

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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

CASE NO: A835/14

30/6/2016

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

**DIRECTOR OF PUBLIC PROSECUTIONS
NORTH GAUTENG**

Appellant

and

GERHARDUS JOHANNES ALBERTS

Respondent

JUDGMENT

Baqwa J (Kubushi J concurring)

Child pornography - Appeal against sentence - Nature of the offence - Section 28(1) (d) of the Constitution - Protection of children against maltreatment as subjects of pornographic material - The purpose of the Films and Publications Act 65 of 1996 - Specific issues on sentencing - Need to adopt a global perspective due to online sexual abuse - Need for harmonisation of sentencing.

Summary

The background to this case is that the accused has been a collector of pornographic material involving children for a number of years. He began making the collection after serving in the army until the time of his arrest. The collection was made online and he did not have direct contact with the children nor did he take the photographs himself.

The judgment of the court a quo captures his interest as follows:

"He had the following preferences. The children had to be between the ages of 9 and 12. I must state when looking at the photos, there is quite a few children that is well under that age group. Interest was further according to the e-mails sent anal, animal, girl and girl, man on girl, boy/girl, feisty and incest and the children must look happy. He was also cross examined on these preferences and at no stage he denied this."

At the court a **quo** the appellant had been sentenced to serve a term of five (5) years imprisonment.

Held, that taking into account the nature of the offence, its impact on the 481 victims and their families and the level of depravity of the underlying crimes further perpetrated by continued publication of the images, the court **a quo** misdirected itself by not giving sufficient weight to the aggravating factors referred to in the grounds of appeal.

Held, further that the crimes committed on the minor children could not only be described as disgusting and degrading but that, as was testified by the experts, their youth had been taken away and their future tarnished and that the court **a quo** had been correct in determining that a non-custodial sentence would be inappropriate taking into account the seriousness of the offences and the interests of society.

Held, accordingly, that the appeal against sentence had to be upheld and the sentence by the Regional Court, Pretoria be set aside and be substituted with the sentence of ten (10) years imprisonment and that the respondent's name be recorded in the Register of Sex Offenders.

Annotations:

Reported cases

S v C 1996 (2) SACR 370 (SCA)

S v Malgas 2001 (1) SACR 469 (SCA)

De Reuck v Director of Prosecutions, Witwatersrand Local Division and Others
2003

(2) SACR 445 (CC)

Du Toit v Ntshinghila 2016 (2) All SA 328 (SCA)

Statutes

Criminal Procedure Act 51 of 1977

Constitution of the Republic of South Africa, 1996 Films and Publications Act 65
of 1996

Children's Act 38 of 2005

Children's Amendment Act 41 of 2007

Sexual Offences and Related Matters Act 32 of 2007 Films and Publications

Amendment of Act 3 of 2009

Introduction

[1] The respondent appeared before the Regional Court, Pretoria on four hundred and eighty two (482) charges of possession of child pornography in contravention of Section 27 (1) (9) of The Films and Publications Act, 65 of 1996.

[2] He initially pleaded not guilty on 27 January 2012 but changed his plea on 31 August 2012 and was convicted on 481 charges.

[3] The respondent was sentenced to two five year terms of imprisonment which were ordered to run concurrently in terms of the provisions of Section 276 (1) (i) of Act 51 of 1977 on 22 August 2014. Leave to appeal against sentence was granted to the appellant on 11 November 2014.

[4] The court **a quo** gathered the charges into two groups and in that regard stated as follows:

"I went through the images and where actual penetration is evident as under the old rape charges, I grouped them into that group. The rest of the images depicted, I grouped into another group."

The Background

[5] The background to this case is that the accused has been a collector of pornographic material involving children for a number of years. He began making the collection after serving in the army until the time of his arrest. The collection was made online and he did not have direct contact with the children nor did he take the photographs himself.

[6] The judgment of the court a **quo** captures his interest as follows:

"He had the following preferences. The children had to be between the ages of 9 and 12. I must state when looking at the photos, there is quite a few children that is well under that age group. Interest was further according to the e-mails sent anal, animal, girl and girl, man on girl, boy/girl, feisty and incest and the children must look happy. He was also cross-examined on these preferences and at no stage he denied this."

[7] Doctors Labuschagne and Viljoen also testified as part of the pre-sentencing procedures after having held interviews with the respondent.

Personal Circumstances

[8] The respondent was born on [...] 1973 and he was 41 years old at the time of sentence. He was born in the Cape Province and was an adopted child. He describes his family life as not being pleasant mainly due to his father who was abusive. He describes his school life as fairly lonely and regarded himself as the odd one out. After school he was drafted into the army. At the time of arrest he was working for the Pretoria City Council as a systems controller. He has a life partner and they have been together for about 10 years. No children were born of the relationship. The respondent stated that his interest in child pornography began after he left the army when he viewed nude pictures of children on an artwork site on the internet.

The Nature of the Offence and the Law

[9] It is generally accepted that children are the most vulnerable members of society and crimes perpetrated against them are usually highly disturbing and lead to heightened outrage in societies where they are committed. Specific legislation has been passed for the protection of children but despite progressive children's rights legislation in line with international conventions the crimes against children seem to remain alarmingly high.

[10] The South African Constitution expressly addresses the rights of children and affords them specific protection. Section 28 (1) (d) provides that every child has the right to be protected from maltreatment, neglect, abuse and/or degradation. The Child Protection Act and its amendment 41 of 2007 (promulgated in 2010) addresses children's rights in its entirety. Section 110 specifically deals with the protection of children and resonates with the United Nations Convention and African Union Charter on the protection of children's rights. Section 110 of the Children's Amendment Act mandates a long list of persons in their professional capacities to report any child abuse. Section 54 of the Sexual Offences and Related Matters Act 32 of 2007 compels "[a] person" who knows or who has a "reasonable belief or suspicion" of any form of sexual abuse against a child or mentally challenged individual to report it to a police official.

[11] In the unreported decision of **Du Toit v Ntshinghila** 2016 (2) All SA 328 (SCA) commenting on the use of pornographic materials Ponnann JA stated as follows:

"[1] '[T]he use of children as subjects of pornographic materials is very harmful to both the children and the society as a whole' (New York v Ferber 458 US 747 (1982)). Ferber observed that child pornography generates a set of harms distinct from those generated by pornographic depictions of adults - harms related to the sexual abuse of children. The Films and Publications Act 65 of 1996 (the "Acf"), enacted to inter alia address the child pornography, has, amongst its objects, the protection of children from exposure to disturbing and harmful materials and from premature exposure to adult experiences (Section 2

(b) and to make the use of children - and their exposure to - pornography punishable (Section 2 (c)). As it was put in De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others [2003] ZACC 19; 2004 (1) SA 406 (CC) para 61:

"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 for good reason. 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 and the use to which it can be put in grooming children to engage in sexual conduct."

[2] Pornography is notoriously difficult to define. In Jacobellis v Ohio (No. 11) 378 US 184, Justice Stewart intuitively opined:

'I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core pornography], and perhaps I could never succeed in intelligibly doing so.' Defining child pornography is no less difficult. 'Child pornography', according to Section 1 of the Act, 'includes any image, however created, or any description of a person, real or simulated, who is or who is depicted, made to appear, look like, represented or described as being under the age of 18 years –

(a) engaged in sexual conduct;

(b) participating in, or assisting another person to participate in, sexual conduct; or

(c) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation.'

In terms of Section 24 B (1):

'any person who unlawfully possesses any film, game or publication which contains depictions, descriptions or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children, shall be guilty of an offence.'

Specific Issues on Sentencing

[12] Sentencing in child pornography cases is discussed in an article titled "*The Trivialisation of Child Pornography Crimes in South African Courts*" by Iyavar Chetty, KINSA Africa, 2014 (<http://kinsa.net/news/trivialisation-child-pornography-crimes-south-african-courts-iyavar-chetty/>). In that article the writer opines:

"Fundamental to appropriate and effective legal responses to the online sexual abuse and exploitation of children is a proper understanding of the complexities involved in not just the creation but also the dissemination and sinister use of child abusive images, commonly referred to as child pornography. The interesting issues which arise from child abusive images include child protection concerns, technological architecture and politics of the internet and the implication of offenders who operate in cyberspace but whose devastating effects are most keenly felt at the local level and within communities. But the suspended sentencing of convicted child pornography offenders by South African courts (seen as nothing more than a "slap on the wrist") suggest that the subject-matter is full of ignorance, confusion and lack of the proper understanding of the reality of child pornography."

[13] To further illustrate the point Chetty writes in the same article:

"A South African Court's recent suspended sentence of a person convicted of a child pornography crime stands in chilling contrast to the recent sentencing of a couple in the United States of America. Patricia Ayers was sentenced to 1 590 years in prison after pleading to 53 counts of producing child pornography. And her husband, Matthew Ayers, also pleaded guilty to 25 counts of producing child pornography and was sentenced to 750 years in prison. Both received the maximum penalties for each count, (Couple Sentenced to More Than 1 000 years After Child Pornography Production, Florence, USA, Katelyn Murphy, 24 October 2014). Remember also the report by Korea Times, Seoul, South Korea a few years ago that an Arizona man who received a 200 year prison sentence for possessing 20 pornographic images of children failed to persuade the Supreme Court to have his sentence reduced."

[14] Chetty concludes by saying:

"In order to ensure appropriate sentencing of those convicted of involvement in child pornography acts, the crime should be seen not 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."

[15] The article by Chetty captures the essence not only of how child pornography ought to be viewed in consideration of sentence but also echoes a view that has not yet sufficiently penetrated the South African jurisprudence in regard to offences against children. There seems to be a chasm between the public outrage that is expressed when those offences are committed and the manner in which the courts articulate that outrage when sentences are meted out. It is true that sentencing is a balancing act in that it has to take into account the interests not only of the criminal but also to consider the seriousness of the crime and the interests of society. In my view the court, as the upper guardian of minor children ought not to be hesitant in protecting the interests of one of the most vulnerable groups in our society. The courts, in my view, are *enjoined by the Constitution to do so. It is not an option which they may or may not take.*

[16] Chetty makes reference to the practice in the United Kingdom in this regard when he states:

" The advice of the United Kingdom's Sentencing Advisory Panel to the Court of Appeal on Offences Involving Child Pornography should, therefore, be followed by South African Courts:

'...it is fundamental that sentencing for these offences should reflect the harm suffered by the children who are abused and exploited by the production of indecent photographs. 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. Sentences for possession should also reflect the continuing damage done to the victim or

victims, through copying and dissemination of the pornographic images. Those who make or distribute the images bear a more direct responsibility for the eventual use as well for encouraging further production"

[17] In **casu**, it appears from the evidence of the experts including Dr Labuschagne that 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.

[18] Having viewed the images which the respondent was accused of possessing, those images can only be described as depicting absolute depravity. A number of them depict very young children being raped in different positions. The depictions in themselves are outrageous in the extreme.

[19] Chetty makes reference to the practise in the United States and the view that is taken with regard to child pornography. He writes:

*"The possession of child pornography should, in fact, be seen as not far from falling within the scope of what is defined as depraved recklessness or reckless endangerment in the United States. 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 of 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." 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. Depraved indifference to human life reflects a wicked, evil or inhuman state of mind, as manifested by brutal, heinous and despicable acts. It is evinced by conduct that is wanton, deficient in a moral sense of concern, and devoid of regard for the life or lives of others. (See, for example, **People v Register**, 60 N. Y. 273, 469 NYS 2s 599 and **People v Russell**, 91 NY2d 280, 287)."*

[20] It is an absolute necessity to understand not only the nature of the crime but also the impact it has not only on the victim, the victim's family but also the society at large. By society, it must be understood not only the society in and around the victim but society in a global sense due to the advances in technology through which images can go around the world in a matter of seconds.

[21] As Chetty (**supra**) puts it, *"what matters is that there can be no proper interpretation and application of a law if there is no proper understanding and appreciation of the subject matter of that law. The subject matter of Section 27 (1) of The Films and Publications Act is child pornography and is a direct response to the constitutional rights of children to be protected from what child pornography is all about - maltreatment, neglect, abuse and degradation, as enshrined in Section 28 (1) (d) of the Constitution."*

Lack of Harmonised Sentencing Policies

[22] In an article entitled *"Lack of the Appropriate Custodial Sentencing of Child Pornography Offenders Amounts to the Trivialisation of the Online Sexual Abuse and Exploitation of Children"* by Iyavar Chetty, (www.scribd.com/iyavar), the writer makes a comparison of sentences meted out internationally and sentences handed down by South African Courts in similar cases. The comparison, in my view demonstrates the ground that still needs to be covered not only with regard to an understanding of the nature of the crime but also with regard to the legislative regime with regard to child pornography.

[23] Chetty writes as follows:

"The online sexual abuse and exploitation of children is a global crime. Given the global nature of the trade of child pornography, and the fact that the all offenders in all countries access and download the same images from the same sites, the difference in sentencing policies in different countries is disturbing and makes no sense. The lack of harmonisation of sentencing policies to combat one of the most heinous crimes against children stands in stark and chilling contrast to the harmonisation of the child pornography industry by internet and mobile phone

paedophiles and child terrorists. Compare, for instance, sentences handed down to those convicted of the possession of child pornography in the United States:

- (1) **Round Rock Man Gets 2 Life Sentences** for Child Pornography "Round Rock Police obtained a search warrant of Baley's house and seized several computers that contained 1 500 photographs and 50 video clips of graphic child pornography";
- (2) **The Eagle Times, Claremont, NH, USA. A Vermont man will spend next 13 years in prison after he pleaded guilty to transporting child pornography across state lines;**
- (3) **Detroit Free Press, Detroit, MI, USA reported that Mariscal was sentenced by a federal judge to 100 years in prison for producing, importing and distributing child pornography;**
- (4) **Korea Times, Seoul, South Korea - An Arizona man who received a 200 year prison sentence for possessing 20 pornographic images of children failed on Monday to persuade the Supreme Court to have his sentence reduced;**
- (5) **KHQ Right Now, Spokane, WA, USA had a report of 66 year old Thomas Herman who was sentenced to 10 years in prison in federal court after pleading guilty to one count of possession of child pornography;**
- (6) **Muncie Star Press, Muncie, IN, USA. Rinehart, 33, pleaded guilty before Judge David F. Hamilton to two counts of producing child pornography and was sentenced to 15 years in prison;**
- (7) **Frederick News Post, Fredrick, MD, USA reported that a Frederick man whose computers contained thousands of images of child pornography accepted a plea agreement that put him in jail for 18 years;**
- (8) **Appleton Post Crescent, Appleton, WI, USA. A 32 year old Oshkosh man faces up to 575 years in prison and \$2.3 million in fines if convicted on 23 counts of possessing child pornography;**
- (9) **Justin Fritscher, [...] November 25, 2010" Porn charge could bring 200 years: Images of children found on computer brought in for repair - a convicted sex offender arrested Tuesday night could face a 200 year prison sentence, if convicted, after five images of child pornography went found on his computer, Madison-Rankin District Attorney Michael**

Guest said;

(10) <http://amplify.com/u/bne2x>. *Production of Child Pornography Results in More Than **27 years in Prison** for 23 Year Old Austin Man;*

(11) **Man possessed 'astronomical amount' of child pornography faces 2114 years in jail** - <http://www.whptv.com/news/local/storv/IPDATE-Distributing-child-porn-collection-containedlbEUH>, 20 January 2011; and

(12) **Prison: 700 years in Houston child sex, porn case:** A Houston man has been sentenced to three life terms in prison for sexual assault of a child and 720 years more for possessing child pornography. Rodney Williams changed his plea to guilty during jury selection Monday in a case prosecutors say involved a 5 year old girl. Investigators say the case began last July, when his common-law wife found digital images on a camera that showed him sexually assaulting a child. Investigators also recovered more than 70 images of child pornography on computers in his home. Williams, who's 23, must serve three life sentences for super aggravated sexual assault of a child under the age 6. **He was also sentenced to 720 years in prison for the child pornography found on his computer and digital camera.** (Associated Press, 04/0512010)
In contrast, some of the sentences imposed by South African courts are as follows:

(1) **Two Newlands East men get 5 year sentences, wholly suspended for 5 years, after pleading guilty to the creation, production, possession and distribution of child pornography and indecent assault;**

(2) **Man who claims to have child pornography for research sentenced to a fine of R24 000, half of which was conditionally suspended. The magistrate agreed to a deferred fine of sixteen monthly payments of R750.00;**

(3) **Teacher found guilty of possession of child pornography and exposing children to pornography sentenced to 5 years imprisonment suspended for 5 years;**

(4) **Man who indecently assaulted his own daughter and took pornographic pictures of her over a period of two years sentenced to 7 years imprisonment.**

- (5) "Father Christmas" guilty of indecent assault, exposing children to pornography and possession of child pornography sentenced to 5 years imprisonment;**
- (6) Man found guilty of four counts of creation and possession of child pornography and of exposing children to pornography sentenced to 5 years in prison;**
- (7) Teacher found guilty of possession of 180 minutes of video recording, 265 digital movie clips, 16 slides and 626 still images of child pornography and indecent assault of children sentenced to 6 years imprisonment;**
- (8) Man court finds to be a homosexual paedophile sentenced to 2 years imprisonment, with 1 year suspended, for possession of child pornography; and**
- (9) Man found guilty of indecent assault of two minor children and the creation and possession of 71 images of child pornography has sentence reduced to 6 years imprisonment, with 2 years suspended for 5 years.**

Courts have an opportunity to harmonise sentencing in child pornography cases, without having to submit to any bureaucratic protocols. It is not difficult to find points of similarities in child pornography cases: the same or substantially similar number of the same type of images downloaded from the same websites by perverts in different countries. There is no impediment to the harmonisation of sentencing policies. Courts, therefore, have an opportunity to make a major contribution to the harmonisation of child pornography laws and enhance the protection of all children from sexual abuse exploitation.

*Until the 2004 amendment, the creation, distribution, production and possession of child pornography constituted a single offence, with a maximum of 5 years imprisonment. **However, Parliament, concerned at the increase in incidents of sexual abuse and exploitation of children in pornography, both nationally and internationally, amended section 27 of the Act in two important respects. Firstly, Parliament created possession, creation, importation and distribution as separate offences and, secondly, increased the permitted maximum to 10 years for each separate offence.***

[24] Prior to the amendment of Act 3 of 2009 Section 27 of the Films and Publications Act 65 of 1996 provided as follows:

"(1)(a) Any person shall be guilty of an offence if he or she –

- (i) is in possession of;*
- (ii) creates or produces or in any way contributes to, or assists in, the creation or production of;*
- (iii) imports or in any way takes steps to procure, obtain or access, or*
- (iv) knowingly exports, broadcasts or in any way distributes or causes to be exported, broadcast or distributed, a film or publication which contains child pornography or which advocates, advertises or promotes child pornography or the sexual exploitation of children.*

Section 30 (1A)

Any person found guilty of a contravention of Section 27 (1) may be sentenced to a fine or to imprisonment for a period not exceeding ten years or to both a fine and such imprisonment."

[25] The appellant submits that an effective sentence of five (5) years imprisonment in terms of 276 (1) (i) of Act 51 of 1977, is in the circumstances of this case shockingly light and inappropriate.

[26] The respondent on the other hand submits that imposing .sentence is mainly a function of the trial court and that the powers of this court to intervene are limited.

Grounds of Appeal

[27] The appellant submits that the magistrate erred in attaching insufficient weight to the aggravating features present, **inter alia** that:

- The respondent possessed a vast amount of child abuse images;
- That he collected these over an extended period of time;
- That the images depict sexually abusive acts including the rapes of children as small as 2 years old;

- That the respondent, by collecting the images, promoted the production thereof and that his conduct served to instigate and perpetuate the sexual abuse of children, thereby effectively making him an accomplice to the continued sexual violation 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;
- That the crimes in hand are not victimless, but that the victims of the offences are children who had not only been sexually abused but who have to live with the knowledge that images portraying 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 to privacy, dignity, bodily and psychological integrity.
- The respondent used a false identity and address to mask his identity which also indicates that a lot of planning and time went into the commission of these crimes.

[28] The respondent submits that most of these aggravating features were mentioned in the judgment of the court **a quo** and that by so doing the magistrate applied her mind properly to those aspects. The fact of the matter is, it is one thing to mention aggravating factors but it is another matter to bring those to bear on the sentence itself. It is the sentence that gives effect to the moral indignation of the community and to the deterrent effect sentence should have on would be offenders.

[29] The appellant in his heads of argument refers to the case of **S v C** 1996 (2) SACR 181 (c) in which the following was said:

"Rape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim - he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life - a fate often worse than loss of life. Serial rapists and murderers are regarded by society as inherently evil beings. They are the most feared and loathed criminals in our community. Society demands protection in the form of

heavy and deterrent sentences from the courts against such atrocious crimes."

[30] The respondent submits that reference to this case is irrelevant as the respondent is not charged with rape. As stated (**supra**) it is quite evident from the pornographic images that a significant number of the children were raped in order to secure those images. The fact that the accused was not charged for rape does not refute that reality. Even the court **a quo** in handing down sentence referred to *"images and where actual penetration is evident"*.

[31] The court **a quo** goes on to say the following:

"However the effect on children, although the accused denies this, is severe. There are very young children involved in this case. I even... in one of the photos there is a child under the age of 2 depicted on the photos and when I state under the age of 2 I am very lenient with regard to my estimation. The effect on these children is severe and that, due to people like the accused, this industry thrives."

[32] In his report, Dr Labuschagne states:

"It must be pointed out that whether or not the offender has previous hands-on offences, he has participated in an industry that supports the sexual abuse of children. For each image produced. a child was sexually abused..." (My emphasis)

In the present case we are dealing with a conviction in which 481 children were abused.

[33] Dr Labuschagne concludes his report as follows:

"In conclusion I diagnosed the accused as a paedophile with accompanying interest in zoophilia, otherwise known as bestiality and incest. These sexual interests will remain present throughout the accused lifetime. I believe that the accused poses a significant threat to sexual wellbeing of children between the ages of 9 and 12. Due to his use of the internet, it is clear that it is not only children in his immediate environment that are threatened, but children in any

part of the world."

[34] Taking into account the nature of the offence, its impact on the 481 victims and their families, the level of depravity referred to (**supra**), the court **a quo** misdirected itself by not giving sufficient weight to the aggravating factors referred to in the grounds for appeal.

[35] In **S v Malgas** 2001 (1) SACR 469 (SCA) at para 12 497 e - g Marais JA states as follows:

"Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court, is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking": "startling" or "disturbingly inappropriate"."

[36] In **De Reuck v Director of Prosecutions, Witwatersrand Local Division and Others** 2003 (2) SACR 445 (CC) para 63, The Constitutional Court, acknowledging the international law applicable remarked as follows with reference to the harm intrinsic to the making and possession of child pornography:

"[63] Similarly, article 1 of the Universal Declaration of Human Rights stresses the importance of human dignity. It states: "All human beings are born free and equal in dignity and rights." Children merit special protection by the state and must be protected by legislation which guards and enforces their rights and liberties. This is recognised in section 28 of our Constitution. Children's dignity rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth. Society has recognised that childhood is a

special stage in life which is to be both treasured and guarded. The state must ensure that the lives of children are not disrupted by adults who objectify and sexualise them through the production and possession of child pornography. There is obvious physical harm suffered by the victims of sexual abuse and by those children forced to yield to the demands of the paedophile and pornographer, but there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available. The chief purpose of the statutory prohibitions against child pornography is to protect the dignity, humanity and integrity of children.

[64] Little need be said about the second purpose of section 27 which is to protect children from being used in the production of child pornography. The expert evidence in this case confirms that abusing children in this way is severely harmful to them. The psychological harm to the child who was photographed is exacerbated if he or she knows that the photograph continues to circulate among viewers who use it to derive sexual satisfaction."

[37] The crimes committed on the minor children can indeed only be described as disgusting and degrading. Their youth was taken away and their future had been tarnished. It would be difficult for them to recover from the scars of the acts perpetrated upon them. That much is evident from the expert evidence. The court **a quo** was correct in determining that a non-custodial sentence would be inappropriate taking into account the seriousness of the offences and the interests of society.

[38] On a conspectus of all the facts and the applicable law it is quite apparent that even though the court **a quo** seemed to take cognisance of the aggravating factors in this case, it erred in not affording adequate weight to them in the sentence passed. I therefore find the sentence meted out materially inadequate and disturbingly inappropriate.

[39] In *S v Swart* 2004 (2) SACR 370 (SCA) at para 12 the court held that:

"In our law retribution and deterrence are proper purposes of punishment and that they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but

instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that rehabilitation of the offender play a relatively smaller role."

[40] Upon consideration of all relevant facts and submissions by counsel in this case I am persuaded that the misdirection of the court **a quo** entitles the court to consider the question of sentence afresh.

[40] Wherefore, I propose that the following order be made:

- 40.1. The appeal against sentence is upheld.
- 40.2. The sentence handed down by the Regional Court, Pretoria is set aside and substituted with the following.
- 40.3. The respondent is sentenced to serve a term of ten (10) years imprisonment.
- 40.4. The respondent's name will be recorded in the Register of Sex Offenders.

It is so ordered.

S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree.

E. M. KUBUSHI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on: 19 April 2016

Delivered on: 30 June 2016
For the Appellant: Advocate A. Coetzee
Advocate C. P. Harmzen
For the Respondent: Advocate C. J. van Wyk