

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

REPORTABLE

Case no.: CCD39/2019

THE STATE

and

G[...] K[...] R[...] P[...]

JUDGMENT

Delivered: 11 December 2020

Moodley J:

[1] The accused in this matter, G[...] K[...] R[...] P[...], has been indicted before this court on 56 charges as detailed in the indictment. The complainant in each charge is the accused's minor stepdaughter, who lived with him after the death of her mother. The State alleges that during the period January 2017 and 11 June 2018, the accused perpetrated the offences he has been indicted with, while he lived with or was alone with the complainant at several places, including Benoni, Gauteng; Overport and Redhill in the district of Durban; and Rietriver in Verulam. The offences, which include rape; attempted rape; sexual grooming and sexual exploitation of a minor; exhibition of pornography to a minor and creation, distribution and possession of child pornography; trafficking; and child abuse, are constituted by alleged contraventions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the CL(SORM)AA'), the Films and Publications Act 65 of 1996 ('the FPA'), the Children's Act 38 of 2005 ('the CA'), and the Prevention and Combating of Trafficking in Persons Act 7 of 2013 ('the PCTPA'), read with the relevant provisions of the

Criminal Procedure Act 51 of 1977 ('the CPA').

Plea

[2] The accused pleaded not guilty to all the charges. His counsel, Mr *TP Pillay* of the Durban Justice Centre, confirmed that:

- (a) The accused's plea was a bare denial without an explanation in terms of s 115 of the CPA.
- (b) The accused denies all allegations in the indictment and puts the State to the proof thereof.
- (c) The accused has been advised of and understands the provisions of the minimum sentence legislation.

Admissions

[3] In terms of s 220 of the CPA, the accused made the following admissions (Exhibit A):

- (a) The name and date of birth of the minor complainant, being [...] 2007.
- (b) A black and white Huawei Y541-U02 cellphone ('the Huawei phone'), IMEI number 869153024939834, containing one memory card and two MTN SIM cards, was recovered by Mr J Pillay Ronald Pillay ('Mr J Pillay') at the accused's residence in Verulam.
- (c) The said Huawei phone was handed to Mr Vinodh Singh ('Mr Singh') of the Reaction Unit SA ('RUSA'), who handed it over to Warrant Officer R Naidoo ('W/O Naidoo') of the South African Police Service, who subsequently handed it over to Detective W/O D Pillay ('W/O Pillay').
- (d) The said Huawei phone was sealed and forwarded, first to the Forensic Cybercrime Unit, Durban for analysis and thereafter to the Forensic Cybercrime Unit in Pretoria for the purpose of extracting and downloading videos, images and other relevant content.
- (e) On 12 November 2018, Colonel A Maimele ('Col Maimele') of the Cyber Crime and Deep Web Investigations Forensic Unit in Pretoria received the Huawei phone, photographed it and thereafter downloaded its contents, which he exported and saved onto a 64GB Sandisk USB flash drive, serial number BN180625625B and a 16GB Black Kingston USB flash drive, serial number DT100G3/16GB. Both flash drives were marked Verulam Cas 202/06/2018.
- (f) From the time the Huawei phone was recovered until the contents were extracted and downloaded by Col Maimele, the contents were not tampered with,

edited, modified or corrupted.

(g) Col Maimele confirmed in an affidavit in terms of s 213(2)(a) of the CPA dated 22 November 2018 (Exhibit B), that he received the forensic bag with the accused's cellphone, the screen of which was damaged. He photographed the cellphone, and downloaded the contents of the cellphone onto the 64GB SanDisk USB flash drive, serial number BN180625625B. He then reviewed the content extracted and found potential evidence: viz pornographic images and videos of a minor and adults, sex toys and a penis ring. The Huawei phone was thereafter handed to the investigating officer. Annexed to Col Maimele's affidavit were the photographs taken of the cellphone.

(h) The colonel's affidavit was a true and correct recording of the processes followed and the observations made by him during the photographing, extraction and downloading of the said Huawei phone.

(i) The videos and images contained thereon depict inter alia pornographic images of the complainant, and the complainant performing or engaging in sexual acts.

The trial

[4] Because of the unusual turn in the trial proceedings, it is appropriate to record the sequence of events in the course of this trial. Ms *S Naidu*, who represented the State herein, led the evidence of six witnesses and the complainant, whereafter she closed the State's case. The accused commenced testifying on 27 October 2020 and completed his evidence-in-chief on the morning of 28 October 2020. Ms *Naidu* commenced cross-examination immediately thereafter. Although he maintained a calm and meek demeanour during the trial, under cross-examination, the accused had to be cautioned several times for his belligerence and argumentative responses. He also claimed prejudice, alleging that he was not being given the opportunity to place his version before the court. In order to pre-empt a similar situation, at the commencement of the proceedings the following day, the accused was reminded of the various occasions during the trial when his counsel was afforded the time to consult with him, as well as the several adjournments during the trial, which were necessitated because he was not well. The accused confirmed that his counsel had consulted with him, and that he had given full instructions, all of which had been duly put by his counsel to the State witnesses. He also agreed that he was therefore not prejudiced in respect of his rights to a fair trial, including his right to be heard and to place his

version before the court. He confirmed further that he received his medication and has been well during the hearings.

[5] Thereafter, Ms *Naidu* proceeded with cross-examination. The accused commenced with his responses calmly, but grew visibly and palpably angry, and finally, became extremely incensed when confronted with images allegedly of himself in which scars he had confirmed and drawn attention to, were visible. He stormed out of the witness box, swearing and declaring that he 'had had enough' and was confrontational with the court security personnel. We noted that the accused's pronounced limp with which he entered the dock daily, was neither evident nor an impediment as he marched towards the court door, and that despite his protestations under oath that he never used vulgar language, he uttered a string of profanities during this incident.

[6] The accused was ushered back into the witness box by the security personnel, but refused to proceed with his testimony. After the proceedings were adjourned for about an hour, the accused returned to the dock and apologised for his outburst. Mr *Pillay* placed on record that the accused's instructions, confirmed in writing, were that he no longer wished to be cross-examined or to answer any more questions, and intended to exercise his right to remain silent. He also refused to participate in any further proceedings or to be present in court at any stage of the trial. He confirmed that his counsel had advised him of the consequences of his decision, that the proceedings would continue in his absence, and that any further evidence and argument would be presented in his absence. The accused further instructed Mr *Pillay* to continue to represent him in his absence from court, including when judgment was delivered; and in the event he were to be convicted on any charge, Mr *Pillay* should continue to represent him in the sentence proceedings.

[7] Although the accused confirmed his decision and instructions, it appeared prudent that he be allowed time to reconsider his decision. The following morning, 29 October 2020, the accused confirmed in person and through his counsel that his instructions remained unchanged. He was informed that he would nevertheless be brought to the court but remain in the grille during the remaining proceedings in order to ensure that he was able to instruct his counsel. Thereafter, I ruled that in view of the accused's election to remain silent and not to participate in any further proceedings before this court, and in terms of s 159(1) of the CPA, the trial proceedings would continue in his absence.

[8] Before proceeding to the evidence, there are two other preliminary issues, which it appears to be expedient to deal with at this stage of the judgment.

Jurisdiction

[9] The first issue is this court's jurisdiction to determine offences that were committed outside of this province. Counts 1-6 refer to offences, which were committed in Benoni, in the province of Gauteng. At the commencement of the proceedings, Ms *Naidu* advised the court that the National Director of Public Prosecutions ('NDPP') would be issuing the necessary authority in order for counts 1-6 to be heard by this court. However, the certificate Ms *Naidu* subsequently obtained was dated 27 October 2020. Ms *Naidu* drew the court's attention to this anomaly. She conceded that when the trial commenced and the accused was indicted and pleaded, and despite the consent by the accused to the commencement of the proceedings without the necessary authorisation, this court was not vested with the necessary jurisdiction as the prosecuting authority had not complied with its obligations under s 111 of the CPA. Mr *Pillay* similarly submitted in argument that this court has no jurisdiction in respect of counts 1-6. From the endorsements on the file for this matter, it would appear that this matter was set down for trial almost a year ago. There is no reason why, even given the constraints of the lockdown, that the relevant office of the NDPP could not issue the authorisation timeously, as it was clear that it was in the interests of justice and expedient for all counts against the accused to be prosecuted at one time in a single jurisdiction. Nevertheless, as the accused has pleaded to the first six counts, he is entitled to a verdict on those counts. Further, the evidence remains on record as part of the State's case.

Splitting of charges

[10] The second issue is the splitting of charges, which both Ms *Naidu* and Mr *Pillay* raised in their heads of argument. They agreed that the following 14 charges could not be persisted with as they were continuous transactions with common elements and amounted to splitting or duplication of charges per Wallis JA in *S v Maseti* 2014 (2) SACR 23 (SCA) para 3. These are counts 10, 11, 21, 22, 23, 26, 35, 44, 45, 49, 51, 52, 53 and 55. Again, as the accused has pleaded to these 14 counts, he is entitled to a verdict on them.

[11] Mr *Pillay* initially argued that although the State relied on s 94 of the CPA, there was splitting in respect of the various counts of rape. However, he conceded that each act of sexual penetration constitutes a rape in itself. As it was common cause that the

accused and complainant lived at three different residences and it was alleged that the rapes occurred at each one of the residences as well at an unknown location in Durban, there was no splitting in respect of the charges of rape. Therefore, counts 7, 8 and 9, which relate to Firwood Road and Overport; counts 28, 29 and 30, which relate to Neptune Drive; and counts 42 and 43, which allegedly occurred at an unknown location in Durban, stand. I shall revert to the issue of splitting of charges.

Evidence

[12] I return to the evidence presented in this trial. Much of the evidence presented by the State, including a substantial portion of the evidence of the complainant, was not challenged or disputed by the accused under oath because of his refusal to complete cross-examination. It is therefore appropriate to summarise the common cause facts and undisputed evidence, and deal with the disputed evidence thereafter.

Common cause or undisputed evidence

[13] It is common cause or undisputed that the accused, who is 45 years old, was in a relationship with the complainant's mother, I[...], for about two years until her death on 14 April 2014. The complainant was six years old at the time. They lived in Ottawa together until I[...]'s death. At that time, the complainant attended school and was in Grade 1. After I[...]'s funeral, the complainant's aunt and uncle took her to Shakaskraal, from where the accused fetched her after he had an argument with her uncle. They returned to the house in Ottawa. The complainant lived with the accused thereafter and had no contact with her relatives.

[14] In 2014, the accused and the complainant moved in with Rebecca, the accused's girlfriend, who lived in Pinetown. The complainant attended [...] Primary. The relationship between Rebecca and the accused ended towards the end of 2015.

[15] The accused and complainant moved to Phoenix where the complainant attended [...] Primary School for three months. In 2016, the accused obtained employment in Witbank, and he and the complainant moved to Witbank. The complainant went to [...] Primary School.

[16] In September 2016, the accused and the complainant moved to Benoni, into the home of Ajeera, with whom the accused had a relationship. The accused and Ajeera had a daughter together, A[...], in 2013. Ajeera's mother lived with her. The complainant went to [...] Primary where she was in Grade 3 and A[...] was in pre-primary. While they lived in Ajeera's house, the accused was unemployed. During 2017 the accused left the complainant with Ajeera and returned to Durban to find

employment. He returned to Benoni to fetch the complainant in the latter part of 2017, when Ajeera and her mother refused to have the complainant in their home any longer.

[17] The accused and complainant lived in Firwood Road, Redhill, and in Overport in a flat called Taliash, in Durban, until about February/March 2018. The accused was employed. The complainant did not attend school after she left [...] Primary, and remained at home at their respective residences. On 15 September 2017, the accused purchased a tablet for the complainant as her tenth birthday present. The accused also purchased the Huawei phone referred to earlier in this judgment, and at some stage owned a smartwatch. Sometime during this period, the accused also had a girlfriend called Candace.

[18] In about March 2018, the accused and complainant moved to [...], Rietriver. The accused at this time was employed at Mamba Maintenance. Their neighbours at this residence included a couple, A[...] S[...] ('Aneesa') and Mr J Pillay. Mr J Pillay and the accused worked together at Mamba Maintenance, and travelled to and from work together. The complainant did not attend school, and during the day spent time with Aneesa and her mother who lived nearby.

[19] On the accused's return from work on 10 June 2018, he and the complainant had an argument because she had handed over a pregnancy test, which belonged to the accused's friend, to a lady she believed to be the friend's mother. The accused demanded the test back. The complainant attempted unsuccessfully to contact the woman she had handed the test to. This altercation led to the complainant leaving the house in which she lived with the accused and spending the night in the home of Aneesa and Mr J Pillay.

[20] Whilst there, the complainant reported to Aneesa that the accused was sexually abusing and assaulting her. On 11 June 2018, a report was made to RUSA. Mr Singh, a senior security officer with RUSA, stationed at Verulam, responded to the call. On arrival at [...], he found several members of the community around the complainant. He was informed that the child had been assaulted and raped several times by her stepfather. He arranged for the complainant to be taken by ambulance to SAPS Verulam with Aneesa. The complainant made a statement at the police station and returned with Aneesa to Neptune Drive where she remained at Aneesa's house.

[21] That same evening, 11 June 2018, when the accused and Mr J Pillay returned from work, the complainant did not return to her house, even though the accused wanted to see her. Members of the community assaulted the accused outside his

house, and RUSA and the police were called to intervene. Mr Singh again attended the scene, and when the police arrived, the accused was handed over to them and he was taken to hospital. Mr Singh observed the items including adult lingerie, sex toys, a condom, and pornographic DVDs, as depicted in Exhibits C14 and C15, outside the accused's house. These items were also observed by Mr J Pillay . He (Mr J Pillay) placed the items in a packet, which he subsequently handed to the Child Protection Unit.

[22] On the evening of 11 June 2018, the complainant was taken to a private hospital in Umhlanga, where she was refused assistance. She was then taken to the Thuthuzela Centre at Mahatma Gandhi Hospital in Phoenix where Dr Raksha Ramjiawan ('Dr Ramjiawan') conducted a medical examination on her. The complainant was scared and traumatised and it took a long time for her to speak to the doctor and the social worker. Dr Ramjiawan referred her to a psychologist and a social worker because she was emotionally disturbed. She completed a J88 medico-legal form at 22h40 (the J88 was admitted as Exhibit H). In the patient history on the second page of the J88, Dr Ramjiawan recorded as follows:

'The patient states that on the 4th June 2018 her step dad put his penis into her vagina. He did not use a condom. The incident occurred at home in Verulam, he did this many times to her since December 2017. He used to suck her vagina and used a vibrator on her. He made her watch pornographic movies as well, He also made her suck his penis. She has not been to school since December 2017. He also used to hit her.'

[23] Although Dr Ramjiawan found no injuries during the gynaecological examination of the complainant, she noted that the complainant's hymen was annular and one mm in thickness. She explained that normally in a child, the hymen would be thicker, at least two mm. The thinning of the hymen to one mm was caused by repeated sexual intercourse. The six o'clock cleft she observed indicated a healed tear. She stated that in children, such tears would heal very quickly. Her conclusion was 'clinical findings are consistent and suggestive of vaginal penetration'.

[24] Dr Ramjiawan testified that according to the history given by the complainant, several sexual acts were performed on her. The doctor concluded that although the complainant may have been penetrated by both a vibrator and penis over a long period of time, because the healing process is quicker for children, any injuries she may have

suffered had healed. She testified further that the penis that she was penetrated by may have been lubricated. Alternatively, if the penis were flaccid, there would not be full penetration, although the male could still maintain an erection for a period of time. The yellowish discharge found in the complainant's vaginal vault is not normal in a child her age and indicated sexual activity. The result of the sample sent to the laboratory indicated that the complainant had a yeast or candida infection, which is usually associated with sexual activity, as it could be caused by sucking a penis and genital contact. The other causes of candida or thrush such as oral contraceptives, pregnancy or uncontrolled diabetes were excluded because of the age of the complainant. Dr Ramjiawan confirmed under cross-examination that even with uncontrolled diabetes, hypertension and a cardiac condition, a man could still be aroused and maintain an erection for a period.

[25] On the morning of 12 June 2018, Mr J Pillay informed Mr Singh that he was in possession of a black and white Huawei phone, which allegedly belonged to the accused. Mr Singh collected the Huawei phone and unlock PIN, which Mr J Pillay obtained from the complainant, and handed them to W/O Naidoo. Later that morning, Mr Singh was informed that the accused was being sought by the police, who were unaware that he had left the hospital. His Unit received information that the accused was at a business premises in Phoenix Industrial Park. Mr Singh proceeded there and apprehended the accused, who had been assaulted again, and handed him over to the Verulam SAPS.

[26] Also on 12 June 2018, W/O Pillay, who is deployed at the Family Violence Child Protection and Sexual Offences Unit of SAPS Phoenix, attended the crime scene at [...] with Captain H Naidoo and other members of the LCRC. He described the building in which the accused and complainant resided as a small structure of concrete block, which was in a very dilapidated and dirty state. To the left of the door, was a makeshift bed with bedding, a duvet and clothes on it as depicted in Exhibit C4. W/O Pillay was present when the LCRC photographer took the photographs in the photo album admitted as Exhibit C, which included photographs of the inside and the outside of the structure, the heap of wet female underwear, and sex toys depicted in Exhibits C14 and C15. W/O Pillay recorded the items in the SAP13 register. He confirmed that the photograph of the Huawei phone shown to him was of the cellphone that was given to him by W/O Naidoo at the scene.

[27] W/O Nevargé Lutchminarain, ('W/O Lutchminarain') who is also attached to

Family Violence Child Protection and Sexual Offences Unit of SAPS Phoenix, and the investigating officer in this matter from its inception, confirmed that Aneesa, who is the first report in this matter, was unable to testify because she was currently diabetic, heavily pregnant and seriously unwell. W/O Lutchminarain switched on the Huawei phone when he received it on 12 June 2018 in order to confirm the unlock code and the pattern on the phone. Thereafter he switched it off, packed it up and sent it to the Cybercrime Unit for downloading.

[28] Col Maimele, the deponent to Exhibit B, exported all the information on the Huawei phone, including images, videos and WhatsApp messages, to the 16GB and 64GB flash drives. The integrity of the process was maintained through the utilisation of the XRY forensic tool, which is utilised globally by law enforcement officials and private companies to conduct forensic investigations on mobile devices such as cellphones, because it is not possible to add, delete or amend any image or information on the cellphone under investigation. This forensic tool has a capability of downloading everything stored on the handset as well as extracting information deleted from the handset. On 12 November 2018, Col Maimele extracted information from the Huawei phone, the two SIM cards and memory card and generated a PDF report. He analysed the data and identified evidence that the investigating officer had asked him to look for, which he placed in the potential evidence folder.

[29] Colonel Maimele created folders in the PDF report which he created for each set of information which he extracted, in which he stored downloads from the handset and the memory card. The user account (contained in Exhibit D) reflected the user as K[...] R[...] with the email address [...]. As the Huawei phone was a smartphone it could be used to access the internet. During his testimony Col Maimele displayed the web history extracted from the phone (also in Exhibit D), which reflected the date and time that the sites were visited according to the time set on the phone itself. Colonel Maimele clarified that if the date on the phone were incorrect, the report extracted would reflect that incorrect date. The web history reflected 354 websites visited by the user, 90 percent of which were porn sites, from 10 June 2018 to 2 January 2018.

[30] On the SIM call log (Exhibit E), two calls incoming calls were recorded. An SMS messages log was extracted from the SIM card beginning with 4497; the second SIM card (4611. . .) had no SMS log.

[31] In the video folder in the potential evidence folder, Col Maimele created

separate folders for each date on which the videos were recorded: 16 October 2017, 19 October 2017, 22 November 2017 and 14 January 2018. Each date folder contained a varying number of videos. Each video recording was of a prepubescent, naked female child engaged in various sexual acts with an adult male; in some video recordings, the face of the complainant was visible.

[32] Colonel Maimele created one folder for the 133 images or photographs he downloaded from the Huawei phone. He was unable to download the precise location where the images were taken. Some of the photographs depicted the complainant lying on her back, touching her genitalia, or wearing adult lingerie. An image of the complainant wearing pale pink underwear with a cut out crotch appeared several times. Colonel Maimele explained that the original image would reflect the date and time it was taken, but if that image was forwarded or sent via WhatsApp as a message, the same image would reflect the date and time when it was forwarded. He testified that images could be sent from the handset in several ways, eg via wireless connection. The image could be downloaded onto the handset or saved on the handset and be transferred via email. It could also be downloaded from social media, in which case it would reflect that date and time.

[33] Colonel Maimele also downloaded voice notes from the Huawei phone's memory card, which he played to the court and which was filed separately. Many of the voice notes were male voices and work related. The accused later identified his voice and that of his work colleagues. There were also voice notes from the accused to the complainant in which the accused referred to her as 'Roe'. There were three outgoing voice notes from the complainant.

Documentary evidence

[34] The user account, web history, the call log, and SMS and WhatsApp messages from the Huawei phone were also admitted in the form of documentary evidence as Exhibits D, E, F and G respectively. The USB of images and videos downloaded from the Huawei cellphone was admitted as Exhibit 1.

Issues for determination

[35] During his testimony, the accused confirmed, as is consistent with his admissions in terms of s 220, that the complainant was depicted in the videos and photographs performing sex acts with an adult male and posing in lingerie while exposing and touching her genitalia. He also admitted under cross-examination, that he appeared bare chested and in underwear in a number of the images downloaded

by Col Maimele from the Huawei phone. He further admitted that he was depicted using sex toys and a penis ring in the photographs. The accused, however, disputed that he was the adult male person with the complainant in the videos and photographs in which she is engaged in sexual activity, and that he had caused the complainant to dress or pose as depicted, thereby placing the identity of the adult male perpetrating the unlawful acts in dispute. The accused also alleged that he bought the Huawei phone for the complainant in February 2018 and it was always in her possession and used by her, and that he had not used the Huawei phone to take the aforesaid videos and photographs. He only provided the number of the Huawei phone as an emergency or back up number as he had his own Samsung Galaxy Lite cellphone, which Rebecca had given him.

[36] Therefore, the court has to determine whether the State has proved beyond a reasonable doubt that:

- (a) The Huawei phone belongs to, and was used by, the accused to record the videos and take photographs depicting the complainant and the adult male.
- (b) The accused is the adult male in the images and videos in which the complainant is performing sexual acts with or on.
- (c) The accused exhibited pornographic videos to the complainant with the intention of instructing her how to perform sexual acts, and masturbated in front of the complainant.
- (d) The accused smoked cannabis ('weed') and made the complainant smoke cannabis too.
- (e) The accused deliberately prevented the complainant from attending school and forced her to remain at home.
- (f) The accused forced the complainant to do household chores such as laundry, washing and cleaning the house.
- (g) The accused conspired with Candace and compelled the complainant to perform sexual acts and have sexual intercourse with him in Candace's presence, and compelled the complainant to watch him and Candace perform sexual acts and have sexual intercourse, with the intention of grooming her to do likewise.
- (h) The accused made the complainant perform fellatio on an unknown male in a hotel while he (the accused) had sexual intercourse with her.
- (i) The accused penetrated the complainant's vagina and mouth with his penis and/or tongue on the beach and in their various places of residence and made

her perform sexual acts with or on him.

(j) The accused disseminated the images of the complainant to other people via electronic platforms such as WhatsApp, with the intention of exploiting her sexually.

(k) The accused assaulted and threatened the complainant.

(l) The accused trafficked the complainant in contravention of the PCTA.

[37] In determining these issues, we have remained mindful that the onus to prove that the perpetrator was the accused remains with the State.

State's case

[38] The evidence in the State's case, which was placed in dispute by the accused, was that of Mr J Pillay, Mr Singh and the complainant. The State presented substantial evidence of the photographs and videos in which the complainant confirmed she was photographed or recorded, and she described in detail where and under what circumstances those photographs and images were taken. As it is only the identity of the person interacting with her in dispute, and as all the evidence is on record, it is not necessary to summarise her evidence except in so far as is relevant to the issue in dispute.

Mr J Pillay's evidence

[39] Mr J Pillay testified that the complainant stayed over at his home on the night of 10 June 2018, as the accused had hit her on her chest with a piece of sjambok during their fight. While at his mother-in-law's house on 11 June 2018, the complainant told him that everything that the accused was doing to her was on his phone. When Mr Pillay, his wife and the complainant returned to [...] around 18h30- 18h45 that evening, they saw that the accused had been assaulted and was seated on the ground leaning against the wall of his house. Mr Pillay asked him for his cellphone. The accused said it was in his pocket. The cellphone fell out of the accused's left pocket. Mr Pillay took the phone to the complainant who switched the phone on.

[40] Mr J Pillay described the accused's cellphone as being a Huawei cellphone, black in front and white at the back. He identified the phone on Exhibits B3 and B4 and pointed out that the screen of the cellphone was cracked, which happened when it fell out of the accused's pocket on the evening of 11 June 2018. He confirmed that it was the phone the accused had at work every day and that he had never seen the accused with another phone. To his knowledge, the complainant did not have a

cellphone.

[41] Mr J Pillay testified that he had been working with the accused for about three weeks prior to 11 June 2018 and that the accused and the complainant had been living on the property for about two to three months at that date. He described the relationship between the accused and the complainant as strained. Although the complainant always remained physically very close to the accused, she appeared nervous and afraid of him; she was reticent and not comfortable with other people nor did she look at them; she did not leave the house. However, when the accused was not present, she was less restrained. She also started visiting him and his wife and other neighbours. If the complainant were with his wife when he and the accused returned from work, she would immediately run across to her own house. She had spoken freely to Mr J Pillay for the first time on the night that she stayed with them.

[42] Mr J Pillay testified that the accused drove with him to work at 06h00 every morning in the company bakkie, which was parked at night in the driveway of the property at [...] . About two weeks before the accused was arrested, Mr Pillay heard the bakkie leave the premises at about 01h30. He presumed that the accused and the complainant left together as he heard two doors shut. When he awoke at about 05h30, the bakkie was not yet back. The accused and the complainant returned around 06h00. He noted that the previous day the complainant had been wearing a tracksuit. When they returned that morning, the complainant appeared to be shivering. The accused told Mr Pillay that they had left the house because he had seen a snake but did not tell him where they went. Mr Pillay subsequently saw him filling the gaps in the house.

[43] Mr J Pillay stated that he had a very good relationship with the accused and that the accused was good with other people as well. He testified that the only jewellery that the accused wore was a silver hoop earring. I shall refer to the cross-examination of Mr J Pillay whenever relevant in my assessment of the evidence.

[44] Mr J Pillay was a confident and coherent witness. His responses were spontaneous and unhesitating, and therefore convincing. He was adamant that he was not mistaken about when the accused took the complainant out at night. He disputed the accused's version that he took the complainant out at about 20h00 and returned at about 01h30. Although there was another night on which they left at about 19h30 and returned about 22h00, he was certain that in the week before the accused was arrested they had left at 01h30 and returned at 06h00. He also acknowledged that the

accused had good relationships with himself and other people and that the accused had arranged employment for him. He conceded that he was not present during all interactions between the accused and complainant but stood by his assessment of their relationship. His credibility was not undermined during cross-examination, although he was determined to distance himself from the assault on the accused.

Mr Singh's evidence

[45] Mr Singh testified that he was the first responder on the scene after the accused was assaulted on 11 June 2018 by members of the community. He was also the first responder on 12 June 2018, when the accused was sought by the police who were unaware that he had left the hospital, and was located at the business premises at Phoenix Industrial Park. Under cross-examination, he disputed that members of RUSA assaulted the accused with batons and tasers on the evening of 11 June 2018, or the next day. Mr Singh was a good witness who had no previous involvement with the accused. The accused did not identify the RUSA members who allegedly assaulted him and there was no evidence presented to the contrary in respect of RUSA personnel being issued with tasers. The accused's allegation of assault by members of RUSA is irrelevant to the charges against him.

The complainant's evidence

[46] Following an application by the State in terms of s170A of the CPA, which was unopposed by the defence, the complainant testified via intermediary. A competency test established that the complainant was able to distinguish between truth and lies. However, she did not understand what an oath was or its import, and was admonished to speak the truth.

[47] The intermediary infrastructure at this court is highly unsatisfactory, and although the complainant and intermediary were visible on the camera, it was frequently very difficult to hear the complainant clearly. The stenographer advised the court that the complainant's responses on the first day of her testimony were not audible. Consequently, the intermediary was requested to repeat the complainant's responses and testimony verbatim. Counsel and the court nevertheless ensured that they and the accused were able to hear the complainant's responses, and did not merely rely on the repetition by the intermediary. The verbatim repetition by the intermediary was the solution we were compelled to utilise to ensure the integrity of the record. The first day of the complainant's testimony was reconstructed in court.

[48] The circumstances under which the complainant came to live with the accused

were common cause except for whether the accused fetched her from her aunt and uncle, who lived in Shakaskraal, on the same day as her mother's funeral as alleged by the accused, or whether he stayed with them for a few days first, as contended by the complainant. Although the complainant wanted to communicate with her family subsequently, the accused became angry if she broached the subject.

[49] The complainant testified that the first sexual assaults on her by the accused took place while they lived in Benoni with Ajeera. The assaults took place during the afternoon when she returned from school, whilst Ajeera and her mother were at work. The accused who was unemployed, sent A[...] to sleep. Then he assaulted as described below. The assaults occurred three or four times.

[50] The accused instructed the complainant to take off all her clothes; he also took off his clothes and as they stood by the bed, he made the complainant perform fellatio on him, until 'the white stuff came out'. The accused also attempted to penetrate her with his penis. When he could not penetrate her, he kept trying and 'normally it would not go in'. He stopped attempting to penetrate her only when the gate squeaked, which indicated that Ajeera's mother was home. The accused then told the complainant to put her clothes on and he dressed as well.

[51] When asked why she performed fellatio on the accused for the first time as instructed, the complainant responded 'maybe because I trusted him'. She was scared and did not tell anyone about what the accused had done because he threatened to put her 'in my mother's place', which she understood to mean that the accused was going to kill her or leave her on the road.

[52] When the accused asked her to perform fellatio, she did not know what to do. He told her to suck his penis as she would suck a lollipop but she should not bite him. She felt 'not nice'. The complainant had never seen adult male genitalia before she saw the accused's. She thereafter saw male genitalia on videos, which the accused downloaded onto his phone and made her watch. He told her that he was showing her the videos because he wanted her to do the same as the people in the video, ie perform fellatio and have sexual intercourse. The accused made the complainant watch a number of videos. Thereafter he made her perform fellatio and then made her lie on her back and picked up her legs, where he attempted to penetrate her with his penis. The complainant did not know the make or model of the white cellphone on which the accused downloaded videos of adults performing sex acts. Despite what the accused did to her, the complainant stated that she got along 'okay' with him.

[53] When the accused brought her back to Durban from Benoni, they moved into a house in Firwood Road. The accused worked in various places. During the day, as instructed by the accused, the complainant did chores such as clean the house, wash dishes and her clothes and sometimes the accused's clothing too. She sometimes cooked food on the stove in the kitchen, watched TV or played TV games. If she did not clean the house, the accused would shout at her, which made her 'sad'. She also visited the landlady, although the accused did not approve of her visits. He wanted her to remain inside the house, and became angry and shouted at her if he found her with the landlady. The complainant nevertheless persisted with her visits because she was lonely and felt happy to be with somebody.

[54] She testified that she last attended school in Benoni. She asked the accused to send her to school and although he said he would, he did not make any enquires about a place for her. He also told his friends who asked why the complainant was not at school that he was looking for a suitable school, but never did.

[55] The first time the accused was able to put his penis right inside her vagina was at Firwood Road. The sexual acts took place after the accused returned from work. The complainant described how the accused would instruct her to undress. When they were both naked, he made the complainant perform fellatio, and penetrated her vagina with his penis. The complainant described how they were positioned and that the accused held her legs and spread them apart when he penetrated her with his penis. He would have sexual intercourse with her until he ejaculated. These sexual acts took place on the pink and blue mattress or 'sponge' in the bedroom. The complainant described the accused's attempts at penetration and his penetration during sexual intercourse as 'painful'.

[56] While they were engaged in these sexual acts, the accused sometimes held his phone, which he charged from a white battery pack and a white charger with a white cord. He recorded or photographed everything she did and what she was wearing. He told her how to pose. Sometimes she would lie on a bed with her legs apart or sit on a chair with her hands on her vagina. He made her wear lacy net and silky lingerie and what she described as 'cut underwear', being underwear cut away at the crotch or at the back. The accused told her that he was sending other people the videos and pictures of their sexual acts on his cellphone and she would have to do the same sexual acts with others to make money. She 'did not feel happy', but she did what he asked because she thought it was right because the accused said so.

[57] The complainant said she used the accused's cellphone for her games and cartoons. The accused used the same cellphone to phone people and to show her videos of adults performing sexual acts, which he made her do with him. When the accused showed her adult videos on his phone and they were both naked, the accused would sometimes shake his penis at the same time with his hand. When the video ended, he would put her down on the bed and perform sexual acts and have sexual intercourse with her like they had seen in the video. At that stage, his penis 'looked big'. When asked whether the accused put a condom on, the complainant responded that he used to put something like a round ring with balls on it and push it right up his penis to the end. After the accused ejaculated, he would sometimes stop or he would continue to have sexual intercourse with her until he ejaculated again.

[58] The complainant did not tell the landlady at Firwood Road anything about what the accused was doing to her because she was scared as the accused told her that if she told anyone he would send her to the place where her mother is.

[59] As the complainant consistently repeated the same description of the vaginal and oral penetration by the accused and the sexual acts she performed with and on the accused's instructions and how he ejaculated, I shall not repeat the same details in the rest of her testimony. I shall refer to sexual acts, sexual intercourse or penetration or fellatio, unless it appears necessary to provide further details.

[60] The complainant could not say how often the sexual acts between her and the accused took place at Firwood Road. However, she knew it happened 'more times' at Firwood Road than in Ajeera's house, which she thought was because there were people in Ajeera's house whereas she and the accused lived alone at Firwood Road.

[61] The complainant testified that the accused introduced Candace, his girlfriend, to her at Firwood Road. The first day that Candace came to the house and after they had eaten, the accused said that the three of them should take off their clothes. He told the complainant to watch while Candace performed fellatio on him and they then had sexual intercourse. All three of them were on the mattress in the bedroom. The accused told the complainant to watch what they were doing so that she could learn and do the same things with other people so that he could make money, by which he meant that the complainant and Candace had to perform sexual acts and have sexual intercourse with other men, and he would watch them.

[62] The complainant then performed the same sexual acts and the accused had sexual intercourse with her. Candace watched them while touching her own genitals.

Candace wanted to touch the complainant's genitalia but she refused because she did not feel like doing anything with Candace and did not trust her.

[63] One day the accused took her to Candace's house, the location of which she did not know. The three of them went into the bedroom where the accused told her and Candace to undress and he did too. Candace went onto the bed, performed fellatio on the accused and had sexual intercourse with him. Then Candace told the complainant to do the same sexual acts with the accused, which she did. When they were done, the accused told Candace and the complainant to pose in underwear, holding each other with their hands on their private parts. The accused took pictures of them with his cellphone, which had a white back cover and black screen, which were intended to facilitate the complainant and Candace performing sexual acts with other people. The complainant estimated that she, the accused and Candace did these sexual acts together about four or five times. The other incidents took place at Firwood Road, as she did not go to Candace's house again.

[64] The complainant identified several sex toys on Exhibit C15, which the accused showed to her for the first time at Firwood Road. When Candace visited the house in Firwood Road, the accused showed the toys to her and placed them on the mattress. The accused put the toys into the complainant's private parts or watched her while she did, and made her watch him inserting the sex toys into his anus. She testified that he generally used the toys after they finished the sexual acts. The complainant was reluctant to put the toys into her private parts and found it painful, but she did it because the accused told her to do it. She also believed it was 'okay' because the accused told her several times that her mother used to do 'these creepy things'. He told her about her mother when he wanted her to do something.

[65] The complainant also testified about the time she did the 'work' the accused wanted her to do with an unknown male. One evening the accused told her that they were going somewhere. He packed white lingerie in a bag and they went to the road and waited; a black car driven by an unknown male arrived. The accused and complainant went with the man to 'a kind of hotel'. Inside the room, the three of them took off all their clothes, and the accused told her to put on the white lingerie while the man watched her. The accused told her to perform fellatio on the man. She was lying on her back on the bed and the man was close to her head. Then the man wanted to have sexual intercourse with her. The accused told her to 'let him do it', but she refused as she was afraid and did not like what he wanted. Then the accused took off the

lingerie she was wearing and had sexual intercourse with her and instructed her to perform fellatio on the man. The accused ejaculated and went into the bathroom. The male remained with her and told her to carry on with the fellatio. When the accused returned from the bathroom, the man went in. They then dressed and packed up their stuff. The man dropped them off at the same point from where he had picked them up.

[66] As the purpose of this work was to get money, the accused was angry because they received no money when she refused to have sexual intercourse with the man. The complainant described the unknown male as 'white, tall, and he had muscles'. He spoke to her and asked her name and surname and whether she went to school. She had no idea how the accused and the man knew each other or what was going to happen at the hotel.

[67] The accused and complainant left Firwood Road when the house was flood damaged and returned to Taliash, taking the sex toys, lingerie and the pink and blue mattress with them. The apartment was large and had a bathroom with a shower with a glass door and a sink. There were peach tiles on the walls and floor. There was no shower at Firwood Road. Again, the complainant and the accused lived on their own. The accused was still employed fixing cars. The complainant did not see Candace while they lived at Taliash.

[68] The complainant testified that the same sexual acts and use of sex toys that happened at Firwood Road took place at Taliash, 'often'. These acts took place in the bedroom on the same pink and blue sponge. Some of the floor in Taliash was blue and other parts were wood. The accused also photographed and took videos on his cellphone of her wearing adult lingerie in the same poses as previously described and performing sexual acts. To the complainant's knowledge, the accused had the same cellphone, which was white at the back and black near the screen, at all times (her description of the accused's phone was consistent). She had a tablet whilst they were at Firwood Road, but by the time they got to Taliash, she was unable to use it. She communicated with the accused via voice notes on WhatsApp because she could not spell properly and tried to read the messages he sent.

[69] The complainant did not attend school while they were at Taliash. Although the accused said he would send her to school, he did not, which made her 'sad'. At Taliash, she stayed inside the house because the accused had told her not to leave the house or open the door, although the key was in the door. From inside she spoke to a neighbour who would sit on a chair near the door. She was sad about staying

inside all the time. She watched TV, cleaned the apartment and cooked. She and the accused would do the laundry when he returned from work.

[70] After a brief stay, they left Taliash and moved to the small one roomed house in Neptune Drive, which had an external toilet and bathroom without a door. They lived there for two to three months. The accused did not want anyone inside the house so the complainant cleaned inside and a lady did their laundry. The accused kept the packet with the adult lingerie and sex toys behind the big grey/dark green basin because he said no one would check there.

[71] The complainant testified that while they lived in Neptune Drive, the accused made her wear the lingerie, perform fellatio and have sexual intercourse with him every night, which he recorded and photographed with his cellphone. He also photographed and recorded her posing in the lingerie and naked. Sometimes after he ejaculated, he would not have sex with her again. Other times, he would continue with the sexual acts and only stopped when he got tired or when she said she was sleeping. The accused became angry when she said she was tired.

[72] On one occasion, the accused thought there was somebody peeping through the roof. That night the accused took her to the beach and carried a blanket and a torch. Using the torch, the accused looked for a spot and checked that no one was in their vicinity before he fetched her. He put the towel down and after checking that no one was anyone around, he made her perform the usual sexual acts. She was wearing the lingerie that she had put on while they were still in the house. They returned home in the morning before sunrise. She was wearing only the accused's big black jacket with many pockets that he used for work and nothing underneath. The accused told Mr J Pillay who was waiting for him that they had slept in the car because there was a big snake on top of the roof. The accused told the complainant that she should tell everybody about the snake.

[73] The complainant testified that they did not go to the beach very often at night and sometimes they performed the sexual acts in the car. The complainant described how the accused would position himself in order that she could perform fellatio and have sex with her in the vehicle.

[74] The complainant was afraid to tell the accused that she was scared to go to the beach because he became angry. She complied with his instructions as she 'did not want to die', because when the accused got angry he hit her at the back of her head and sometimes he threw a sjambok at her, which is how she was injured on her chest.

The accused also told her frequently that he would put her where her mother was; by that she understood that he would leave her by herself and that made her sad because he was the only person in her life.

[75] On the Saturday night, after the argument with the accused, the complainant stayed in Aneesa's house because the accused had hit her. An argument arose between them because she had handed a pregnancy test that the accused brought to the house to someone and he wanted it back. When the complainant was unable to get it back, the accused told her to get out of the house. That was when she stayed the night at Aneesa's house, and told Aneesa that the accused touched her private parts and she touched his. This led to the abuse being reported to the police.

[76] The complainant confirmed that the pictures and the videos of her as well as of the sex acts they performed were always taken by the accused on the same cellphone. The accused told her that he took the pictures to show other people. He used the same phone to talk to people via WhatsApp or to call them or send voice notes. She saw the accused's phone on the night when the accused was assaulted - when Mr J Pillay brought the phone to his house.

[77] The complainant testified that on one occasion, a young girl of ten who was not known to her, chatted to the accused about a swop between her father and herself and the complainant and the accused. The accused told her that there was another girl like her who did the same things she did to the accused to her father, and they were going to swop partners. She did not speak to the girl but sent her a voice note on the accused's instructions. The accused also sent pictures of her touching herself and when they were performing the sexual acts. She was unable to say what happened about the swop. The accused thought it was fun but it seemed weird to the complainant.

[78] The accused called the complainant by her name and various other names such as 'Rowi', or 'Baby'. She called the accused 'daddy'. The accused wore silver circle earrings that were thick outside and thin in the ear. He had a smartwatch when he came to fetch her from Johannesburg, and while they were at Taliash and Firwood Road, but he did not have the watch when they returned to Taliash. The complainant described the accused's tattoos on his arms and on both sides of his chest. The accused kept his money in a bag in his pocket and sometimes in his big jacket.

[79] The complainant stated that the accused showed her how he rolled and lit cigarettes. He told her about smoking and made her smoke weed for the first time at

Firwood Road, and thereafter often, even at Ottawa. He did not make her smoke weed at Taliash. The accused told her that it was weed. He would wrap the weed in paper, light it with fire and then he would inhale the smoke. She was unable to inhale properly because she coughed after inhaling. The complainant was aware that children did not normally smoke, but she was afraid not to smoke when the accused told her to, because the accused would become angry with her, and shout and throw things at her. When they were at the beach, she smoked while the accused watched her. He wrapped the weed, which was 'a green grass thing', and she and the accused smoked it. The complainant said she did not feel nice or like smoking weed. The accused smoked weed frequently. Both she and the accused were normal after they smoked weed.

[80] The complainant pointed out the pink mattress and other bedding such as the brown and cream blanket and a pink checked blanket in Exhibit C5, which they took from house to house. In Exhibit C15, she pointed out the various sex toys that the accused inserted into his anus and she into her vagina, and the DVDs, which were the adult movie videos in which men and women performed sex acts on each other that the accused made her watch. She also pointed out the 'underwear', which the accused kept in a packet and made her wear. She recognised the black underwear in the foreground of C15; she described it as 'like a jumpsuit with net stockings that goes up your legs and goes up to shoulders with a net pattern'.

[81] When shown images downloaded from the Huawei phone, in which she was wearing adult lingerie, the complainant responded that the accused made her wear the lingerie at night and instructed her on how to pose and took pictures on his cellphone. In a photograph taken on 19 October 2017, the complainant pointed out the tattoos on the accused's bare chest and arms and said that she had taken that photo. In a photograph taken on 21 October 2017, the complainant pointed out a blue chair, which they only had while at Firwood Road. There were several pieces of what appeared to be female underwear on the chair, which the complainant stated belonged to the accused. The blue chair was visible in many images downloaded from the Huawei phone.

[82] The complainant was taken through the images, videos and voice notes downloaded from the Huawei phone. She identified herself, the accused and the residences in which the photos were taken and videos recorded. She answered questions posed on the photographs confidently and unhesitatingly. I shall revert to

her evidence in this respect and the cross-examination of the complainant later in this judgment.

[83] Despite her age and the nature of her evidence, the complainant responded directly and generally without hesitation. Although she spoke softly and dropped her voice at times, she was not uncertain or inconsistent in her responses. Her language and expression were notably childlike, and consistent and appropriate with her age. Her inability to use sophisticated language assured us that she had not been schooled in the evidence that she was giving. She consistently repeated the same description of the sexual acts whenever she described what the accused had compelled her to do. The one aspect of her evidence in respect of which she initially displayed some reluctance was about her smoking weed. However, she soon dispelled the reluctance and testified clearly and coherently about smoking weed. She also stood up very well under cross-examination, and there were no material contradictions or inconsistencies between her evidence-in-chief and responses under cross-examination. She asked direct questions if she did not understand or was uncertain about a question and obtained clarification before responding. Although she reverted to a fearful child when she was brought into court to identify the accused as the Kelvin that she had referred to in her testimony, she did point out the accused as 'Kelvin'.

Defence's case

[84] As already recorded, the accused testified in his defence, but did not complete his cross-examination. He also did not call any witnesses.

Accused's evidence-in-chief

[85] The accused testified that he is 45 years old, has a matric level of education and an N6 qualification. He confirmed that the complainant lived with him after her mother died in 2014. Her relatives, Yvonne and Roger, treated him like an outsider.

[86] The accused stated that he and the complainant lived with Rebecca from 2014 until late 2015. The complainant attended Reservoir Hills Primary School. Rebecca gave him a Samsung Galaxy Lite cellphone, which was white at the back and black around the screen in front. The accused and Rebecca had a falling out and in 2015, the accused moved with the complainant to Phoenix where she attended [...] Primary School for three months. In 2016, the accused obtained employment in Witbank where he and the complainant lived in a guesthouse, and the complainant went to [...] Primary School. They lived in Witbank for ten months until the accused failed his medical examination.

[87] They moved in with Ajeera in September 2016 in Daveyton, Benoni; the complainant went to Actonville Primary. They lived in Ajeera's house for almost a year until her house burnt down and her family suggested that the accused go back to Durban. He left the complainant with Ajeera and her mother, because Ajeera suggested that they keep her. However, after about four months, Ajeera did not want the complainant and he brought her to Durban.

[88] The accused and complainant lived together in Taliash until the end of 2017. The complainant did not attend school because the two schools the accused went to, [...] Primary and [...] Primary, could not accommodate her. The accused stated that the complainant accompanied him to the schools and was present when he was told that there was no place. The accused persisted that they lived at Taliash at that stage only for about three months. While they stayed in Taliash, the accused worked for the owner of the property and earned over R10 000 a month. However, because of the school situation, the accused found a place in Redhill and they moved there from Taliash in March 2017.

[89] When they lived at Firwood Road, he worked for various people and was earning R12 000 a month. After the house they occupied in Redhill was flood damaged, a friend arranged the house for him at [...], Ottawa Rietrivier. At the time of his arrest, he had only lived in Neptune Drive for two weeks. He earned about R15 000 per month working for Mamba Maintenance and subcontracting. The complainant did not attend school in Ottawa because they were only there for a very short period; he did however attempt to find a place for her at a school nearby, the name of which he could not remember. He had taken the complainant with him when he went to find a place for her.

[90] The accused denied ever owning a Blackberry phone and confirmed that he still had and used the same Samsung Galaxy Lite that Rebecca had given him. He had bought a Vodacom tablet for the complainant on her tenth birthday. When there was a problem with the tablet later in 2017, he bought the Huawei phone with white back cover and black in front with a clear screen for the complainant, which was the phone admitted in evidence. He registered the Huawei phone in the name of K R[...] and under his email address because the complainant was ten years old. The complainant played games, which he downloaded for her on the phone with data he bought.

[91] The accused alleged he used the complainant's phone as an emergency

backup but denied ever sending WhatsApp messages or voice messages on it, and specifically not the WhatsApp messages contained in Exhibits F and G. He messaged the complainant from his phone. He also denied that he had used the Huawei phone to take pictures or videos. The only time he took pictures was when he, his girlfriend Candace and the complainant had come back from uShaka. He never used the phone before or after that to take photos.

[92] He testified that he did the chores 90 percent of the time, before and after work, when he and the complainant lived at Taliash. The complainant was only expected to clean up after her meals. Similarly, in Firwood Road, a woman called Eleanor did the washing and ironing and cleaned inside the house only when he was present. When they moved to Neptune Drive in Ottawa, a lady and then Aneesa took over the washing. The complainant only cleaned up after herself when she made food for herself and packed away the laundered clothes.

[93] The accused alleged that the lingerie depicted in Exhibits C14 and C15 belonged to Candace, who had left it behind when she moved to her sister's house because she did not want her sister to find it. The accused identified only three of the sex toys: the purple/pink, the brown and the orange sex toys, which were kept with the lingerie and the other sex toys in a box under the bed. The accused disclaimed any knowledge of the other sex toys, the condoms or the pornographic DVDs. He did not use condoms or lubricants because he has an allergic reaction.

[94] According to the accused, the sleeping arrangements at Neptune Drive were that the complainant slept on the pink mattress and he slept on the blue mattress on the floor (the mattresses were depicted in Exhibits C4 and C5). At Taliash, the pink mattress was against the wall because the complainant would roll around, and his mattress was in front of the TV. They only slept on the same mattress when there was a storm as the complainant was afraid and she would sleep on his shoulder.

[95] The accused admitted that he smoked cigarettes and sometimes a hookah but denied that he kept weed or smoked it, as it was not proper to go to work intoxicated, and further, he could not stand the smell of weed.

[96] The accused alleged that he only got upset with the complainant when she did not do what he wanted her to do as he was trying to bring her up like a lady and not a tomboy. This included when she would do simple chores haphazardly and throw things on the floor. He did not like her frequenting the neighbours' houses and wanted her home at 16h00. He denied assaulting the complainant and pointed out that if he had

struck her, she would have suffered injuries and highlighted that she did not report any assault.

[97] The accused testified that when he returned from work on 11 June 2018, three Indian males were standing in his driveway. He was carrying his sling bag with his personal effects, his cellphone was in his pocket and he was wearing a Samsung smartwatch. One of the man assaulted him; whereafter a whole group of people started pushing him and asking him what he was doing. During this time, Mr J Pillay pulled the bag off his shoulder and took it away. Mr J Pillay asked him where the phone was. Whilst members of the community were assaulting him, Mr J Pillay took his phone and his watch. He denied that the Huawei phone fell out of his pocket as testified by Mr J Pillay . He alleged that his Samsung phone was always unlocked while the complainant's Huawei phone had a lock.

[98] His version of the argument which led to the complainant staying the night at Aneesa's house, was not that the complainant had handed the pregnancy test to the wrong person caused the argument. The accused alleged that he put R2 500 in cash into the brown packet with the pregnancy test. On his return from work the next day, 10 June 2018, he asked the complainant for the packet because the money was for electrical supplies, but the money and pregnancy test were missing. He was upset and questioned the complainant, and she started crying. The accused told the complainant that if the money was not found, he was going to pack her up and take her to her mother's family in Shakaskraal. Aneesa, who had heard their argument, told the complainant to pack her stuff and took her away. He disputed that he ever assaulted the complainant, but he admitted that he was upset with her because she took the money. When they moved to Phoenix, she took R1 200 for school fundraising. When he went to the school to arrange her transfer, he was told that she had won a bicycle in the fundraising. He then suspected that she had taken the money.

[99] The accused disputed the complainant's testimony in respect of the rapes, the sexual acts at Umdloti Beach at night and at other locations, including with the white man in the Jeep and at Candace's house, and that he made her wear adult lingerie and pose and then perform oral sex on him and watch pornography. He alleged that due to his diabetes, he has suffered with erectile dysfunction for about seven years, and a penis ring was 'not something he would use'. He also denied that he had assaulted the complainant sexually and attempted penetration when they lived with Ajeera, or that he had made her watch pornography. He disputed all the complainant's

allegations that he told her that he was going to make money from her having sex with other people, especially as with his qualifications, he was never short of money. He denied taking any videos or that he was the male in the videos and pictures on the Huawei phone. He pointed out that he had scars on his leg from an accident, whereas the person in the videos had no scars. He admitted that he had tattoos on both sides of his chest and that he was the bare chested male in some of the pictures. I shall revert to the cross-examination of the accused.

Argument

[100] Both counsel filed heads of argument, which they supplemented with oral argument, which is on record. I shall refer to their argument in the course of my evaluation of the evidence.

The law and legal principles

[101] It is trite that the onus to prove the guilt of the accused beyond reasonable doubt rests on the State. In evaluating the relevant testimony and the credibility of the witnesses, and in determining whether the State has discharged the onus on it, or whether the version of the accused is reasonably possibly true, we remain mindful of the guiding precept of Nugent J in *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448f-i:

‘The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. . . . These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.

In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.’

[102] This precept was affirmed and applied by the Supreme Court of Appeal (‘SCA’) in *S v Van Aswegen* 2001 (2) SACR 97 (SCA) and in *S v Trainor* 2003 (1) SACR 35

(SCA) para 9 per Navsa JA, where he restated what the trial court is obliged to do:

‘A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the *onus* on any particular issue or in respect of the case in its entirety.’

Cautionary rule

[103] Section 60 of the CL(SORM)AA provides:

‘Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.’

[104] However, that does not mean that the evidence of children should not be scrutinised with great care. As pointed out in D T Zeffertt and A P Paizes *The South African Law of Evidence* 3 ed (2017) at 1093:

‘The danger is not only that children are highly imaginative but also that their story may be the product of suggestion by others. In sexual cases, for example, a child who is prompted by leading questions when he or she first makes a complaint is quite likely to believe that things which were suggested to him or her really happened and Swain JA, in *S v ML 2016 (2) SACR 160 (SCA)* para 9], found the caution in this text “particularly relevant” to the facts in that case.

. .the cautionary rule applicable to single witnesses applies [*Matshivha 2014 (1) SACR 29 (SCA)* para 22]. This signifies [as Nugent JA held in *S v Vilakazi 2009 (1) SACR 552 (SCA)* para 21] that the prosecution of rape presents peculiar difficulties. . .“and even more so when the complainant is young”.’

[105] We have remained mindful in evaluating the complainant’s evidence that she was between the ages of nine and 11 when the offences were allegedly perpetrated, and 13 when she testified, and a single witness to the offences perpetrated on her, specifically the rapes and sexual assaults. Therefore the cautionary rules pertinent to a young child witness as well as a single witness have been applied to the evaluation of her testimony.

[106] In P J Schwikkard and S E van der Merwe *Principles of Evidence* 3 ed (2009) at 546-547, the following is stated:

‘The cautionary rule is a rule of practice and must be followed whenever the evidence of *certain* witnesses is evaluated. . . .It serves as a constant reminder to courts that the facile acceptance of the credibility of certain witnesses may prove dangerous.

The cautionary rule requires, first, that the court should consciously remind itself to be careful in considering evidence which practice has taught should be viewed with suspicion and, secondly, that the court should seek some or other safeguard reducing the risk of a wrong finding based on the suspect evidence.

It has often been stressed, however, that the exercise of caution should not be allowed to displace the exercise of common sense. The application of the cautionary rule does not affect the standard of proof. Corroboration is not the only manner in which the cautionary rule can be satisfied. Any factor which can in the ordinary course of human experience reduce the risk of a wrong finding will suffice, for example, mendacity, a failure to cross-examine, the absence of gainsaying testimony, etc.’ (Footnotes omitted).

[107] In *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A), Diemont JA provided a helpful guide to approaching the evidence of young children. The guide highlights, as the focal point, the trustworthiness of the evidence. At 1028A-F of the judgment, the learned judge said:

‘The question which the trial Court must ask itself is whether the young witness’ evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his *Code of Evidence* para 568 at 128, depends on factors such as the child’s power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears “intelligent enough to observe”. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion “to remember what occurs” while the capacity of narration or communication raises the question whether the child has “the capacity to understand the questions put, and to frame and express intelligent answers” (Wigmore on *Evidence* vol II para 506 at 596). There are other factors as well which the Court will take into account in assessing the child’s trustworthiness in the witness-box. Does he appear to be honest – is there a consciousness of the duty to speak the truth? Then also

“the nature of the evidence given by the child may be of a simple kind and may relate to a subject-matter clearly within the field of its understanding and interest and

the circumstances may be such as practically to exclude the risks arising from suggestibility”

(*per* SCHREINER JA in *R v Manda* [1951 (3) SA 158 (A)]). At the same time the danger of believing a child where evidence stands alone must not be underrated.’

[108] In respect of single witnesses, in *Stevens v S* 2005 [1] All SA 1 (SCA) para 17, the following was held:

‘In terms of section 208 of the Criminal Procedure Act 51 of 1977, an accused can be convicted of any offence on the single evidence of any competent witness. It is, however, a well- established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility. . . .The correct approach to the application of this so-called “cautionary rule” was set out by Diemont JA in *S v Sauls and others* 1981 (3) SA 172 (A) at 180E-G. . . “There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. . . .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. . .It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.”’

[109] It is also appropriate to note that although the onus to prove the accused’s guilt beyond a reasonable doubt remains with the State, the accused’s decision not to complete cross-examination impacts on the evaluation of the evidence before the court. Although the accused’s evidence-in-chief was complete and his version was put to State witnesses, the effect of his refusal to be cross-examined is that no weight may be accorded to his untested allegations and versions which were put to the State witnesses, but to which he did not testify under oath. The purpose of the cross-examination is *inter alia* to challenge the truth or accuracy of the accused’s version of the disputed events. Therefore, the State’s evidence on the issues, and in respect of those charges which were not yet covered in cross-examination, and which constitutes *prima facie* evidence, may become proven fact.

[110] In *Ex Parte the Minister of Justice In Re Rex v Jacobson & Levy* 1931 AD 466 at 478-479, the court held that:

“‘*Prima facie*’ evidence in its more usual sense, is used to mean *prima facie* proof of

an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving it discharges his *onus*.’

[111] Holmes JA held as follows in *S v Mthetwa* 1972 (3) SA 766 (A) at 769D-E:

‘. . .Where. . .there is direct *prima facie* evidence implicating the accused in the commission of the offence, his failure to give evidence, *whatever his reason may be* for such failure, in general *ipso facto* tends to strengthen the State case, because there is then nothing to gainsay it, and therefore less reason for doubting its credibility or reliability. . . .’

[112] In *S v Khoza* 1982 (3) SA 1019 (A) at 1043C-E, Holmes AJA stated similarly:

‘The fact that the appellant did not give evidence does not result in proof beyond reasonable doubt that he murdered or attempted to murder the deceased. I say this because, before the absence of gainsaying testimony from an accused can be said to carry the day against him, there must first be a *prima facie* case against him. . . .’

[113] The constitutional imperatives relating to the fair trial rights of an accused and his right to remain silent do not detract from this principle as confirmed by the Constitutional Court in *S v Boesak* 2001 (1) SACR 1 (CC) para 24:

‘The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.’ (Footnotes omitted).

These principles have informed our evaluation of the issues on which the accused was not cross-examined.

Evaluation:

The State’s allegation that the Huawei phone belongs to, and was used by, the accused to record the videos and take photographs depicting the complainant

and the adult male.

[114] Although the complainant could not remember the type of cellphone the accused had at Ajeera's house, she was adamant throughout her evidence-in-chief that the Huawei phone belonged to the accused, and that it was the only cellphone he had during the time frame relevant to this trial, and a smartwatch. She consistently described the phone as having 'a white back and black in front where the screen is'. She admitted that she played games and watched movies on that phone. However, she used her tablet at home to watch movies, play games and make WhatsApp calls or send messages to the accused. Once the tablet broke, she did not have a phone. Under cross-examination, the complainant disputed the accused's version that Rebecca gave him a Samsung Galaxy Lite phone, which was white at the back and black in front. She confirmed that for her tenth birthday on 15 September 2017, the accused bought her a Vodacom tablet on which he downloaded children's games and WhatsApp, and bought data for her.

[115] She disputed that the accused then bought her the Huawei phone for her own use, stating firmly that 'Kelvin had that cell-phone with him before I got the tablet'. She remembered clearly the phone brought to her by Mr J Pillay and agreed that it had a white back cover and was black around the screen, and persisted that it was the accused's phone. She also disputed that the accused use to buy her data for the phone which he bought for her; she responded, 'no, he only used to open the wi-fi on his phone and then give the phone to me'. The complainant persisted that she did not have a cellphone and that when her tablet broke, the accused allowed her to play games on his phone.

[116] She maintained unwaveringly throughout cross-examination that she never had a cellphone and denied that any communication between herself and the accused took place on cellphones as alleged by the accused. Although she agreed that she and the accused would communicate using WhatsApp messages and voice notes when the accused was not at home, she responded that she used her tablet and not a cellphone.

[117] When asked how she communicated with the accused while at Firwood Road, the complainant responded, 'my tablet was working in Firwood Road; it only broke at the time when we returned to Taliash from Firwood Road'. After that, she did not communicate with the accused unless he sometimes phoned his friends to check on her or he came back home. She also persisted that the voice note in which the accused told her not to let anybody in was a voice note that she received on her tablet and not

on the phone.

[118] When asked if apart from the tablet whether she did not have another cellphone, the complainant responded that in Firwood Road, before she had the tablet, the accused had a Blackberry phone, which he lent her and on which she took pictures. When the accused's denial that he owned a Blackberry was put to her, her immediate response was, 'he did because Ajeera's messages were on that phone' and 'he definitely used the Blackberry'. She persisted that the accused had a Blackberry phone before they went to Johannesburg and that other than that Blackberry; the only other cellphone that she ever used to play games on was the accused's cellphone, which was taken by the police.

[119] The complainant was coherent, direct and very convincing in her responses under cross-examination on the issue of the ownership of the Huawei phone. She admitted that she did not know what make of cellphone the accused had while they lived with Rebecca and Ajeera, but she recalled the Blackberry she played on independently. Her response to the accused's denial that he had a Blackberry phone was immediate when she pointed out that she had seen Ajeera's messages on it because she played on it. That response undermined the accused's version that he only had the Samsung phone after Rebecca gave it to him.

[120] When the accused's version that he had his own phone and only used her phone from time to time for emergency purposes, the complainant first clarified which phone the allegation related to. She then stated that he did not have any other phone and that they never had two phones in their house at any time after her Vodacom tablet was broken. She persisted that the Huawei phone belonged to the accused, and it was on that phone that he took pictures and videos of her.

[121] Corroboration for the complainant's responses is found in the equally firm stance of Mr J Pillay . When it was put to him that the accused bought the Huawei phone for the complainant and his own phone, a Samsung Galaxy Lite, was in his possession when he was assaulted, Mr J Pillay responded that the accused always had the Huawei phone with him. He recalled the day when the accused left the phone to charge and ran back to fetch it. He also persisted that the accused only had one phone, being the Huawei phone, and spontaneously added that once when the accused wanted to fix his phone, he asked their boss for money. When the accused's denial that he had taken money from their boss to repair his Huawei phone was put to Mr J Pillay , he immediately countered that it definitely happened, because he went

with the accused to fix the phone. Mr J Pillay also testified that the accused did not have a smartwatch as he used his cellphone to check the time. This was consistent with the complainant's evidence that the accused did have a smartwatch at some stage but not when they were at Neptune Drive. Mr J Pillay testified that to his knowledge, the complainant did not have a cellphone.

[122] As much of the State's evidence relating to the Huawei phone was put to the accused under cross-examination, it appears appropriate to deal with it now. In assessing the accused's testimony we remain mindful to apply what was laid down by Heher AJA in *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15:

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'

[123] The accused confirmed that he bought a tablet for the complainant on her tenth birthday, which was on 15 September 2017. He alleged that when her tablet broke, he bought the Huawei phone for her in February 2018 while they were at Firwood Road. This enabled the complainant to be in contact with him via WhatsApp while he was at work. He had a Samsung Galaxy Lite cellphone and alleged that there was no need for the complainant to play games and watch cartoons on his phone as she had her own smartphone. The only time business people would communicate with him on the Huawei phone was when his phone was off. He denied using the Huawei phone for any contact via social media, Facebook, etc. He confirmed that he could use his smartwatch and the Samsung phone for that.

[124] Ms *Naidu* then played a number of voice notes. The accused identified the first voice note from a work colleague and admitted that it was his own voice in the response, but alleged that he must have been contacted on the Huawei phone because his phone was switched off. In the next set of voice notes, from 13 to 22 October 2017, the accused identified the voice of the complainant and himself. When asked why both voice notes were on the Huawei phone, the accused replied he had sent the complainant a voice note from his Samsung phone to her Huawei phone on 22 October 2017. When reminded that on his version, the complainant did not have a Huawei phone at that date, he stated it must have been on her tablet.

[125] In order to explain this anomaly, the accused alleged that he took the memory card out of the Vodacom tablet and put it into the Huawei phone. When he was correctly reminded that Col Maimele had testified that he extracted the voice notes from the hard drive on the Huawei handset and not from the memory card or SIM, and that the voice notes were recorded on that Huawei phone, the accused became extremely defensive. When again correctly reminded that he allegedly bought the Huawei phone in February 2018 but the voice note was in October 2017, the accused alleged that when the complainant's tablet was damaged, he transferred everything, including the date and times of the data, via his computer from the tablet onto the phone. When questioned why this allegation was not put to Col Maimele, the accused stated that he was not asked about the transfer and became extremely defensive.

[126] He then suggested that his SIM card was taken out of his Samsung smartwatch and put into the Huawei phone, but conceded that he assumed that Mr J Pillay was responsible. It was put to Mr J Pillay that during the assault, the accused lost his Samsung watch, his cellphone and wallet, but when the accused testified, he alleged that Mr J Pillay took his watch and phone. This was not put to Mr J Pillay nor was it put to him that he swapped SIM cards in the Huawei phone. The accused also stated categorically that he did not know how many SIM cards were in the phone, although he had not disputed Col Maimele's evidence or requested clarification when the colonel testified he downloaded two SIM cards, which were in the device.

[127] The accused estimated that he had purchased the Huawei phone for the complainant round about the end of the first week in February 2018 and transferred the memory card and all the contents from the Vodacom tablet onto the phone about one and a half, two weeks later. All the contents from the tablet were transferred to the Huawei phone by the end of February 2018.

[128] The accused alleged that information from his phone was on the Huawei phone because his phone must have been off. He did not send any WhatsApp messages or voice notes to anyone, not even his work colleagues. He transferred the complainant's tablet number to the Huawei phone and used that number on the Huawei phone as a work emergency number. As submitted by Ms *Naidu*, significantly, the accused did not mention the smartwatch and why it was not used as the alternate contact number. The accused alleged that once he transferred all the information, he did not transfer anything else, although he later said that he could have downloaded music.

[129] Ms *Naidu* then played the voice notes for February and March 2018. The

accused admitted that the voice notes were work related but then alleged that the complainant was with him at those times. But when confronted with another voice note which was clearly not work-related, the accused alleged that he and the complainant went to get food at the Engen one-stop near Durban North, but he was unable to explain why he did not have his phone with him. However, the sequential voice note between the accused and the other person indicated that the next stop was going to be the Ultra City, and therefore the accused could not have been in Durban North. The accused then alleged that if the complainant's phone was with him and he was at work, the complainant would have been with him as he sometimes took her work. This was the first time this allegation was made and was not put to the complainant.

[130] In a voice note for 16 May 2018, the accused identified the voice of one Jaydee, and alleged that Jaydee always called him on the complainant's phone because he had an MTN card and it was cheaper. Jaydee also called mostly in the evening when the battery on the accused's phone was flat and at that time, he did not have a power bank. The accused answered evasively when Ms *Naidu* put it to him that there was no need to look for cheap calls as the voice note required data and not airtime. In that voice note, the accused, who admitted it was his voice, is clearly heard saying that 'my daughter hijacks my phone most of the time, I don't have my phone most of the time'. The accused then alleged that when the complainant used his phone to get on to Netflix, he switched his calls off to avoid static breaks, and therefore messages for him came on the complainant's phone.

[131] This was a material contradiction from the accused's initial allegation that each of them used his or her own phone exclusively. Although the accused denied he had ever sent messages to anyone, including to his colleagues and the complainant, on the Huawei phone, under cross-examination he also admitted a voice note was from him to the complainant in which he spoke to her about a firearm and told her to take care. He thereby contradicted the version that was put to the complainant on his instructions. Further, there were no voice notes from the complainant on the Huawei phone, which the accused had no explanation for. Finally, there were also voice notes from a female with adult content in March 2018. The accused could not explain why voice notes from an adult female were on the complainant's phone. Eventually he stated that the message was not intended for him.

[132] The accused was also referred to various images, which included photos he had taken of himself. He also identified photos of cars and tow trucks etc taken at his

workplace on 12 May 2018. He alleged that he took the photographs with the complainant's phone because she was present and the battery on his phone was flat. When Ms *Naidu* put to him that the battery on his phone always appeared to be flat, the accused responded evasively by alleging that he only used the complainant's phone when she was present.

[133] The accused alleged that pictures of firearms on the Huawei phone were taken when he went hunting with his friends, which he transferred onto the complainant's Huawei phone via his laptop. When reminded that in his previous testimony he had stated that he had exported the contents of the Vodacom tablet to the Huawei phone that he bought for the complainant and inserted the SIM card from the tablet into the phone, the accused persisted that he sent pictures to the complainant's phone because he was running out of memory. He also responded that the pictures of firearms would not impact adversely on the complainant. When reminded about the voice note in which the complainant asked him about using the firearm and the instructions he had given her, the accused responded that he had taken the complainant to the firing range to show her what damage a firearm could cause.

[134] Not only were many of these allegations not put to the complainant, although Mr *Pillay* was at pains to take instructions from the accused, it was apparent from his foregoing responses that the accused had the ability to fabricate explanations quickly. This was until the evidence of the voice notes was overwhelmingly in favour of the conclusion that the Huawei phone did not belong to the complainant. There was further evidence, which sustained the finding that the Huawei phone was used by the accused. It was common cause that when the complainant and the accused moved to Witbank in 2016, she went to Panorama Primary School. The Huawei SMS records reflect messages from Panorama in respect of arrear fees. It is highly improbable that the school would contact the learner and not the parent or guardian about unpaid fees.

[135] Finally, the accused admitted that an SMS from Greenwood Park SAPS on the Huawei phone records sent to the Huawei phone number on 8 August 2017, related to a charge of assault which he laid and in respect which he made a statement. He could not explain why he had only given the Huawei number to the police as his contact number, and not his number if he always had his Samsung phone with him. Significantly, as correctly argued by Ms *Naidu*, the accused's version regarding the ownership of the Huawei phone completely unravelled when he was confronted with the impossible situation that he provided the Huawei phone number, which allegedly

belonged to the complainant, on 8 August 2017, when according to the accused himself, he only bought that SIM card on 15 September 2017. We are in the premises satisfied that the State has proved beyond a reasonable doubt that Huawei phone belongs to and was used by accused at all times material to the offences he has been indicted with.

Is the accused the adult male in the images and videos in which the complainant is performing sexual acts with or on?

[136] As already recorded in this judgment, it is common cause that the complainant has been sexually assaulted and further, that she was confident and unhesitating in her responses that the male person in the images and videos downloaded from the Huawei phone was the accused. She also remained unshaken and unwavering under cross-examination. Although there were no photos relating to the offences allegedly perpetrated on the complainant by the accused at Ajeera's house, the complainant remained steadfast in her evidence-in-chief. She disputed the accused's version that he did not make A[...] go to sleep but that she watched cartoons until the granny came home. She also persisted that the accused made her watch pornographic videos, remove her clothes, perform fellatio and attempted to penetrate her at this time. The complainant explained that although she lived with Ajeera for several months while the accused was in Durban, she did not tell anybody, including Ajeera about what the accused had done as he had warned her not to tell anybody what he had done and she was scared because 'he would come back'.

[137] The complainant's immediate response to the accused's version that he never took pictures of her naked or in her underwear was that 'he did' and she persisted that he made videos of her whilst she was naked and in adult lingerie. When the accused's denial that he was the male person in the videos and photographs was put to her, she smiled and responded as follows, 'then who is it?' When asked to explain, her response was, 'if it is not Kelvin, then who else is it'.

[138] This was indeed a very relevant question. Although the accused admitted that it was the complainant who was engaged in sexual acts with an adult male in the videos and who was photographed in lewd poses wearing erotic adult lingerie, he did not allege or testify that the complainant spent time with or lived with any other person or persons but himself during the relevant times. Nor did he testify or even allege that the complainant had the opportunity to make these videos or take the photographs with any other person or persons. Further, given that the complainant was a minor

between the ages of nine and 11 at the times material to the allegations in this matter, she cannot be said to have conducted herself in the manner depicted voluntarily or with an awareness of the unlawfulness of the acts being perpetrated upon her.

[139] One of the allegations made by the accused to challenge the charges of rape is that due to illness and poor health, he was unable to put his penis into her vagina. His further version was that as he was earning good money, there was no need for him to use the complainant to make money or to take photos of her to send to other people. This was disputed by the complainant who persisted that he had sexual intercourse with her, and that he took pictures and videos with the intention to make money through her. The accused's attempt at obtaining a medical endorsement of his erectile dysfunction from Dr Ramjiawan failed when she testified that even with all the medical conditions the accused suffered from, and even if he had uncontrolled diabetes, he could still be aroused and maintain an erection.

[140] Under cross-examination, the accused indicated that he had no objection to displaying his tattoos that he had done between 2009 and 2010. In court, he voluntarily displayed the tattoos on his right chest, a rose with the name 'I[...]' tattooed above it, and the spear of destiny on his left chest. On his right forearm was a tattoo of a dragon and above that a monster. His left arm had his initial and then a lizard. The tattoo on his left hand, between the base of the thumb and forefinger was that of an initial 'K' for K[...]. The circular scar next to the 'K' on his left hand was from an electrical shock over ten years ago.

[141] With reference to images dated 2 October 2017, the accused confirmed that he had a scar above his right nipple, a curved long linear scar to the left of his right nipple and a shorter curved scar from the end of the linear scar, from injuries which he had sustained long before 2017. The accused confirmed that the same scar in an image dated 6 October 2017 appeared to be healing. He also confirmed that he was in a self-image in which he was lying on his back, with his tattoos visible.

[142] The accused alleged that he never took any videos of himself performing sexual acts with anybody because it was not something that he did, but he did take a couple of pictures of a naked Ajeera, which were downloaded from the Huawei phone. The accused also identified himself and I[...], the complainant's mother, having sexual intercourse and performing other sexual acts in a video but denied that there had been any intention to record same. I[...] had suggested that they watch themselves, so he had switched the camera on, but was not aware that they

were being recorded. However, it became clear when in the video the accused adjusted the camera and then said, 'we are making a small time movie', that he was being disingenuous. The accused became defensive, saying that he was not the one that was making the video and that it took the two of them. However, when he watched a further part of the video in which he is heard saying, 'I am recording us', he responded that he and I[...] made the video, although he was the one who spoke about the recording. We noted that in that video, the penis ring worn by the accused was similar, if not the same, as the penis ring worn by the male in the impugned videos and images with the complainant.

[143] The complainant testified that the accused put the sex toys in Exhibits C14 and C15 into his bum in front of her and showed her what he was doing and told her to watch. He normally used the toys after they finished the sexual acts. Under cross-examination, the accused identified a bare chested image of himself in Ottawa in Exhibit D. He did not dispute that the next image was that of the blue sex toy inserted between his buttocks and into his anus, with a white substance smeared around the toy and on his buttocks. The accused initially responded that he just placed the toy there, and did not insert it and that he did not know what the white stuff around it was. He persisted he did not use lubricant. He then alleged that it was Candace's idea. She had been in the house in Ottawa on 12 May 2018, and it was her idea that they play with the toy. In the next image, the accused is depicted holding the blue sex toy in his hand. He described the toy as a long, thin, blue anus sex toy between six and seven cms in length. When it was put to him that it was therefore incorrect in his evidence that he had never had a sex toy inserted into his anus, he responded that if it was something that Candace did in the spur of the moment. He was therefore not answerable, and secondly, that as it happened two and a half years ago, he did not think about it.

[144] There were several material contradictions and inconsistencies in this response. The first is that it contradicts the accused's version that he and the complainant only lived in the Ottawa property in Neptune Drive for two weeks. The complainant's evidence was that after they left Firwood Road, and even when they were in Taliash, she never saw Candace again. It was not put to her that Candace came to Ottawa at some stage. Mr J Pillay stated that he did not know that the accused had a girlfriend. The next contradiction is that this sex toy is clearly depicted in Exhibit C15, yet the accused disclaimed any knowledge of the toys other than the three he

identified. The next contradiction is that he stated that he did not take any photos of this nature nor did he use the Huawei phone to do so. When asked why the image was on the Huawei phone, the accused responded that it had been on his Samsung phone and he did not know how it got onto the Huawei phone. By this stage, the accused's denials were beginning to fray and so was his temper.

[145] Photograph WA0007 dated 8 August 2017, is a self-image of the accused wearing what he insisted was a white vest that was pushed up. However, as pointed out by Ms *Naidu*, no rolls or folds in the so-called vest were visible; instead, the garment appeared to be a woman's crop top. The accused admitted that the photo was taken at Taliash in Overport and the grey tracksuit jacket depicted on the right was his. In the same sequence, there were images in which the lower part of the accused's body and his black underwear is depicted and that he is wearing a penis ring. Inconsistent with his former denial that he ever used a penis ring, the accused stated that Candace had bought it for him, but then attempted to dispute it was a ring because it was not a complete sealed ring. He also disputed that his penis was erect in that photo.

[146] In a photograph dated 21 October 2017 in Exhibit D, which depicted a male wearing blue lace panties, a chair upholstered in blue fabric was visible. This chair was depicted in a number of images and was identified by the complainant as a chair in the Firwood Road house, which was never disputed by the accused. Nevertheless, under cross-examination, the accused persisted that he never had that blue chair in Firwood Road. When it was put to him that the complainant's evidence was never challenged, the accused shouted that he had never moved with furniture or had furniture and then admitted that he did not tell his counsel anything about the chair because he did not find it relevant. The complainant identified this blue chair in an image in which several pieces of underwear were on the chair and testified that the underwear was worn by the accused. The blue underwear on that chair was remarkably similar to the one that the accused was wearing. The accused also identified himself in a photo dated 7 June 2018, but disputed that he was wearing white lacy female underwear. After insisting that it was male underwear, the accused stormed out of the stand and refused to complete cross-examination.

[147] The videos and images we viewed left us in no doubt that the male in the videos and images was the accused. I do not intend traversing all the evidence, which overwhelmingly sustains this conclusion, but I will highlight a few specifics.

[148] The accused testified he wore two earrings in each ear but the complainant insisted that he wore one earring in each ear, saying that he wore one thick silver earring in each ear which was thin where it entered through the ear. In the video with I[...], the solid silver earring, as described by the complainant, is clearly visible. What is even more striking is the accused's hairstyle and the way it is shaped around his ear from his forehead down his right ear. Both the earring and the hairstyle are exactly the same as in the image of the male with his tongue inserted into the complainant's vagina.

[149] Secondly, the complainant testified that the accused photographed and recorded the sexual acts on his Huawei phone and sometimes kept the phone charged even at these times. The white charger cord is visible in many of the photos. In image 0001 taken on 30 November 2017, the complainant identified herself seated on a chair and explained that the cord in front belonged to the charger with which the accused charged his phone.

[150] Thirdly, the bedding ie blankets and the pink and blue mattresses or 'sponges', and the blue chair, are visible in many images and videos. It was not disputed (except for the chair and that too only under cross-examination) that the bedding belonged to the accused and that they took it with them from house to house. The complainant denied the accused's version that they always slept on their own sponge, saying that they sometimes slept apart and sometimes together, and at times, the accused put the sponges together. In image 0014, the complainant identified herself lying next to the accused with her arm across him sleeping together on one sponge.

[151] The accused alleged that the sleeping arrangements were that the complainant slept on the pink mattress, which was on top of the structure, and he slept on the blue mattress on the floor (as depicted in Exhibits C4 and C5). In Taliash, the pink mattress was against the wall because the complainant would roll around, and then his mattress was in front of the TV. When faced with the complainant's version, the accused responded that there were occasions when the complainant became very afraid during thunder and lightning storms. They then slept on the same mattress and the complainant slept on his shoulder. This contradicted the accused's version put to the complainant that she and the accused never ever slept on the same sponge. Further, in Exhibit G, which is the transcript of a set of WhatsApp messages between the accused and a person calling herself 'Perseverance', in a WhatsApp message dated 6 June 2018 the accused messaged, 'My daughter share bed wid me' and in a further

message states that 'me in the middle' after consenting to the request from Perseverance to sleep with the both of them.

[152] Finally, Ms *Naidu* focussed on specific images and stills from the videos in which the accused's distinctive tattoos and scar on his hand and other body scars, which the accused himself drew attention to, were clearly visible. The accused himself provided corroboration for the State's case through his mendacity and contradictory and false allegations. In the premises we are satisfied that the State has proved the identity of the male in the videos and images downloaded from the Huawei phone beyond reasonable doubt, and that it is the accused.

Did the accused exhibit pornographic videos to the complainant with the intention of instructing her how to perform sexual acts, and masturbate in front of the complainant?

[153] The complainant testified that from the time of the first incident at Ajeera's house, the accused downloaded pornographic videos onto the Huawei phone and made her watch them. He then told her to do what the adults in the videos were doing. Although the accused denied this, corroboration is found in the history of downloads from the Huawei handset and the memory card. With reference to Exhibit D, Col Maimele testified that the user account for the Huawei phone (Exhibit D) was registered with the user K[...] R[...] with the email address.[...]. As the Huawei phone was a smartphone it could be used to access the internet. Colonel Maimele displayed the web history extracted from the Huawei phone, which reflected the date and time of the sites visited according to the time set on the phone itself. The web history for 2 January to 10 June 2018 reflected 354 websites visited by the user, 90 percent of which were porn sites. Secondly, amongst the items depicted in Exhibits C14 and 15, the complainant identified pornographic DVDs, which the accused made her watch. Mr J Pillay confirmed that these were adult DVDs.

[154] The complainant also testified that there were times when both she and the accused would be naked and the accused would hold his phone to show her the videos 'and normally he would be shaking his private part with his hand'. When the video was finished, he would make her do the things that were on the video. In one video recording, the complainant is seen touching her genitalia while the accused is masturbating by shaking or stroking his penis vigorously.

[155] We are in the premises satisfied that the State has proved beyond a reasonable doubt that the accused did display pornographic videos to the complainant with the

intention of instructing her on how to perform sexual acts and thereby groom her, and that he masturbated in her presence.

Did the accused smoke cannabis (weed) and make the complainant smoke cannabis too?

[156] The complainant testified very persuasively about when and how the accused made her smoke weed. Under cross-examination she disputed the accused's denial that he made her smoke weed, saying that there was even a picture. She identified an image in Exhibit 1 where she is depicted smoking and confirmed that she was smoking cannabis. When faced with the complainant's evidence that he used to buy weed and the paper to roll it in, and an image dated 20 February 2018, the accused alleged that he was holding apple flavoured tobacco, which was green. He also alleged that he was smoking a cigarette which he rolled with a machine with tobacco inside and not a cigar. When shown an image depicting a green substance on a brown round plate, which the complainant had spontaneously pointed out as weed, he denied it was weed. He also did not know why the complainant had said that she smoked weed or why she was in that photograph. He also denied that he had round plates in his house, but when shown an image of the complainant eating off a round plate, he denied that the plate belonged to him.

[157] Given the contradictory and clearly false denials by the accused, and the complainant's detailed description of the accused smoking weed, together with her own initial reluctance to admit that she smoked weed, we are satisfied that the complainant was telling the truth. In her limited exposure to the world, there would have been little opportunity for her to observe anyone else rolling and smoking weed. We are therefore satisfied that the State has discharged its onus on this issue and that the accused's denials are false.

Did the accused deliberately prevent the complainant from attending school and thereby force her to remain at home?

[158] It is common cause that the last school the complainant attended was Actonville Primary, while they lived with Ajeera. The accused alleged that after the complainant returned to Durban around August/September 2017, they stayed in Taliash, then Firwood Road, Redhill and thereafter they moved to Ottawa. The complainant persisted that from Firwood Road, Redhill, they stayed at Taliash, and then moved to Ottawa. She also disputed the accused's version that they only stayed at Neptune Drive for two weeks before the accused was arrested. She estimated that they lived in

Ottawa for two or three months because she turned ten in Firwood Road, and she did not have a birthday in Taliash or in Ottawa and turned 11 in the Children's home. Her evidence that they lived in Neptune Drive for about two to three months was corroborated by Mr J Pillay , who added that he worked with the accused for three weeks at Mamba Maintenance as at June 2018, and the accused had already moved onto the property before that.

[159] Although the complainant testified that she constantly asked the accused to enrol her at school, which he said he would do but didn't, she confirmed under cross-examination that when the accused brought her to Durban, he took her to [...] Primary in Overport to find her a place in school. However, she did not know that the accused was advised by a teacher that there was no place for her, because he did not tell her that. The accused also did not tell her that he attempted to enrol her at Saint Michaels' Primary School when they moved to Firwood Road. The complainant also testified that the accused told his friends who asked why she was not at school, that he was looking for a place but that he did not.

[160] The accused alleged that while they lived at Taliash, until the end of 2017, the complainant did not attend school because the two schools the accused went to, [...] Primary and Sydenham Primary, could not accommodate her. This version varied from the version put to the complainant, which was that they went [...] Primary, not to two schools. The accused also alleged that he was earning over R10 000 a month working for the owner of Taliash, but because of the school situation, he found a place in Redhill which they moved to about March 2017. Neither the timeline nor the accused's logic makes any sense. If the accused were genuinely concerned about obtaining a school placement for the complainant, he would not have attempted to enrol her in March when the school year commences in January. The appropriate time would have been in December or perhaps as late as January, but not during or at the end of the first term in March. Secondly, he would have first checked about placement at the school before he moved house, not afterwards.

[161] The complainant was very clear in her recollection about the schools she attended and those that the accused took her to, yet she did not remember the school that the accused allegedly attempted to enrol her in at Redhill. In cross-examination, it was put to the complainant that the accused tried to find her a place at Saint Michaels, to which she said, 'no that did not happen'. However, the accused alleged that he went to two schools in Redhill and that neither of the schools were able to take

the complainant. The accused also alleged that he did not have the opportunity to look for a school because they were in Ottawa for only two weeks. Mr J Pillay corroborated the complainant's evidence that as at 11 June 2018, they had been living at Neptune Drive for two to three months. He responded to the accused's allegation that they had lived there for two weeks by stating that the person who had previously worked with the accused left a month before he started working with the accused, and he had worked and been paid for three weeks. Therefore, he was certain that they had lived there for two to three months, not two weeks.

[162] Therefore, the accused's allegations about his attempts to enrol the complainant at school, except for [...] Primary, are rejected as false. In our view, the accused made no genuine attempt to place the complainant in school. It suited his nefarious intentions in respect of her to keep her at home because of the probability that his abuse and sexual assaults on her would be exposed if she went to school.

Did the accused force the complainant to do household chores?

[163] The complainant was cross-examined about the household chores that she had testified that the accused instructed her to do at the various places where they lived. To the accused's version that all he expected the complainant to do was 'neaten the place', the complainant firmly responded, 'no'. She denied that the accused cleaned and did the laundry at Taliash on his return from work, responding that the accused told her to clean the place every day, which she did. She also disputed the accused's version that Eleanor washed and cleaned for them. Her response was, 'no, Eleanor used to help me with the washing but he never let her into the house to do cleaning'. The complainant agreed that whilst in Ottawa, a lady washed their clothes and thereafter Aneesa did their washing. In response to being told 'the place in Ottawa was very small and there was not much cleaning' she stated, 'the place was small but there was a lot of stuff at the place and when the accused went to work, he would open the packets and the room will get dirty. I had to clean that afterwards'.

[164] Under cross-examination, the accused denied that he had ever made the complainant wash his clothes as his work clothes were full of grime and oil and needed to be washed by an adult. Ms *Naidu* played voice note WA0005, which the accused identified as his voice. In the voice note the accused asked, 'did you wash all our clothes because daddy have no clothes?', and thereafter told the complainant to wash his jeans. The accused became extremely defensive, and declared that he meant that the complainant should wash all her clothes and just his jeans, which was not the jeans

that he wore to work. He claimed that it was not abusive to make a child wash clothes, he was mainly teaching her to be clean. He alleged that it was Eleanor who cleaned the house and washed clothes.

[165] In another voice note, after the accused responded to the complainant's message about cool drink, he reminded her to clean 'the damn house' and wash the clothes because he needed socks for the next day. The accused admitted his voice note and that he 'ranted and raved if the house was untidy'. He also alleged that when he said he would swear at the complainant if she did not wash her clothes, he did not swear vulgarly but merely asked her in a raised voice why she did not do simple chores when she was at home the whole day. Nevertheless, the accused effectively admitted that he instructed the complainant to clean the house and do the laundry.

[166] The complainant also disputed that the accused always cooked food or bought food and his allegation that he gave her cereal, porridge or toast at home for breakfast. She first enquired 'which house?' the accused provided the aforesaid breakfast for her at. When told 'at all the houses' she responded, 'No, Kelvin used to go and whatever was there I used to eat'. When asked what she ate at Ottawa, she stated, 'I used to make noodles for breakfast and lunch'. She also disputed that the accused made or bought lunch at Firwood Road. She stated that she ate leftovers and sometimes cooked for herself. This aspect of her evidence was not tested with the accused.

[167] In the premises, we are satisfied that the accused instructed the complainant to do household chores such as cleaning the house and washing their clothes, and that she also cooked her own food whenever necessary. Further, although the accused was employed and asserted that he earned well, he did not ensure that he provided nutritious meals for the complainant.

Did the accused conspire with Candace and compel the complainant to perform sexual acts and have sexual intercourse with him in Candace's presence, and did he compel the complainant to watch him and Candace perform sexual acts and have sexual intercourse, with the intention of grooming her to do likewise?

[168] When Mr *Pillay* referred her to a photograph of herself and Candace, the complainant had a clear recollection of it because she corrected Mr *Pillay* saying she wore red and not pink pants. She denied the accused's version that this photograph was taken on their return to Candace's house in Umbilo from uShaka. The accused was taking a picture of Candace in her beach clothes and Candace pulled her towards her. The complainant disputed that saying, 'it did not happen like that; we did not come

from the beach and we did not go to the beach'. She persisted with her testimony-in-chief, and to the accused's denials she responded, 'he did and said I must learn from Candace'. She also persisted that the accused had sexual intercourse with her and made Candace watch, and that the accused made her pose with Candace holding each other with their hands on their private parts.

[169] The accused on the other hand alleged that although they had just wet their feet, the complainant had removed her top when they got home. They had been playing in the sand and Candace was going to give her a shower. He also denied that Candace was deliberately posing. Under persistent cross-examination by Ms *Naidu*, he began changing his version. Although Candace was wearing socks, the accused persisted that she was going to give the complainant a shower, while standing outside the shower. Then he said that they were going to shower together. When asked why it was not put to the complainant that Candace was going to give her a shower, the accused responded that he had told his counsel that they were going to shower. However, when taken to task on why Mr *Pillay*, who diligently took instructions and put his instructions throughout the trial to the complainant, would have failed to do so on this issue, the accused retracted, saying that he did not tell his counsel as 'it was not important to him because it was just his girlfriend and his child'.

[170] The accused identified Candace in a photo dated 3 August 2017. Therefore, we can accept that she is real. This admission together with the accused's apparent mendacity in an attempt to mislead the court that there was nothing sinister in the obviously posed photograph, in our view, provides corroboration for the complainant's detailed evidence about the role of Candace and her interaction with the complainant and the accused. The complainant also described the incidents involving Candace at Firwood Road and at Candace's house and stated, that she did not see Candace after they moved out from Firwood Road. She stated that she did not like Candace because she was 'creepy' and encouraged her 'to do things which were not nice'. This adds a ring of truth to her evidence. Further corroboration is found in the attempt by the accused to assign ownership of the lingerie and sex toys to Candace. In the absence of a complete version from the accused, we are constrained to accept the complainant's version as the truth. We are therefore persuaded that the State has discharged its onus in respect of the allegations relating to Candace.

Did the accused make the complainant perform fellatio on an unknown male in a hotel while he (the accused) had sexual intercourse with her?

[171] I have already set out the complainant's detailed evidence about this encounter, which remained uncontroverted under cross-examination. In his evidence-in-chief, the accused alleged that the only person that he knew with a black car was an Indian business friend, who would pick them up and take them for a bite to eat and then drop them at home again. This Indian friend was however not light skinned. This was not put to the complainant and there was no cross-examination on this issue. Again, we are satisfied that the complainant's evidence was too detailed and graphic to be a figment of her imagination. Apart from the sexual acts, the description of the man and his car, and what each man did during that time in the hotel, she even related that the man had asked her name and if she attended school. This encounter is also consistent with her evidence that the accused told her that she would have to work and make money by performing sexual acts with other men and that Candace too was encouraging and teaching her to do the same. Her description of how the accused was upset with her because she did not have sex with the man was also consistent with the tenor of her evidence.

[172] We are therefore satisfied that there is no reason to find that the complainant's evidence is insufficient to sustain the State's allegations and are satisfied that the State has proved beyond reasonable doubt the allegations on this issue.

Did the accused penetrate the complainant's vagina and mouth with his penis and/or tongue on the beach and in their various places of residence and make her perform sexual acts with or on him?

[173] We have already found that there are clear depictions of the complainant performing fellatio on the accused and being penetrated by him with his penis and tongue in the videos and still images on the Huawei phone. For example, in a sequence of images dated 4 May 2018, the complainant is depicted wearing adult lingerie touching her vagina; two images depict the complainant inserting the accused's penis into her vagina while seated on him; the hand on her thighs is that of the accused, who took the photos. In an image dated 6 June 2018 taken by the accused, the accused is depicted inserting his penis a blue penis ring into the complainant's vagina.

[174] The complainant explained that the light visible in the photograph was from the torch that the accused used so that he could see when he was penetrating her. In videos dated 16 October 2017, the complainant identified herself, and the accused seated in front of her while she performed fellatio. The accused who clearly recorded

the video is heard asking her, 'did you get what you want?' The complainant did not know what he meant. In a video dated 19 October 2017, the complainant is depicted inserting her finger into her vagina while the accused is recording her from the front. In the second video on the same date, the accused is visible inserting his tongue into her vagina.

[175] We have considered this real evidence with its relevant dates and times holistically with the evidence of where the accused and complainant lived at various times. It is common cause that they lived in the Durban and Verulam jurisdictions. The complainant testified that the acts of penetration by the accused occurred at the three houses in which they lived, as well as at Candace's house in Umbilo. The dates on the videos and images corroborate the complainant's evidence. Furthermore, we have examined the images to find corroboration in the background: the bedding, the floor and blue chair in Firwood road; the shower and the colour of the tiles in Taliash, as there was no shower in Firwood road and Ottawa. We have no hesitation in accepting the complainant's uncontroverted evidence as the truth. In the premises, we are satisfied that the State has proved that the complainant was raped as defined in the 'the CL(SORM)AA.

[176] The complainant testified about the night the accused took her to the beach and made her perform the sexual acts and had sexual intercourse with her. She was wearing only lingerie under the accused's jacket when they returned to Neptune Drive. Mr J Pillay was waiting for them. The accused told her to tell everyone there was a snake in the house, but he took her out of the house because he suspected someone was spying on them. The complainant disputed the accused's version that he used to take her to Umdloti Beach to swim during the day. She persisted with her testimony, and spontaneously recalled one night when they were stopped at the beach by security who questioned the accused about where they were going. The complainant testified that they did not go to the beach often because she was afraid, but she was also afraid to tell the accused because he would get angry. In an image dated 28 May 2018, the complainant identified herself standing in front of a white car wearing only lingerie over her lower body, and holding a lighter. She testified that the accused took the photo one night in Ottawa when they were going to the beach because the accused did not want to do the sexual acts in the house.

[177] Mr J Pillay corroborated the complainant's evidence when he testified that he heard the accused and complainant leaving their home at about 01h30 and only

returning at about 06h00 about two weeks before the accused was arrested. Although Mr J Pillay agreed with the accused's version that the complainant was wearing the accused's jacket, but the accused himself later denied that they had gone out and returned at 05h30, contradicting his own version. Mr J Pillay immediately disputed the veracity of the accused's further allegation that he took the complainant with him to Mamba Maintenance to attend to wiring for their boss' son for a sound competition. He was certain the competition took place two days before the incident. He convincingly explained that he was certain of the time frame because he had been very excited as he was going to attend the sound competition for the first time. He had dressed and waited but he did not go. He was therefore not mistaken that the day when the accused told him about the snake was the same day when the accused and complainant returned at 06h00. This allegation was not put to the complainant.

[178] The accused's version was not tested under cross-examination. We are satisfied that the complainant's version was the truth. The only reasonable inference to be drawn from the evidence is that the accused did not want his privacy invaded because he was in fact perpetrating a sexual assault on the complainant. In the light of the complainant's detailed evidence and the corroboration by Mr J Pillay, we are satisfied that the accused did take the complainant to the beach where he compelled her to perform sexual acts and had sexual intercourse with her.

Did the accused disseminate images of the complainant to other people via electronic platforms such as WhatsApp, with the intention of exploiting her sexually?

[179] There are many images of the complainant posing in the adult lingerie, sitting or lying on her back with her legs apart exposing her genitalia in Exhibit 1. It is apparent from the images that the photographs are taken by the man we have identified as the accused (he is sometimes visible in the images or the relevant images are in a sequence on a particular date, and there are images of the accused in the same sequence). Images 31, 32 and 40 depicted the complainant lying exposing her vagina and underwear with an open crotch, with her T-shirt pushed up and exposing her chest. In images for 13 October 2017, which were taken at Firwood Road, the complainant identified herself posing with her vaginal area exposed and with her finger in her vagina, which she testified was in accordance with the instructions of the accused who was taking the photographs.

[180] In a further sequence of images for 24 November 2017, the complainant is

depicted lying on her back wearing the black underwear she described as a jumpsuit in C15, with her finger in her mouth. She wore white underwear over the black lingerie on the accused's instructions. In that series of images, the complainant is lying on the cream and brown blanket depicted in Exhibits C14 and C15. The complainant confirmed that the pictures and the videos that the accused had taken of her and the sex acts they performed were always on the same Huawei phone. The accused told her that he took the pictures to show other people. She did not feel good but she let him do it because she was afraid.

[181] The complainant testified that she once sent a voice note on the accused's instructions to a girl of about her age who chatted on WhatsApp to the accused about a swop between her father and herself and the complainant and the accused. The messages, videos and images are contained in Exhibit F. It is apparent that the accused is referring to the complainant by her name and is chatting with a young child who calls him 'Uncle'. The child is depicted in an image she sent to the accused. The accused also sent images of the complainant to the child. The conversation speaks for itself and provides corroboration for the complainant's evidence. The accused was not cross-examined on this aspect. We are satisfied that the State has discharged its onus on this issue beyond reasonable doubt.

Did the accused assault the complainant and/or threaten her?

[182] During her testimony, the complainant reiterated several times that the accused would become very angry if she did not do as instructed and threaten to send her to the place where her mother was. She testified that after the argument with the accused about the pregnancy test she stayed with Aneesa because the accused had hit her. Under cross-examination, the complainant disputed the accused's denial that he had ever assaulted her, responding that he used to hit her in front of her mother, Rebecca and other people, and he assaulted her when they stayed together alone. Mr J Pillay corroborated the complainant's allegation of assault. When it was put to her that she had stolen various sums of money at various times, the complainant responded that she only took R100 once from the accused while they were living in Phoenix. She asked him for money; he had just grunted at her and she then took a R100. However, she had never taken any other money thereafter because she got into trouble. The accused did not give her money but she would buy things from the tuckshop and he would settle the bills.

[183] The accused denied that he ever assaulted or threatened the complainant. He

was upset with her because she took money. When they moved to Phoenix, she took R1 200 for school fundraising. He discovered about the money when he went for her transfer and was told that the complainant had won a bicycle in the fundraising. It was then that he had a suspicion that she had taken the money. This version was not put to the complainant nor was there any indication of what became of the bicycle allegedly won. The accused merely told the complainant that if the money was not found he was going to pack her up and take her to her mother's family in Shakaskraal. The complainant was upset and became quiet. Aneesa told the complainant to pack her stuff and took her away. The accused was not cross-examined on this issue. We are satisfied that the State has proved beyond a reasonable doubt that the accused did assault the complainant after the argument.

Did the accused traffick the complainant in contravention of the Prevention and Combating of Trafficking Act 7 of 2013?

[184] The complainant alleged that the accused did not like her visiting or talking to other people wherever they lived. She nevertheless spoke to the neighbours because she was lonely. At Taliash the neighbour would speak to her from the other side of the door, although the keys to the door were there. At Firwood Road, she could go to the landlady and to the tuckshop if she needed anything. Similarly, at Ottawa she visited Aneesa and her mother, and went to the two tuckshops nearby. She did not agree that the accused would get 'a bit upset' if she were not at home when he returned; instead, she said that he would get 'angry'.

[185] The complainant was financially and socially dependent on the accused. She had no money of her own. She was completely isolated from her family by the accused who became angry if she mentioned them. She had no friends, as she did not go to school. Therefore, she sought the company of the adults who lived on the various properties on which they resided. The complainant reiterated several times that the accused threatened to 'send me where my mother was', by which she understood that he would kill her or leave on the road.

[186] The State alleged that the accused harboured the complainant at home and prevented her from attending school. The complainant did not have the support of any other person and was therefore afraid of the accused and vulnerable to him. The accused was therefore in a position to and did thus sexually exploit the complainant for his own gratification and benefit. Ms *Naidu* argued further that the complainant was prevented from leaving because she was financially dependent on the accused and

vulnerable to his anger and his size (the accused is taller than average and would have towered over the complainant). The complainant was also deliberately isolated from her family. She submitted therefore that the State has proved the act, the means and the purpose for which the harbouring took place.

[187] In response, Mr *Pillay* submitted that the State has failed to prove the offence of human trafficking, in that it has failed to prove that there was an element of 'trafficking'. The State failed to prove that the child was 'harboured' at the residences, as the complainant testified that at Overport, Firwood Road and Ottawa, she was free to visit the neighbours and the tuckshop when the accused was at work. He submitted that in the event the court accepts the evidence of the child that she engaged in sexual acts together with the accused and Candace, then a conviction should follow on the alternative count of sexual exploitation of children. He submitted further that the main count of human trafficking is a splitting of charges to count 20 (conspiracy to commit a sexual offence).

[188] Section 4 of the PCTPA provides:

'Trafficking in persons

(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;
- ...
- (h) the abuse of power;
- ...

aimed at . . .the person. . .for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.'

[189] I find an anomaly in the use of the word 'harbours', the normal meaning of which is 'to shelter or hide or give refuge'. The words 'shelter' and 'give refuge' suggest a sense of safety and protection from harm or danger, and convey a positive connotation. Hence, ships seek safety in a harbour. However, in the context of this statute and applying the rules of contextual interpretation to s 4(1), it would appear that the word 'harbour' means to hide or provide a person with shelter with the intention of exploiting that person, thereby conveying a negative connotation.

[190] The circumstances of the complainant fall within the ambit of the definition of 'abuse of vulnerability' in s 1 of the PCTPA':

'1 Definitions

In this Act, unless the context indicates otherwise-

"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-

. . .

- (e) being a child;
- (f) social circumstances; or
- (g) economic circumstances;'

In the Act, "child" means a person under the age of 18 years'.

[191] This court has found that the nature of the abusive and restrictive relationship between the accused and the complainant proved beyond reasonable doubt, as set out earlier in this judgement. We are satisfied that the State has proved the elements of the offence of trafficking and the accused may be properly convicted of the offence in counts 19 and 40.

Assessment of the accused

[192] In summary, the accused attempted to portray himself as an ingenuous victim. However, he was an inveterate liar. His arrogance and narcissism were evident in his responses in court as well as from his propensity to take photographs of himself. He is clearly intelligent, as he was able to think on his feet and fabricate answers to further his version very quickly. Nevertheless, his web of lies eventually caught up with him because of his own inconsistencies and contradictions. His attempts to create sympathy for himself by shedding tears about neglecting his own child A[...] for the sake of the complainant failed dismally when he spat vitriol about the complainant's 'betrayal' of him and that she had left him to rot in prison. It exposed the falsity and hypocrisy of his emotion-filled claims of how he considered only the interests of the complainant who was like his own child. There was no acknowledgement of his criminal and destructive conduct in respect of the complainant, while his aggressiveness and violent temper were clearly revealed in court.

The indictment and outcomes

Counts 7, 8, 9, 28, 29, 30, 42 and 43: Rape (alternative on counts 9 and 30: sexual assault)

In contravention of SECTION 3 read with SECTIONS 1, 2, 50, 55, 55A, 56, 56A, 57, 58, 59 AND 60 of the CL(SORM)AA as amended read with SECTION 51(1) and PART 1 OF SCHEDULE 2 of the CLA and SECTIONS 94, 256 and 261 of the CPA.

Counts 7, 8 and 9 (main count):

[193] The State alleges that during the period August 2017-February 2018, at Firwood Road, Redhill; Overport and other places in the District of Durban, the accused unlawfully and intentionally raped the complainant by committing various acts of sexual penetration of the complainant by inserting his penis and/or tongue into her vagina and his penis into her mouth without her consent. The first such sexual penetrations took place at Firwood Road, and thereafter on diverse occasions at the aforesaid residences and other locations in Durban during the relevant period, the accused committed the aforesaid acts of sexual penetration on the complainant.

Counts 28, 29 and 30 (main count):

[194] The State alleges that during the period March 2018 and 11 June 2018, the accused committed the offences as aforesaid at [...].

Counts 42 and 43:

[195] The State alleges that during the period March 2018 and 11 June 2018, the accused committed the offence of rape by penetrating the complainant with his penis at an unknown address in the Durban area. These charges relate to the evidence that the accused had sexual intercourse and penetrated the complainant at a hotel.

[196] The consolidates all crimes relating to sexual matters. Section 3 of the CL(SORM)AA provides that any person who unlawfully and intentionally commits an act of sexual penetration with another person, without the latter's consent, is guilty of the offence of rape.

[197] The expression 'sexual penetration' is defined in s 1(1) of the CL(SORM)AA as follows: "**sexual penetration**" includes any act which causes penetration to any extent whatsoever by—

(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;. . . .'

[198] The words 'genital organs' as they appear in the Act are further defined in s 1(1) as including 'the whole or part of the male and female genital organs. . . .'

[199] The use of the word 'causes' in the first line of the definition means that the

crime of rape is now a materially defined crime, that is, a crime consisting in the causing of a certain situation, namely sexual penetration. The act of sexual penetration set out above must take place without the consent of the complainant:

‘Where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act-

. . .

(iv) a child below the age of 12 years;. . .’

[200] Paragraph (iv) of subsection (3)(d) above contains a provision which is very important in practice: if, at the time of the commission of the sexual penetration, the complainant is a child under the age of 12 years, any ostensible ‘consent’ by him or her is in law invalid. Such a child is irrebuttably presumed to be incapable of consenting to the act of sexual penetration. What has to be considered is the complainant’s true age, not his or her mental age.

[201] It is common cause that the complainant was born on [...] and that the offences were committed during August 2017 and June 2018, when she was between the ages of ten and 11. We are satisfied that the evidence as evaluated clearly sustains the State’s allegations beyond a reasonable doubt that the accused raped the complainant in all the aforesaid counts.

Count 12: Sexual grooming of children (encourage, enable, instruct or persuade a child to perform a sexual act)

In contravention of the provisions of SECTION 18(2)(a) READ WITH SECTIONS 1, 2, 19(a)/(b)/(c), 50, 56A, 57, 58, 59, 60 AND 61 of the CL(SORM)AA. Further read with SECTIONS 94, 256, 270 and 276 of the CPA. Further read with SECTION 120 of the CA.

[202] The State alleges that on diverse occasions during the period August 2017 and February 2018, and at or near Overport and/or Firwood Road, Redhill and other places in Durban, the accused exhibited films or recordings depicting sexual conduct between adults to the minor complainant on a cellular phone, with the intention to encourage, enable, instruct or persuade her to perform similar such sexual acts in order to procure money.

[203] The evidence sustains the aforesaid allegations against the accused beyond a reasonable doubt.

Counts 13 and 36; Count 50 : Using a child for child pornography (alternatively creation of child pornography)

In contravention of the provisions of SECTION 20(1) read with SECTIONS 1, 2, 50, 56A, 57, 58, 59, 60 AND 61 of the CL(SORM)AA read with SECTION 51(2) AND SCHEDULE 2 of the CLA; further read with SECTIONS 94, 256, 270 AND 276 of the CPA.

Count 13:

[204] The State alleges that on diverse occasions between the period August 2017 and February 2018, and at or near Overport and/or Firwood Road, Redhill and other unknown locations in Durban, the accused unlawfully and intentionally used the child complainant, with or without her consent, whether for financial or other reward, favour or compensation to her or not, for the purpose of creating, making or producing any image, publication, depiction or sequence in any manner whatsoever of child pornography depicting the complainant.

Count 36:

[205] The State alleges that the accused committed the same offence at [...] on diverse occasions between March 2018 and 11 June 2018.

Count 50:

[206] The State alleges that the accused committed the same offence on or about 6-7 June 2018 when he engaged in a WhatsApp conversation with an adult female whose identity is unknown to the State and incited this unknown female to engage in sexual acts with himself as well as the complainant. In order to facilitate this interaction amongst the three of them, the accused sent pornographic images of the complainant to the said female.

[207] Section 20 of CL(SORM)AA provides:

'Using children for or benefiting from child pornography

(1) A person ('A') who unlawfully and intentionally uses a child complainant ('B'), with or without the consent of B, whether for financial or other reward, favour or compensation to B or to a third person ('C') or not-

(a) for purposes of creating, making or producing;

(b) by creating, making or producing; or

(c) in any manner assisting to create, make or produce,

any image, publication, depiction, description or sequence in any manner whatsoever of child pornography, is guilty of the offence of using a child for child pornography.'

[208] The images and videos on the Huawei phone with the relevant evidence sustain a conviction on counts 13 and 36 (main count). However, the WhatsApp messages in

Exhibit G do not indicate that the accused photographed or recorded the complainant specifically during the chat. Therefore, we are not satisfied that the State has discharged its onus in respect of this charge and the accused is entitled to an acquittal.

Counts 14 and 37: Possession of child pornography

In contravention of SECTION 24B(1)(a) read with SECTIONS 1 and 30B of the FILMS AND PUBLICATIONS ACT 65 OF 1996 as amended, and further read with SECTIONS 94 AND 276 of the CPA.

Count 14:

[209] The State alleges that on diverse occasions between the period August 2017 and February 2018, and at or near Overport and/or Firwood Road, Redhill and other places in the District of Durban, the accused did unlawfully and intentionally possess various publications and/or films which contain depictions or scenes of child pornography, of the minor complainant and an unknown female child.

Count 37:

[210] The State alleges that on diverse occasions between the period March 2018 and 11 June 2018, and at or near [...], the accused committed the same offence. Mr Pillay submitted that the two charges amounted to splitting. Although the act of possession of pornography expresses the same intent, each count covers a different time period. In the premises, the accused ought to be convicted on both counts but the convictions taken as one for the purposes of sentence.

Counts 15, 38 and 56: Distribution of child pornography

In contravention of SECTION 24B(1)(d) read with SECTIONS 1 and 30B of the FILMS AND PUBLICATIONS ACT 65 of 1996 as amended, and further read with SECTIONS 94 and 276 of the CPA.

Count 15:

[211] The State alleges that on diverse occasions between the period August 2017 and February 2018 and at or near Overport and/or Firwood Road, Redhill and other places in Durban, the accused unlawfully and intentionally knowingly made available and/or distributed OR assisted in making available and/or distributed various publications and/or films which contain depictions or scenes of child pornography, of the child complainant.

Count 38:

[212] The State alleges that on diverse occasions between the period March 2018 and 11 June 2018, and at or near [...], the accused committed the offence as

aforesaid.

Count 56:

[213] The State alleges that on or about the period between 5 May 2018 and 10 June 2018 and at or near [...], the accused committed the offence as aforesaid by forwarding the images of the complainant to a young female child.

[214] Mr *Pillay* submitted that counts 15 and 38 and counts 38 and 56 amounted to splitting. Although the act of distribution of pornography expresses the same intent, in counts 15 and 38, each count covers a different time period. In the premises, the accused ought to be convicted on both counts but the convictions taken as one for the purposes of sentence. However, in respect of counts 38 and 56, count 38 refers to a distribution over a period of time, and count 56 to one specific instance to one specific recipient. Nevertheless, the period 5 May 2018 to 10 June 2018 falls within the period between March 2018 and 11 June 2018 and there is one intention to distribute although the recipients may differ. Therefore, there is merit in the submission that counts 38 and 56 amount to splitting, and the accused ought to be acquitted on count 56.

Counts 16, 17, 18 (in Durban during August 2017 – February 2018) ; Counts 31, 32 and 33 (in Ottawa during March 2018 – June 2018): Compelled sexual assault

In contravention of the provisions of SECTION 7(a), 7(b) and 7(c) respectively read with SECTIONS 1, 2, 50, 56(1), 56A, 57, 58, 59, 60 AND 61 of the CL(SORM)AA. Further read with SECTIONS 94, 256, 261, 270 AND 276 of the CPA. Further read with SECTION 120 of the CA.

Count 16:

[215] The State alleges that the accused compelled the complainant without her consent to engage in self-masturbation and/or a sexually suggestive act of touching her vagina herself.

Count 17:

[216] The State alleges that the accused compelled the complainant without her consent to wear revealing adult lingerie and pose in them while he photographed and/or recorded her, which conduct had or may have sexually aroused or degraded the complainant.

Count 18:

[217] The State alleges that the accused compelled the complainant without her

consent to penetrate her genital organs by inserting a sex toy and/or vibrator in her vagina.

[218] There is clear corroborated evidence of all these allegations against the accused. The State has discharged its onus on the three counts and the accused's denials are rejected as false beyond a reasonable doubt.

Counts 31, 32 and 33:

[219] These counts are also charges of compelled sexual assault, which the State alleges occurred at Neptune Drive. Mr *Pillay* submitted that these counts were a duplication of counts 16, 17 and 18, where the offences allegedly were perpetrated during the period August 2017 – February 2018 in Durban. Counts 31, 32 and 33 however cover a different time period and occurred at a different location ie Ottawa between March 2018 – June 2018. In the premises, the accused ought to be convicted on these three counts but the convictions on the corresponding counts taken as one for the purposes of sentence.

Counts 19 (main count), 40 and 41: Human trafficking

In contravention of the provisions of SECTION 4(1), read with SECTIONS 1, 2, 3, 11(1)(a), 13(1)(A), 13(2), 14, 29, 30 AND 48 of the PCTPA; further read with SECTIONS 1, 2, 50, 55A, 56, 56A, 57, 59, 60 AND 61 of the CL(SORM)AA; further read with the provisions of SECTIONS 1 and 120 of the CA and the provisions of SECTIONS 92, 94, 256, 257, 261A, 268, 270 of the CPA and SECTION 51(1) and PART 1 of SCHEDULE 2 of the CLA.

Count 19:

[220] The State alleges that on diverse occasions between the period August 2017 and February 2018, the accused unlawfully and intentionally trafficked the complainant by harbouring her at their residences in Overport and/or Firwood Road by means of threats, including threat of force, or use of harm and/or other forms of coercion, and/or the use of vulnerability and/or the abuse of power aimed against the said complainant, for the purposes of sexual exploitation for his own gratification and in preparation for the complainant to be made available to other unknown persons for the purpose of sexual exploitation in order to procure payment from them for the benefit of the accused and/or Candace.

Count 40:

[221] The State alleges that the accused similarly trafficked the complainant at [...]on diverse occasions during the period 1 March 2018 – 11 June 2018.

[222] I have already dealt with the evidence, law and argument in respect of these counts earlier in the judgment. We are satisfied that the accused may properly be convicted on counts 19 and 40, but that the counts should be taken as one for the purposes of sentence. Given my reasoning on the counts, and the requirements of Act 13 of 2007, I am not persuaded that there is splitting or duplication of charges in respect of counts 19 and 40.

Count 41:

[223] In this count the State alleges that upon a date during the period 1 March 2018 – 11 June 2018, the accused trafficked the complainant by making her available to a man unknown to the State at an unknown address in the Durban area and demanded that the complainant perform sexual acts with the said unknown male and himself simultaneously for the purpose of sexual exploitation in order to procure payment from the said unknown male for the benefit of the accused.

[224] The complainant's testimony in respect of these allegations has been accepted as the truth. The count is not a duplication of count 40 as it refers to a specific set of facts and not 'in preparation for the complainant to be made available to other unknown persons for the purpose of sexual exploitation' as set out in count 40.

Count 20: Conspiracy to commit a sexual offence

In contravention of the provisions of SECTION 55(b) read with CHAPTERS 2, 3, 4 and SECTIONS 1, 2, 50, 56, 57, 58, 59, 60, 61 and 71(1), (2) and (6) of the CL(SORM)AA. Further read with SECTIONS 94, 256, 270 and 276 of the CPA. Further read with SECTION 120 of the CPA.

[225] The State alleges that on diverse occasions between the period August 2017 and February 2018 and at or near Overport and/or Firwood Road, Redhill and other places in Durban, the accused unlawfully and intentionally conspired with his lover Candace, to sexually exploit the complainant by sexually grooming her in preparation of making her willing and available for profit to unknown men for the purposes of engaging in sexual acts.

[226] I have set out the relevant facts and evaluation thereof which sustain the State's allegations in respect of sexual acts with Candace and the accused, under the accused's instructions, which took place on diverse occasions at Firwood Road and at Candace's house. The proven facts are that the accused and Candace agreed that Candace would teach the complainant how to use her body to perform sexual acts with other men in order to make money. They performed acts of sexual penetration

with each other while the complainant watched and then instructed her to do the same. They also used sex toys. The accused was the primary caregiver and de facto guardian of the complainant at all material times during which he allowed Candace to interact with her. We are also satisfied that the accused and Candace acted in the furtherance of a common purpose to commit the offence. The State has therefore discharged its onus to prove the allegations in this charge beyond reasonable doubt.

[227] As this offence includes the act of grooming and not the allegations set out in count 19 in respect of harbouring the complainant; it does not amount to a splitting of count 19. However, it does amount to a duplication of the allegations in count 25: sexual grooming of a child.

Count 25: Sexual Grooming of a Child

In contravention of the provisions of SECTION 18(2)(b) read with SECTIONS 1, 2, 19(a)/(b)/, 20(1), 50, 56A, 57, 58, 59, 60 and 61 of the CL(SORM)AA. Further read with SECTIONS 94, 256, 270 AND 276 of the CPA. Further read with SECTION 120 of the CA.

[228] The State alleges that the accused unlawfully and intentionally committed various acts of sexual penetration with Candace in the presence of the complainant with the intention of encouraging the complainant or diminishing any resistance or unwillingness on her part to perform sexual acts with other persons just as Candace had been engaging in with the accused. The accused must be acquitted on count 25.

Counts 24 and 34: Compelling or causing children to witness self-masturbation

In contravention of the provisions of SECTION 21(3) read with SECTIONS 1, 2, 50, 56A, 57, 58, 59, 60 and 61 of the CL(SORM)AA. Further read with SECTIONS 94, 256, 270 AND 276 of the CPA.. Further read with SECTION 120 of the CA.

Count 24:

[229] The State alleges that on diverse occasions between August 2017 and December 2017 and at Firwood Road, Redhill and other places in Durban, the accused unlawfully and intentionally whether for the sexual gratification of himself or of Candace, compelled or caused the child complainant, without her consent, to be in the presence of or watch him and/or Candace while they engaged in acts of self-masturbation. The State alleges that the accused and Candace acted in the furtherance of a common purpose to commit the offence.

[230] The complainant's testimony in this respect was uncontroverted and corroborated in respect of the accused by a video and images downloaded from the

Huawei phone. The complainant testified that the self-masturbation occurred when Candace and the accused were grooming her. We are satisfied that the complainant was truthful and that the accused and Candace acted in the furtherance of a common purpose to commit the offence. The State has discharged its onus on this count.

Count 34:

[231] The State alleges that on diverse occasions between the period March 2018 and 11 June 2018, and at or near [...], the said accused compelled the child complainant without her consent to be in the presence of and/or photograph the accused while he engaged in acts of self-masturbation. The allegations are proved beyond reasonable doubt. However, Mr *Pillay* has submitted that this count is a duplication of count 24. As the time period and place in count 34 differs from count 24, this is not strictly a duplication but the two counts may be taken as one for the purposes of sentence.

Counts 27 and 46: Child abuse

In contravention of SECTION 305(3)(a) read with SECTIONS 1, 3, 7, 9, 16, 18(1), 18(2), 305(6), 305(7), 305(8) and 314 of the CA, read further with SECTION 94 of the CPA.

Count 27:

[232] The State alleges that on diverse occasions during the period August 2017 and February 2018 and at Overport and/or Firwood Road, Redhill and other places in Durban, the accused unlawfully and intentionally and despite being employed, kept the complainant confined mainly to their homes and ill-treated her by, inter alia:

- (a) failing to enrol her at a school and/or preventing her from attending school;
- (b) confining her in the home and demanding that she clean the house.

[233] These allegations have been dealt with in the judgment. We are satisfied that the State has proved the relevant allegations against the accused beyond reasonable doubt.

Count 46:

[234] The State alleges that on diverse occasions between March 2018 and June 2018, and at [...], the accused unlawfully and intentionally ill-treated the complainant, not only by confining her mainly to their home and failing to enrol her at school, but that he also made her cook and facilitated the complainant smoking. Mr *Pillay* contended that this count, which is also child abuse, is a duplication of count 27. However, not only does this charge allege a different location and time period, the

allegations include making the complainant cook, but more significantly, introducing her to and encouraging her to smoke cannabis.

[235] The complainant's evidence on these allegations was not controverted and we are satisfied that despite the accused's denials, the State has proved this charge against him beyond a reasonable doubt.

Count 39: Compelling or causing children to witness sexual acts

In contravention of the provisions of SECTION 21(2) read with SECTIONS 1, 2, 50, 56A, 57, 58, 59, 60 and 61 of the CL(SORM)AA. Further read with SECTIONS 94, 256 and 270 of the CPA. Further read with SECTION 120 of the CA.

[236] The State alleges that on diverse occasions between March 2018 and 11 June 2018 and at [...], the accused unlawfully and intentionally for his sexual gratification, compelled or caused the child complainant without her consent to be in the presence of or watch the accused while he engaged in a sexual act to wit inserting a sex toy and/or aide into his anus.

[237] The complainant's evidence, which sustained the State's allegations, was corroborated by the images, the photographs of the sex toys in Exhibit C and the accused himself. The State has discharged its onus on this count.

Counts 47 and 48:

[238] The State alleges that between late evening of Wednesday, 6 June 2018 and the early morning of Thursday, 7 June 2018, the accused engaged in a WhatsApp conversation with an unknown adult female referred to as Perseverance, and incited her to engage in sexual acts with himself and the complainant. In order to facilitate this interaction amongst the three of them, the accused sent pornographic images of the complainant to the said female and unlawfully and intentionally committed the following offences.

Count 47: Incitement or inducing another person to commit a sexual offence

In contravention of the provisions of SECTION 55(c) READ WITH CHAPTERS 2, 3, 4 AND SECTIONS 1, 2, 50, 56, 56A, 57, 58, 59, 60, 61 AND 71(1), (2) and (6) of the CL(SORM)AA. Further read with SECTIONS 94, 256 and 270 of the CPA. Further read with SECTION 120 of the CA.

[239] The State alleges that the accused induced or incited the unknown adult female to commit a sexual act with the complainant.

Count 48: Sexual grooming of a child

In contravention of the provisions of SECTION 18(1) READ with SECTIONS 1, 2, 19,

20(1), 50, 56A, 57, 58, 59, 60 AND 61 of the CL(SORM)AA. Further read with SECTIONS 94, 256, 270 AND 276 of the CPA. Further read with SECTION 120 of the CA.

[240] The State alleges that the accused supplied, exposed or displayed to the aforesaid unknown female, child pornography with the intention of encouraging her to perform a sexual act with the complainant.

[241] All these allegations against the accused are corroborated by the relevant WhatsApp messages between the female and the accused, the transcription of which was admitted as Exhibit G. The State has therefore proved the allegations against the accused in counts 47 and 48 beyond a reasonable doubt.

Count 54: Sexual exploitation of children (being involved in the sexual exploitation of a child)

In contravention of the provisions of SECTION 17(2) read with SECTIONS 1, 2, 50, 56A, 57, 58, 59, 60 and 61 of the CL(SORM)AA. Further read with SECTIONS 94, 256 AND 270 of the CPA. Further read with SECTION 51(2)(b) and SCHEDULE 2 of the CLA. Further read with SECTION 120 of the CA.

[242] The State alleges that between the period 5 May 2018 and 10 June 2018, the accused engaged in a WhatsApp conversation with a young female child whose identity is unknown to the State, during which he incited the said child to send him pornographic images of herself and to commit sexual acts with him whilst the complainant would perform sexual acts with the child's father. In order to facilitate this interaction amongst the four of them, the accused sent and/or distributed pornographic images of himself and the complainant to the said unknown child, and thereby unlawfully and intentionally offered the services of the complainant to an unknown adult male through the said unknown child with or without the complainant's consent, for financial or other reward, to the accused by making available or offering the complainant for the purpose of committing a sexual act with the said unknown male.

[243] The complainant's uncontroverted evidence as corroborated by the relevant voice note and the WhatsApp messages downloaded from the accused's Huawei phone, the transcriptions of which was admitted as Exhibit F, prove the allegations by the State beyond reasonable doubt. I am unable to find any merit in the submission that there is a splitting of charges in respect of counts 40 and 54.

Result of trial

- 1 **Counts 1, 2, 3, 4, 5 and 6: Not guilty and acquitted**
- 2 **Counts 10, 11, 21, 22, 23, 26, 35, 44, 45, 49, 51, 52, 53 and 55:**
Not
guilty and acquitted
- 3 **Counts 7, 8, 9 (main count), 28, 29, 30 (main count), 42 and 43**
- Rape: Guilty as charged
- 4 **Count 12 - Sexual grooming of children: Guilty as charged**
- 5 **Counts 13 and 36 (main count) - Using a child for**
pornography: Guilty as charged
- 6 **Counts 14 and 37 - Possession of Child Pornography: Guilty**
as charged (to be taken as one for the purposes of sentence)
- 7 **Counts 15 and 38 - Distribution of child pornography: Guilty**
as charged (to be taken as one for the purposes of sentence)
- 8 **Counts 16, 17, 18, 31, 32 and 33 - Compelled sexual assault:**
Guilty as charged (counts 16 and 31, counts 17 and 32, and counts 18 and 33 to
be taken as one for the purposes of sentence)
- 9 **Counts 19, 40, and 41 – Human trafficking: Guilty as charged**
- 10 **Count 20 - Conspiracy to commit a sexual offence: Guilty as**
charged
- 11 **Counts 24 and 34 - Compelling or causing children to witness**
self- masturbation: Guilty as charged (to be taken as one for the purposes of
sentence)
- 12 **Count 25 - Sexual grooming of a child: Not guilty and**
acquitted (duplication)
- 13 **Count 27 - child abuse: Guilty as charged**
- 14 **Count 39 - Compelling or causing children to witness sexual**
acts: Guilty as charged
- 15 **Count 46 - child abuse: Guilty as charged**
- 16 **Count 47 - Incitement or inducing another person to commit**
a sexual offence: Guilty as charged
- 17 **Count 48 - Sexual grooming of a child: Guilty as charged**
- 18 **Count 50 - Using a child for child pornography: not guilty**

and acquitted

19 Count 54 - Sexual exploitation of children (being involved in the sexual exploitation of a child): Guilty as charged

20 Count 56 - Distribution of child pornography: Not guilty and acquitted (duplication)

Dates of Trial: 5 – 29 October 2020

Date of judgment: 11 December 2020 Appearances

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