

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: CC47/2019

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES
REVISED: NO

In the matter between

THE STATE

and

ALABA MAKUNJUOLA OSABIYA
(Hereinafter referred to as the Accused)

Accused

JUDGMENT ON THE MERITS

MORRISON AJ

[1] The Accused, **Alaba Makunjuola Osabiya** is a 38-year-old male and a Nigerian national, who was 33 years of age at the time of the alleged commission of the offences.

[2] The Accused was tried in this Court on charges of:

Counts 1 and 2: Trafficking in persons in contravention of section 4(1) of the Prevention of Trafficking in Persons Act No 7 of 2013;

Count 3: Participating in a conspiracy in contravention of section 49(7) of the Immigration Act No 13 of 2002;

Count 4: Being in possession of an identity document to facilitate movements across the borders in contravention of section 49(15(b)(iv) of the Immigration Act No 13 of 2002;

Counts 5 and 6: Production of child pornography in contravention of section 27(1)(a) of the Films and Publications Act No 65 of 1996;

Count 7: Possession of child pornography in contravention of section 27(1)(a) of the Films and Publications Act No 65 of 1996;

Count 8: Using services of victims of trafficking in contravention of section 7 of the Prevention of Trafficking in Persons Act No 7 of 2013; and

Count 9: Compelling or causing children to witness sexual offences or sexual acts in contravention of section 21(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007.¹

Introduction: background

[3] The charges stem from events following on information regarding trafficking in person received by a private investigator, Pierre Erasmus, who on 3 July 2018 together with his team encountered the alleged victim ("Y") at a bar called Vic's Pub

¹ *Please note that on 18 June 2021 there was a formal amendment to the charges in counts 5, 6 and 7 as section 27(1) was repealed by Act 3 of 2009 and section 24B(1) inserted into Act 65 of 1996, although this did not affect the body of the allegations. Furthermore, on 23 June 2021 the accused was acquitted on counts 3, 4 and 9 as a result of an application in terms of section 174 of the Criminal Procedure Act No 51 of 1977. The application was dismissed in respect of counts 1, 2, 5, 6, 7, and 8.*

in Pretoria North. Erasmus contacted Warrant Officer Strydom, a member of the South African Police Services who arrived accompanied by Warrant Officer Makwele. "Y" made a report to them and the Accused and another person were arrested. The Accused took them to his flat at Theresa Park in Pretoria North where they encountered "X", wearing a bath robe and a negligée and engaged in an online sex chat on a computer in the bedroom. Seizure of electronic equipment, passports, other documentation and cash cards was carried out after the interior of the flat was photographed by a member of the SAPS Local Criminal Record Centre. What happened and was said at the flat is set out in a summary of the material portions of these witnesses' testimony below. "X" and "Y" were taken to a place of safety. A fully fledged investigation followed.

Arising from the subsequent investigation the aforementioned charges were framed and the resultant evidence and evidentiary material acquired flowing from the investigation was led by State counsel, who sought to prove allegations that the Accused ran his own organised criminal enterprise of trafficking in persons for sexual exploitation, that he recruited and groomed victim "X", a Zimbabwean female child and illegal foreigner in South Africa and that he was instrumental in securing the presence of victim "Y" in the country, a female child and illegal foreign immigrant, having lured her under fraudulent and false pretences from Zimbabwe into South Africa, utilizing an illicit infrastructure to transport young women across the border. In addition, the evidence was tendered that the Accused was allegedly responsible for harbouring them in the country, sexually exploiting them, using his adult male power and threats, abusing their vulnerability, amongst others that they were illegal immigrants, and in addition as regards victim "Y" on the basis of her having to work off the transport cost incurred by his bringing her into the country. The two victims allegedly were threatened, assaulted and forced against their will to perform in sexually explicit videos or films creating and producing visual presentations of child pornography which he disseminated on the internet, after registering the victims on internet sex chat platforms and to participate online in the streaming of cyber-sex performances with males in across the borders of South Africa. The Accused allegedly forced them to render these performances day and night. He allegedly harboured and treated "X" as his own personal sex slave, gave her a sexually transmitted disease, made her pregnant on two occasions and forced her to undergo

two abortions. In addition, the allegations were that the victims were not allowed to leave the house where they were kept, unless they were accompanied by the Accused, or another person or persons who were to watch over the victims who were subjected to constant restriction of their movements. They allegedly received scant food, no money, had to sleep on the floor, and contact with family and friends was forbidden or heavily restricted and phone calls strictly monitored by him. He allegedly threatened to harm victim "X's" parents should she alert them as to her plight. Whilst he was detained in Limpopo he made contact with "X" and threatened her that if she did not behave, or stepped out of line, she must be aware that he was keeping her under scrutiny of street thugs with knives. He assaulted "Y" more than once. He allegedly lived off the earnings of the sexual exploitation. Furthermore, he created and was found in possession of child pornography.

The Accused's version is a bare denial that he was involved in trafficking in persons, sexually exploiting the victims and thereby benefitted financially or otherwise from their services. He denies that he produced, possessed or disseminated child pornography. He denied that he had trained "X" how to go online and engage in cyber-sex chats, how to perform in sexually explicit videos and do live streaming on the internet with men and further denies that when "Y" came to live with them that he instructed "X" to show her how to give a sexually explicit performance, while he watched.

His defence is that the two girls had his passwords to his computers and he was oblivious of the fact that they were engaging in the online streaming giving sexually explicit performances. He blamed a certain Princess for leading them astray.

He also testified that "X" was his wife and he had paid lobola for her and further maintained that "X" and "Y" had freedom of movement to go where they wished and were not kept under lock and key, they were treated well and at the time of his arrest they were well nourished, well dressed and flourishing. He blamed his arrest on a certain Princess who visited at his flat and misbehaved by showing pornography to "X" and "Y" was told to leave as she had been disrespectful and out of belligerence was responsible for his being arrested.

The issues

[4] The first issue is whether the Accused can be linked to and / or committed the trafficking in persons “X” and “Y” for sexual exploitation and that he had performed any of the acts set out in section 4(1) of the Prevention of Trafficking in Persons Act No 7 of 2013.

[5] The second issue, dependent upon findings in respect of the first issue, is whether the accused intentionally benefitted from the services of victims of trafficking “X” and “Y”, therefore, financial exploitation resultant from the alleged sexual exploitation.

[6] A third issue relates to the Accused’s contention that “X” was his wife and had paid lobola for her and whether the Court must proceed in its judgement from a premise that the merits should be determined within the context of ukuthwala, or customary marriage and whether he had acted in a belief that he had entered into a customary marriage that permitted sexual coercion. In respect hereto the provisions of section 11 of the Prevention of Trafficking in Persons Act No 7 of 2013 come into the equation in deciding on this issue.

[7] A fourth issue is whether the State has proved that the Accused had produced or possessed child pornography.

The Court’s approach

[8] The facts are hotly disputed. Thus was a very long trial with a transcribed record running into excess of 1 500 pages. I am faced with two conflicting versions have to exercise my judgment to determine where the truth lies. Issues of credibility, reliability, consistencies or inconsistencies in the witnesses’ evidence and probabilities or improbabilities of the case become relevant in the evaluation of the evidence.

[9] I was also guided by an address by the Honourable former Chief Justice M M Corbett at the First Orientation Course for New Judges, held at Magaliesberg on 21

July 1997, published in the South African Law Journal, where he stated credibility involves wider problems than demeanour concerned with whether a witness is telling the truth as he or she now believes it to be. Main factors to determine whether a witness is lying or not, are (1) the probability or improbability of the testimony seen against the background of the case as a whole (2) the inherent contradictions in the evidence of the witness for which there is no discernible explanation, especially when the explanations relate directly to the issues in the case (3) the contradiction of the evidence by other credible witness or by objectively indisputable facts, such facts as are common cause, or notorious or are demonstrated by contemporary documentation (4) contradiction of the witness by his or her own extra-curial statements or previous conduct; and (5) well founded attacks upon the general character and credibility of the witness where this is permissible.

[10] As regards demeanour, which has been described as an unruly horse to ride and as held by the Honourable Diemont JA in *S v Kelly* 1980 (3) SA 301 (A) at 308B-E, demeanour of witnesses can be most misleading and convincing in cases where *“a crafty witness may simulate an honest demeanour . . . and tell a plausible story”* as opposed to the situation where *“on the other hand an honest witness may be shy or nervous by nature, and in the witness-box show such hesitation and discomfort as to lead the court into concluding, wrongly, that he is not a truthful person.* Diemont JA held that:

“Nevertheless, while demeanour can never serve as a substitute for evidence, it can, and often does, 'reflect on and enhance the credibility of oral testimony'.

[11] The Court was alive throughout to the fact that it had to *“apply its mind not only to the merits and the demerits of the State and the defence witnesses, but also to the probabilities of the case”* as held in *S v Singh* 1975 (1) SA 227 (N) at p 228 E-G. In this regard see too the judgment of the Honourable Broome DJP in *S v Bhengu* 1998(2) SACR 231 (N) endorses this. In *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 593 H *et seq*, on the issue of credibility, it was held that not every mistake and contradiction or departure by a witness will sully his credibility and non-material departures are not necessarily relevant.

In *S v Sauls and Others* 1981 (3) SA 172 (A) at 180F, Diemont JA held that:

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

[12] The cautionary rule in respect of the evidence of victims in sexual offences applies in this matter. It requires recognition by a court of the dangers inherent in accepting the evidence of such witnesses who may have an ulterior motive in falsely implicating an accused and as they have intimate knowledge of the facts and may convincingly substitute that accused as the offender. Safeguards must be present before relying on their evidence, such as corroboration in a respect implicating the accused or the absence of gainsaying evidence from him, (see *S v Snyman* 1968 (2) SA 582 (A) at p586).

[13] I found the article on *Human Trafficking, Victims Rights and Fair Trials* by Tony Ward of the Northumbria University, UK and co-author Shahrzard Fouladvand of the University of Sussex, UK published in the Journal of Criminal Law, 2018 Vol 82(2) page 138 *et seq*, apt and refer to the following excerpts from it:

"We argue for the victims' rights as an important factor in evidential decisions, coupled with an insistence that such rights cannot trump the defendant's right to a fair trial. Restrictions on evidence of a witness's bad character or sexual history should not be interpreted in such a way as to prevent the defence from introducing evidence, or asking questions, that are of substantial probative value, even if they are potentially distressing to witnesses; but such evidence and questioning should be limited to what is necessary for a fair trial."

"The court also had regard to the Central to the success of human trafficking prosecutions is the involvement and cooperation of human trafficking victims as witnesses. Human trafficking is a covert crime which presents complex evidential issues. Victims of modern slavery and human trafficking, whether for sexual exploitation or labour, can be among the most vulnerable of

witnesses, often belonging to socially excluded groups and requiring significant support. However, they are most often treated as the primary source of evidence, so that securing their cooperation plays an important role in a successful prosecution. Studies of law enforcement responses to human trafficking suggest that victim cooperation is central to the success of human trafficking prosecutions⁶ and is one of the most common challenges faced by law enforcement in the identification and investigation of human

"In a procedural or evidential context, the most important right of protection is a right to protection against secondary victimisation."

"We can sum this up by saying that victims have a right to a fair opportunity to participate in a fair trial of anyone whom they and/or the state accuse of violating their rights. They also have a right that such a trial be conducted, so far as is consistent with fairness to the accused, in a way that minimises the risk of 'secondary victimisation or further trauma'. These principles of effective participation and minimising former trauma also underlie Ellison and Munro's recent view of criminal procedure through a 'trauma-informed lens'. The integration and recall of painful traumatic experiences and events is extremely complex, involving 'chaotic, fragmented images, somatic affects, and bodily enactments.'"

[14] As regards the third issue in paragraph [6] above I am guided by the provisions of section 11 of the Prevention of Trafficking in Persons Act No 7 of 2013 as well as cognisance of the approach of the Court in the judgment in the matter of *S v Jezile* 2015 (2) SACR 452 (WCC) at pages 479-480E, paragraphs [90] to [95].

Commencement of the trial, the parties and the plea

[15] The trial commenced on 28 November 2019. The Accused was initially represented by Adv C Matambuye until 12 December 2020 when he withdrew. On 26 April 2021 Adv M Monyakane, instructed by the Legal-Aid Board, came on record as the Accused's legal representative. State Prosecuting Counsel are Adv A van Deventer and Adv A Roos.

[16] It is trite that the State had to prove its case against the Accused beyond a reasonable doubt, whereas his defence needs only to be reasonable possibly true.² Furthermore, in terms of section 35 of the Constitution, the supreme law of the Republic, he has the right to a fair trial.

[17] On 28 November 2019 the accused pleaded not guilty to all nine counts mentioned above in the indictment, expanded upon in a general preamble dealing with relevant legislation.

[18] The provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 cited in the indictment applicable to counts 1 and 2 were amended immediately during the reading out of the charges. It had to be read with Schedule 2 Part I of the said Act and the indictment erroneously referred to Part 2 of Schedule 2. The provisions and import of section 51(1) were explained to the Accused by the Court.

[19] The Accused did not wish to make a statement in terms of section 115(1) of the Criminal Procedure Act 51 of 1977, exercised his right to silence and put the State to the proof of the allegations. The State addressed the Court in terms of section 150 of the Criminal Procedure Act of explaining the charges and indicating, without comment, to the court what evidence would be adduced in support of the charges.

Amendment of sections alleged to have been contravened in counts 5.6 and 7

[20] On 18 June 2021, in the light of the fact that section 27 of the Films and Publications Act 65 of 1996 alleged to have been contravened in counts 5, 6 and 7 of the indictment had been repealed by section 30 of the Films and Publications Amendment Act No 3 of 2009, which came into operation with effect from 14 March 2010 and which, in terms of section 29 thereof, inserted sections 24A, 24B and 24C in the Films and Publications Act 65 of 1996³, the State applied for amendments of

² *R. v M*, 1946 AD 1023; *R. v Difford*, 1937 AD at p. 373.

³ The Films and Publications Amendment Act 11 of 2019 brought about further amendments to Act 65 of 1996, the date of commencement to be proclaimed and these are not relevant to the adjudication of this matter.

these counts to refer to the correct sections as amended, which application was unopposed by defence counsel and duly granted. In paragraph [15] below the sections allegedly contravened in counts 5, 6 and 7 appear as amended.

Application for discharge

[21] On 23 June 2021 an application for a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 brought by Ms Monyakane, in respect of all the counts and opposed by the State, succeeded on counts 3, 4 and 9 but was dismissed in respect of counts 1, 2, 5, 6, 7, and 8.

The prevailing charges after amendment and acquittal in respect of counts 3, 4 and 9

[22] My judgment on the merits is accordingly only in respect of the remaining counts 1, 2, 5, 6, 7 and 8, as amended, to be read with the statutory provisions in the general preamble to the indictment. The bodies of the charges (in italics) remain unaffected by the amendments. These counts, for clarity's sake, read as follows:

Count 1 Trafficking in persons in contravention of section 4(1) read with sections 1, 2, 11, 12, 13, 14, 18, 23, 29 and 30 of the Prevention of Trafficking in Persons Act No 7 of 2013.

IN THAT during or about the period 2015 up until 4 July 2018, and at or near Freedom Park and/or Theresa Park in the district of Pretoria, the accused unlawfully and intentionally trafficked X, a 17 year old female from Zimbabwe, in that she was reduced to a state of total control by the accused whereby he sexually exploited her by forcing and/or instructing her to perform acts of a sexual nature over the internet in adult online sex chat rooms at the request of the clients of the accused.

Count 2 Trafficking in persons in contravention of section 4(1) read with sections 1, 2, 11, 12, 13, 14, 18, 23, 29 and 30 of the Prevention of Trafficking in Persons Act No 7 of 2013.

IN THAT during or about the period October 2017 up until 4 July 2018, at or near Freedom Park and/or Theresa Park in the district of Pretoria, the accused unlawfully and intentionally trafficked Y, a 17 year old female from Zimbabwe, in that she was reduced to a state of total control by the accused after he under false pretences persuaded her to come to the RSA in contravention of the Immigration Act, whereafter he sexually exploited her by forcing and/or instructing her to perform acts of a sexual nature over the internet in adult online sex chat rooms at the request of the clients of the accused.

Count 5 : Production of child pornography in contravention of section 24B(1)(b) read with section 1 and Schedule 1(a) of the Films and Publications Act 65 of 1996 as amended by section 29 of the Films and Publications Amendment Act No 3 of 2009.

IN THAT from 2016 until the victim X became an adult, and at or near Theresa Park, in the district of Pretoria, the accused did unlawfully and intentionally take photos and/or videos films depicting victim X, a 17-year-old female child, committing sexual acts, thereby knowingly creating or producing publications which contain visual presentations of child pornography.

Count 6 : Production of child pornography in contravention of section 24B(1)(b) read with section 1 and Schedule 1(a) of the Films and Publications Act 65 of 1996 as amended by section 29 of the Films and Publications Amendment Act No 3 of 2009.

IN THAT from about October 2017 until the victim Y became an adult, and at or near Theresa Park, in the district of Pretoria, the accused did unlawfully and intentionally take photos and/or videos films depicting victim Y, a 17-year-old female child, committing sexual acts, thereby knowingly creating or producing publications which contain visual presentations of child pornography.

Count 7 : Possession of child pornography in contravention of section 24B(1)(a) read with section 1 and Schedule 1(a) of Act 65 of 1996 as

amended by section 29 of the Films and Publications Amendment Act No 3 of 2009.

IN THAT upon or about 3 and 4 July 2018 and at or near Theresa Park in the district of Pretoria, the accused did unlawfully possess various images of a pornographic nature on a Nokia Lumia RM976 (Lumia 630) device and/or a Samsung Galaxy S5 of which at least 2 videos clearly depicted sexual conduct and/or participation in sexual conduct, or exposed and depicted body parts of clearly underage female children to wit:

- *an image of a very small prepubescent female child who had to perform acts of fellatio on an adult male, anal penetration with a device, masturbation and anal intercourse with an unknown male, and*
- *an image of a second very small prepubescent female child that had to perform oral sex on an unknown male.*

Count 8: Using services of victims of trafficking in contravention of the provisions of section 7 read with the provisions of sections 1, 2, 3, 11, 12, 13, 14, 29, 30 and 48 of the Prevention and Combating of Trafficking in Persons Act No 7 of 2013, further read with the provisions of sections 94, 256 and 270 of the Criminal Procedure Act No 51 of 1977 and further read with the provisions of sections 1 and 120 of the Children's Act No 38 of 2005.

IN THAT during or about the period December 2016 up until 4 July 2018 and at or near Theresa Park in the district of Pretoria, the accused did unlawfully and intentionally benefit financially or otherwise, from the services of victims of trafficking, to wit victim X and victim Y, by receiving money from clients through bank transfers and/or deposits as proceeds for selling acts of a sexual nature performed by X and/or Y at the request of the said clients of the accused, on adult sex chat room/platforms such as Bonga, Skype, MyfreeCams and others, whilst the accused knew that the said victim X and victim Y, are victims of trafficking.

Relevant parts in the statutes in question

[23] The relevant parts of the statutes and definitions, or parts thereof, which are applicable in respect of the counts below, in my view, are the following:

Counts 1 and 2: Trafficking in Persons

Section 4(1) of Act 7 of 2013 reads as follows:

“4(1) Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of-

- (a) a threat of harm;*
- (b) the threat or use of force or other forms of coercion;*
- (c) the abuse of vulnerability;*
- (d) fraud;*
- (e) deception;*
- (f) abduction;*
- (g) kidnapping;*
- (h) the abuse of power;*
- (i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or*
- (j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage,*

aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.”

In respect of “X, who was already living in the country at the relevant time, the following parts of section 4(1) are relevant in count 1:

“Any person who . . . recruits, . . . , harbours, . . . or receives another person within . . . the borders of the Republic, by means of- (a) a threat of harm;(b) the threat or use of force or other forms of coercion; (c) the abuse of vulnerability;(d) fraud; (e) deception;(f) . . .(g) . . .(h) the abuse of power; (i) . . . or (j) . . . ,

aimed at either the person or any other person in close relationship to that person for the purpose of any form or manner of exploitation.”

In respect of “Y”, who was recruited while in Zimbabwe who entered across the borders of the Republic, the following parts of section 4(1) are relevant in count 2:

“Any person who . . . recruits, transports, transfers, harbours, . . . or receives another person within or across the borders of the Republic, by means of- (a) a threat of harm; (b) the threat or use of force or other forms of coercion; (c) the abuse of vulnerability; (d) fraud; (e) deception; (f). . . (g). . . (h) the abuse of power; (i) . . . or (j). . . , aimed at either the person or any other person in close relationship to that person for the purpose of any form or manner of exploitation.”

The following definitions in section 1 of the Act are relevant to charges under section 4(1)

‘abuse of vulnerability’ for purposes of section 4 (1), means any abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes but is not limited to, taking advantage of the vulnerabilities of that person resulting from-

- (a) the person having entered or remained in the Republic illegally or without proper documentation;*
- (b) . . . ;*
- (c) . . . ;*
- (d) . . . ;*
- (e) being a child;*
- (f) social circumstances; or*
- (g) economic circumstances;*

[Proof of the ages of “X” and “Y”, qualifying them as children, is important for a decision by the Court on the evidence, as to whether this form of *abuse of vulnerability* existed and was taken advantage of.]

'child' means a person under the age of 18 years;

'exploitation' includes, but is not limited to-

- (a) all forms of slavery or practices similar to slavery;
- (b) sexual exploitation;”
- (c) servitude;
- (d) forced labour;
- (e) child labour as defined in section 1 of the Children's Act;
- (f)
- (g)

'servitude' means a condition in which the labour or services of a person are provided or obtained through threats of harm to that person or another person, or through any scheme, plan or pattern intended to cause the person to believe that, if the person does not perform the labour or services in question, that person or another person would suffer harm;

'sexual exploitation' means the commission of-

- (a) any sexual offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act; or
- (b) any offence of a sexual nature in any other law;

'slavery' means reducing a person by any means to a state of submitting to the control of another person as if that other person were the owner of that person;

Count 8: In respect of the averments in this count to convict the Accused the State had to prove that the accused intentionally benefited, financially or otherwise, from the services of the alleged victims of trafficking, “X” and “Y”.

Importance of section 11 of Act 7 of 2013 and its relevance as to defences that cannot be raised in respect of a charges of contravening section 4 and 7 of the Act set out in counts 1,2 and 8

Proof of that “X” and “Y” were children, or not, at the time of the alleged commission of the offences in terms of sections 4 and 7 of the Act dictates what defences the Accused cannot raise under section 11 of the Act. If the alleged trafficked person is a child, section 11(1)(a) of Act 7 of 2013 is applicable and if the alleged trafficked person is an adult, section 11(1)(b) is applicable. The provisions of section 11 appear below:

“11(1) It is no defence to a charge of contravening section 4, 5, 6, 7, 8, 9 (1) or 10 that-

(a) a child who is a victim of trafficking or a person having control or authority over a child who is a victim of trafficking has consented to the intended exploitation, or the action which was intended to constitute an offence under this Chapter or that the intended exploitation or action did not occur, even if none of the means referred to in section 4 (1) (a) to (j) have been used; or

(b) an adult person who is a victim of trafficking has consented to the intended exploitation, or the action which was intended to constitute an offence under this Chapter or that the intended exploitation or action did not occur, if one or more of the means referred to in section 4 (1) (a) to (j) have been used.”

(The underling is my own)

Counts 5, 6 and 7: These statutory provisions in my view do not require specific elaboration, except in so far as to whether “X”, “Y” and other unknown females, depicted in the images or films in the evidentiary material relied on by the State were children at the time to prove production and possession of child pornography.

The following definitions in section 1 of Act 65 of 1996 are relevant to these charges:

'child pornography' includes any image, however created, or any description of a person, real or simulated, who is or who is depicted, made to appear, look like, represented or described as being under the age of 18 years-

- (a) engaged in sexual conduct;
- (b) participating in, or assisting another person to participate in, sexual conduct; or
- (c) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation;

'sexual conduct' includes-

- (i) male genitals in a state of arousal or stimulation;
- (ii) the undue display of genitals or of the anal region;
- (iii) masturbation;
- (iv) bestiality;
- (v) sexual intercourse, whether real or simulated, including anal sexual intercourse;
- (vi) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any object;
- (vii) the penetration of a vagina or anus with any object;
- (viii) oral genital contact; or
- (ix) oral anal contact;

'possession', in relation to a film or publication, without derogating from its ordinary meaning, includes keeping or storing in or on a computer or computer system or computer data storage medium and also having custody, control or supervision on behalf of another person;

Formal admissions and facts which are common cause

[24] On 5 December 2019 the accused made formal admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 that the following items were seized on 3 July 2018 by the police, sealed and booked into the SAP 13 exhibit register with the seal numbers of the various items:

- 1.1 1 x Logitech Webcam (PAD 002243072);
- 1.2 1 X Webcam and 1 X camera (PAD 002243071)
- 1.3 Passports, ID books, bank cards, SIM cards (PAD 40025444954)
- 1.4 8 X Cellphones (PAD 002243069)
- 1.5 9 X Cellphones (PAD 4002544957)
- 1.6 1 X Apple Laptop (PAD 002243070)
- 1.7 1 X HP Laptop, memo stick, blue tooth devices (PAS 4001214738)
- 1.8 1 X E Machine (PW 4001214739)
- 1.9 1 X Huawei modem (PW 3000615351)
- 1.10 1 X HP Laptop (PAB 000506771)

[25] The accused did not contest the correctness of the contents of the schedule of financial transactions on the Excel spreadsheet compiled by the Henri Petrus Schomper, Senior Manager for Western Union Law Enforcement and Investigation for the whole of Africa who testified on 28 April 2021. He was called by the State to testify.

[26] The accused did not contest the correctness of the contents of the schedule on the Excel spreadsheet compiled by the witness Ms Sherri Diane van Eeden, a Certified Anti-Money Laundering Specialist at Makuru Africa (Pty). She was called by the State to testify.

[27] The chain of evidence regarding the handling and extraction of data from the cellular phones and computers seized, and captured and stored on a hard drive after extraction, and the affidavit in terms of section 213(1) and 213(2) of the Criminal Procedure Act 51 of 1977, comprising two reports with annexures by Warrant Office Mathakane Louisa Sodaba a Digital Forensic Investigator which was handed in by the State with the consent of the defence. On 16 October 2018 she handed her

reports and the hard drive containing forensic working copies of all the seized electronic devices to Mr Ultrich Kruger an expert in digital computer forensics attached to the United States Secret Services for analysis.

[28] The defence consented to the reports with annexures (Exhibits P1 and P2) compiled by Mr Ultrich Kruger, an expert in digital computer forensics being handed in. He was called by the State to testify.

[29] Affidavits were handed in terms of section 212(1) of the Criminal Procedure Act 51 of 1977 deposed to by Mr Kenneth Ndou, an Immigration Officer employed by the Department of Home Affairs relating to “X”, “Y”, Ms Mubi Tsakani California, Ms Princess Moses and the Accused, Alaba Makunjuola Osabiya (the A (Exhibits “F”, “G”, “H”, “J” and “K” “K1” and “K2”). The defence counsel had no objection to the first four affidavits being handed in as to the correctness and proof of the information therein, but indicated that she wished to hear the evidence of Mr Ndou and cross-examine him on aspects in his affidavit regarding the Accused. The State handed in Mr Ndou’s affidavit in respect of the Accused together with its annexures under section 212(1) The salient facts in Mr Ndou’s evidence appear below.

To summarise the contents of Mr Ndou’s affidavits, it is common cause from:

(Exhibit “F”) that X” born on 13 June 1998, arrived in the RSA on 21 September 2015 and her temporary resident visa expired on 5 October 2015 and she was an illegal foreigner in the RSA from that date.

(Exhibit “G”) that “Y” born on 10 June 2000 was an illegal foreigner in the RSA.

(Exhibit “H”) that Ms Mubi Tsakani California born on 16 January 1994 was issued with RSA identity number [...].

(Exhibit “J”) that Ms Moses Princess was not allocated identity number [...], that identity number was issued to a certain Ms Nomabaso Mcilongo, and the identity document depicted in the annexure to the affidavit with a photo of Princess Moses

and a date of birth of 13 June 1996, is fraudulent and was not issued by the Department of Home Affairs.

(Exhibit “K” “K1” and “K2”) The contents in respect whereof reflect that the Accused a citizen of the Federal Republic of Nigeria with date of birth of 13 March 1983, married Lillian Leseho Basson a South African citizen on 26 April 2012 in Pretoria and was granted a relative Visa valid until 28 July 2018, on condition that he reside with her, his spouse, and that he may not conduct work. The Accused broke the conditions having left the common household after two years. The Accused applied for condonation on 1 July 2016 based on good cause to stay in the country. The good cause application was granted for him to remain in South Africa from 1 July 2016 until 1 January 2017. Further extension was not granted and as from 1 January 2017 the Accused was an illegal foreigner in the RSA.

[30] It is common cause that the evidence on 23 June 2021 in respect of the contents of two schedules compiled by Ms Sibongile Patience Makhubu, a forensic liaison officer at Cell C, reflect that cellular phone number [...] was allocated to the Accused for his Samsung Galaxy cellular phone according to “Q 2” and its sim card was used in a Nokia Lumina on 24 March 2017 according to the IMEI number on the Nokia and her table “Q 1”.

The proceedings

[31] The Court ordered that the proceedings be held in camera under section 152(2) read with section 153(3) of the Criminal Procedure Act 51 of 1977 and that the identities of the persons other than the accused not be revealed.

[32] The Court further ordered that in terms of section 158(3) read with section 158(2) of the Criminal Procedure Act 51 of 1977 witness “X” and “Y” may give evidence by means of closed-circuit television as consented to by both victims, as well as the prosecution and the defence.

[33] A Yoruba/English interpreter interpreted throughout the trial for the benefit of the Accused. For certain witnesses an additional Shona/English interpreter interpreted in conjunction with the Yoruba interpreter.

[34] On 26 April 2021 when Ms Monyakane appeared for the first time before me, she indicated that she wished to recall witness "X" for further cross-examination. On 17 June 2021 she withdrew this application. She placed on record that was satisfied that Mr Matambuye had adequately covered the material aspects in his cross-examination of "X" and therefore she did not need to cross-examine her any further.

THE EVIDENCE LED BY THE STATE

The evidence of Erasmus, Strydom and Makaulele

[35] The evidence of Pierre Erasmus, a private investigator, Warrant Officer Frederick Strydom, attached to the District Commissioner's Tracing Unit and Warrant Officer Ngedziseni Makaulule attached to the Pretoria North Local Criminal Record Centre who photographed the interior of the Accused's flat and the exhibits seized at the scene, was led by the State in respect of the events on 3 July 2018. I find these witnesses to be reliable and credible and they corroborate one another in material respects, in respect of what happened at the various stages where they were involved with one another and present in the initial investigation. The material portions of their evidence follow.

Erasmus, a private investigator, employed by Justicia Investigations for 13 years was a former senior constable and member of the Murder and Robbery unit of the South African Police Services at Silverton, with seven years' experience. On 1 July 2018 he had obtained information regarding human trafficking from an informer. Under cross-examination he stated that he verified this information given to him by opening an internet "sex portal webcam thing" that he was told to look at and as he put it and ascertained that the girl who he later identified as "Y" at Vic's pub on 3 July was registered as a performer for payment.

On 3 July 2018 Erasmus and an undercover agent armed with a name, which he was not sure was a real name, and a picture and tracked down "Y" at Vic's Pub, a bar and poolroom in Pretoria North. She was with the Accused and other unknown males in the pool room smoking area. Erasmus was seated at the bar waiting to speak to "Y" alone. She came out of the pool room to the bar. He phoned Warrant Officer Strydom and he arrived together with a colleague Warrant Officer Makwele.

When he arrived, W/O Strydom introduced himself to the victim. Erasmus testified that the victim had a look of relief on her face. They told her that they were there to help her. Erasmus stated that she appeared to him to be younger than seventeen years of age. She told them that she was brought to South Africa by a Nigerian person for domestic purposes and a Nigerian person was forcing her to perform sexual acts on the internet in a chat room like a video call. She was not doing out of her own free will. The two Nigerian persons came into the bar and went into the pool room, one of whom was the Accused. She told Erasmus that the person accompanying the Accused and who was also arrested is the person who checked on her and watched her when the Accused was away.

W/O Strydom approached the Accused in the smoking room, had a discussion with him and then arrested him and another male person. There was some discordance between the Accused and the Strydom who displayed distress. Strydom informed both of them of their Constitutional rights. Erasmus did not hear the conversation between Strydom and the Accused as he, "Y" and his undercover agent remained in the bar.

Thereafter the Accused, co-operating, agreed to take them to his flat in a gated residential complex at Theresa Park, Pretoria North on the first floor of a double story unit pointed out by the Accused. W/O Strydom called for police back-up who arrived. "Y" was behind Erasmus, the under-cover agent and two others who had followed Strydom and the Accused to the flat.

The Accused called out for someone whom he referred to as his wife to open up. Door was opened by a young woman, who later transpired to be "X". It was in the afternoon. Erasmus noted that she wore a bathrobe which was not quite closed and

was wearing lingerie underneath. The Accused told them that she was his wife. They entered the flat and went into the main bedroom.

Erasmus and Strydom both testified further that “X” had come from the main bedroom which they entered. They saw a computer set up with a whole lot of modems, cameras, a computer screen, webcams, and a loose standing screen which was still on a chat room site. “X” wanted to turn off the computer but was told to leave the room. Erasmus testified under cross-examination that there was “a complete set up for a cam show for girls to sell their bodies online”.

Strydom asked the Accused for his cell phone and pin. There were two phones handed to him. One was a Samsung cellular phone and the Accused told him there was no pin on the phone. Strydom found video clips of child pornography on it and asked the Accused to explain whereupon the Accused said, “this is my thing” and added this was his preference. Erasmus confirmed that he a portion of a video depicting scenes of child pornography. That it was child pornography is corroborated by the evidence of Mr Ultrich Kruger and that it was the Accused’s cellular phone which was further corroborated by Ms Makhuba from Cell C mentioned in paragraph [23] above.

Erasmus testified that he was present at that point in time in the room, Strydom enquired about the screen set up. The Accused, who was handcuffed, stated that this was where the girls are doing their thing which he described as cam-models and did live sex shows. The Accused did not specify who performed these, whether it was “X” or “Y”. Erasmus stated that the Accused told him personally that he was a model and was doing shows on camera as well and made moves to demonstrate this.

Erasmus left the main bedroom. The Accused, the other person who had been arrested at Vic’s bar, Strydom and a couple of policemen remained behind in the flat. Erasmus saw “X” in the second bedroom as he was walking out of the flat. Erasmus went to talk to “Y” who was standing on the veranda. According to him she was emotionally distraught. She reiterated that she had come from Zimbabwe, lured to

South Africa with the promise of a job but forced into sex slavery. Erasmus could not recall having spoken to “X” at all.

Erasmus denied that “X” was crying and asking why they were arresting the Accused when they arrived at the flat. He further denied having a conversation with the Accused to the effect that, after the case, he wanted to talk to the Accused about forex trade and bitcoins. It was put to Erasmus that the Accused denies ever forcing either the victim (“Y”) or his wife (“X”) to engage in any illicit activity or posing for clients in return for payments in nudity, which Erasmus disagreed with.

Erasmus was asked if he knew any clients who paid for watching the nudity and Erasmus stated that he did, a person called Alex, whereupon it was put that the Accused knew Alex and had a business relationship with him. Defence counsel gave detail of what appeared to be a nefarious scheme to the financial detriment of Western Union. When asked by the Court if he wished to pursue this line of questioning as defence counsel was placing evidence of his bad character on record, defence counsel withdrew the question but stated that his instruction was that Alex was not one of “Y’s” or “X’s” clients and added that if Alex was one of their clients the Accused knew nothing about it. Erasmus replied that Alex was the person who had got him involved in coming to the aid of “Y”.

Strydom who remained in the flat after Erasmus went outside and stood on the veranda, telephoned Captain Fihlangu, a member of the Directorate for Priority Crime Investigation (DIPC), the Hawks, who instructed him to seize all the electronic equipment, which he did. He stated there were a lot of cell phones, some had sim cards and others not. Strydom contacted Warrant Officer Ngedziseni Makaulule whom he came and photographed the interior of the flat and all the seized items before and after they were sealed in evidence bags. W/O Makaulule compiled an album which was received in evidence as Exhibit “L”. All the exhibits were taken to Pretoria North police station, and these were entered into the SAP 13 register and would be taken to forensics. It is noted that in W/O Makaulule’s album are photographs of two pornographic compact discs found in the Accused’s flat.

Strydom testified that the Accused was having a conversation with “X” in the bedroom and told Strydom that he was married to her by “lobola”. “X” and “Y” were taken to a place of safety.

Warrant Officer Makaulule testified on 2 June 2021 and introduced his album which contained 104 photographs in evidence which was brief. Defence Counsel, at this stage Ms Monyakane, in cross-examination, contended that some photos that were not clear were not in the album and it was incomplete. It is however my finding that the photographs in the album provide a clear, satisfactory and comprehensive picture of the whole scene and of all items photographed which are relevant to the charges in this case.

During lengthy cross-examination, covering virtually the full ambit of the Accused’s defence, Mr Matambuye interrogated aspects of this matter of which the Erasmus and Strydom could not have had any knowledge. Although, some of the aspects raised by Mr Matambuye were inherently inconsistent on minor issues, such as the fact that it was put to Erasmus that “Y” was “X”’s sister and later put that she was a cousin, whereas she was the daughter of a neighbour in the township in Zimbabwe and not related to “X” at all. Other aspects were in respect of material issues such as the involvement of a certain Princess in this matter of which they knew nothing.

One line of cross-examination stands out, put to Erasmus, who did not have knowledge of payments allegedly made by “Y” through a financial institution called Makuru. It is common cause that the Accused registered himself and “X” as clients of Makuru. What was put to Erasmus was that from time to time the victim, who in the context of the cross-examination at that point was “Y”, sent money to her mother in Zimbabwe through Makuru. I shall deal with this aspect when I deal with the evidence of Ms Sherri Diane van Eeden below.

The submission of defence counsel in her argument on the merits that Erasmus and Strydom were dishonest I find this argument is unconvincing and does not pass muster.

Furthermore, defence counsel had no acceptable answer to the fact that the Accused in clarification of the Court of the allegation that he had used a forged identity document of a certain Princess Moses to try to register “X” online on the internet, where his answer was that he only saw that document in Court and the police had forged it to incriminate him.

Evidence of Gainmore Chirapu

[36] On 3 December 2019 Gainmore Chirapu, “Y” s father testified on 3 December 2019 and relates to events immediately before and after the Accused’s arrest. This approach after the Accused’s arrest, I find is, indicative of the Accused endeavouring to do damage control and to interfere with potential State witnesses.

Mr Chirapu had left “Y” with her mother when he came to South Africa to work. He became aware at a certain stage that “Y” was in Johannesburg when she phoned him in 2017 and told him she had a house job working for Mike. It is common cause that Mike was the Accused. He had problems communicating with her and could not get hold of her on a number of occasions when he attempted to phone her. When they did talk it they could not have a private conversation because she used the Accused’s phone. He was aware that “Y” sent groceries to her mother with the help of her aunt when the aunt travelled to Zimbabwe.

The significant part of his evidence relates to two phone calls. One from the accused on 28 July 2018 and one from a certain lady called Princess on or about 3 July 2018. His evidence was that the call from the Accused was that he kept on asking for forgiveness and that he did nothing to his daughter. It was put to him by defence counsel that the accused made the call to him on a cellular phone he borrowed at court when he was there for a postponement. Mr Chirapu stated that after a few days when he phoned his wife, he was informed by her that “Y” was in a place of safety. It was further put to the witness that the Accused had phoned him to tell him to get a lawyer as he believed that “Y” was also being arrested.

The fact that there was a second phone call arose when he was cross-examined by defence counsel, Mr Mathambuye. Chirapu testified that this was just before the arrest on 3 July 2018. The telephone call was from a lady called Princess who said

that she had been given his number by “Y”. This is consistent with “Y”’s evidence. Chirapu testified that Princess told him to come and fetch “Y” as the conditions were not good, where “Y” was living was not safe, and he should move her immediately. Chirapu stated that this was the first time that he heard that there were problems. It was put to him that his wife had told him that Princess was involved in illicit sexual activities and wanted “Y” to take her away with her so that she could make more money, which he denied, saying that he did not know anything about that. Mr Mathambuye put it to Chirapu that the accused suspects that Princess had been responsible for his arrest, and furthermore she was fighting for “Y” because she wanted her to come and live with her so that she can introduce “Y” to a life of modelling. These instructions from the Accused, in my view, are inconsistent with the facts that came to the fore in the cross-examination of Erasmus that an informer called Alex had been the catalyst leading to events resulting in the Accused’s arrest. It is also inconsistent with the Accused’s testimony as to why he told Princess to leave his house, having caught her engaging in pornographic online chats in the presence of “X” and “Y”, when he came home late at night shortly before his arrest and was disrespectful to him. This version put to Chirapu is speculative and furthermore does not accord with Chirapu’s evidence, elicited under cross-examination, that Princess had warned the him that it was not safe for “Y” at the Accused’s home and asked him to come and fetch her immediately.

This scenario of the accused suspecting that Princess had been responsible for his arrest and wanted to take “Y” away to live with her to make big came up again, as will be dealt with below when I deal with the defence case, when the Accused was cross-examined by State counsel as to why Princess was chased away from his flat. When he was cross-examined and asked questions in clarification answered that when he had phoned “X” from the police station, the call mentioned by Warrant Officer Sithole in his evidence summarised below. His answer was that when he had phoned “X”, she was the one who had told him of Princess’s intentions to take “Y” away and this information was relayed to Mr Mathambuye’s during consultations.

I accept the veracity of Chirapu’s evidence.

Evidence of Sithole

[37] On 8 June 2021 Warrant Officer Philip Ngolodi Sithole with nineteen years' experience in the South African Police Services, attached to the Directorate for Priority Crime Investigation on the Human Trafficking desk testified. He and Captain Qedu, appointed as investigating officer, were allocated the investigation in this matter on 4 July 2018. They were given the police docket which related to of human trafficking.

It is significant from my summary below of certain telephone calls, one made by the Accused using Sithole's phone which was confirmed by Sithole, who was with Captain Qebu, to have been to "X" who was in a place of safety. The gist of the call was to influence "X" as what not to say and what she ought to say if a statement was taken from her and if she were to testify. Again, I find that this call by the Accused to "X" was interference with potential State witnesses and an attempt to defeat the ends of justice.

Two persons had been arrested, the Accused and another person. The charges against the other person were withdrawn because of a lack of evidence. Mr Sithole stated that upon fetching the accused from the police cells. While he, Qedu and the Accused were seated on a bench that the Accused asked for a phone to make a call. Sithole overheard him tell the person he spoke to not to co-operate with the police. He said that person that if she is asked she must say the police told her what to say. She was told not to tell the police about the abortion she had. Qedu confronted him asking who he was talking to, and he gave an explanation which they could understand. It was never put to either Sithole or Qedu that they ought to have also overheard the Accused talking about Princess and that she had wanted to take "Y" away.

Qedu telephoned the place of safety where the victims were being accommodated and asked if one of the victims had been on the phone. As a result of what she was told, Qedu and Sithole went to the place of safety and "X" confirmed that she had been phoned by the Accused and confirmed what Sithole and Qedu had overheard him tell her what they had overheard at the police station. It is significant under cross-examination by State counsel that the Accused does not deny having made the telephone call to "X". He stood by his evidence in chief that the reason for

chasing Princess away from his home was that having come home late at night prior shortly before his arrest and had caught Princess busy with an online chat in the presence of "X" and "Y", which he regarded as disrespectful. He was asked to clarify why his counsel had put it to Chirapu that just prior to his arrest that the information regarding Princess having wanted to

The two also went to the Accused's flat and got hold of the estate agent who was renting out the flat. The rental was in arrears.

Sithole also testified about a telephone call he received who identified herself as the wife of the accused's brother and wanted to talk to Sithole about the case. She would not say what she wanted over the phone and wanted to meet him in person. He told her that if she wanted to discuss something he could not go to her, but she could come to their offices at 218 Visagie Street in Pretoria. He did not know her and was not going to go to her for a meeting.

During 202 the lady and a young girl came to his office. He warned the lady first that if she was there to get information or to bribe him, he would arrest her and she looked frightened. She told him that she came to see him because the Accused did not have an attorney. Sithole told her that that had nothing to do with him and he is an investigating officer in the case. As he was speaking harshly, they left. In respect of the aspect relating to the two women, Accused's version was put that they did not come to him to bribe him but to see Sithole about clothes. Sithole found this suspect that they would travel to town all the way from Soshanguve to discuss clothes with him.

Defence counsel put it to Sithole, who had felt uncomfortable with the telephonic interaction with these women and that they had wanted to meet at a restaurant and not his office, making him suspicious of their intentions, that the Accused had never sent these two ladies to intimidate him.

As regards the phone call, it was put that the only interaction that the Accused had with Sithole was when Sithole asked him if he was well as he was looking sickly and allowed the accused to use his phone to phone his brother, which he did and asked

him for clothes. Sithole agree that that had happened and lent him his phone to phone his brother but that this was a long time after the two ladies had started phoning him.

I find that Warrant Officer Sithole was a reliable and truthful witness and accept his evidence.

Medical examination and evidence of Dr Eugene Seller

[38] During the course of the trial the State handed in J88 medico-legal examination reports compiled by Dr Eugene Seller in respect of “X” and “Y”. The recorded general examination section C required clarification in respect of handwritten entries in Afrikaans, and he was called to testify. He is a medical practitioner at the Medical Legal Crisis Centre of the Steve Biko Hospital dealing with examinations of traumatised patients.

In respect of “Y” whom he examined at 15:45 on 4 July 2018, he stated that Captain Qedu had brought her to the Crisis Centre. “Y” was 18 years old when he examined her. “Y” had a chronic disease and had had treatment a month or more before being brought in. Dr Seller got her history from “Y” herself. “Y” stated and he recorded her account under C in the J88 that:

She had been in the RSA for 18 months. Lived with a man and woman. The woman takes photographs of her, naked. Her husband uses them on the internet. She denied that this man and others had sex with her. He slapped her twice previously. Ear-ache right ear and the ear was normal. No other external injuries.

He concluded that she was not externally injured. There were no tears or stains on her clothing and her clothes were normal. As regards emotional status, she was stable. There were no signs that she was under the influence of drugs or alcohol. She had intercourse in 2016 last, and this was consensual. A gynaecological examination showed that she had been penetrated more than 15 days ago. Her cleft seen on page 3 shows tears and when hymen tears the edges do not heal. There was a white cheesy discharge indicative to a candida fungal infection which is not

seen as being sexually transmitted. It a common condition among women. An anal skin-tag which he saw was indicative of constipation

In respect of “X” whom he examined at 16:00 on 4 July 2018, he testified that Captain Qedu had brought her to the Crisis Centre. He got “X” ’s history from her. She was 20 years old at the time. She told him she suffers from epilepsy but does not use medication. Her clothes were intact, and she had a normal build. He recorded what she told him in paragraph 5 that a man takes videos and records sex deeds, and she does sexual things and masturbates in front of a camera. He paid lobola for her in 2017. He threatens her if she refuses to do this and have sex. She is scared that he will beat her if she refuses to do these things. She had no external injuries. Dr Sellers stated and I find that this evidence is significant in the context of this case, that she had blunt emotions, a lack of emotions, her face was a mask.

She had had two previous pregnancies that were terminated. She uses injectable contraception and had intercourse eight days before the examination without him using a condom. There were only pieces of the hymen remaining. The absence of injuries cannot exclude penetration. It was a normal examination.

The only question asked in cross-examination was to establish if a girl menstruates for the first time at the age of 16, can she have sex before that, and Dr Sellers replied in the affirmative.

The evidence of Henri Petrus Schomper

[39] Henri Petrus Schomper, who testified on 26 April 2021, gave evidence that he has been employed for seven years by Western Union Financial Services as the senior manager Western Union Financial Intelligence Unit – Law Enforcement Outreach and Investigations for the Southern and East Africa Region. Western Union he stated is not a bank but an entity reporting in South Africa to the Reserve Bank and Financial Intelligence Centre. It is listed on the New York Stock Exchange and operates on a global basis with the exception of North Korea and Iran. Its Head Office is in Denver Colorado

He has a law degree and has 22 years' experience in the financial investigation area and the tracing financial transactions, in co-operation with law enforcement agencies, of terrorism financing, wildlife trafficking, drug trafficking and human trafficking.

He testified that in South Africa a foreign national must produce a passport issued by the country of citizenship and regard is had to his visa pasted in the passport. A sender must produce proof of address, a utilities bill or bank statement. Provide his or her full name and that of the receiver who has to receive the cash, according to the documents to prevent fraud. One can transact remotely or go to a branch in person. All transactions through Western Union are across border and one cannot for example send money from Pretoria to Durban. Transactions are permitted in business hours but agents at airports can operate 24/7 because of currency exchanges.

He testified that when generated on the system every single transaction are defined and identified by a ten-digit control number that is unique to every specific transaction. A sender will notify the recipient giving full particulars of the transaction as regards the amount and the reason for the transfer, a gift or family support or suchlike, by means of whatsapp. The amounts are always reflected in US dollars. The transactions are made by individual persons to individual persons. If business transactions or transactions which relate to traditional medicine or *muti* customers who are unbanked are detected Western Union takes steps against these people, which is usually detected by Western Union online software. A consumer scam would be blocked. In addition, and this is significant in relation to the Accused, third party transactions are not allowed. One can try but this is not allowed. In this matter there were other people who received funds and shared a common cellular phone number.

Mr Schomper testified that on 22 January 2019 he commenced with the investigation and did a financial analysis the result whereof was captured on an excel spreadsheet which was admitted in evidence as an exhibit. The transactions are chronological by date. Schomper took the Court through all the headings on the spreadsheet and the content of each line in respect of each particular transaction. He gave evidence that

different people who used the same cell number as Alaba Makunjuola Osabiya, the Accused and received the remittances on behalf of the Accused. There were 111 transactions where the Accused was the recipient, one transaction where Moremi Mmakwena was the recipient, one transaction where Christopher Nong Tlou was the recipient, six transactions where Sindiwe Mzobe was the recipient and four transactions where Ledile Lisbeth Seaba was the recipient, all in all 123 transactions.

Schomper's evidence was further that the Accused used three different cell phone numbers, As the Accused had used different cell phone numbers Schomper stated he drilled down the various numbers on his system at the time of receipt of the funds by the Accused. He found that the Accused used two Nigerian passports and two South African passports with different numbers. The Accused gave an explanation as to why the passport numbers differed and subsequently admitted under cross-examination by State counsel that the cell phone numbers were his.

Schompers testified further that the funds were mainly sent to the Accused by middle aged men based in the USA, United Kingdom, Trinidad Tobago, Germany, Finland and the United Arab Emirates. In most of the cases the men were repeat senders from 23 different individuals. He testified that the system indicated that the Accused received a total amount of USD 21 652.54 from the 123 transactions. converted to approximately R238 297.85 over the full period of his analysis. The transactions which are relevant in to this case are from line 50 of the spreadsheet.

Schomper testified that he looked at the dates but also a familial connection in the diaspora, in other words the nature of the distribution of the transactions, the concentration of a particular nationality in a foreign country. The earlier transactions in 2012 which are only relevant in this case to show that Schomper did look at a familial connection to the Accused and Schomper was of the view that James Obih and John Osabiya were ostensibly Nigerian and Ngozi Okorie was from the UAE but used a Nigerian passport. As regards the other persons in his schedule they had Western names. Of significance is that in looking at the other transactions Schomper stated that these transactions

- (i) in his opinion, these transactions were not familial;

- (ii) mostly western men were sending money to a Nigerian male in South Africa;
- (iii) he looked at whether the questions and answers by the senders in the column dealing with these in the excel spreadsheet and initially thought that these appeared to be a possible scam such as a consumer fraud, 419 types of scam;
- (iv) later, he did a typology analysis from consumer frauds and patterns expected in such consumer frauds, patterns in terrorism financing, with drug trafficking, wildlife trafficking and patterns formed within human trafficking.

He testified that in the United States, from his experience, men who are middle aged or elderly who send money to women is part of the typology of human trafficking especially exploitation of children or women. His evidence was that in the investigation in this matter he started looking at the age of the senders and at the recipient in South Africa, as well as the dollar amounts and concluded that the transactions fitted in with the typology of child exploitation. He also looked at the questions and answers and the nickname codes of the senders, such as Melvin Pierce who sent money on 22 February 2017 to the Accused, whose nickname was "blackshaft" which has a sexual connotation where the pattern is for senders to refer to their body parts. Alex Buchinger referred to "X" by name to the question who your friend or good friend is. He detected the same type of pattern with the other senders and the amounts sent were what he expected from sexual exploitation.

Schomper in his testimony gave examples in his analysis of senders and the type of payments to the Accused. Here the amounts were relatively small and from his experience were indicative of a person paying for sex. Daniel Griffiths, whose questions and answers on the spreadsheet stated that his favourite food was "birthday cake", having a possible sexual connotation, made eleven payments on 4, 12 and 26 November 2016, 26 December 2016, 6, 13, 11, 27, and 30 January 2017, 10 June 2017, and 15 September 2017 in the order of USD 700.00. The same pattern was evident from other senders' profiles and payments.

Schomper testified further that the Accused was blocked on the Western Union system by way of an interdiction on 9 October 2017 after he had reported his

findings to his head office in Denver Colorado and on their instructions. Western Union, Schomper testified, is exposed to enormous penalties for allowing transactions which are crime related where victims are involved in whatever scam or exploitation, fraud and sex prejudice and has to act immediately to block such transactions.

Amongst other things, in cross-examination defence counsel put it to Schomper the Accused assisted friends in the community to receive their money. Also put was that when he was interdicted, he was not given the opportunity to make representations because he merely wanted to help people who were allowed by him to use his identification and even use his cell phone, so that they could access their money, as some of these people were uneducated and some could not even understand English. Schomper replied that the profile he saw showed him possible crime and even if the Accused had contacted him to explain receiving money on the part of others, those would be third party transactions against Reserve Bank regulations and Western Union rules and conditions. Furthermore, the forms that the Accused had to fill in to qualify as a client warns against third party transactions and that this is against Western Union Rules. Agents are alerted that they are to be on their guard against this and they are the forefront of Western Unions' protection. It was further put to him that the Accused did not know of the rules and denied that anyone had warned him or gone through the rules with him, to which Schomper stated that he did not know what the Accused was thinking or whether it was drawn to his attention.

It is noted that under cross-examination by the State, the Accused said he only collected moneys from Western Union which were business related. It is significant that as Schomper's testified earlier that Western Union does not allow business transactions.

Schomper's evidence as tabulated in his spreadsheet, which contains a myriad of detail, is indicative of an extensive and an ongoing operation of sexual exploitation on the internet internationally over a lengthy period and was not a once-off exercise. As will appear below from Van Eeden's evidence and excel spreadsheet in respect of Makuru, this operation continued beyond the date that Western Union blocked the Accused's account

I accept Schomper's evidence as reliable, truthful and well-founded and accept his findings and conclusions.

I do however agree with the opinion aired by Mr Christian Strydom, who was called by defence counsel during the defence case, that the conversion of the dollar remittances testified to by Schomper were not converted in Rand in accordance with the prevailing exchange rates. However, for purposes of my findings in respect of Count 8, an accurate determination of the Rand equivalents is unnecessary.

The evidence of Sherri Diane van Eeden

[40] Ms Sherri Diane van Eeden testified that she is employed as a Certified Anti-Money Laundering Specialist at Makuru Africa (Pty) and a member of the Certified Anti-money Laundering Specialist International Organisation and also has certificates in sanctions compliance and in money laundering detection and investigation from the University of Pretoria. She testified that Makuru provides a money transfer service in South Africa and assists its customers with sending remittances to recipients in other countries and remittances from disbursing organisers sent from other countries to people in South Africa. Her role at Makuru is to monitor Makuru Africa's customers and their transactions, investigate and report financial crime and ensure that Makuru Africa adhered to all requirements of the Financial Intelligence Centre.

Her evidence was that she was alerted by Mr Schomper from Western Union that Makuru Africa was possibly linked to a human trafficking case in Johannesburg and provided her with the names and identity numbers of "X" and the Accused. She acted accordingly regarding the involvement of certain clients who allegedly paid for services for illicit sexual material. Her evidence was that "X" had received funds at the Hillbrow and Bosman street Makuru branches in US Dollars from four Americans males, one German male and one British male whose names were listed in the schedule which she produced together with the report she had drafted at the commencement of her testimony (exhibit R2).

Van Eeden's investigation in terms of the subpoena in terms of section 205 of the

Criminal Procedure Act 51 of 1977 was conducted in respect of remittances over the period 1 October 2016 to 31 June 2018 and the transactions recorded on her schedule fall within that period. The remittances only started on 15 June 2017.

During the period 15 June 2017 to 30 May 2018 the following persons according to her schedule made payments into the Makuru account held by "X": Alex Buchinger from the USA; Daniel Griffiths from the USA; John Thorpe from the UK; Edward Grandi from the USA; Michael Rose from the USA; and Bernd Lischewski from Germany. The names of the first four persons appear on the schedule prepared by Western Union and received as an exhibit.

Van Eeden under cross-examination stated that there was one remittance where "X" was not the recipient, to a certain Precious Shandodnga on 22 December 2017 of R752.00. Her schedule reflects that in the order of R174 000.00 was received by "X" during the period 15 June 2017 to 30 May 2018. The Accused also a customer had never utilised his Makuru account. On 8 October 2021 the Accused was asked if "Y" had a Mukuru account and he stated under oath that she did not have one. It was never put to "X" or "Y" in cross-examination that the payment of the R752.00 had been made by "X" on behalf of "Y" to her mother, if indeed Precious Shangundonga was the latter's mother. I find that the cross-examination of Erasmus as to the fact that "Y" was sending money from time to time to her mother utilising Makuru's services is inconsistent with what he testified to under cross-examination on 8 October 2021 that she did not have a Makuru account.

On this aspect and later when asked questions by the Court on 15 October 2021, in clarification, after being cross-examined by State counsel and re-examined by counsel for the Accused, he stated that he now presumed that "X" made payments of "Y" 's alleged money he had paid her through "X". Although Van Eeden's Excel spreadsheet schedule reflected 74 remittances to "X" on her Makuru account from Alex Buchinger, Daniel Griffiths, John Thorpe, Edward Grandi , Michael Rose, and Bernd Lischewski, which the Accused stated to the Court he was totally unaware of and did not why they did so, and one remittance made by "X", he surmised that that remittance by "X" on 22 December 2017 was probably money sent by "X" to "Y" 's mother on her behalf, whose name he did not recall. When asked who Precious

Shangundonga was his memory returned and he stated that that was “Y” ’s mother. However, that was the only remittance to Zimbabwe on Makuru’s records.

On 13 October 2021 State counsel cross-examined the Accused on the SMS notifications sent by Makuru to the Accused’s Samsung Galaxy S5 found on this cellular phone and tabularised in the analysis report by the witness Ultrich Kruger, who is referred to in paragraph [28] above.

The table shows notifications sent by Makuru to collect 13 payments from Edward, ostensibly Edward Grandi, amounting to R86 602.00, 2 payments by John, ostensibly John Thorpe, amounting to R1 482.00, 4 payments by Alex, ostensibly Alex Buchinger, amounting to R12 216.00 and 1 payment by Daniel, ostensibly Daniel Griffiths, in the amount of R371.00, whose names appear in Van Eeden’s schedule.

The accused stated that he did not remember receiving the SMSs and he never collected the moneys from Makuru. It was put to him that “X” testified that she was told by the Accused to collect the money. His reply was that nobody sent him money through Makuru and he never received money through Makurur, “X” lied. He maintained throughout that he never received the SMSs, knew nothing about them and that he never received any money.

It was put that “X” would not have known that she should fetch the money unless she was given the reference number to enable her to collect the money, whereupon he again stated that he did not see the SMSs and dit not know how “X” was able to collect the money. He also challenged the aspect as to procedures followed by Makuru and when it was out to him that “X” testified that when he opened their accounts with Makuru both accounts, his and hers, were opened with his cell phone number. The State put it to him that the probability was that his number was used in opening these accounts he stated that how they got into his phone he did not know and whether he registered “X” s account with his number he did not know. In any event he could not explain why the SMSs were on his phone. It is probable that “X” sent them to him. Confirmation was obtained that “X” used two cell numbers which are ostensibly her own. “X” did however collect all the money remitted.

The Accused also stated under cross-examination that he was astonished that John Thorpe should send money through Makuru to South Africa and did not why he should have done so, even though his version was that John Thorpe, a UK citizen, and a neighbour of a friend of the Accused's, a Nigerian citizen called Wally, was sending money to the Accused on Wally's behalf so that he could collect it and give it to Wally's family. In the Court's mind, this casts doubt on the Accused's version as to the role attributed to John Thorpe by the Accused in this case.

In her evidence Van Eeden set out the requirements for registration with Makuru and the application for registration required furnishing a cellular phone number so that Makuru could send out SMSs that moneys had arrived and could be collected requiring producing the reference number reflected in the SMSs in question. She also stated that debit cards were sent to both the Accused and "X" but they had never used them. All moneys collected were paid out in cash. The Accused never utilised his own account.

On 8 October 2021, the Accused, under cross-examination by State counsel, on the contention in the evidence by "X" that the Makuru accounts were only opened when Western Union closed the Accused's account, maintained that the Mukuru account was operative before the Western Union account was closed because people in Zimbabwe preferred using Makuru accounts to carry out money transfers. It does however appear from the Schompers schedule that the Western Union account was still open until 2 October 2017. The Makuru accounts were opened on 15 June 2017.

The defence counsel did not vigorously challenge Van Eeden's evidence, especially since "X" was the recipient of the moneys in question. Whether these moneys were indeed handed over by "X" to the Accused as testified by "X", ultimately depends on my findings in this regard.

I accept Ms van Eeden's evidence as being reliable and truthful. I have no reservations in accepting her evidence. I find that the remarks made in the evidence of Christian Strydom regarding her schedule of remittances did not sway me from accepting the schedule and her evidence.

The evidence of Mathakane Louisa Sodaba

[41] Warrant Officer Mathakane Louisa Sodaba testified on 7 June 2021. As indicated above in [She is a Digital Forensic Investigator, and her reports and photographs of the electronic devices and hard drives were handed in by the State with consent of the defence as indicated in paragraph [26] above. On 16 October 2018 she handed her reports with annexures as well as the hard drive containing forensic working copies extracted by her from all the seized electronic devices and hardware to Mr Ultrich Kruger an expert in digital computer forensics attached to the United States Secret Services for analysis.

Her evidence and reports were detailed and thorough. I accept her entire evidence as reliable and truthful.

The evidence of Ultrich Kruger

[42] Mr Utrich Kruger is currently employed by the United States Secret Services as a Locally Employed Staff Investigator stationed at the United States Embassy in Gauteng. He is an expert certified computer forensic examiner with extensive qualifications and attached to the Digital Forensics Laboratory. His evidence corroborated the evidence of “X” and “Y” and together with their evidence I find that the Accused was inexorably linked to the live streaming of the pornographic matter testified to and confirmed by “X” and “Y”, and the sexual and financial exploitation of “X” and “Y”. The evidence hereof as argued by defence counsel on the merits was not simply circumstantial, requiring inferential determination of the facts, and defeats her contention that “X” was the chief orchestrator of the live streaming of sex performances and chats on the pornographic websites.

He compiled two reports and attached additional screen shots of videos to his second report to provide conclusive confirmation that certain videos stored on the electronic media seized is indeed child pornography.

As is evident from the record and transcription thereof, Kruger assisted State counsel when the two complainants “X” and “Y” testified via closed circuit television, in enabling these two witnesses, the parties, the interpreters and the Court to view

the relevant videos of the sex videos and other photographic material featuring “X” and “Y”.

Defence Counsel does not contest Kruger’s evidence or the contents of the two reports that he compiled, primarily on the basis put to him that the accused was oblivious to the fact that “X” and “Y” were streaming live sex chats and engaging in posting videos of their sexual performances on the internet on pornographic sites. It was put to Kruger that he cannot tell who the initiator was, the people behind the devices, to which he replied that all he could see is in his analysis of what was on the electronic devices and cannot say who was physically sitting behind a phone. This he stated was not within the mandate he received. He looked at identifiers that a specific account was used, but who used the computers and cellular phones he could not say as he could only testify as to what he discovered on them.

Defence counsel put the Accused’s version to Kruger that he was staying with “X” and “Y” in the same space, these devices were in the same place and accessible to “X” and “Y” and during Kruger’s testimony the Accused sees in some respects that his passwords and his e-mail addresses were used and linked to activities he never knew of, and as far as he is concerned he has used his particulars in his own business deals and he had nothing to do with live streaming. Kruger replied that he could only comment on what he had seen. If the Accused did not share his addresses etc then he does not know how these had been created.

To avoid prolixity, I do not intend repeating the full ambit or minutiae of Kruger’s testimony which is on the record. However, I can state that his detailed analysis contained in his report coupled with his testimony speaks volumes as to what was found on the seized media.

I accept that his analysis of the seized media revealed numerous images of the Accused, “X” and “Y” and that these images include numerous photographs of personal identifiable information of the individuals to include passports, identification documents (IDs), debit and cash cards issued by pornography internet sites in the Accused’s name were found as well as payment confirmations and amounts due. Numerous images were found by him of “X” and “Y” in different stages of undress

and sexually provocative poses and behaviour. I accept that the two videos of pre-pubescent females conducting sexual acts with adult males were found by him across different devices. In addition, I accept that he found that the electronic devices were used to create user accounts on multiple adult webcam streaming websites. Moreover, I accept that he found a video taken by the Accused with his Samsung S5 cell phone, which displayed an act of self-gratification, which video he admitted to having sent to a girlfriend in Nigeria. This proves that this phone was his and used by him. I find that Kruger's evidence and evidential material produced by him which was extracted from the seized media, also corroborates material facts deposed to by both "X" and "Y",

In the result I accept his expert testimony in its entirety as accurate, reliable and truthful.

The evidence of Sibongile Patience Makhubu

[43] Sibongile Patience Makhubu a forensic liaison officer at Cell C testified on 23 June 2021 in respect of the contents of two schedules (exhibits "Q1" and "Q2"), that cellular phone number [...] was allocated to the Accused for his Samsung Galaxy cellular phone according to "Q 2" and its sim card was used in a Nokia Lumina on 24 March 2017 according to the IMEI number on the Nokia and her table "Q 1".

Whereas defence counsel in cross-examination of Kruger put it to him that the video in Kruger's report, (at page 22 paragraph 8.2 of exhibit P1), was introduced from a cell number [...] and sent to his phone, the State called this witness to gainsay a contention that the Accused had received this video from somebody else using a cell-phone application called "whatsapp". Succinctly stated, State counsel wished to prove that the Accused had sent the video to himself, and I find succeeded therein. This was the video displayed in Court of an adult male performing sexual acts with a prepubescent female

I accept Ms Makuba's evidence is reliable, accurate and truthful.

The evidence of "X"

[44] Ms “X” is the complainant in Count 1 of the indictment. Her testimony commenced on 4 December 2019 and ended on 12 December 2019. At that stage Adv Mathumbuye was representing the Accused. She is a Zimbabwean citizen who came with her parents and sister to South Africa on 21 September 2015 which is confirmed by Mr Ndou from Home Affairs. Her visitor’s visa expired on 5 October 2105.

My observation when “X” started giving evidence was that she was nervous and in trepidation at having to give evidence and relive the events about which she had to testify. She gave her evidence in detail and gave the impression that she was sure of her facts and answered questions put to her without hesitation, even under cross-examination by defence counsel. I found her to be a convincing witness and displayed a convincingly good demeanour.

It was noted in the record and in my recorded notes on the bench, that when State counsel covered certain areas of her evidence, for example, when testifying about her first abortion, where she had been given abortion pills to drink after the Accused had arranged for her to visit a back street abortionist, The Accused left her with a female friend and went out. She painfully aborted the baby and put it in the sink for the Accused to see when he came home. He came home and put the dead baby in a cereal box to throw away in the refuse bin outside. Relating this event was clearly traumatic and painful to recall. She became very upset to the extent that the Court had to adjourn to allow her to regain her composure. There were a few more episodes of crying and distress.

Her age in this case when she met the Accused is important for purposes of determining in accordance with section 4(1)(c) of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 read with the definition in section 1 of ‘*abuse of vulnerability*’ where under (e) of that definition, ‘*being a child*’ is one of the vulnerabilities listed. A ‘child’ means a person under the age of 18 years in terms of the definition in section 1 of the Act.

The very first questions asked when State counsel led “X” in chief was “when did you come to South Africa for the first time” and she stated that it was “at the end of the

year 2016". In her evidence in chief, she stated that she was 17 when she met the Accused and repeated that when cross-examined by defence counsel. Under cross-examination she insisted that she was 17 years old when she met the Accused and turned 18 years old when the Accused was in gaol in Limpopo. Given that her date of birth 13 June 1998, defence counsel put it to her that and that if she met the Accused at the end of 2016, she would have been 18 already. Which of course would be correct.

However, her answer that she arrived in South Africa with her parents and sister at the end of 2016 is obviously erroneous, as she actually arrived with them towards the end of 2015. I ascribe this error to her nervousness, her memory as to dates fading due to the lapse of time between her arrival and having to testify four years later. Furthermore, it is significant that in paragraph 6 of her affidavit, which is an exhibit in this case, she recounted that during April 2016 the Accused was in prison and was released in October 2016. He sent her money for her 18th birthday. In her evidence she stated that he told her that he had young gangster watching her and should behave herself while he was away. When he was released, she arranged for him to come and stay with her in the home of a lady she was working for and where she had a room. If she only arrived and met the Accused at the end of 2016 these events could not have taken place.

The Accused exploited this error in under cross-examination by State Counsel, that this did not happen as he had not met "X" then, he only met her at the end of 2016 and gave the standard answer to virtually all the questions put to him under cross-examination that "nothing like that happened, she is lying".

I find that she was obviously confused as to the dates and that she must have met the Accused at the end of 2015 to have experienced this episode in her unfortunate relationship with the Accused. Her testimony later in evidence in chief, as to the Accused telling her to pose for a photo holding a forged identity document of a certain Princess Moses, which significantly bears a date of birth of 13 June 1998, to register her on a sex website, evidence the fact that the Accused knew at that time that she was 17 and underage. This attempt to register her failed as the owners of the website found out that the identification was forged. A similar situation arose

where registration was challenged by the website owners of a sex platform, as the woman on the identification photograph was darker than her. "X" testified that the Accused made her pose with a jar of skin lightener to convince them that it was her and that she had used skin lightener for a lighter complexion. This later photograph was found by Kruger on the seized media that he reported on in his cyber forensic analysis and corroborates "X" 's testimony in this regard.

In the result I find that the State has proved that at the time of the Accused started exploiting "X" that she was indeed 17 and therefore a child within the definition of 'child' in section 1 of Act 7 of 2013.

I find that she was subjected to cruel unconscionable treatment, suffered bodily harm when going through the trauma of two abortions, had to be treated for a sexually transmitted disease, had to live in fear and threats and was forced by an abuse of power and was sexually exploited. I find that "Y" was brought into the country to act as her understudy, and not her helper, as epilepsy and inability to perform online owing to hospitalisation led to loss of income. "X" went through dread, debility, and dependence, petrified as to what would happen if she did not carry out the Accused's instructions, and ultimately, I find, resigned herself to her fate. I also find that she was used as the Accused's sex slave while being harboured by him.

Dr Seller's evidence was significant that "X" was emotionless when he examined her, and her face was a mask.

As regards the fact that the Accused maintained that she was his wife by traditional marriage, it is clear from the evidence that she stated that she did not want to marry him and that although there was a ceremony, he never paid the lobola. I have dealt with this aspect further below.

The Accused, on Ndou's testimony, married Leseho Lillian Basson on 26 April 2012. On his own admission neither he nor she wished to get divorced.

It is my finding that "X" was a satisfactory and truthful witness and that there are sufficient safeguards in accordance with the cautionary rules to accept her evidence.

Her evidence was consistent with the objective facts. Her evidence of the events in question is corroborated by “Y” and by the evidence and evidential material on record of particularly Schomper, Van Eeden, Sithole, Dr Seller and Kruger. It is consistent throughout with the oral evidence of other State witnesses and evidential material, and wholly in keeping with the dominant probabilities in this case. She stood her ground well under cross-examination. I have no reason to reject her evidence and that there are more than adequate safeguards to accept her evidence as a witness in a sexual offence. I have no hesitation in rejecting the contention by defence counsel that she was the orchestrator of the sex videos, live sex shows and live streaming of sex chats on pornography websites.

The evidence of “Y”

[45] I accept “Y” ‘s evidence, which is corroborated by “X” in material respects and find that it is truthful and reliable.

Moreover, I find that that she was fraudulently brought across the border of the Republic of South Africa from Zimbabwe and that the Accused was directly involved in this process. She was recruited, transported, harboured, and received by the Accused. She was subjected to male power of an adult over a child, as well as sexually and financially exploited. Her vulnerabilities were blatantly abused, as to having entered and remained in the Republic illegally, furthermore she was a child and her social and economic circumstances were abused, in addition she was threatened with harm and assaulted by the Accused, she was forced and coerced into performing in child pornographic videos, defrauded into coming to South Africa.

Her evidence is corroborated by the objective evidence and evidential material on the record, of particularly Schomper, Van Eeden, Sithole, Dr Seller and wholly in keeping with the dominant probabilities in this case. I find that her demeanour in Court was exemplary, she stood up well to cross-examination her testimony was consistent with all the objective facts, and she was internally consistent when she testified. Her evidence was corroborated by “X”, Dr Seller, her father Mr Chirapu, and Kruger. There are more than adequate safeguards to accept her evidence as a witness in a sexual offence. I cannot fault her evidence in any respect.

THE DEFENCE CASE

The evidence of the Accused and his defence witnesses

[46] The Accused's defence is a bare denial of all the allegations in the charges, although on count 7 his defence is that the child pornography video was sent to his Samsung S5 phone on *whatsapp* by a number which he gave in Court, trying first of all to create the impression that this came from somebody else, which I find was dishonest on his part, and secondly contending that he had not been responsible for the creation thereof, which the State did not allege. However, the State proved that the number was his own cell number, and that he himself had sent the video to his Samsung S5 phone. There were however, more than one child pornography video on his cell phone and the seized, as testified by Kruger, whose evidence I have accepted.

The Accused endeavoured to prove that he and "X" had met and fell in love and that he was looking after her. He was amenable to "X" arranging for help from a relative, who ultimately was "Y" to come and assist her with housework, washing and cooking as "X" suffered from epilepsy. His testimony was that he had nothing to with the arrangements regarding "Y" and only met her at his house some four or five days after "Y" arrived there. When he met "Y" for the first time he did not even know her name. This version that they were living in bliss with one another is not what "X" and "Y" stated, and it is significant that the lady Princess telephoned "Y"'s father shortly before the Accused's arrest to warn him that it was dangerous for "Y" to live in the Accused's home and that he should come and fetch her.

The Accused testified about the lobola ceremony to marry "X" and her parents were happy about the arrangement. As stated above in paragraph [44] and for the reasons set out therein, I find that although the Accused paid a deposit of R5 000.00 in April 2017 towards the negotiated Lobola bride price of R50 000.00 he has not paid anything further to date. During discussion of this evidence with defence counsel, I asked her if the R5 000 paid by the Accused was Lobola, and I may have misunderstood her to say that this was the facilitators' fee for their role in the ceremony, however it appears from a section 220 admissions by State counsel that

the elder who received the money handed it over to “X” ‘s parents as a deposit on the amount of R50 000.00 Lobola.

I find, in a similar vein to that in the *Jezile* decision, cited above in paragraph [44], the facts being different in this case, that it cannot be countenanced that the Accused can be protected from the consequences of the trafficking of “X”, that he could simply evade the course of justice by entering into a traditional marriage. He was already married, and “X” did not want to marry him. It is evident from her testimony that she was petrified of him and did whatever he told her to do. It cost him a mere R5 000.00 to acquire this shield to thwart law enforcement and the course of justice. I find that the purported Lobola ceremony was a sham and an abuse of traditional beliefs by the Accused. I do not accept as argued on the merits by defence counsel that he and “X” were in love and that he was an upstanding and respected person in the community. In casu I find that the Accused succeeded in pulling the wool over the eyes of the community at large as well as the facilitators of what I have found to be a sham Lobola ceremony, as well as “X”’s parents. Obviously, the people in the community would not know about his conduct behind closed doors. Trafficking in persons is covert. As indicated in several legal journals referred to in this judgement, prosecuting a matter such as this is dependent upon the co-operation and courage of the victims, otherwise such crimes go undetected and never reach the Courts.

His defence to the charges trafficking in persons was a bare denial. that he repaired broken cellular phones and sold them in addition he also fixed computers and television sets. He was travelled frequently. “X” and “Y” lived with him, and he looked after them, fed them and clothed them. They were free to come and go as they liked. He never trained “X” to go online and have sex chats with men. When the police came to his flat and seized all his electronic devices and other documents, passports, identification documents his counsel at the time put it to Erasmus that the Accused was oblivious to the fact that the two girls had been live streaming sex chats and posting videos on internet porn sites. In fact, on his version, he had chased away a young lady called Princess, a friend of “X” from his home who had disrespected his home by showing the girls pornography, which is disingenuous, and I reject this evidence as mendacious.

His defence that he never saw any of the sex performances or live streaming by “X” and “Y” is inconsistent with not only their evidence but also with the objective fact that owing to different time zones, some States in the USA being on Eastern Time Zone are 8 to 9 hours behind Greenwich Mean Time in South Africa. “X” and “Y” were live streaming and on the go during the day as well as during the night. They all lived in the same premises.

His being oblivious about their live streaming of sex shows and never witnessing anything like sex videos being created is implausible and highly improbable and inconsistent with the objective facts.

In addition, Erasmus, who apart from being a private investigator had years of experience of investigations in the South African Police Service, gave evidence that there was a complete set up for a cam show for girls to sell their bodies online. The Court having viewed the videos and performances displayed on screen in court, these appeared to have been professionally produced in a studio.

As regards the allegation of having financially exploited and benefitted from live streaming of sex chats and distributing child pornography videos produced by him utilising “X” and “Y” to perform on online sex websites, he stated, that although his particulars appeared on the Western Union spreadsheet received in evidence by the and Schomper’s having testified on the contents thereof, he had allowed people in his community who were illiterate and could not speak English to use his personal particulars, address and cell phone number and all he did was collect moneys from Western Union on their behalf. He did not collect any money arising from the girls’ own live streaming. One of the people who sent money, John Thorpe, was helping a friend of his to send money to him to give to his relatives. I find that this is disingenuous and inconsistent with the proven facts and totally improbable, in the light of Kruger’s evidence and his two Digital Forensic Laboratory reports received as exhibits and thoroughly presented to in Court, linking the accused to the electronic digital media extracted and analysed and report on by Kruger. I find that the Accused’s version regarding the Western Union payments is untenable, inconsistent with the objective facts and evidence and improbable.

As regards the Makuru accounts he and “X” opened two accounts and he never saw or received notifications from Makuru to come and collect moneys. I have accepted “X” ‘s evidence that she collected the money and gave it to him. Moreover, his evidence regarding Thorpe having assisted the Accused’s friend Wally to send money to South Africa into the Accused’s account to on send this to Wally’s family , I find, this is a concocted story, which is evident from the Accused’s replies under cross-examination by State counsel that he was surprised that Thorpe sent money to “X”’s account and had no inkling as to what that was about, and why he should send money to her.

I do not intend summarising all aspects of his evidence, but have several observations and findings regarding his evidence, which is on the record. As stated above, my observation is that he tailored his testimony, exploiting the error “X” made in her evidence as to when she came into the country, stating under State counsel’s cross-examination on early events that he had not met “X” yet. He denied every iota of “X” and “Y” ‘s evidence.

Counsel for the State cross-examined the Accused and took him through the complete spectrum of the testimony of “X” and “Y”. The Accused either replied that he had not met “X” yet when questioned on the events regarding his being detained and the fact that “X” lied about the events in and around her 18th birthday as stated above, or that when confronted by certain evidence given by “X” and “Y”, there was nothing like that at all, or simply that they lied. At one stage he said that “X” was lying because she did not want to be deported back to Zimbabwe. His version on all aspects of their evidence was completely divergent from theirs on all points, even in so far as the first time he had intercourse with “X”, stating it was in a car outside her house. Her version, in a room in his house with locked doors where she gave in to him because she feared him, was not challenged by Adv Mathambuye in cross-examination.

At one stage he was adamant that there were photographs of “X” ‘s mother handing over groceries to “Y” ‘s mother taken in Zimbabwe, and he had seen them when

Kruger among photographs showed to him and his defence counsel before the trial started. He insisted that they should be found and handed in to Court.

I informed the Accused that he should have instructed his counsel to do so. I asked him in clarification hereof if he had these picture in Court. He then addressed the Court directly, stating that the Court only took pictures that work in the Court's favour. I explained to him that the Courts function is to ensure that he had a fair trial in accordance with the Constitution. I further informed him that his remark was contemptuous.

The happenings in the Accused's flat after his arrest at Vic's bar in Pretoria North were not traversed in cross-examination of the Accused by the State. Mr Mathambuye did cross-examine Erasmus and Strydom at length on the events at the Accused's flat, but did not seriously challenge their testimony as to what they saw, or as to what was said by the Accused there. It concerned me that the Accused ought to have been given the opportunity to answer to whether he had told Erasmus that "this was where the girls are doing their thing" which Erasmus testified that the Accused described them as cam-models and did live sex shows. I asked the Accused about this and he said the police were lying. I further asked him if Erasmus stated that he, the Accused, told him personally that he was a model and was doing shows on camera as well and made moves to demonstrate this, to which the Accused stated that the police were lying. Erasmus was not a member of the police and these comments to Erasmus are significant and revealing that he was aware of the fact that "X" was streaming live sex shows on the internet and not oblivious as to what they were doing as he maintained.

I also asked the Accused about what he knew about the ID book of Princess Rose, which was found to be a forgery as testified to by Mr Ndou. as it appeared that it was photographed by the police photographer in an exhibit bag and in the photograph album handed in to Court. The Accused replied to my question asked in clarification in clarification, that the police had forged this identity document themselves to implicate him in this case, which is a preposterous allegation.

As regards his lifestyle, he could afford to live in an upmarket gated community in Pretoria North and to buy a new car. It is apparent to the Court that he created a façade of decency in the community and ultimately used “X” as a front for his operations.

Consent to intended exploitation cannot be raised by an Accused at all where the victim is a child in terms of section 11(1)(a) of Act 7 of 2013 and where the victim is an adult it cannot be raised if one or more of the means referred to in section 4 (1) (a) to (j) have been used.

I find that the Accused’s evidence is inconsistent with the objectively proved facts and he was wont to contradict what was put to the State witnesses by his counsel in cross-examination. He was evasive and rambled on at times about irrelevant matters after he had been asked questions. I find him to be untruthful and mendacious. His version in his defence is improbable on all counts and in the result, I reject his evidence in its entirety as being false.

[47] The defence witness Mr Hendrik Dladla was the Accused’s landlord when they lived in Naturella. I find that he did not materially contribute to the Accused defence. Trafficking in persons is a covert crime. Obviously, a façade would be kept up in public, or in the presence of outsiders. Dladla gave the Accused. “X” and “Y” privacy and did not see what happened behind closed doors, nor did not see computer equipment in the flat. From “Y” ‘s testimony, although were allowed to venture into the community, they were either in the Accused’s company, or when he was away, they were watched by other men on the Accused’s instructions.

[48] Mr Christian Warren Strydom was the next witness to testify in the defence case. He described himself as a professional investigator. He has an A+ Security Agency certificate. He does case building for attorneys and advocates and does work for them and the South African Police tracking and tracing persons. He has been in this profession for 18 years.

He is not a certified fraud examiner with the Association of Certified Fraud Examiners (ACFE) or a commercial forensic practitioner with the Institute of

Commercial Forensic Practitioners (ICFP), has a degree in Psychology, and was in the South African Police Services for 7 years in Durban attached to the Organized Crime Unit, before he resigned.

Although defence counsel was given the whole of Monday to consult with this witness and the Accused at the High Court, he testified that he had only consulted with the defence counsel and not the Accused. He was given a number of slips, which were not handed in as exhibits. He did submit a document comprising of four pages, with pictures on them and annotations in red pen on the pages. On the front page there is a group of three photographs downloaded, which indicate that the elderly lady is the mother of Alex Buchinger, the male is a grandson, and the third picture is marked with "X" 's name. On the second page is a screen shot of the same picture and certain messages, where Strydom was trying to find out regarding the third photo referred to above who the lady was, the reply giving "X" 's name. The third page shows a photograph of Alex Buchinger and his family, and the fourth page displays a small picture, one of ten pictures of Buchinger.

Mr Strydom was testifying in a vacuum as he have the background to this case or have regard to what Schomper and Van Eeden testified. He just went on what he was told. Had he had the background he would have found out that Buchinger and the Accused had come a long way together in a venture to buy and sell diamonds. This was touched upon when Mr Matambuye cross-examined Erasmus and sounded spurious. I suggested that he reconsider what he wished to place on record. This topic arose again when "X" testified that she was with the Accused and his ex-girlfriend Machudu, the latter suggesting that "X" should take on Alex as a client and Mashudu and the Accused were going to rob Alex.

Strydom's evidence was to the effect that "X" was a granddaughter. Apparently adopted, and therefore "X" was related to Alex Buchinger. He tried to convince the Court that Buchinger had not been paying for sexual favours. This was based on research done on Face Book, surfing for information of pornography sites on the Internet and I find that the averment as to a family connection between "X" and Alex Buchinger is inadmissible hearsay, unsubstantiated and wholly based on what the Accused told his defence counsel and they conveyed to him. The information about

Bobby Badilla Endico was also inadmissible hearsay. Mr Strydom conceded that did not have the time to verify the information he got about him or for that matter any of the other information, as he had had only one and a half days to investigate before coming to testify. The sources he used, such as social media, were not exactly reliable either.

He had other comments about the table of SMS's, the notifications of arrival of fund to be collected, in Kruger's report which he stated were suspect as these SMSs did not have dates on any of them. It is surprising then that those moneys were in fact collected from Makuru.

In cross-examination his attention was directed by State counsel to Kruger's evidence on 9 and 11 June 2021 as to Bonga models mobile app statements, from a porn website, on 6 June stating what payments and which were pending. It was put to him if he was saying it was probable that the payments were not paid to the Accused whereupon he stated that he did not say "probable" but that it was unlikely that these amounts were paid to the Accused. He added that the payments were not for live streaming but for recorded things sold and gave an example of a video in Kruger's album which Kruger stated was a video live streamed. "X" testified pertinently that she had a live sex chat with the client and that he had copied the session and sent it to her.

I am not swayed in any way by what Mr Struydom suggested were red flags in Kruger's reports, which I considered carefully, to change my views as to the cogency of Kruger's evidence. I am of the view that his evidence did very little, if at all, to support the Accused's defence. The quality of his investigation lacked finesse and any form of expected preparation to testify in Court.

[49] Mr Simon Sithole Tandanani would have been the next defence witness. He was not available, was somewhere in Maputo and could not be contacted telephonically. The State made section 220 admissions that he was the elder who represented the Accused at the marriage negotiations between "X" and the Accused. He paid R5 000.00 to "X" 's parents as part payment of R50 000.00 which

was the Lobola price. The negotiations – terms of marriage agreement were reduced to writing. There was a traditional wedding “mshato” held at “X” ‘s parents place.

[50] The defence closed its case.

Addresses by the State and Defence counsel in terms of section 174 of Act 51 of 1977 on the merits.

[51] I have heard oral argument of State and Defence Counsel on the merits of this case and considered all their submissions.

My Conclusions

[52] I have weighed up all the evidence presented and evidential material received during this long and extensive trial, and I find that on a *conspectus* of all the evidence that the State has proved its case beyond any reasonable doubt. I reject the Accused’s evidence in toto and find that it is false and not reasonably possibly true.

My Order:

[53] In the result, I find the Accused guilty of:

Count 1 Trafficking in persons in contravention of section 4(1) of the Prevention of Trafficking in Persons Act No 7 of 2013. read with section 51(1) read with Schedule 2 Part I of the Criminal Law Amendment Act 105 of 1977

Count 2 Trafficking in persons in contravention of section 4(1) of the Prevention of Trafficking in Persons Act No 7 of 2013 read with section 51(1) read with Schedule 2 Part I of the Criminal Law Amendment Act 105 of 1977

Count 5 Production of child pornography in contravention of section 24B(1)(b) read with section 1 and Schedule 1(a) of the Films and Publications Act 65 of 1996 as amended by section 29 of the Films and Publications Amendment Act No 3 of 2009.

Count 6 Production of child pornography in contravention of section 24B(1)(b) read with section 1 and Schedule 1(a) of the Films and Publications Act 65 of 1996 as amended by section 29 of the Films and Publications Amendment Act No 3 of 2009.

Count 7 Possession of child pornography in contravention of section 24B(1)(a) read with section 1 and Schedule 1(a) of Act 65 of 1996 as amended by section 29 of the Films and Publications Amendment Act No 3 of 2009.

Count 8 Using services of victims of trafficking in contravention of the provisions of section 7 of the Prevention and Combating of Trafficking in Persons Act No 7 of 2013.

B G MORRISON AJ

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 28 NOVEMBER 2019 to 14 OCTOBER 2021

DATE OF JUDGMENT: 21 OCTOBER 2021

APPEARANCE FOR THE STATE: ADV A VAN DEVENTER and ADV A ROOS

APPEARANCE FOR THE DEFENCE: ADV C MATAMBUYE (withdrew 12 December 2020); **ADV M MONYAKANE** (from 26 April 2021)