Act 8 of 2000 – RAPE, further read with section 94 of the Criminal Procedure Act 51 of 1977.

In that on diverse occasions, during the year 2012 and at or near Okahandja, in the district of Okahandja, the Accused, hereinafter called the perpetrator, caused Nico, an adult male, to commit or to continue to commit a sexual act with the complainant, Maria Epafra, by inserting his penis into the vagina of the complainant under coercive circumstances and the coercive circumstances were that:

- (a) Threats made (whether verbally or through conduct) to cause harm (other than bodily harm) to the complainant under circumstances where it is not reasonable for the complainant to disregard the threats, and /or
- (b) The complainant was affected by helplessness.

[3] The accused pleaded not guilty to all the counts. She did not disclose the basis of her defence.

Summary of the State's case.

[4] Complainant Maria Epafra who was 18 years old at the time of the incident testified that she was approached by the accused at Okahenge village. The accused told the complainant that she should leave school because she got a job for her in Okahandja where she was residing. The complainant believed that the accused was going to arrange employment for her and she told the accused that she needed a job.

This was during 2012. The accused and the complainant agreed that the complainant should travel to Okahandja. Before the accused went back to Okahandja she gave N\$200 to the complainant to pay for a lift on the understanding that, when the complainant starts working, she had to refund the money to the accused. The accused also gave her cellphone number to the complainant.

[5] During April 2012, when the complainant finished writing her exams she decided to go to Okahandja to take up the promised employment. On the instructions of the accused, the complainant took the birth certificate of Ndapandula, the accused's sister, so that she could use it as hers at the road blocks in case an identification document was demanded from her. When the complainant arrived at Okahandja service station she gave the accused's cell phone number to a security guard to phone the accused. The accused came to fetch her from the service station. They went to spend a night at the house belonging to the accused's sister. The following day they travelled to the farm in Okahandja district where the accused was staying and where the complainant was supposed to take up employment. This was during the beginning of May 2012.

[6] The whole day when they arrived on the farm the complainant was with the accused. Her luggage was taken into the accused's house. They sat under a tree. Whilst they were sitting under the tree the accused informed the complainant of the reasons why she told her to travel from the North of the country. She allegedly told her that it was not because of the job, but there was a guy who wanted the complainant, she gave the guy's name to the complainant. The complainant asked the accused why she did not tell her the truth and why she was giving her a boyfriend. The accused became angry and told the complainant that she must go and stay with Johnny. She further told her that the money that she gave her in Owamboland to pay for the lift was from Johnny and not her money. She again told the complainant that she was not working. She was living with her boyfriend Samuel the father of her children. The accused said that the complainant must move from her place and go and stay with Johnny. It was at that stage that the complainant realized that the accused had called her from the village so that she could give her to men. The accused threw the

complainant's luggage out of her room. She again said if the complainant did not want to go and stay with Johnny, she must find where to stay.

[7] The complainant did not know anyone on the farm apart from the accused. The accused went to Johnny's place. When she returned, she said the complainant must vanish from her place. She sounded very angry. The complainant had no alternative, she took her luggage and went to Johnny's place who was also residing on the same farm. Johnny Puarine helped the complainant to carry her luggage. At a later stage, the accused also came to Johnny's place. After the accused had left, Johnny asked the complainant why she appeared to be afraid and told her not to be scared because he was a brother to the accused person's boyfriend.

[8] After they had supper, the accused and the complainant went to sleep in one bedroom sharing a bed. Johnny made sexual advances to the complainant and she refused. The following day Johnny went to see the accused. The accused came to the complainant. She was very angry with her and inquired from the complainant why she refused to have sexual intercourse with Johnny. She reminded her that Johnny paid for her transport fees for her to go to Okahandja. She again warned the complainant that it must be the last time for her to refuse sexual intercourse with Johnny. The complainant felt very bad because she was forced to do something she did not want to. The following day the complainant and Johnny started to have sexual intercourse.

[9] Johnny used to have sexual intercourse with her twice a night. Sometimes she could be sleeping and Johnny would have sexual intercourse with her whilst she was sleeping. They had sexual intercourse several times. Sometimes Johnny used to put his fingers into her vagina and on some occasions he could put a condom on and inserted his penis into her vagina. The complainant told Johnny that she was only having sexual intercourse with him because she was forced by the accused and that she never accepted Johnny as her boyfriend. Johnny continued to have sexual intercourse with the complainant twice a night then he changed to three times a night and then he told her that she was supposed to lick his penis. Johnny gave the accused 10kg of sugar

and meat. The complainant stayed with Johnny for about two months and half and left Johnny on the third month. She stayed with Johnny from May to July 2012.

[10] During July, the complainant left Johnny's place because she was fed up of having sexual intercourse with him every day and they used to fight. The last day she left, Johnny had sexual intercourse with her in the middle of the night and again in the morning. When she used to complain that she was tired of having sexual intercourse, Johnny told her that she used his money from the village. When the accused heard that there was a misunderstanding between the complainant and Johnny, the accused told the complainant to leave Johnny. The complainant went to stay with the accused. The accused promised to find a job for her. The complainant stayed with the accused for about a month which is July 2012.

[11] Whilst the complainant was staying with the accused, a man by the name Phillip used to call the accused to go to their farm to fetch meat. The accused was taking the complainant along. One day when they went to fetch meat on Phillip's farm they found Phillip at the garden. Phillip gave the accused some carrots and meat. Phillip asked the accused and the complainant to clean the kitchen. After they finished to clean, the accused went outside and the complainant remained inside with Phillip. Phillip asked the complainant whether she was aware that she belonged to him. The complainant told him that she was not aware. The complainant left Phillip and found the accused on the way. As the accused was walking towards her place she was insulting the complainant. She asked the complainant why she left Phillip. She accused the complainant of being stupid because she did not want Phillip. That day, she prevented the complainant from eating the meat that was given by Phillip whom the complainant refused to be his girlfriend. She further told the complainant that she did not want her at her place, because she was giving her men and she did not want them.

[12] On a different date, the accused received a call and she told the complainant that it came from Phillip who told her to go and fetch meat from their farm. The accused told the complainant that she was very busy. She told the complainant to go and fetch the

meat from Phillip. The complainant went to fetch the meat from Phillip. Whilst she was at Phillip's farm he received a phone call from the accused. Phillip told the complainant that it was the accused who phoned and told him that she should not go back to the accused's farm she must remain with Phillip because she is Phillip's girlfriend. The complainant told Phillip that she wanted to hear it from the accused. Phillip called the accused and the accused talked to the complainant. The accused told her that she should not go back where she was staying. She must stay with Phillip until she comes to fetch her. The complainant gave the phone back to Phillip and Phillip told her to go and get the meat.

[13] Phillip left the complainant in the sitting room and he went to another room. When he came back he was wearing a condom . He did not have anything on his upper body however, he was wearing boxers and the penis was sticking out of the boxers. He walked towards her and she ran away to the accused. It appears whilst the complainant was on the way, Phillip communicated with the accused. When the complainant reached the accused's place, the accused was very angry with her. The accused inquired from the complainant why she did not want to have sexual intercourse with Phillip.

[14] The following day, a certain man by the name Nico came to the accused's farm. They were making jokes to each other in Otjiherero which the complainant did not understand properly. After Nico left, the accused told the complainant that Nico was her friend. One day, the accused informed the complainant to go with her to Nico's farm to fetch her meat. When they arrived on the farm the accused was given the head of a warthog by Nico. The accused and Nico went in a room where they were talking. After they finished their discussion the accused and the complainant left Nico's farm. At home accused cooked the meat she was given by Nico. The following day the accused was very angry with the complainant and told the complainant that she was tired of her. She could not take it any longer for the complainant to continue surviving from her 'husband' while there were men who could support her and she was refusing them. The accused was very angry with the complainant that day and she said nasty things to her.

[15] The complainant left the accused's house and went to the bush not far from the accused's place. She was crying. After sometime, Nico and another person arrived at the accused's place. After the accused finished greeting the two men, she went into her room and threw the complainant's bags out of her room. She called the complainant in her room and told her to disappear from her place. She further said Nico and the other men came to fetch her. The complainant collected her bags from where the accused threw them. Nico took the bags from the complainant; he carried one bag and he gave the other bag to his friend. The accused escorted them halfway. When the complainant, Nico and his friend reached the farm, Nico started to have sexual intercourse with the complainant. She could not remember very well whether it was the same day or the following day. Nico told the complainant that she had now become his wife as she was given to him by the accused. He told her that the time he is going to be with her he would not give her money because he was going to give the money to the accused. Nico had sexual intercourse with her by putting a condom on and inserted his penis into her vagina. He told the complainant that whenever she went to bed she must be naked. Nico had sexual intercourse with her several times. If the complainant forgot to take off her clothes when she was in bed, Nico would beat her for not obeying his instruction.

[16] At one stage whilst the complainant was living with Nico, she became sick. She was bleeding profusely. She reported to one Haufiku who was also staying on the farm that she was bleeding heavily. Haufiku told the accused. The accused came the following day. She brought along the health passport that she was using whenever she took the complainant to the hospital. When the complainant came from the village whilst she was with Johnny, the accused took her to the family planning clinic and she was injected. From there she did not get her menstruation. The accused gave her a card that she used for family planning. Before the accused gave the complainant a health passport she scratched out the original name that was on the card and told the complainant to write her name on the health passport. The accused completed the part where the complainants' parents' names were supposed to be written. The accused wrote her name on the place where it was indicated 'mother's name.'

[17] The accused told the complainant that the card would be hers and that she, the accused, would be keeping it. One day when it was time for her to take her children for immunization, the accused told the complainant that she wanted her to start with family planning. When they went to the clinic she spoke to the nurse. She informed the complainant that she was going to receive the injection. The nurse tried to communicate to the complainant in English and Afrikaans but the complainant did not understand her. That day the complainant was given family planning injection. The accused told the complainant that if she is injected she would not fall pregnant. The health passport was admitted in evidence as Exhibit 'D'.

[18] When the accused brought the health passport after she was phoned by Haufiku, she told the complainant that she was not going to the hospital. Nico arranged for transport to take the complainant to the hospital.

[19] One day after Nico got his salary he went to town and never returned to the farm. The accused was informed by Haufiku that Nico had left the farm. The accused told Haufiku that complainant should just remain at that farm.

[20] One day, Nico's boss came and offered her a job as a domestic worker. He said he would be paying her N\$200 a month. She accepted the offer. She worked as a domestic worker for a month. After a month the accused fetched her from Nico's farm. The accused said she was not supposed to work because she only gave the complainant to Nico as 'a wife.' The accused took her to their farm where she stayed for about a month. After sometime the accused chased the complainant away from her house. She threw the complainant's luggage outside in the bush. From that time the complainant went to stay with Helena from her village. She found Helena on the farm where the accused was staying when she came back from Nico's farm. Before the complainant left the accused's place, the accused took the money from her that she was paid as a domestic worker. The complainant stayed with Helena for two days. The accused fetched her from Helena's place and took her to Okahandja to the busses to go

back to the village. The accused paid for the complainant's trip back to the village with the money from her (accused's) boyfriend.

[21] The complainant further testified that she is an orphan. She was brought up by her mother's sister. The accused offered her a job because of the poverty situation in which she was. It was again complainant's evidence that the accused by doing what she did to her had destroyed her life. She has no future and she is psychologically affected because right now she is not thinking straight or properly.

[22] Helena Mutweumwe from the complainant's village and a cousin to the accused testified that she was approached by the accused to leave school and move to Okahandja to go and stay with a man who was looking for a girlfriend. Helena declined the offer at first but after she dropped out of school she phoned the accused and told her that she wanted to go to Okahandja. The accused should get a job for her. The accused promised to get a job for her in the salon. When the witness went to Okahandja the accused paid for her transport. When Helena arrived at Okahandja she, the accused and the complainant spent three nights at the house of accused's sister. The complainant had come for her follow up for family planning. At the clinic the accused and the complainant went inside and Helena remained outside. The accused told Helena to go for family planning but she refused. When the complainant, the accused and Helena went to the farm, Helena was given by the accused to Kuvamba to be his girlfriend. It is alleged that Kuvamba paid for Helena's transport from the village to Okahandja. It was further Helena's testimony that the accused would complain that Kuvamba, the man to whom Helena was given by the accused, never gave her a gift as a means of thanking him for securing Helena for him. Helena took the man she was given by the accused because of the suffering or poverty in which she was. Helena did not know Kuvamba before.

[23] When Helena and the accused went to Kuvamba, the accused told Helena that Kuvamba is 'the guy who gave me money to look for him a girl and he is the one who gave me money to pay for the transport.' Kuvamba confirmed that it was him who gave

the money to the accused to search for him a girl and gave the money for the girl to pay for transport. The accused took Helena's bag to Kuvamba's room. When the accused and Helena met Johnny, the accused whispered in Helena's ear that if Helena had come earlier she was going to be Johnny's girlfriend. The first day the witness arrived on the farm she spent a night at Kuvamba's room. She remained there up to date. On the third day they had sexual intercourse and continued to have sexual intercourse thereafter. According to Helena, the complainant stayed with her after she was chased by the accused. The accused asked Helena why she was keeping the complainant as she had given a man to each of them. The accused told Helena that she sent the complainant back to the north because the complainant reported the accused to a certain Oupa that she had stolen corrugated iron sheets.

[24] Ndapandula Jonas, a sister to the accused, testified that the accused phoned her and told her that she found employment for the complainant at Okahandja. The accused requested the witness to give her (Ndapandula)'s birth certificate to the complainant to use it as identification document if requested at the roadblocks on her way to Okahandja because the complainant did not have a birth certificate.

[25] Monika Kaushake Johannes, the accused's neighbor, testified that one day whilst at a market at Okahenge Village in the North and in the company of the complainant and Helena they were approached by the accused. She informed them to go to Okahandja to be with the accused's male friends who were looking for girlfriends. They all refused. She further testified that the complainant told her that she was leaving for Okahandja to take up employment secured for her by the accused. It was the witness' testimony that whilst the complainant was in Okahandja district, Helena had phoned her and informed her of how the accused had been selling the complainant to different men. The accused was receiving money from those men. Before the complainant left for Okahandja, she went to the witness at 03h00 and informed her that she was going to Okahandja because the accused got her a job. This was after some time when the accused approached them that there were men in Okahandja who wanted girlfriends.

[26] Wilbartine Toteya testified that she was approached by the accused who told her that her boss in Okahandja sent her to find him a housekeeper. The witness did not accept that offer because she had a newly born baby to look after. The witness said the accused approached her on 27 March 2012. It was the witness' further evidence that when the complainant returned from Okahandja, the complainant told her how she suffered at the hands of the accused who was giving her to men for sexual activities.

[27] Eilla Ndapwa Kahenge testified that she was an aunt to the complainant. When she realized that the complainant and Helena disappeared from the village, she phoned the accused to inquire if they were with her. The accused denied that they were with her and she later started to reject Kahenge's calls. She further testified that the accused had visited Toteya's home whilst Toteya was on maternity leave. It was again Kahenge's testimony that when the complainant returned from Okahandja she narrated to her how she was deceived by the accused and how the accused caused her to be sexually exploited.

[28] Katjiporere Kuvamba testified that he had requested the accused to get him a girlfriend and the accused gave him Helena as a girlfriend. He gave N\$250 to the accused for Helena's transport from Okahenge Village to Okahandja. When the witness was confronted through cross-examination that he told the police that he came to know Helena through the accused's boyfriend and that he never gave money to the accused, the witness testified that the accused was the one who was making arrangement between Helena and the witness. When Helena and the witness were talking through the phone the accused was the one who was interpreting because Helena and the witness could not understand each other. The witness said he lied to the police because he was afraid to tell the truth. He said it was wrong to call a person from Oshakati area to the farm.

[29] Warrant Officer Ello Pombili Hamukwaya testified that he was the Scene of Crime officer. On 23 November 2015, he took photographs of the two different places where the alleged offences took place. These places were pointed out to him by the

complainant. These places are situated at Farms Ravensberg and Droogbos. The witness explained his photo plan as per Exhibit F. According to the photo plan the complainant pointed out the places where she was staying with Johnny and the place where she stayed with Nico.

[30] Steven Bonga Kativa testified that he was part of the investigative team from the beginning and that he arrested the accused. He interviewed the accused and took a statement from her with the help of an interpreter but there is no certificate of the interpreter attached on the statement to confirm such interpretation. He also testified that there were two other suspects who could not be traced.

[31] The next witness called by the state was Samuel Haindongo who testified that he was the accused's boyfriend during 2012. He confirmed that he was present when the accused and Johnny arranged for the accused to get him a wife. He had also witnessed Johnny giving N\$200 to the accused for the transportation of the complainant. The accused was given the N\$200 by Johnny on Droogbos Farm. The accused then went to the North and phoned Johnny from there in his presence. The witness asked Johnny with whom he was talking. Johnny said he was talking to the accused and that the accused had found him a wife. One day Johnny, the accused and the complainant came from Okahandja. The accused introduced the complainant to him as Johnny's wife. Johnny and the complainant were staying together for about three months and they separated. The witness further testified that the accused had given Helena to Katjiporere Kuvamba as a wife. After the complainant separated with Johnny, the accused gave the complainant to Phillip. Thereafter, the complainant went to stay with Nico. Later on the complainant moved to the farm where the accused and the witness were staying.

[32] When the complainant was staying with them, the accused went to Windhoek. When she returned, she accused the complainant of having a sexual relationship with the witness, because according to the accused, there were condoms at home and when the accused came back one condom was missing. The witness testified that he never

slept with the complainant. The witness confirmed that he gave N\$200 to the accused to give it to the complainant to return to the village.

[33] Doctor Esther Gideon testified that she examined complainant on 19 February 2013 in connection with an alleged rape that took place during 2012. The examination took place at Oshakati Hospital. Her findings were that the hymen was not intact, but no abnormalities were detected. It cannot be excluded that sexual intercourse took place because the hymen was broken and the examination was conducted a long time after the alleged rape had taken place. Even if there was any scar, injury or trauma it could have healed.

[34] Karianda Siegfried Yuhanuka, who was staying on Farm Ravensberg with Nico, testified that one day when they went to look after cattle they passed at the farm where the accused was staying. Nico went to talk to the accused. Nico and the witness went back to their farm. Nico went to the accused's farm to see the lady he was told about by the accused. Nico said he wanted to see the lady before he gave N\$250 to the accused in connection with the lady. A few days after the complainant came to Nico's farm Nico introduced the complainant to the witness and told him that he had brought his woman. After the complainant separated with Nico she was working on the farm and the witness paid her N\$350 as a wage. The accused was the one who caused the complainant to leave her job.

[35] Detective Warrant Officer Celestine Shotete Alweendo testified that she investigated this matter. Her evidence mainly consisted of what she was told by the witnesses. She testified that the complainant was given to three men for sexual relations. All these three men's whereabouts are unknown. The accused recruited the complainant by means of deception. She was promised a job and when she arrived at Okahandja there was no job opportunity that she was promised. Instead, she was given to men for sexual exploitation. This concludes the summary of the evidence led by the State.

Defence case

[36] The accused, Tuufilwa Ndawina Jonas, testified under oath and called no witnesses. She testified that she is currently 34 years of age. She lived in Okahandja on a farm during 2012 with her boyfriend Samuel. During March or April 2012 she travelled to Okahenge village at her grandmother's house to visit her family. Whilst in Okahenge she met the complainant and Helena. The complainant's mother and the accused's mother are half-sisters. They share one father. The complainant went to the house of the accused's grandmother. They never discussed anything apart from the complainant taking the accused's cellphone number. During that time the complainant was not attending school. They never discussed how the complainant was coping with life. She never requested the complainant to go to Okahandja. Instead, it was the complainant who phoned the accused and told her that she wanted to visit her at Okahandja. She further testified that although she stayed in Okahenge for a month she did not meet with Monika Johannes or any of the witnesses who testified except the complainant and Helena.

[37] It was further her evidence that she did not give the complainant N\$200 for transport. She denied having encouraged the complainant to leave school. She never promised the complainant any job. Accused again denied having promised Helena a job. She denied that she told Monika Johannes that there were men in Okahandja that wanted girlfriends, because she did not meet her.

[38] When the complainant went to Okahandja the bus driver phoned the accused to ask her where the complainant was supposed to be dropped and the accused said she must be dropped at Engen Service Station. After she was dropped off, the accused went to fetch her and they went to the house of the accused's sister in Okahandja. They stayed for two days and the complainant was taken to town so that she could go to the farm. She was dropped at the farm and the accused did not accompany her. The accused only went to the farm after two weeks. She found the complainant at the room of Samuel, the accused's boyfriend. Whilst she was on the farm the complainant met

Johnny who became her boyfriend and she went to stay with him. The accused denied having had any conversation with Johnny to get him a girlfriend. She denied having received N\$200 from Johnny to pay transport for the complainant or receiving any money from men to find them girlfriends. The complainant moved on her own to Johnny's place.

[39] The accused denied that she took the complainant's luggage out of her room and took it to Johnny's room. She never forced the complainant to go and stay with Johnny. She never refused to give food to the complainant. She never became angry and aggressive towards the complainant because the complainant did not want to have boyfriends. She also denied that she and her boyfriend could no longer look after the complainant. The accused testified that there was never a day the complainant reported to her that she did not want to have sexual intercourse with Johnny and that she never forced the complainant to sleep with Johnny because Johnny paid for her transport fees. The complainant never reported to the accused that Johnny was mistreating her. When Johnny went to Okahandja and did not come back the accused told the complainant to come back from Johnny's room in order to go and stay with them but she did not go back. It was again the accused's testimony that she never controlled or restricted the complainant's movements. The accused testified that she never received any money from Johnny or meat because she found him a girlfriend in the person of the complainant. The accused and the complainant had an open relationship and the complainant had no reason to be scared of the accused.

[40] It was further the accused's testimony that she never forced the complainant to go for family planning. There was no discussion at all concerning family planning except when the complainant asked the accused if there was a nearby hospital. The accused told her that if she wanted to go to the hospital she should wait until she takes her children for immunization. The complainant told her that she wanted to go for family planning. She denied having provided a health passport to the complainant. However, she had seen the health passport with the complainant she did not know where she found it. The accused never scratched any particulars from the health passport. She

never added any particulars on the health passport or instructed the complainant to put her particulars on the card. Although they went together to the hospital, they went into two different rooms. The complainant went to the family planning room alone. The accused never spoke to a nurse. The accused only came to learn English whilst she was in custody. The complainant had her health passport at all maternal times and there was not a time the accused kept the complainant's health passport. The accused denied having received 10 kg of sugar from Johnny because she gave him the complainant as a girlfriend. She never arranged for the complainant to be Johnny's wife.

[41] The accused further testified that she knew Phillip because their farms were not far from each other. She denied that she introduced the complainant to Phillip. She never knew that there was a relationship between Phillip and the complainant. She never forced the complainant to have sex with Phillip. She never knew that Phillip wanted to have sexual intercourse with the complainant. She never knew that the complainant ran away from Phillip. The complainant never reported to her such an incident. The accused never went with the complainant to Phillip's farm for a visit. They only called them to get meat when the complainant and the accused were passing through their farm. She never encouraged the complainant to be Phillip's girlfriend in order to be given meat. Phillip never visited the accused's farm whilst the complainant was staying there.

[42] The accused testified that she knew Nico because he was her boyfriend's friend. He would come and visit them. He also came to visit them whilst the complainant was on the farm. The accused and the complainant went to Nico's farm to fetch some meat. She never forced the complainant to go to Nico's farm. She never told the complainant to remain at Nico's farm. At the beginning she did not know that there was a sexual relationship between the complainant and Nico. She only came to know at a later stage when the complainant used to go to Nico's farm alone. When the complainant left the accused's farm that was the day she told the accused that she was going to Nico's farm. She stayed there. There was no time when the accused chased the complainant away because she did not want to be with a boyfriend. The accused never received

money from Nico to arrange for him a girlfriend. The accused never told the complainant that she received N\$200 from Nico for transport fares. She never told the complainant she could no longer take care of her. She never chased the complainant to the bushes. She never forced the complainant to have a sexual relationship with Nico. She never mistreated the complainant to such an extent that she was forced to go and stay with Nico because she had no other option. The complainant never reported to the accused that Nico had sexual intercourse with her against her will. The complainant only told her that Nico was beating her up that is when the accused intervened. The complainant was like a sister to the accused that was the reason she intervened. There was a meeting between Nico's boss, the accused, the complainant and Nico.

[43] The accused's further testimony was that she could not recall an occasion when Nico and his friend came to fetch the complainant from the accused's farm. The complainant went on her own to Nico's farm. The accused never had a problem for the complainant to take up employment. She never caused the complainant to lose her job. She never confronted the man who gave the complainant a job. She never took money from the complainant. The complainant left Nico's farm because Nico left her there and she came to stay with the accused. The accused never refused to give the complainant food. The accused denied that she accused the complainant of sleeping with her boyfriend. The complainant and the accused's boyfriend insulted the accused because she inquired about the missing condom. Complainant removed her things on her own from the accused's place and went to stay with Helena. The accused followed her to Helena's place to go and apologize. The complainant had reported the accused for stealing zinc plates from the farm. Because of the relationship between the accused and the complainant that had gone sour the accused and the boss discussed that the complainant should go back to the village.

[44] The accused's boyfriend gave money to the accused to pay transport for the complainant to go back. The accused again testified that whilst the complainant was on the farm she never communicated with the complainant's family. None of the complainant's family members asked her where the complainant was. The accused

denied to have requested her sister Ndapandula to give her birth certificate to the complainant. She denied to have received Ndapandula's birth certificate from the complainant.

[45] With regard to Helena going to the farm, Helena asked for the accused's cell phone number whilst the accused was at Okahenge village. She was unemployed and she did not go to school. The accused never arranged a man for Helena. Helena went on her own to the farm. She was not promised a job or a boyfriend. When Helena came to Okahandja the accused collected her from Engen Service Station. The accused paid her transport fares because she said she did not have money. The accused did not receive any money from any man in respect of Helena's transport. She denied that she interpreted for Helena or the complainant because of the language barrier. The accused testified that when Helena arrived at the farm, she was staying at the accused's place. It was only at a later stage when she met Katjiporere Kuvamba. The accused did not know of the circumstances how Helena became Katjiporere's girlfriend. The accused never got any benefit from Katjiporere because of their relationship. She never received any money from Katjiporere to be used for Helena's transport. The accused denied that she misused her power to get the complainant into sexual relationships with men. The accused was arrested on 24 November 2015. The police never found her in possession of the complainant's health passport.

Submissions by counsel

Counsel for the State

[46] Counsel for the State argued that although the complainant was a single witness, she came across as being truthful and reliable. Her evidence was supported in many respects by the evidence of other witnesses called by the State. Helena's version showed that the modus operandi employed by the accused to recruit the complainant was similar to that used in respect of Helena. The same modus operandi was used in respect of Monika and Wilbartine Toteya. All of them were four young ladies who were

approached by the accused. The accused wanted to traffic all of them to Okahandja. The complainant's evidence that the accused offered her a job opportunity is corroborated by the evidence of Ndapandula Jonas, the accused's sister, who testified that the accused phoned Ndapandula and informed her that the complainant would be travelling to Okahandja to take up employment at the farm where she was employed. In addition to that, the accused asked Ndapandula to give her birth certificate to the complainant as a means to deceive the police at the roadblocks.

[47] Furthermore, Samuel Haindongo the accused's boyfriend testified that he was present when the accused and Johnny were making arrangements for the complainant to travel to the farm as Johnny had requested the accused to find him a girlfriend. He was also present when the accused was given N\$200 by Johnny for the purpose of transporting the complainant to Okahandja. Again, Katjiporere Kuvamba approached the accused and offered N\$250 for Helena to be transported from Okahenge to Okahandja. The complainant's version had been corroborated in material respects. Comparing it to the accused's version, the accused merely made a bare denial claiming that all the witnesses came together and concocted the story because they were her enemies. The version that the witnesses were enemies to the accused was never put to them.

[48] Furthermore, counsel argued that two mutually-destructive versions had been presented before the court and the court should consider the evidence as a whole for the court to come to a proper and just conclusion. The accused committed acts of human trafficking by recruiting the complainant by using deceitful means and the purpose was sexual exploitation. After the complainant arrived in Okahandja, she recruited her for Johnny. Once Johnny had finished with her, she recruited her for Phillip. Phillip did not succeed to sexually exploit her. She then recruited her for Nico who also exploited her sexually. Furthermore, the accused had been charged with contravening s 2 (1) (b) of the Combating of Rape Act. She did not physically rape the victim but she is a contributing factor, the driving force that led to the complainant being sexually assaulted by all three men. The accused had also made verbal threats to the

complainant and those rape and attempted charges had been proved. Counsel argued that, the State had proved the attempted rape because when Phillip approached the complainant he was half naked because he was only wearing his underpants and a condom. Counsel further submitted that the accused should be convicted on all the counts as charged.

Counsel for the defense

[49] Counsel for the defence argued that the State had failed to prove its case beyond a reasonable doubt. The complainant testified that when she arrived in Okahandja, she was already 18 years old. Although the complainant testified that she was given N\$200 for the transport she also testified that the accused said when the complainant started to work she must refund the money to her, which meant the money was given as a loan. Counsel further argued that if the court had regard to the evidence of Monika who testified that she was with the accused person, Helena and the complainant when they were approached by the accused and informed that there were her male friends in Okahandja who wanted girlfriends and that all of them agreed to come to Okahandja for boyfriends. It must follow that whilst at the village, the complainant was aware that she was going to Okahandja to get a boyfriend. She made an informed decision to come to Okahandja whilst the other two refused.

[50] Helena had also testified that she was aware of the reason she was going to Okahandja, namely to meet her boyfriend. Counsel argued further that the complainant lied to the court that she was offered employment whilst she knew already of the reason why she went to Okahandja. Concerning the birth certificate, counsel argued that the complainant gave conflicting versions. Firstly, she said she found the birth certificate in the bag of the accused's sister that was given to her and later on through cross-examination she said there was no conversation regarding a birth certificate. However, she later on changed her version that the accused person told her to travel with the accused's sister's birth certificate to show it at road blocks if it happened to be demanded from her. She again said that the accused's sister demanded the birth

certificate from her as she had to register for Grade 10 examinations. The complainant then sent back the birth certificate to the accused's sister.

[51] Counsel further argued that the complainant lied that she was forced by the accused to go for family planning. She also lied that she could not inform the nurse because of the language barrier. Why counsel argued that the complainant lied was because when she was cross-examined, she said she visited the clinic on eight occasions. When asked why did she did not then inform the nurse that she did not want family planning, she could not give a satisfactory explanation. The reason why she could not give an explanation was because she is not a reliable witness and her credibility is questionable so, counsel argued.

[52] Furthermore, counsel argued that if it was true that the accused caused the complainant to be sexually exploited by men she could have reported it earlier on. She even went with Nico to the hospital, but she never reported him. Again in respect of rape counts, the complainant when she came from her village to Okahandja she was aware that she was coming to her boyfriend Johnny. She stayed with Johnny for two months and half and she went back to the accused. She never reported Johnny to other people. With regard to the attempted rape, the complainant met up with Phillip on her own. She was not forced to go to Phillip. When Phillip went to her naked and with a condom on, they did not talk to each other and there was no further engagement. Therefore, this did not amount to attempted rape. This may only amount to indecent assault or *crimen injuria*.

[53] Counsel further argued that the State had failed to call the nurse who attended to the complainant in connection with family planning to explain what exactly transpired. It was again counsel's point of criticism that if it was true that the accused was in possession of the health passport, the police were not going to recover it from the complainant. This is an indication that the complainant was not a reliable witness.

[54] Furthermore, the fact that the complainant's hymen was broken is an indication that she has had sexual intercourse but it did not prove that the hymen was broken due to the alleged incidents of rape.

[55] Counsel argued that there is no onus on the accused to prove her innocence. The court does not have to believe the accused's version that it is true. It is enough if the version of the accused is reasonably possibly true. The State case as well as the defence case is based on the evidence of a single witness and counsel had drawn the attention of the court to the provisions of s 208 of the Criminal Procedure Act 51 of 1977. Counsel had also argued that there could be duplication of charges. However, he did not specifically point out which of those charges could be a duplication. Counsel prayed that his client should be acquitted on all counts.

Both counsel referred the court to relevant authorities and the court is very grateful to them.

Applicable Law

[56] Section 1 of POCA defines 'trafficking in persons' as follows:

'The recruitment, transfer, harboring, or receipt of persons by means of threat or use of force or other forms of coercion, the abduction, fraud, of deception, of the abuse of power, or of a position of vulnerability or of the giving or receiving of payment or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation and includes any attempt, participation or organizing of any of these actions. Exploitation includes at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'

Count 1

[57] Starting with the first count, being a contravention of section 15 read with s 1 of POCA, in terms of s 15 of POCA it is an offence for anyone to participate in or to aid

and abet the trafficking of persons in Namibia as contemplated in Annexure 11 of the United Nations Convention Against Transnational Organised Crime and the Protocol thereto adopted by the General Assembly Resolution 55/25 dated 15 November 2000. This convention is the main international instrument in the fight against transnational organised crime.

[58] Article 3 of Annexure 11 reads as follows:

'For the purposes of this Protocol:

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

[59] The complainant is a single witness in some material respects. However, the court may convict on evidence of a single witness if certain requirements are reached. In the matter of *S v Sauls and Others* 1981 (3) SA 172 (A) at 180 E-H the court held:

"The trial judge will weigh 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, is satisfied that the truth has been told."

Apart from the complainant who testified that she was approached by the accused who promised her employment in Okahandja there is evidence from other three young women who corroborated the complainant's version that the accused was on a mission and approached young girls either to become girlfriends to his male friends who were in Okahandja or promising them jobs. Monika Kaushake testified that whilst she was in the company of the complainant and Helena Mutweumwe at King Palace Market, the accused approached them and told them to go to Okahandja to be with her male friends. All three girls declined the offer. This version was corroborated by Mutweumwe who said the accused told her to move to Okahandja to go and stay with a man who was looking for a girlfriend. Helena declined the offer because she was still at school. However, when she dropped out of school she phoned the accused to get her a job. The accused then promised to get her a job in a salon. Their version has also been corroborated by the version of Wilbartine Toteya who said she was approached by the accused who told her that the accused's boss in Okahandja told her to find a housekeeper. Again, the accused denied that she ever approached Toteya or that they met at all. However, Kahenge gave evidence that the accused came to see Toteya whilst Toteya was on maternity leave.

[60] Although Kaushike testified that she was approached while in the company of the complainant and Helena Mutweumwe, neither the complainant nor Mutweumwe testified that they were together when they were approached. The complainant also did not testify that the accused first told her to go to Okahandja to be a girlfriend to his male friends who wanted girlfriends.

[61] Except the evidence of the young ladies who testified that they were approached by the accused as mentioned earlier on, Katjiporere Kuvamba testified that he had requested the accused to get him a girlfriend. The accused arranged for Helena to be Kuvamba's 'wife' and Kuvamba in turn gave N\$250 to the accused for Helena's transportation from Okahenge Village to Okahandja. Although the witness in his statement to the police denied that the accused ever gave him Helena and that he paid

N\$250 for Helena's transport, the witness admitted in court that he lied to the police. He said he did so because he was scared. Samuel Haindongo, the accused's boyfriend, also confirmed that he was present when the accused and Johnny arranged for the accused to get him 'a wife.' He had also witnessed Johnny giving N\$200 to the accused for the transport of the complainant. When the complainant arrived on the farm, the accused introduced the complainant to Haindongo 'as Johnny's wife.'

[62] Looking at the totality of the evidence regarding the complainant's travel to Okahandja and the evidence tendered by other witnesses as mentioned above, it is evident that the accused indeed approached the complainant and other young ladies and offered them to go to Okahandja to be his male friends' girlfriends. After the offer was declined, the accused tricked them by telling them that she would get them employment. This trick can also be confirmed by the evidence that when the accused gave N\$200 to the complainant, she told her that she would have to refund it once she starts working. However, when the complainant arrived in Okahandja she was told by the accused that the money she used for transport was paid by Johnny. Although there has been some discrepancies in the complainant's testimony by omitting to testify that she was first approached by the accused and told that the accused had male friends in Okahandja who wanted girlfriends, as well as discrepancies in Kuvamba's testimony, this court is satisfied on a conspectus of the evidence of the State witnesses that the complainant and Kuvamba are truthful witnesses despite the fact that there are some shortcomings or contradictions in their testimonies. It has been established beyond reasonable doubt that the accused approached the complainant and the other girls with an indecent proposal for them to become girlfriends to his male friends in Okahandja. After they declined the offer, the accused promised to get the complainant and Helena jobs. But when they arrived in Okahandja they were given over to men they had never met before.

[63] The accused did not offer a defence. Although counsel argued that there were mutually destructive versions before court, on the contrary, the court's finding in this regard is that there was only one version and bare denials. The accused only offered

bare denials. The explanation that she did not recruit the complainant cannot be reasonably possibly true in the circumstances. There is overwhelming evidence that the accused used the same modus operandi to recruit her victims. It cannot be a coincidence that all the four witnesses testified about the same modus operandi. The accused claimed that the State witnesses were her enemies and decided to concoct stories in order to incriminate her. However, it has never been put to the State witnesses especially the ladies who testified, that they were the accused's enemies. In light of the totality of evidence as far as the recruitment of the complainant from Okahenge to Okahandja is concerned, the accused is not a truthful witness. Her evidence is rejected as it cannot reasonably possibly be true.

[64] Having considered the definition in section 1, read with section 15 of POCA, this court is satisfied that the complainant is a vulnerable person because she was an orphan who came from a less privileged background. The complainant travelled to Okahandja during May 2012. However, according to the health passport, the complainant was born on 6 June 1994. When she was testifying on 6 June 2019 counsel for the defence congratulated her on her birthday. If one had regard to the complainant's birth date, she was a few weeks shy away from her 18th birthday. She was not yet 18 years old. However, the charge did not refer to the complainant as being under the age of 18 years. Therefore, this court will not regard her as such. Instead, it accepts that the complainant was already 18 years old at the time of the recruitment.

[65] The accused recruited, transferred and received the complainant by means of fraud, deception, the abuse of power or position of vulnerability. She promised the complainant a job although she had no intention of providing her with a job. The entire purpose of recruiting the complainant was to facilitate her sexual exploitation. The accused received and gave complainant N\$200 to travel. Section 15 of POCA makes it an offence for anyone to participate in or to aid and abet the trafficking of persons in Namibia as contemplated in Article 3 of Annex II of the Convention referred to in the preceding paragraphs of this judgment. As earlier mentioned, Annex II (b) of the Convention states that the consent of a victim of trafficking in persons to the intended

exploitation set forth in subparagraph (a) is irrelevant where the means set forth in subparagraph (a) have been used. The accused employed some of the means mentioned in subparagraph (a) of Article 3 of Annex II. She recruited and facilitated the transportation of the complainant; she received the complainant through fraud or deception; she abused the vulnerability of the complainant, and she received payments or benefits to achieve the consent of the complainant for the purpose of sexual exploitation. Therefore, counsel for the defence's argument that the complainant was aware that she was going to the farm to have a boyfriend does not amount to a defence.

[66] What the accused did in respect of count 1 amounts to a contravention of s 15 read with section 1 of POCA. I am therefore satisfied that the State has proved the 1st count beyond reasonable doubt and the accused is found guilty as charged.

Count 2

Contravening section 2 (1) (b) as read with sections 1, 2(2) 3, 5, 6 and 18 of Act 8 of 2000 – Rape.

Combating of Rape Act 8 of 2000

[67] Section 2(1) (b) of the Combating of Rape Act 2000 reads as follows:

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

(a).

(b) causes any person to commit a sexual act with the perpetrator or with a third person, shall be guilty of rape.'

[68] Section 2(2) provides that for the purpose of subsection (1) 'coercive circumstances ' includes, but is not limited to-

'(a).. . . .

(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).

(e).

(f) circumstances where the complainant is affected by –

- (i) physical disability or helplessness, mental incapacity or other inability (whether permanent or temporary) to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act.’

[69] There is evidence that after the accused received the complainant at Engen Service Station she went with her to her sister’s house where they spent a night. Thereafter the accused, the complainant and Johnny arrived at the farm. The complainant’s evidence that she arrived with the accused on the farm is corroborated by Haindongo. Although the accused denied that she was in the company of the complainant when she arrived on the farm, I regard this is a mere denial. When the complainant arrived in Okahandja, she did not know any person at the farm apart from the accused. It is highly improbable that the accused would send the complainant unaccompanied by her. The complainant testified that upon arrival at the farm whilst they were seated under a tree, the accused informed her that she did not take her to the farm to work but that there was a man who wanted the complainant to be his girlfriend; she mentioned Johnny’s name. She again disclosed to the complainant that the money she used for transport was from Johnny. She threatened the complainant that if the complainant did not want to go to Johnny she must find a place to stay. According to the complainant, the accused sounded very angry. The complainant was forced to go to Johnny’s place. The complainant had no other alternative but to go to Johnny’s place because she was in a state of helplessness. The first day the complainant spent a night at Johnny’s place she refused to have sexual intercourse with Johnny. The following day when the accused learned about her refusal she became very angry with the complainant.

[70] She demanded to know from the complainant why she did not want to have sexual intercourse with Johnny and reminded her that Johnny paid for her transport to Okahandja. The complainant was warned that it should be the last time for her to refuse to have intercourse with Johnny. The following day the complainant had sexual intercourse with Johnny and she continued to have intercourse with him on several occasions. The complainant's version that she was given to Johnny as a 'wife' is corroborated by the version of Haindongo as indicated earlier. It is not disputed that the complainant had sexual intercourse with Johnny. The only dispute is whether it was the accused who caused the complainant and Johnny to have sexual intercourse.

[71] Looking at the evidence in its totality, I find that the complainant's evidence as well as that of Haindongo is more reliable in this regard. It has got a high degree of probability than the accused's mere denial. Looking at the evidence as a whole, there are more pointers which favour the State's version as opposed to that of the defence's version. The accused was even given 10kg of sugar and meat in exchange for the complainant to have sexual relations with Johnny. The complainant stayed with Johnny from May to July 2012.

[72] Although the accused herself did not have sexual intercourse with the complainant, section 2 (1) (b) of the Combating of Rape Act makes it an offence if any person intentionally under coercive circumstances causes any person to commit a sexual act with the perpetrator or with a third person. The accused coerced the complainant to have sexual intercourse with one Johnny by threatening her to remain without shelter in circumstances where the accused knew very well that the complainant was a stranger at the farm, in the bush. The only person at the farm she knew at the time was the accused. The money that she paid for her transportation to Okahandja was used as a means to threaten her and to forcibly induce her to have sexual intercourse with a stranger against her will. The complainant was in a state of helplessness to such an extent that she was deprived of the opportunity to communicate her unwillingness to submit or to commit the sexual act with Johnny.

For all these reasons, I am satisfied that the State has proved the second count beyond a reasonable doubt.

Count 3

Contravening section 2 (1) (b) read with section 1, 2, (2) 2 (3), 3, 5, 6, 7 and 18 of Act 8 of 2000 – Rape further read with section 94 of the Criminal Procedure Act.

Criminal Procedure Act 51 of 1977

[73] Section 94 of Act 51 of 1977 provides as follows:

'Charge may allege commission of offence on diverse occasions –
Where it is alleged that an accused on diverse occasion during any period committed an offence in respect of any particular person the accused may be charged in one charge with the commission of that offence on diverse occasions during a stated period.'

According to this section, it is not necessary to specify the dates on which different offences were committed in respect of the same person. The various offences may be joined in one charge and it is sufficient merely to allege the period.

[74] Complainant testified that after the first day, she had sexual intercourse with Johnny on several occasions from May to July 2012. Sometimes Johnny had sexual intercourse with her twice or thrice a night until the complainant got fed up. The court accepts the complainant's version that the accused caused Johnny to have sexual intercourse with her on diverse occasions. The complainant's version is reasonably possibly true in the circumstances viewing the evidence in its totality. For the same reasons given earlier in respect of the 1st and 2nd counts the court is satisfied that the accused caused the complainant to have sexual intercourse on diverse occasions with Johnny. She coerced her by threatening her verbally. Complainant was in a position of helplessness. The court is satisfied that the accused committed the third count and she is convicted as charged.

Count 4

Contravening section 15 read with section 1 of POCA – Trafficking in persons.

[75] It has already been established that complainant was an 18 years old orphan who came from an under privileged home. Because of her position of vulnerability the accused promised her a job. When she came to the farm she was given to Johnny and after she left Johnny the complainant was given to Phillip by the accused in exchange for carrots and meat. The accused left the complainant at Phillip's place. Phillip asked the complainant whether she was aware that the accused had given her to be his 'wife.' When the complainant left Phillip's place and found the accused on the way, the accused was angry with the complainant. She insulted the complainant, calling her stupid because she did not want to have sexual relations with Phillip. She even went to the extent of not giving the complainant meat that came from Phillip's place. She told the complainant that she did not want the complainant to be at her place because she was refusing the men the accused gave to her.

[76] For the reasons given in the first count and second count, the court accepts the State's version that the accused recruited the complainant for sexual exploitation. The court also rejects the accused's versions for the reasons given in count 1. The court is satisfied that the State has proved its case in respect of the 4th count beyond reasonable doubt and the accused is found guilty as charged.

Count 5

Contravening section 2 (1) (b) read with section 1, 3(2) 3, 5, 6 and 18 of Act 8 of 2000 – further read with section 18 (1) of Riotous Assemblies Act 17 of 1956.

[77] Section 18 (1) of the Riotous Assemblies Act 17 of 1956 provides that any person –

'who attempts to commit any offence against a statute or statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing the offence would be liable.'

[78] It is alleged that the accused caused Phillip to attempt to commit a sexual act with the complainant. Complainant testified that the accused sent her to go and fetch meat from Phillip's place. Whilst there, Phillip went to his room and came back half naked only wearing his boxers and he had put on a condom. The penis was sticking out of his boxers. Phillip walked towards the complainant. The complainant ran away. The question to be decided is whether the actions of Phillip amounted to an attempted rape in terms of the Combating of Rape Act (CORA) read with s 18 (1) of the Riotous Assemblies Act. CORA does not create an offence of attempted rape. However, if a person attempts to commit an offence against a statute he shall be convicted under the Riotous Assemblies Act.

[79] It was held in *S v September* 1999 NR 334 (HC) at 336H – 337A citing *R v Schoombie* 1945 AD 541 at 546 as follows:

'Attempts seem to fall naturally in two classes:

- (a) Those in which the wrongdoer intending to commit a crime, has done everything which he set out to do but has failed in his purpose either through lack of skill, or foresight, or through the existence of some unexpected obstacle, or otherwise.
- (b) Those in which the wrongdoer has not completed all that he set out to do, because the completion of his unlawful acts has been prevented by the intervention of some outside agency. It seems, therefore, that in the case of interrupted crimes and attempt to commit such crime is proved when the court is satisfied from all the circumstances of the case that the wrongdoer at the time when he was interrupted, intended to complete the crime and that he had at least carried his purpose through to the stage at which he was "commencing the consummation."

[80] Applying the above principles to the facts of this case, I am of the opinion that Phillip's actions were mere preparations and did not amount to attempted rape. The accused's actions fall under paragraph (a) of the above dictum. I am therefore not satisfied that the State has proved that the accused had committed attempted rape as charged and she is given the benefit of the doubt.

Count 6

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

[81] It is not in dispute that after the complainant ceased to be with Johnny, she went to stay with the accused and thereafter with one Nico. The complainant went to stay with the accused for about a month. Nico had visited the accused's farm. Thereafter the accused and the complainant went to Nico's farm to fetch meat. This was on a different date where the accused was given the head of a warthog. The following day the accused was very angry and said she could not take it anymore for the complainant to be surviving from her 'husband' while there were men who could have supported her and she was refusing to be in relationships with them. That day Nico visited the accused's place. The accused threw the complainant's bags out of the room and told her to disappear from her place. This was the day the complainant went with Nico. Nico started to have sexual intercourse with the complainant. Although the accused denied that she is the one who caused the complainant to go to Nico, the court regards this as a mere denial. It does not hold water. For the reasons given in respect of the first count and the second count, I am satisfied that the State has proved its case on this count beyond reasonable doubt and the accused is convicted as charged.

Counts 7 and 8

Count 7: Contravening section 2 (1) (b) read with section 1, 2 (2) 3, 5, 6 and 18 of Act 8 of 2000 – Rape.

[82] On this count it is alleged that the accused on an unknown date but during 2012, caused Nico to commit or to continue a sexual act with the complainant under coercive circumstances as described in the charge whilst on the 8th count the accused is charged with a contravention of s 2 (1) (b) read with sections 1, 2 (2) 3, 5, 6 and 18 of Act 8 of 2000 – Rape, further read with s 94 of the Criminal Procedure Act. It appears to me that these two charges are alleged to have been committed on unknown dates but during 2012. However, the 8th count went further and alleged that the sexual acts were

committed on diverse occasions. Reading the allegations in counts 7 and 8, it appears that the alleged sexual act occurred on unknown periods in 2012. I am of the opinion that there has been a duplication of charges. The evidence required to prove count 7 would be the same evidence required to prove count 8. This is in line with *S v Makwele* 1994 NR 53 (HC).

The accused was supposed to be charged with rape that took place on diverse occasions as per count 8. Accordingly, the accused cannot be found guilty on count 7 as it would amount to a duplication of convictions.

[83] With regard to count 8, the complainant testified that the accused made verbal threats to her. She was rendered to be helpless because the accused who arranged for her relocation to Okahandja was chasing her away and giving her to men for sexual exploitation. In light of the complainant's vulnerable position she could not reasonably disregard the threats. The complainant had no alternative but to go with Nico and to be sexually exploited. The court has accepted the complainant's version for the reasons given in counts 1-3 and rejects the accused's versions also for the same reasons given in those counts. There is no dispute that the complainant had sexual intercourse with Nico when she arrived at Nico's farm. Nico continued to have sexual intercourse with her on diverse occasions until such a time the complainant started to bleed heavily. An adverse inference cannot be drawn against the complainant because of her failure to report the offences earlier. The actions of the accused contravened the provisions of s 2 (1) (b) of the Rape Act read with s 94 of the Criminal Procedure Act.

[84] Complainant's version as concerns her association with Nico has been corroborated by Yuhanuka who went with Nico to the accused's farm. The witness also testified that the accused caused the complainant to leave her job.

The accused's version that the complainant went on her own to Nico's place is rejected as it cannot be reasonably possibly true in the face of credible evidence led by the State witnesses. The court accepts the evidence of the complainant as it finds her to be a credible witness whose evidence has been supported by an independent witness on this count. For these reasons and the reasons given in counts 2 and 3 the court is

satisfied that the state has proved its case beyond reasonable doubt. In the result the accused is found guilty as charged on count 8.

Verdicts

1st count:

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

Guilty as charged

2nd count:

Contravening section 2(1) (b) as read with sections 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – RAPE.

Guilty as charged

3rd count:

Contravening section 2(1) (b), read with sections 1, 2(2), 2(3) 3,5,6,7 and 18 of Act 8 of 2000 – RAPE, further read with section 94 of the Criminal Procedure Act 51 of 1977

Guilty as charged

4th count:

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

Guilty as charged

5th count:

Contravening section 2(1) (b) as read with sections 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000, further read with section 18 (1) of the Riotous Assemblies Act 17 of 1956.

Not guilty and acquitted.

6th count:

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

Guilty as charged

7th count:

Contravening section 2 (1) (b) as read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – RAPE.

Not guilty and acquitted

8th count:

Contravening section 2(1) (b), read with sections 1, 2(2), 2(3) 3,5,6,7 and 18 of Act 8 of 2000 – RAPE, further read with section 94 of the Criminal Procedure Act 51 of 1977.

Guilty as charged

NN SHIVUTE

Judge

APPEARANCES:

THE STATE:

Ms Shikerete

Office of the Prosecutor-General, Windhoek

ACCUSED:

Mr Engelbrecht

Engelbrecht Legal Practitioners