



(1) REPORTABLE: YES
(2) OF INTEREST TO OTHERS JUDGES: YES
(3) REVISED

.....26/04/21..
.....**DATE**

MOGALE AJ

INTRODUCTION

[1] The accused was indicted on a multiplicity of charges before the Regional Court, Pretoria. The trial commenced on the 11th July 2018 before the Regional Court Magistrate, Mr. Mokone Eagleton Moloto. Evidence of several witnesses was led in the main trial and before the conclusion of the State's case, the Regional Magistrate died. The State submitted Exhibit "A2", which is a certified copy of a Death Certificate confirming the death of Mr. Mokone Eagleton Moloto.

[2] At the beginning of these proceedings, the State brought an application in terms of section 215 that the trial starts *de novo* in the High Court. The State's application was based on the provisions of section 214(a)(v) of the Criminal Procedure Act¹ which reads as follows:

"the evidence of any witnesses recorded at a preparatory examination –

(a) Shall be admissible in evidence on the trial of the accused following upon such preparatory examination, if it is proved to the satisfaction of the court:

...

(v) that the evidence tendered is the evidence recorded before the magistrate or, as the case may be, the regional magistrate, and if it appears from the preparatory examination record or it is proved to the satisfaction of the court that the accused or, as the case may be, the State had a full opportunity of cross-examining such witness."

[3] The State further submitted the following reasons why the matter was transferred from the Regional to the High Court. Firstly, the offence was committed in 2016 and it took four years for the matter to start in the lower courts due to the roll congestion. Secondly, the State argued that it would be in the interest of justice and of the accused that the matter is speedily finalized.

[4] The accused did not oppose the application, and the court granted the application that the matter start *de novo*.

[5] The State put the same charges to the accused and the accused pleaded. The

¹ 51 of 1977.

charges are as follows:

CHARGES

[6] Count 1 - Contravention of Section 4(1) of Criminal Law (Sexual Offences And Related Matters) Amendment Act² read with the Prevention and Combating of Trafficking in Persons Act³ further read with the provisions of Section 51(1) of the Criminal Law Amendment Act,⁴ further read with the provisions of Section 1,50(2)(A) of the Criminal Law (Sexual Offences And Related Matters) Amendment Act and further read with the provisions of section 1 and 120 of the Children's Act.⁵ **Trafficking of a Person** - In that during the period commencing on 03 September 2016 up to and 01 December 2016 and at or near Derdepoort and in Sunnyside, Pretoria, in the district of Pretoria, the accused trafficked Miss L, a 12 year old female by means of fraud or deception to wit: the said victim was told that she was accompanying a certain unknown coloured female to Sunnyside to spend a night with the said coloured female and thereafter she would give Miss L taxi money to return home to Mamelodi the following day, whereas in truth and in fact the purpose for the visit was to hand over the said victim to the accused for the purpose of sexual exploitation and or to be used as a prostitute in or around Sunnyside, Pretoria.

[7] Count 2 - Contravention of Section 15(1) of Criminal Law (Sexual Offences and Related Matters) Amendment Act read with Section 1,56A, 57, 58, 59 and 261 of the Criminal Procedure Act. **Statutory Rape** - In that upon or about the 04 September up to and including 01 December 2016 and at or near Devenish Court, Sunnyside, Pretoria in the district of Pretoria, the accused unlawfully and intentionally committed an act of sexual penetration with the complainant, to wit, Miss L, a 12-year old female by inserting his penis into her vagina on diverse occasions without the consent of the said complainant.

ALTERNATIVELY

[8] Contravention of Section 15(1) of Criminal Law (Sexual Offences and Related Matters) Amendment Act read with the provisions of section 1, 56A, 57, 58,59, 60 and 261 of the Criminal Procedure Act. **Statutory Rape by a common purpose** - In that upon or about the 04 September up to and including 01 December 2016 and at or near Devenish Court, Sunnyside, Pretoria in the district of Pretoria, the accused unlawfully and

² 32 of 2007.

³ 7 of 2013.

⁴ 105 of 1997.

⁵ 38 of 2005.

intentionally committed an act of sexual penetration with a child despite the consent of the child to the commission of such an act, to wit: the accused had sexual intercourse with the complainant, to wit, Miss L, a 12-year old female child.

[9] Count 3 - Contravention of Section 3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act read with Section 51(1) of the Criminal Law Amendment Act. **Rape by a common purpose** - In that upon or about the 04 September up to and including 01 December 2016 and at or near Devenish Court, Sunnyside, Pretoria in the district of Pretoria, the accused unlawfully and intentionally committed an act of sexual penetration with a child despite the consent of the child to the commission of such an act, to wit: the accused caused several unknown men to have sexual penetration with the complainant, to wit, Miss L, a 12-year old female child.

[10] Count 4 - **Benefiting from the sexual exploitation of a child** - In that upon or about the 04 September up to and including 01 December 2016 and at or near Devenish Court, Sunnyside, Pretoria in the district of Pretoria, the accused unlawfully and intentionally received financial or other rewards, favour or compensation from the commission of a sexual act with, a complainant to wit Miss L, a 12-year-old female child, namely an undisclosed amount of money from unknown clients for sexual intercourse with the said victim with or without her consent.

[11] Count 5 - **Being involved in Sexual Exploitation of a child** - In that upon or about the 04 September up to and including 01 December 2016 and at or near Devenish Court, Sunnyside, Pretoria in the district of Pretoria, the accused is a person (A) who unlawfully and intentionally offered the service of a child complainant (B) to a third person (C) with or without the consent of (B), for financial or other rewards, favour or compensation to A, B or another person –

- (i) For the purpose of the commission of a sexual act with B by C;
- (ii) By inviting, persuading, or inducing B to allow C to commit a sexual act with B;
- (iii) By participating in, being involved in, promoting, encouraging, or facilitating the commission of a sexual act with B by C
- (iv) By making available, offering, or engaging B for purposes of the commission of a sexual act with B by C or

(v) By detaining B, whether under threat, force, coercion, deception, abuse of power or authority, for purposes of the commission of a sexual act with B by to wit, the accused offered the service of Miss L, a 12-year-old female child for the commission of sexual acts by other men with the said victim and or by detaining the said victim to force or coerce her to have sexual intercourse or acts with the unknown men with or without the consent of the child complainant for financial or other rewards, therefore the accused is guilty of an offense of being involved in the sexual exploitation of a child.

[12] Count 6 - **Kidnapping** - In that upon or about the 04 September up to and including 01 December 2016 and at or near Devenish Court, Sunnyside, Pretoria in the district of Pretoria, the accused unlawfully and intentionally deprived Miss L, a 12- year-old female victim of Human Trafficking of her freedom of movement by means of locking the said victim in the said flat at all times and by physically guarding her when she was outside the flat at night, whilst seducing the potential clients for the purpose of prostitution under duress to prevent her from running away.

[13] Count 7- **Keeping a Brothel** - In that upon or about the 04 September up to and including 01 December 2016 and at or near Devenish Court, Sunnyside, Pretoria in the district of Pretoria, the accused unlawfully and intentionally keep or is deemed to have kept a brothel at the said address on diverse occasions to wit:

- (i) By using the said premises for prostitution, and/ or
- (ii) By residing at and or in a brothel, and/ or
- (iii) Managing or assisting in the management of any brothel, and / or
- (iv) Knowingly receiving the whole or any share of any amounts of money taken in a brothel, and/ or
- (v) Being the tenant or occupier of any house or place knowingly permits the same to be used as a brothel.

[14] Advocate Roos and Advocate Van Deventer appeared on behalf of the State and Advocate Mohlahlo appeared on behalf of the accused.

[15] The court warned the accused of the Provisions of Section 51 of the Criminal Law Amendment Act and the impact thereof, which the accused understood.

[16] The accused pleaded not guilty to all charges against him and gave a plea explanation as follows:

16.1 The accused denied kidnapping the complainant, that the complainant was brought to his flat by a person called Tchibuza or Tochukwu further that the said information will be confirmed by Marcel Onye Barachi. That the complainant came to his flat at her own volition, asking for a place to stay as her parents chased her away.

16.2 He started having a love relationship with the complainant after the complainant informing him that she was 19 years of age. The complainant looked older than a 16-year-old, she looked like a 19-year-old woman that's why the accused didn't have a problem being in a love relationship with the complainant. People like Alister van Wyk, a caretaker at Devenish flat, R[...] and L[...] knew that both the accused and the complainant were boyfriend and girlfriend. During the period of their relationship, the complainant fell pregnant as a result of the consensual intercourse that they had.

16.3 The accused denied forcing the complainant to take drugs which were also confirmed by the medical certificate provided, the complainant tested negative for drugs in her system. There are also pictures showing both the accused and the complainant together confirming they were lovers. The complainant was never held captive as she was had a right to walk freely around and was never forced to prostitute in return for the accused to get the money.

SUMMARY OF MATERIAL FACTS

[17] The victim Miss L was a young girl, 12 years of age, who was residing with her grandmother, uncle, and brother in Mamelodi. The accused, a Nigerian citizen, was renting a flat at Devenish Court Sunnyside, Pretoria and on 03 September 2016, both the victim and the accused were unknown to each other.

[18] On 03 September 2016, the victim and her friends travelled to Derdepoort for an outing. In the evening, the complainant and her friend lost each other and the victim ended up being left behind at Derdepoort by her friends. Seeing that her friend left her,

she befriended a certain unknown coloured lady.

[19] The coloured lady offered her a place to sleep for the night and promised to give her money to go home the following day. The complainant travelled together with the unknown coloured lady to Devenish Court, Sunnyside in Pretoria where they both slept in the same bed with the understanding that she will return home the following day but when the victim woke up in the morning the coloured lady was gone and the accused was seated on the bed next to her.

[20] The accused assaulted and raped her repeatedly. The accused further supplied her with drugs to make her addicted to drugs to gain control over her and forced her into prostitution. The accused would make her go out of the flat but guard her to prevent her from running away, and make her seduce men for the purpose of prostitution. The complainant eventually succumbed and worked for the accused as a prostitute and handed money she received to the accused.

[21] On 01 December 2016, the victim managed to escape and travelled to Ga-Rankuwa, to her uncle L[...] M[...] to whom she reported the matter. The police were contacted and the accused was arrested on the same day.

[22] Several exhibits were handed in by consent and were marked in the following order:

- a. Exhibit "A1" - Original copy of a charge sheet from the Magistrate Court where the accused pleaded on 11 July 2018;
- b. Exhibit "A2" - Certified Death Certificate of Pretoria Regional Court Magistrate, Mr. Mokone Eagleton Moloto whom it is confirmed passed away on 31 July 2020;
- c. Exhibit "B" - Admission in terms of Section 220 of Act 51 of 1977
- d. Exhibit 'B1'- The evidence of Colonel A A Marais who testified on 12 September 2019 which is transcribed as per page 121-150 of the paginated record is admitted;
- e. Exhibit "C" - Medico-Legal Examination Report of L[...] E[...] M[...] compiled by Doctor L C Mogale on 01 December 2016. This report is also

supplemented by her testimony delivered on 22 October 2019;

f. Exhibit "D" - E M Masebe compiled a psycho-social assessment report regarding L[...] M[...], which is hereby admitted;

g. Exhibit "E" - The updated report compiled by Doctor Susan Verwayen, a Forensic Psychology. The report is also supplemented by her evidence delivered on 22 October 22;

Exhibit "F" - Affidavit in terms of section 212(1) of the Criminal Procedure Act 51 of 1977;

h. Exhibit "H" - Subpoena in Criminal Proceedings of Marcelo Onyebalance.

SUMMARY OF EVIDENCE

[23] L[...] M[...] confirmed the evidence that was recorded on 11 July 2018 and she further confirmed to the court that she stands by her evidence where she testified that she used to stay in Mamelodi with her grandmother, uncle, and her brother after the passing of her mother. That on 03 September 2016 she took a taxi and travelled to Derdepoort where she gathered with her friends to enjoy themselves. They even smoked hubbly and consumed Russian beer. Initially, she was supposed to travel with her friends (D[...], K[...], and P[...]) with the hired minibus, but they left her behind in Mamelodi and she then travelled alone. She confirmed that she did not go back home with her friends that night as she and her friends lost each other at Derdepoort.

[24] As a result, she met some new friends - an unknown coloured female person, taller in height and light in complexion. She requested from the said lady some money to go home but the lady advised the complainant to accompany her to her place in Sunnyside as it was late, then she would only give her money to go home the following day. They proceeded to Sunnyside and ended up in Devenish Court where they both slept on the same bed. In the morning when she woke up, the lady was gone and she could only see the accused sitting on the bed next to her. She pleaded with the accused to allow her to go home but the accused refused and started assaulting and raping her until she bled. The accused would leave her for some days without food. The other day he came back with skimpy clothes and cheeky pants. He told the complainant that she should wear the clothes and start making money for him as a prostitute, the complainant refused and the accused assaulted and raped her repeatedly.

[25] The accused forced the complainant to smoke drugs. He forced her to smoke cocaine mixed with a rock and when the complainant refused to smoke the drug, the accused would threaten to assault her. The accused would put a drug in a pipe, light it and make the complainant inhale. The complainant complied with the accused instructions of smoking the drugs in fear of assault. After smoking the drug, the complainant would be high and ended up wearing skimpy clothes that the accused bought for her to prostitute. After wearing those clothes she was instructed to go into the street, near Sunnyside Park, to sell her body. At all material times when the complainant was outside in the street selling her body, the accused would guard her at the park to make sure that she does not escape. The complainant would get a client, an older man, and would then take the client to the accused's flat to have sex with him. Thereafter, the client would pay the complainant either R50 or R100 depending on the days.

[26] The accused would also be at the flat when the client was with the complainant waiting for them to finish and she would hand over the money paid by the client to the accused immediately thereafter. The complainant used to sleep with more than five different men daily without using any condom, for her to accomplish that, the accused used to give her drugs after each session with a client. During sexual intercourse with those men, she felt nothing on her body as she was always high due to drugs received from the accused. The complainant had her phone but the accused changed the sim card and the phone was always in the accused's possession unless when the complainant was expecting a client to call or when she was talking to a client. She could not phone her family because she could not remember their phone numbers and their numbers were not stored on the new sim card.

[27] The complainant on 01 December 2016 had extra money which she did not give the accused. She managed to sneak out of the flat by taking a taxi to Ga- Rankuwa to her uncle's place. Upon her arrival, the uncle gave her food, she took a bath, and afterward, she reported the incident to her uncle. The uncle took the complainant to Sunnyside Police Station to open a case. The police thereafter requested the complainant to show them the place where the accused resided. The complainant pointed out a place and the accused who was subsequently arrested. The complainant was taken to Steve Biko hospital for medical treatment where she tested positive for pregnancy, the said pregnancy was later terminated. The complainant disputed that at any stage she discussed her age with the accused and before the incident, she had never had any sexual intercourse with anyone. The complainant admitted that there were photos taken,

some by herself and some by the accused, that at that stage, she was highly drugged and was not even aware that she was taking a photograph.

[28] During cross-examination by the defence counsel, the complainant admitted that she did not inform her grandmother that she was going to Derdepoort as she intended to inform her when she came back. She admitted that the coloured lady took her to McDonald's, bought her some food, further that she never saw the accused with the coloured lady. The lady was gone in the morning when she woke up, she never saw her again. She admitted that she met L[...] M[...] and R[...] M[...] who were also prostituting in the street and further that Lerato taught her how to smoke rock and cocaine. She also admitted that she met Allister van Wyk and Marcelo Onyebalanchi. It never crossed her mind to request any help from passer-bys at the street or try to run away because most of the time she was high and what was coming to her mind was getting a client, having sex, getting paid, giving the accused money and be given drugs.

[29] The complainant was confronted about the report of Ms. Eugenia Masebe, a probation officer who consulted with her. The complainant dispute that she informed the officer that she and her grandmother are not on good terms and further that she was a rebellious child, the complainant contended that her grandmother was not treating her and her brother well but never fought with her nor was she a rebellious child. Her grandmother would allow her to play with other children but the only problem was when she came back home late at night. She disputed the allegations that she did not have a good relationship with her grandmother and the fact that the friends that she used to play with had children. The complainant was adamant that when she was at the accused's place, she was not chased away from home, further that her grandmother would not have chased her away at the age of 12 and if she could chase her away, she would have gone to stay with people she knew, not the accused, a person she had never met before. She also denied the allegations that she came to stay with the accused voluntarily, that she told the accused that her name was L[...] D[...] from Mamelodi, and further that her family went to East London on vacation and they would return in December. The complainant disputed that she consented to sexual intercourse that took place between herself and the accused. The accused put a version which was denied that at some point the complainant moved out from their place being pregnant to stay at Escape. That the accused at some stage had to request the assistance of the police to bring the complainant back to him.

[30] L[...] S[...] M[...] confirmed the evidence that was recorded on 12 September

2019 and further confirmed to the court that he stands by his evidence where he testified that, around September 2016, he received information that the complainant was missing and he went to Mamelodi Police Station to open a missing person docket. 01 December 2016, he was at his home in Ga-Rankuwa when the complainant arrived wearing skimpy clothes, looking very pale, dilapidated and dirty. The complainant had the same hairstyle that he last did on her in September and it was in a state of a mess. The complainant made a report to her that she was kidnapped, used as a prostitute, and forced to use drugs. She told him that the guy who was staying with her used to rape her and other unknown men were also raping her. He immediately took the complainant to Sunnyside Police Station to report the matter. The police accompanied them to the flat where the complainant was kept. Therein, the accused and two young girls who also looked drugged were found. The accused was subsequently arrested. He confirmed that the complainant went missing for three months not knowing her whereabouts.

[31] Mr. M[...] testified that the complainant was traumatized by the incident and had various symptoms including, difficulty in sleeping, fear and anxiety, a decline in academic performance, crying, flashbacks, distress, avoidance to talk about the traumatic incident that happened to her, fear of being alone, inability to travel alone. The witness had to be dropped off and be collect from school and other places she needed to go. The witness confirmed that the complainant was not happy about the school she was attending at Mamelodi but was not aware of the abuse by the grandmother and the brother. He used to see the complainant regularly as he was the one taking care of her by buying food, clothing and even assisting her with school work.

[32] D[...] I[...] M[...] testified that she had a relationship with the complainant but they were not best friends. She is two years older than the complainant and they were in different grades and schools. After school and on some weekends, they would meet at the park and spend some time together. She doesn't know anything about the complainant's situation at home because the complainant never expressed herself or talked about her family situation. On 03 September 2016, they had an arrangement as a group of friends to travel to Derdepoort to have some fun. It was a norm that every first week of September each year, many youths around the area would hire some minibus taxis and travel to Derdepoort to have fun. They would enjoy themselves by drinking alcohol and smoking hubbly.

[33] When they were about to leave Mamelodi, she proceeded to the complainant's home to collect her, unfortunately, she was told that the complainant was not home. Their

meeting place for the departure was Melodie Park and the time for departure was between 12h00-13h00. The complainant did not arrive at the meeting place and when the departure time arrived, she called the complainant to enquire about her whereabouts. The complainant informed her that she had already left with Dineo's group. At Derdepoort she only saw Dineo, she did not see the complainant and never enquired with Dineo about the complainant's whereabouts. Their group went back home at night but did not travel back with the complainant. She never saw the complainant again and after a few days, she saw a post at school that the complainant was missing. She only saw the complainant when she came to her homestead with the police.

[34] Thabo Sithole, a police officer employed by South African Police Service, stationed at Family Violence Child Protection and Sexual Offences, testified that he started being an investigating officer in 2008. He was given instructions by Advocate Mphaga, the previous prosecutor who dealt with the matter, to subpoena witnesses. The witness D[...] M[...] was traced with the assistance of the complainant and was able to be subpoenaed. D[...] assisted them to trace Dineo but her family is no longer residing where they rented a room in Mamelodi, the landlord could not assist with their present or their new address. L[...] M[...] and Marcelo Onyebalanci made statements to the previous investigating officer using the same physical address and telephone numbers. When he was trying to contact L [...], Marcelo answered and informed him that L[...] is no longer staying with him and her present address is unknown. He met Marcelo at Pretoria Magistrate Court and served him with a subpoena to appear in court. He never saw the witness again and Marcelo is afraid of coming to the court because he is thinking that the witness will arrest him. Mr. Sithole promised the court that he will try to trace Marcelo again as he is no longer residing at the residential address recorded on his statement and bring him to court.

[35] The witness found R[...] M[...] on the street prostituting and handed her a subpoena to come to court. She could not provide him with her residential address and as a result, he was unable to collect her to come to court. He was told by the owner of Devenish Court that, Allister van Wyk, a caretaker, was fired from his work and he went back to his hometown, Vereeniging, he could not be assisted with his present address. The officer tried to subpoenaed all witnesses from Devenish Court but could not find them. The owner of the property confirmed that it would be difficult to trace witnesses because, once a person is renting a flat from the owner, he rents it out to someone without the owner's knowledge or consent.

[36] Doctor Susan Verwayen confirmed the evidence that is recorded on Exhibit E and she further confirmed to the court that she stands by her evidence where she testified that she is working as a forensic psychologist, as a consultant to the National Prosecution Authority and the South African Police Service, specifically working on cases of human trafficking. Her educational background is BA in criminology, psychology, and BA Honours in criminology. She testified that she works mainly with trafficked victims and based on her experience, exposure, and training she knows how to explain the behaviour of human trafficking victims. She confirmed that she consulted with the complainant and her uncle on numerous occasions and compiled a report at the end of her assessment.

[37] The doctor report summarily evaluated the complainant's family background, that the sudden death of her mother had a severe impact on her. That the research finds that trafficked children often come from an environment where they experience loss, deprivation, neglect, or different forms of abuse that affected their emotional development, which contributes negatively to their ability to form satisfactory and secure relationships, self-awareness, and self-esteem. The loss of her mother at a young age deprived her of the care and guidance needed by a girl approaching adolescence, this lack of direction, supervision, and a sense of belonging made her vulnerable to human trafficking and further contributed to her acceptance and compliance in the abusive relationship with the accused.

[38] There was a lot of verbal abuse from the grandmother and her brother and that was not conducive for a young growing girl at the age of 12. The absence of the father also contributed as the complainant indicated that since the passing away of her mother, contact with her father was limited. The father was a kind and caring person but had a strange relationship with the primary caretaker, her grandmother, and this contributed to her vulnerability. The fact that she needed a father figure was confirmed by the fact that after the escape, she went to the uncle, the only male authority figure who treated her with respect and dignity. The complainant informed the witness that before she was trafficked, she expressed her desire of staying with her uncle because he used to assist her with school work whereas the grandmother focused on her performing household duties rather than her education, but the grandmother refused to allow her to stay with the uncle.

[39] The witness further explained that victims of trafficking at the beginning of their trafficking experience, are exposed to sexual violence or threats of violence for them to comply, to accept that this is their fate and not to make any fuss. It is also common that

trafficked children are changed names, their identity, for them to accept their new life and the trafficker to be able to keep them in line and do exactly what the trafficker wants. In many cases of human trafficking, all the monies earned by the victim are handed over to the trafficker. The traffickers usually use substance abuse to keep their targets under their control. The victim is not allowed freedom of movement and is kept in isolation from all outside the cycle of the trafficking situation. The complainant was ashamed and fearful of going back home, the shame of what she had been forced to do, and what would the family's reaction be in case she escaped. The fact that the complainant was physically assaulted and denied food exposed her to an incredibly traumatically experience and as a result, she submitted.

[40] Doctor Marriam Kganya is a clinical psychologist at George Mukhari Academic Hospital. Her qualifications being, Bachelor of Science, Honours, Masters, and Ph.D. in clinical psychology. She confirmed the evidence that is recorded on Exhibit (G) and further confirmed to the court that she stood by her evidence where she testified that she received a referral letter with full details from Advocate Mphaga to evaluate a victim who had experienced symptoms indicative of Post -Traumatic Stress Disorder. For her to be able to compile a complete report, she consulted with the complainant on various occasions, the uncle, and the investigating officer and relied on the information they provided. Initially, when she met the complainant, she appeared depressed with the element of anxiety, and her school performance deteriorated, but that improved as the sessions progressed.

[41] During the doctor's evidence, she testified that the complainant attended a trauma debriefing session to alleviate the trauma experience where she was also assisted to prepare for her testimony in court. Family therapy with the uncle to work on the rules, the roles, the boundaries, and the responsibility of every family member was also conducted where the complainant was encouraged to start working towards gaining her independence by doing things on her own. The complainant also received psychotherapy to assist with the psychological and emotional difficulties indicated. She will continuously and consistently be evaluated to assess the need for psychiatric co-management.

[42] Doctor Lerato Caroline Mogale's testimony together with the Medico-Legal Examination Report of Lehlohonolo Ester Mononyane compiled on 01 December 2016 was admitted by the accused in terms of Section 220 of the Act. Her clinical evidence is that at the time she was examining the complainant, she did not have signs that were

suggestive of her being under the influence of drugs. The doctor did not use any instrument or collect any samples like urine or saliva nor did she conduct tests to confirm or ascertain if the complainant was using drugs or not. She was not provided with a drug kit for her to take samples. Concerning the development of the complainant, it is true that she developed breasts and there were pubertal changes noticed. The complainant started early at the age of 10 to see her menstrual periods and that is the reason why she had developed breast and pubertal changes. The fact that she was pregnant also correlates with the manner she had developed when she sees her. The complainant, who was 12 years 11months old because of this surrounding circumstances made her be in tanner stage 4, two years forward instead of being in tanner stage 3. Due to these early developments, the complainant was looking like a 14 or 15-year-old. Concerning the evaluation of sexual activity, there were no physical genital injuries but that does not exclude that there was an incident of sexual penetration. There was a lack of hymen in this case considering the complainant's history of sexual activity.

[43] During cross-examination, the doctor disputed the fact that the complainant looked like a 19-year-old. She was adamant that the complainant is in tanner stage 4 due to early development in puberty stage and pregnancy but still looked between 14 or 15 years old. The fact that she did not observe physical genital injuries did not exclude sexual penetration.

[44] Eugenia Matshidiso Masebe compiled a psycho-social assessment report relating to the examination of L[...] M[...] after receiving a request to compile same. Mrs. Masebe has a BA degree in Social Work and Honours (Probation studies) and has seven years of experience working in the NGO as an educational sector for sexual harassment educational projects and victim empowerment coordinator. During the interview with the complainant, the complainant told her how her grandmother used to ill-treat her and that resulted in her becoming rebellious and befriending older friends in the neighbourhood who were not in school and had children. According to her evaluation, the incident left severely traumatizing effects which resulted in her inability to trust humanity. She was uncomfortable and a bit withdrawn during the interview but because of her good memory, she could articulate herself well when explaining the details of the incident.

[45] The evidence of Colonel Andriaan Albertyn Marais was that he was working as a control forensic analyst dealing with illicit drug analysis which is scheduled in the Drugs and Drug Trafficking Act as well as those in Schedule 7 of the Medicines and Related Substances Act. He holds a Masters's degree in chemical pathology, specifically

toxicology. When the witness was confronted about the J88 findings compiled by Doctor Mogale that there was no evidence of any drug use at the time of examination, the witness replied as follows: "The only consistent evidence that one can have for exposure to a drug is by testing a bio substance, biofluids like blood or urine. Each has its reason why you will test. If you want to show that someone is currently under the influence or that there is a drug circulating in the person's system, the biofluid that you would select is blood because that indicates what is currently circulating in the system meaning that it has access to the brain so that the drug can have its effect. If you want to indicate that the exposure happened with a longer time frame of detection then you would select biofluid like urine. Drugs pass through your system and get metabolized, it gets detoxified by the liver and get excreted in the urine but also derivatives of the drug formed by the liver will also be excreted in the urine. Those derivatives are commonly known as metabolites, so drug testing in urine by looking at the metabolites is the established methodology to show exposure to a drug because it gives the certainty that the drug passed through the system by the formation of the metabolites. But it also gives a longer time frame to detect whether the drug was present or not."

[46] The witness further testified that drug detection cannot be concluded by clinical assessment unless a person is still under the influence of drugs where dilated pupils or increased blood pressure or some other physiological symptom might indicate that the drug is present. Once the active phase of the drug passes and it is starting to eliminate whether exposure occurred depend on the dosage form.

[47] Affidavit in terms of Section 212(1) compiled by Kenneth Ndou, an employee at the Department of Home Affairs, indicated that the accused did appear on the National Immigration Information system as an Asylum seeker in the South African Republic. The Asylum seeker permit was granted until 09 March 2017. The Asylum application was rejected as manifestly unfounded in terms of Section 24(3) (b) of Refugee Act⁶, the Refugee Status Determination Officer rejected the application as manifestly unfounded, abusive, or fraudulent.

DEFENCE CASE

[48] Augustine Omini Obono testified that he is the accused in this matter and can explain his defence to the court. He is a Nigerian Citizen who came to South Africa on 24 March 2013 and used to stay in Devenish Court, Sunnyside where he was sharing a flat

⁶ 130 of 1998.

with one Marcelo Ombanasher. That on 03 September 2016, while he was at the flat watching television, one Tuchuku another name Chibuzu, Marcelo's friend, arrived with the complainant. He saw both Tuchuku and Marcelo talking but did not hear what they were saying as they were speaking the Ibo language. Marcelo told him that he must ask the complainant whether she wants to be his girlfriend or not, if she doesn't agree he must tell her to leave but if she agrees, she must stay. They both left and he remained with the complainant. They started talking, the complainant told him that she was L[...] from Mamelodi and she was 19years old. They ended up staying together as boyfriend and girlfriend whereby consensual intercourse took place on various occasions. He used to take care of the complainant by buying her clothing, food, and a smartphone. The complainant became pregnant with his child and they were happy about the pregnancy. Marcelo was not happy to see him taking care of the complainant and he chased him out of the flat. He left alone, leaving the complainant behind to stay at Allister van Wyk.

[49] After some weeks he received a phone call from the complainant that she moved out from Marcelo's place and was presently staying at Escape's place. He was not happy about her decision but accepted as the complainant informed him that she would only stay with him once he found them a place to stay. The accused mended things with Marcelo and moved back to the flat, the complainant ended coming back with the assistance of the police after having some fight with Escape. They stayed together at Marcelo's place until the end of November when they rented a flat at Allister's place. The accused mentioned that there was a day in which the complainant left for a day and only came back the following day. Upon her arrival, she mentioned that she went home and her parents travelled to East London and would only come back in January. Then on 01 December, the complainant told him that she wanted to visit her home. She took some clothes, her phone and he gave her R500. The complainant was clean when she left and there was nothing wrong between them. Later in the day, the complainant arrived with the uncle and the police to arrest him. He denied that there were young girls who were drugged in the flat when they arrived, he also denied that he raped the complainant or made her sleep with other male persons for his benefit.

[50] During cross-examination, it was put to the accused that he is illegal in the country as per Exhibit F and that he raped and trafficked the complainant for his sexual benefit. The accused could not explain why the uncle would testify that the complainant came home being a state of a mess while his testimony is that she left the flat clean. The accused maintained that the trauma that the doctors testified about was caused by her family members who used to molest or abuse her at her homestead. He maintained that

he believed the lies told by the complainant that she was 19 years and looking at her development, he believed her.

The accused witnesses

[51] Officer Thabo Sithole testified that his efforts of tracing the defence witnesses failed. He used his phone to call Marcelo and requested the accused to assist by talking to him, asking him to come to court but the accused refused. The accused also confirmed that he refused to assist the police in tracing his witnesses as it was not his duty to assist the police to do its work. The court afforded the accused another opportunity to assist in tracing his witnesses. Marcelo was contacted but he was reluctant to come to court to testify. Exhibit H was handed in, a subpoena proving that Marcelo was served on 30 March 2021 to appear in court. A warrant for his arrest was issued out. The defence closed its case without calling any witnesses.

TOTALITY OF EVIDENTIAL MATERIAL

[52] It is a common cause that the complainant travelled with an unknown coloured lady from Derdepoort to Sunnyside on 03rd September and never return home till the 01st December 2016. That she was taken to the accused's place and the accused had sexual intercourse with her between that period. It is common cause that the complainant became pregnant while staying at the accused's place. It is a further common cause that the complainant was a 12-year-old child during that period.

[53] The fact in dispute is whether the physical development of the complainant proved that she was a 19 year old child. Whether the complainant was trafficked and used as a prostitute to benefit income for the accused.

BEYOND REASONABLE DOUBT

[54] The onus of proof in a criminal case is discharged by the State. It has to establish the guilt of the accused beyond a reasonable doubt. Furthermore, the accused's version cannot be rejected solely on the basis that it is improbable, but only once the trial court has found on credible evidence that the accused explanation is false beyond a reasonable doubt see *S v V*.⁷ The corollary is that the accused is entitled to be acquitted if it is reasonably possible that he might be innocent.

[55] Proof of the guilt of the appellant beyond reasonable doubt and the question of

⁷ 2000(1) SACR 453(SCA) at 455 B.

whether the appellant's version is reasonably possibly true is not separated and independently tested as stated by Nugent JA in *S v Van der Meyden*.⁸

APPLICATION OF THE PROVISIONS OF SECTION 208 OF THE CPA

[56] The provisions of Section 208 of the CPA provide that an accused person may be convicted of any offense on the single witness of any competent witness. In *S v Sauls and Others*,⁹ it was held that there is no rule-of-thumb test or formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and should consider its merit and demerits and having done so, should decide whether it is satisfied that the truth has been told despite shortcomings or defects or contradictions in the evidence.

[57] Cautionary rules in terms of *S v Chabalala*¹⁰ the Supreme Court of Appeal pointed out that the correct approach in evaluating evidence is to weigh up all the elements that point towards the guilt of the accused against all the elements that are indicative of his or her innocence, taking proper account of inherent strength and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance is so heavily in favour of the State that it excludes any reasonable doubt about the accused's guilt.

IDENTITY OF THE ACCUSED

[58] The identity of the accused is not in dispute. The complainant pointed out the accused during the arrest and in court. The accused also confirmed that he spent three months staying in the same house with the complainant who was his girlfriend.

CORROBORATION

[59] The evidence of the complainant that she was taken from Derdepoort on the 03rd September and never returned home until 01st December 2016 was corroborated by the complainant's uncle who testified that seeing that the complainant went missing, he went to Mamelodi Police Station and open a missing person file. This evidence was also corroborated by D[...] that the complainant was in Derdepoort but did not return home with them on the 03 September.

[60] It is common cause that the complainant's grandmother and the brother were

⁸ 1999 (1) SACR 447 (W) at 488 f-l.

⁹ 1981 (3) SA 172 (A) 180.

¹⁰ 2003 (1) SACR 134 (SCA).

abusing her, that her mother died, and further that she did not have a relationship with her father. Meeting the unknown coloured lady at Derdepoort and the promises she made, made her to believe her and trusted that she would assist her. The complainant's behaviour was corroborated by Doctor Verwayen, that children who often come from an environment where they experience loss, deprivation, neglect, or different forms of abuse that affected their emotional development that contributes negatively to their ability to form satisfactory and secure relationships, self-awareness and self-esteem. The loss of her mother at a young age deprived her of the care and guidance needed by a girl approaching adolescence, this lack of direction, supervision, and a sense of belonging made her vulnerable to human trafficking and further contributed to her acceptance and compliance in the abusive relationship with the accused. There was a lot of verbal abuse from the grandmother and her brother and that was not conducive for a young growing girl at the age of 12. The absence of the father also contributed as the complainant indicated that since the passing away of her mother, contact with her father was limited. The father was a kind and caring person but had a strange relationship with the primary caretaker, her grandmother and this contributed to her vulnerability, and the fact that she needed a father figure was confirmed by the fact that after the escape, she went to the uncle, the only male authority figure who treated her with respect and dignity.

[61] The complainant version that the accused started by assaulting her, denying her food and water for days when she was refusing to prostitute for him, changing her name to L[...], making her take drugs, as a result of that intake, she would do anything the accused instructed her to do, mainly prostitution. Afterwards, the accused would take the money she made from clients. This evidence was corroborated by Doctor Verwayen that the victims who are being trafficked are exposed to sexual violence or threats of violence for them to comply, to accept that this is their fate and not to make any fuss. It is also common that trafficked children are changed names, their identity, for them to accept their new life and the trafficker is then able to keep them in line and do exactly what the trafficker wants. In many cases of human trafficking, all the monies earned by the victim are handed over to the trafficker. The traffickers usually use substance abuse to keep their targets under their control.

[62] L[...] M[...] testified that the complainant was depressed, unable to sleep because of anxiety, was afraid to go to school or stay alone at home as she was afraid that she would be kidnapped again. At some stage, due to the complainant's condition, he came to court without her and he was in trouble with the court. This evidence was corroborated by Doctor Kganye who evaluate the complainant and observed that she had

experienced symptoms indicative of Post -Traumatic Stress Disorder. When she met the complainant, she appeared depressed with the elements of anxiety, and her school performance deteriorated but that improved as the sessions progressed.

[63] Doctor Mogale conducted a clinical observation when consulting with the complainant and concluded that she was not under the influence of any substance. She did not conduct any examinations by either taking samples to test whether there were drugs in the complainant's system or not. The evidence of Colonel Marais is that, I quote, "the only consistent evidence that one can have for exposure to a drug is by testing a bio substance, biofluids like blood or urine. Each has its reason why you will test. If you want to show that someone is currently under the influence or that there is a drug circulating in the person's system, the biofluid that you would select is blood because that indicates what is currently circulating in the system meaning that it has access to the brain so that the drug can have its effect. If you want to indicate that the exposure happened with a longer time frame of detection then you would select biofluid like urine." Therefore, I find that the fact that the State did not submit any forensic prove that there were drugs in the system of the complainant, does not exclude the fact that the complainant was drugged, but that, no substance was taken from the complainant to be tested.

[64] The complainant corroborated the accused version regarding the photograph that was taken depicting them in the bedroom. The complainant explained that when it was taken, she was highly drugged.

CONTRADICTIONS

[65] It is a common cause that the complainant contradicted herself as to how she left her parental place until Derdepoort and the reasons why she ended up traveling with the unknown coloured lady. She informed the court that she left with a taxi alone to Derdepoort, Dipuo testified that she left with Dineo's group and she told Ms. Masebe that she left with her boyfriend from Mamelodi to Derdepoort. She further informed the court that she didn't have money to go back home when she met this unknown coloured lady and after the lady promised to give her shelter and money to go home the following day, she travelled with her. But she told Ms. Masebe that she did not want to go home at night as she was afraid that she will be punished for coming home later. I find these contradictions to be immaterial, they do not affect the elements of the offense which the accused has been charged with. I also accept that the complainant is a 12-year-old child who had a difficult upbringing and I believe that that changed her behaviour. The evidence of how she travelled to Derdepoort is not consistent, this might also be

contributed by the behaviour and that she does not want the family to know how she travelled to Derdepoort. There are no contradictions on her evidence as to how she travelled to Derdepoort up until she travelled to Ga- Rankuwa.

[66] The accused in his plea explanation, it was admitted that L[...] and R[...] (whom it was alleged were the complainant's friends) were prostitutes, but during his evidence, he disputed knowing such. The accused in his evidence testified that after Tuchuku and Marcelo left him with the complainant, they started having a conversation about her age, name and that she was willing to be his girlfriend. But it was put to the complainant that she told the accused that she was homeless and that she was chased away from home by her parents. When the accused was confronted with these contradictions, the accused failed to give a reasonable explanation to the contradictions.

IMPROBABILITIES

[67] The accused is adamant that the complainant told him that she was 19 years old and when looking at her body, the way it developed, he believed that she was 19 years old. Looking at Exhibit C, Medico-Legal Examination report, Doctor Mogale noted that because the complainant started her menstruations earlier, at the age of 10, automatically that made her two years ahead of her age, she was in tanner 4, her breast development was also in tanner 4, not yet fully developed, pubic hair, tanner 4 not yet fully developed. In essence, her testimony was that the complainant's body was not yet fully developed for one to conclude that she was an adult. The accused had girlfriends who were between 20-25 years and had sexual intercourse with them. Considering the evidence presented relating to the complainant's age and the evidence of the doctor, I find it to be improbable that the accused could not see that the complainant was still a child. The accused was a well-educated adult male of 36 by then, I find it to be improbable that he was unable to hear that the complainant was a young child even when they were having a conversation.

[68] It is improbable for this court to believe that the accused was taking care of the complainant, buying her clothes and that everything was fine between them when she left on the 01Decemember to her uncle's place whereas the uncle testifies that when the complainant arrived at his home she was wearing skimpy clothes, looking very pale, dilapidated and dirty. She was still having the same hairstyle that he did on her in September and it was also in a state of a mess. According to the accused, there was a day in which the complainant travelled to Mamelodi and spent a night there without telling him and the complainant returned the following day. Life continued as normal and the complainant informed him that her parents went to East London and would be back in

January. Police did not come to arrest him nor did they receive any complaint from the complainant's family. On 01 December, the complainant informed the accused that she wanted to go home and he agreed, gave her money, accompanied her to the taxi and travelled home. Later in the afternoon she came with the police to arrest him. I find the submission by Mr. Mohlahlo that the complainant had to lie to her uncle because she left home for three months without informing her parents of her whereabouts improbable and without any substance. The parents, according to the accused, were in East London and only coming back in January. As such, there was no reason for the complainant to lie.

[69] The complainant had some money on her which the accused was not aware of and she found an opportunity for the first time to run away. When the accused left the butler door open, she took the opportunity and ran away to her uncle's place. I find the accused's version as to how the complainant ended up at his flat and how Tuchuku just appear from nowhere with the complainant and dropped her there without saying anything to the accused to be improbable.

FACTUAL FINDINGS

[70] The accused indicated to the court that he had witnesses to confirm his evidence that the complainant was his girlfriend, that she told them that her name was L[...], and also that she told them she was 19 years of age. The accused refused to provide the investigating officer with the information as to how he could trace them. He even refused to be assisted to make a phone call to Marcelo who was previously served to appear in court to inform him about how his evidence is of importance to the court. R[...] and L[...] are prostitutes and could not be traced to come testify on behalf of the accused as they moved from one place to another. I find that Marcelo did not want to come to court to testify because he knew that the accused committed the offenses that he has being charged with. I find that just like R[...] and L[...] who were prostituting for the accused's friends, the complainant was also used to generate money as a prostitute for the accused.

[71] The count of trafficking involves recruitment, movement, exchange, and receiving. I find that the coloured lady recruited the complainant from Derdepoort by making some promises to her and delivered her to the accused who received her in Sunnyside, intending to sexually exploit her. The accused continuously raped the 12-year-old minor without her consent.

[72] I find that the only way for the accused to control the complainant was to instil

fear in her by assaulting her and by not giving her food, by changing her name, by dragging her, and by guarding her all the time making sure that she did not escape. That made it easy for the accused to rape her on a number of occasions. .

[73] I also find that for the complainant to be able to generate money for the accused, the accused needed to drug her, control her and allow her to make use of his place as a Brothel to sleep with various men daily. I find that the State managed to prove that the accused exploited the complainant and also benefited from that exploitation.

[74] The fact that there is no forensic report that drugs were found in the complainant's system does not mean that she was not telling the truth, the evidence is that the samples were never taken for analysis. The fact that the medical report shows that there were no injuries sustained on her genital, does not exclude rape, the fact that the complainant was violated for three months by five to six men daily and further that she was pregnant, shows that she was sexually active.

[75] In totality, I accept the evidence of the State that the complainant was trafficked from Derdepoort to Sunnyside, the accused received her as a slave that would generate money for him, that to succumb to the accused's instruction, the accused had to instil fear in her and drug her. I also accept the complainant's evidence that she was exploited or used to generate money for the accused and the accused kept her at his place for three months against her will. It is a proven fact that the complainant was a 12-year-old child.

[76] I reject the accused version in totality as false that he believed that the complainant was 19 years old by looking at her physical development, further that the complainant stayed with him willingly. I also reject his version that the complainant was his girlfriend, that sexual intercourse was consensual, that he never allowed her to have sexual intercourse with other male persons in his flat and that he gave her drugs with the intention of controlling her as false.

[77] In the premises, there is no doubt in my mind that the accused committed all the counts as per the indictment and there are many improbabilities in his version. I find that the State succeeded to prove the guilt of the accused beyond a reasonable doubt. The version of the accused person is not reasonably possibly true and is rejected.

[78] Accused stand up:

1. Count 1 - I find you guilty of contravention of section 4(1) of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 read with section 51(1) of the Criminal Law Amendment Act 105 of 1997, which is trafficking in persons;
2. Count 2 - I find you guilty of contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with section 51(1) of the Criminal Law Amendment Act 105 of 1997, which is the rape of a 12-year-old child;
3. Count 3 - I find you guilty of contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with section 51(1) of the Criminal Law Amendment Act 105 of 1997, rape by common purpose of a 12-year-old girl;
4. Count 4 - I find you guilty of contravention of section 17(4) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which is benefiting from the sexual exploitation of a child;
5. Count 5 - I find you guilty of contravention of section 17(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which is the exploitation of a child;
6. Count 6 - Kidnapping;
7. Count 7 - Contravention of the provisions of section 2 of the Sexual Offences Act 23 of 1957 and further read with the Criminal Procedure Act 51 of 1977, which is keeping a Brothel.

K MOGALE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on

CaseLines. The date for hand-down is deemed to be 26 April 2021.

APPEARANCES

Counsel for the State: ADV. VAN DEVENTER & ROOS

Instructed by: THE DIRECTOR OF PUBLIC PROSECUTIONS,
JOHANNESBURG

Counsel for the Defence: ADV. MOHLAHLO

Instructed by: JUDICARE PRACTITIONER, PRETORIA

Date of hearing: 12 April 2021

Date of judgment: 26 April 2021