

REPUBLIC OF SOUTH AFRICA



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

Case No: A316/2021

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

DATE: 24 NOVEMBER

2022 SIGNATURE:

In the matter between:

JOHANNES HERMANUS ENGELBRECHT

APPELLANT

and

THE STATE

RESPONDENT

APPEAL JUDGMENT

CORAM : KJ MOGALE AJ Et PD PHAHLANE J

INTRODUCTION

[1] The appeal is before us with the leave of the court *a quo*. The appeal is with respect to the conviction only. The Appellant was charged in the Regional Court of Gauteng, held at Pretoria-North, on one count of contravening the provisions of section 24B(1)(a) of the Films and Publications Act No. 65 of 1996 (unlawful possession of a film, game or publications which contained depictions/scenes of child pornography or promote/ encourage child pornography). He was legally represented.

[2] The Appellant pleaded not guilty to the charge. The State leads the complainant's evidence and other witnesses, including an expert, Mr. M Murendeni. The defense applied for the discharge in terms of Section 174 of the Criminal Procedure Act and contended that the state did not make out a case.

[3] On the 3rd of June 2021, the Appellant was convicted and sentenced to 3 (three) years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977.

THE BRIEF AND RELEVANT GROUNDS OF APPEAL

[4] It is common cause that the Appellant was found in possession of a

Samsung External hard drive, further that he is a lawful owner of same. Upon analysis of the hard drive by Mr. Murendeni, 90 images of child pornography were found.

[5] The appellant's ground of appeal is that Murendeni is not an expert, and his evidence should not have been accepted.

[6] The appellant contends that no crime of child pornography was established or proven. He argued that the Learned Magistrate misdirected himself to conclude that the hard drive contained images of child pornography and that a prima facie case had been established or proved.

THE PRINCIPLES APPLICABLE IN APPEALS

[7] The principle governing appeals has become settled. A court of appeal will not interfere or temper with the trial court's decision regarding a conviction unless it finds that the trial court misdirected itself regarding its findings or the law. See **-Quatermark Investments v Mkhwanazi**¹ and **Sarrahwitz v Maritz**².

[8] In this case, the issue for determination is whether the appellant was correctly found guilty of a charge of unlawful possession of images of child pornography and whether Murendeni is an expert.

[9] To secure a conviction, the State must prove all the elements of the crime beyond a reasonable doubt. Regarding whether the trial court was correct in finding that the State proved its case against the appellant, the evidence of the State must be measured against the evidence of the appellant as to whether the version could be said to have been

¹ 2014 (3) SA 96 SCA at 103B

² 2015 (4) SA 4 SA 491 CC at 5051.

reasonably possibly true. Of course, this cannot be done in isolation, but the court must consider the totality of the evidence before it comes to a just decision.

THE APPLICATION OF THE PRINCIPLES TO THE APPEAL FACTS

[10] Ms. Madelaine van Schalkwyk, the appellant's former girlfriend, found some disturbing images of naked underage girls in a Deli Laptop used by the appellant when they were staying together. She handed over the laptop to Warrant Officer Hendrikus Johannes Boshoff for analysis. The images found were not classified to be child pornographic material.

[11] Warrant officer Boshoff collected various devices from the appellant, including a Samsung hard drive given to Captain Coetzee for downloading and developing images.

[12] Captain Reinette Coetzee accepted a Samsung External hard drive from Warrant Officer Boshoff to assist with downloading images, the acquisition, and the analysis of determining any child pornographic material. She discovered 102 (one hundred and two) images of naked underage girls, but she could not clearly state that the material contained child pornography.

[13] The matter was referred to Mr. Muridile Murendeni, an expert witness who analyzed whether the images contained child pornographic material. During the trial proceedings, the defense never disputed Murendeni's qualifications, experience, and expertise. This is supported by the fact that the defense had, during cross-examination, admitted and acknowledged that Murendeni was an expert. The defense counsel stated the following:

“I know you are an expert; you are doing good work, but I am putting it to you, you cannot without not using these measurements and have children in front of you to measure them or measuring. I do not know how else” [CIS] see page 51, lines 15-18 of the record.

[14] Mr. Murendeni’s analysis was that 90 images depicted from the hard drive were images of girls between 16 years and below 18 years of age. It was his first time seeing those girls depicted in the images, and he could not state their exact ages. But he gave a detailed explanation of how he concluded that they were girls below the age of 16 years.

[15] During his testimony, the appellant conceded that he had images on his Samsung external hard drive that contained mixed pornographic content. The appellant testified that he did not look at the alleged 90 images of child pornography. In my view, it is highly improbable that the appellant who was being charged with possession of child pornography would deny knowledge of images on his hard drive and not even make an effort to look at them to confirm whether he has seen them before.

[16] The appellant further argued that Ms. Van Skalkwyk and other family members, including his cousins, had access to his laptop and could have uploaded child pornographic images into his hard drive. This evidence was never put to Ms. Van Skalkwyk. In fact, it was submitted that the applicant does not dispute her evidence.

THE EVALUATION OF THE PROCEEDINGS

[17] Having given proper and due consideration to all the circumstances

and having considered the arguments and submissions made by both parties, this court cannot fault the decision of the court *a quo*, nor can it be said that the court *a quo* misdirected itself in

accepting the evidence of the State witnesses and rejecting the appellant's version as false.

[18] Accordingly, we agree with the findings of the court *a quo*, and we are of the view that the court *a quo* did not misdirect itself in finding that the appellant was guilty of the offense of contravening the provisions of section 24B(1)(i)(a) of the Films and Publications Act No. 65 of 1996, being (unlawful possession of film, game or publications which contained depictions/scenes of child pornography or which promote/encourage child pornography)

CONCLUSION AND ORDER

We accordingly propose the following order, namely.

19.1 The appeal is dismissed.

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KJ MOGALE
ACTING JUDGE OF THE HIGH
COURT GAUTENG DIVISION,
PRETORIA.

I agree, and it is so ordered.



**PD PHAHLANE
JUDGE OF THE HIGH
COURT GAUTENG DIVISION,
PRETORIA**

Appearances

For Appellant: Adv Van As,
Instructed by: Legal Aid
SA,
PRETORIA.

For the State: Adv. CRONJE

Instructed by: The Director of Public
Prosecutions, PRETORIA

Date of hearing: 11 October 2022

Date of Judgment: 24 November 2022