

## Director of Public Prosecution, Pretoria v Alberts 2016 (2) SACR 419 (GP)

KEY CONCEPTS	
Sentencing child pornography	Possession of child pornography
Aggravating factors in child pornography cases	Child pornography
Impact of child pornography on children	

### Introduction

Respondent was charged in the regional court with 482 charges of possession of child pornography in contravention of s27(1)(a) of the Films and Publications Act of 1996. He initially pleaded not guilty but changed his plea and was convicted on 481 charges. He was sentenced to two 5 year terms of imprisonment to run concurrently.

### Personal circumstances

The respondent was 41 at the time of sentencing and a collector of pornographic material involving children for a number of years. He started his collection after he served in the army and continued until his arrest. His collection was made online and he did not have direct contact with the children nor did he take photographs himself. He had the following preferences: children between the ages of 9 and 12 (although there were photos of children much younger); anal, animal, girl and girl, man on girl, boy/girl, feisty; incest; and the children must look happy.

He was an adopted child and did not have a pleasant family life as his father was abusive. His school life was fairly lonely and he regarded himself as the odd one out. After school he was drafted into the army. He was a systems controller for the Pretoria City Council. He had a life partner with whom he had been for 10 years but they did not have any children. The respondent stated that his interest in child pornography began after he viewed nude pictures of children on an artwork site on the Internet.

### Applicable legislation

Specific legislation has been passed for the protection of children but crimes against children remain alarmingly high. the following legislation is applicable:

- section 28(1)(d) of the Constitution affords children protection against maltreatment, neglect, abuse or degradation;
- the Children's Act 38 of 2005 and its amendment, the Children's Act 41 of 2001 address children's rights in its entirety; s110 requires professionals to report;
- section 54 of the Criminal law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 compels people who have a reasonable belief or suspicion that a child is being abused to report it to the police;

- the Films and Publications Act 65 of 1996 has amongst its objects the protection of children from exposure to disturbing and harmful materials and to make the use of children in pornography punishable.

### **The nature of the offence**

With regard to the nature of the offence, the High Court had the following to say:

- children are the most vulnerable members of society and crimes committed against them are usually highly disturbing and lead to heightened outrage in societies
- in *Du Toit v The Magistrate and Others* 2016(2) SACR 112 (SCA) the court stated that the use of child in pornographic materials was harmful to both the children and society as a whole; the purpose of the legislation is to curb child pornography, which is seen as an evil in all democratic societies;
- child pornography is universally condemned because it strikes at the dignity of children, it is harmful to children who are used in its production and it is potentially harmful because of the attitude to child sex that it fosters.

### **Specific issues on sentencing**

The following points on sentencing in child pornography cases were referred to by the High Court:

- courts need to be aware of the complexities involved in the creation and dissemination and use of child pornography;
- the suspended sentencings of convicted child pornography offenders by South African courts, "which are seen as nothing more than a 'slap on the wrist,' suggest that the subject-matter is full of ignorance, confusion and lack of proper understanding of the reality of child pornography;
- the recent suspended sentences in South Africa were compared to recent cases in the USA where a woman was sentenced to 1590 years in prison after pleading to 53 counts of producing child pornography while her husband was sentenced to 750 years on 25 counts of producing child pornography;
- to ensure appropriate sentencing, the crime should not be seen simply as the possession or distribution of child abuse images but as the sexual abuse, exploitation, degradation and impairment of the dignity of all children and the promotion of the use of child pornography for sexual gratification through the portrayal of children as acceptable sexual objects;
- in South Africa there seems to be a chasm between the public outrage and the manner in which the courts articulate that outrage when sentencing;
- the court as the upper guardian of minor children ought not to be hesitant in protecting their interests;
- the courts are enjoined by the Constitution to protect minor children, one of the most vulnerable groups in society;
- the court referred to the United Kingdom's Sentencing Advisory Panel to the Court of Appeal on Offences Involving Child Pornography:

- o sentencing for these offences should reflect the harm suffered by children who are abused and exploited by the production and distribution of indecent photographs;
  - o an offender sentenced for possession of child pornography should be treated as being in some degree complicit in the original abuse which was involved in the making of the images;
  - o sentences for possession should reflect the continuing damage done to the victim(s), through copying and dissemination of the pornographic images;
  - o those who make or distribute the images bear a more direct responsibility for their eventual use, as well as for encouraging further production.
- According to expert evidence, possessors of child pornographic material view it as a lesser evil in that they were not involved in the production thereof and for that reason should not be seen as complicit in the crimes committed in the production thereof;
- The view with regard to child pornography in the United States is that the possession of child pornography is seen as being very close to falling within the definition of “depraved indifference or reckless endangerment”;
  - o depraved indifference or reckless endangerment describes conduct “which is so wanton, so deficient in a moral sense of concern, so lacking in regard for the life or lives of others, and so blameworthy as to warrant the same criminal liability as that which the law imposes upon a person who intentionally causes a crime;”
  - o depraved indifference refers to a person’s state of mind in recklessly engaging in conduct which creates a grave risk of harm – conduct that shows utter disregard for the value of human life not because such a person means to cause harm but because he or she simply does not care whether or not such conduct will lead to harm;
  - o it reflects a wicked, evil or inhuman state of mind, as manifested by brutal, heinous and despicable acts;
- it is absolutely necessary to understand the impact which the crime has on the victim, their family and society at large, which includes society at a global level because of technology;

### **Need for harmonised sentencing policies**

There is a great disparity in sentencing between the sentences handed down by South African courts and those handed down internationally. Online sexual abuse is a global crime – offenders in all countries access and download the same images from the same sites so the differences in sentencing policies is disturbing. In the United states there are sentences up to 700 years imprisonment while in South Africa we have sentences of 5 years’ imprisonment suspended for 5 years up to 7 years’ imprisonment. Courts have an opportunity to harmonise sentencing in child pornography cases and thus enhance the protection of all children from sexual abuse and exploitation.

## **Grounds of appeal**

The appellant argued that an effective sentence of 5 years' imprisonment was shockingly light and inappropriate while the respondent argued that imposing sentence is mainly a function of the trial court and the powers of the appeal court were limited in this regard.

The appellant argued that the magistrate erred in attaching insufficient weight to the following aggravating features:

- the respondent possessed a vast amount of child-abuse images;
- he collected these over an extended period of time;
- that the images depict sexually abusive acts, including the rapes of children as young as 2 years old;
- that the respondent promoted the production of child pornography by collecting the images and his conduct thereby served to instigate and perpetuate the sexual abuse of children, making him an accomplice to the continued abuse of children;
- that the respondent was in the process of 'ordering' child pornography to be created to his specifications, which would of necessity have involved the further sexual abuse of children;
- these crimes are not victimless – the victims are children who have not only been sexually abused but who have to live with the knowledge that images of them being raped or sexually violated will remain in the public domain forever, reminding them of the abuse and perpetuating the infringement of their rights;
- the respondent used a false identity and address to mask his identity which indicates that a lot of planning and time went into the commission of these crimes.

The respondent argued that these aggravating features were mentioned by the trial court and the magistrate applied her mind properly to those aspects. However, the High Court noted that it was one thing to mention these aggravating factors but quite another to bring them to bear on the sentence itself.

The expert testified that he had diagnosed the accused as a paedophile with accompanying interest in zoophilia (bestiality) and incest. It was his opinion that these sexual interests would remain present throughout his life, and he would pose a significant threat to the sexual well being of children between the ages of 9 and 12. He was a threat, not only to children in his immediate environment but also children in any part of the world.

In the present case the respondent had been convicted of offences involving 481 children who were abused. The images were described by the High Court as depicting absolute depravity. A number of them depicted very young children being raped in different positions. Taking into account the nature of the offence, its impact on the 481 victims and their families, the level of depravity referred to above, the High Court found that the trial court had misdirected itself by not giving sufficient weight to the aggravating factors referred to. Where material misdirection by the trial court vitiates its exercise of discretion,

an appeal court is entitled to consider the question of sentence afresh. In so doing, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance (*S v Malgas* 2001 (1) SACR 459 (SCA)). The appeal court can also interfere with the trial court sentence where the disparity between the sentence of the trial court and the sentence which the appeal court would have imposed is so marked that it can properly be described as shocking, startling or disturbingly inappropriate.

The High Court was of the opinion that the crimes committed on the minor children could only be described as disgusting and degrading. Their youth was taken away and their future has been tarnished. It would be difficult for them to recover from the scars of their abuse. The High Court, therefore, found the sentence meted out materially inadequate and disturbingly inappropriate. The misdirection of the trial court entitled the High Court to consider the question of sentence afresh.

The appeal against sentence was upheld. The sentence of the regional court was set aside and substituted with a sentence of 10 years' imprisonment, and the respondent's name was to be recorded in the Register of Sex Offenders.