Du Toit v The Magistrate and Others 2016 (2) SACR 112 (SCA)

KEY CONCEPTS	
Pornography	Rape by stepfather
Disclosure of pornography to defence	Impact of pornography on children
Prosecution's discretion not to disclose pornographic evidence	

Introduction

On 13 May 2010 members of SAPS, armed with search warrants, conducted a search of the home of the appellant. Various items, including 4 mobile phones, compact discs, memory sticks and a laptop were seized. The appellant was charged with the possession of child pornography in terms of the Films and Publications Act 65 of 1996 (the Act) and before the trial commenced he sought an order from the regional court that the prosecution be directed to furnish him with copies of the images which are alleged to constitute child pornography. The prosecutor had objected to reproducing the images and providing copies thereof to the defence but had offered to put arrangements in place for him, his legal representatives and any expert for the defence to view the images at an office at either the local police station or the court. The regional court found that the arrangement proposed by the prosecution was "sufficient/adequate" and dismissed the appellant's application.

The appellant then applied to the High Court for an order as follows:

1. that the search warrant be declared unlawful and set aside;
2. that the respondents be ordered to restore all the assets seized;
3. that s24(B)(1) of the Films and Publications Act 65 of 1996 be declared inconsistent with the Constitution and invalid;
4. that the regional court magistrate's decision be reviewed and set aside
5. that the respondents be ordered to pay the costs of the application.

The High Court dismissed the application in terms of para 1-3 but ordered that the decision by the regional court magistrate be reviewed and set aside and that each party pay its own costs.

The DPP sought and obtained leave to appeal against para 4 and the appeal is concerned solely with the correctness of the order of the High Court to review and set aside the order of the regional court magistrate that the prosecutor did not have to furnish the appellant with images of the child pornography.

High Court application

The High Court found that there was no reason why in this instance the rights of the applicant should be subjected to limitations. Section 35(3)(b) of the Constitution confers upon the accused the right to have adequate time and facilities to prepare a defence. In order to do this, it is expected that the applicant may want to know exactly what the specific allegations are that the state aims to level against him in the trial. Section 35(3)(i) of the Constitution confers upon him the right to adduce and challenge evidence. He would, therefore, need the same materials or articles to prepare his defence. The High Court was of the opinion that there was no reason why the applicant could not have access to copies that were suitably verified.

Matter before the SCA

In the Canadian Supreme Court decision of ***R v Stinchcombe*** (1991) 68 CCC (3d) 1 ([1991] 3 SCR 326; [1992] SCC 1; [1992] LRC (Crim) 68; 18 CRR 92d) 210; 8 CR (4th) 277) the court set out the applicable principles with regard to the prosecution's disclosure obligation:

- justice is better served by the elimination of surprise;
- the fruits of the investigation in the possession of the prosecution are not the property of the prosecution but of the public to ensure that justice is done;
- the defence has no obligation to assist the prosecution and is entitled to be adversarial;
- the search for the truth is advanced by disclosure of all relevant material;
- the prosecution must retain a degree of discretion in respect of these matters;
- the exercise of the prosecution's discretion should be subject to review by the court;
- disclosure is not to be withheld if there is a reasonable possibility that failure to disclose may impede or may impair the accused's right to make full answer and defence which is a principle of fundamental justice;
- anything less than full disclosure by the prosecution falls short of decency and fair play;
- it is not possible nor appropriate to lay down precise rules here and disclosure should be worked out in the context of concrete situations.

Stinchcombe gave 3 situations where the prosecution may properly exercise its discretion to refuse to disclose i.e. if the information sought is:

- beyond its control;
- clearly irrelevant; or
- privileged.

These three factors were not intended to be closed and limited.

In ***Shabalala and Others v Attorney-General of Transvaal and Another*** 1995 (2) SACR 761 (CC) the Constitutional Court stipulated that, although entitlement to disclosure is a matter of constitutional right, such right was not an unqualified one. Instead it is for the court in each instance to exercise a proper discretion by balancing the degree of risk involved in attracting the consequences sought to be avoided by the prosecution against the degree of the risk that a fair trial might not ensue. Essentially a judicial assessment of the balance of

risk must be undertaken. At para 55 the court said the prosecution must establish reasonable grounds for its belief that the disclosure of information sought carries with it a reasonable risk that it might lead to the identity of informers or the intimidation of witnesses or the impediment of the proper ends of justice. It is an objective test i.e. a reasonable person in the position of the prosecution would be entitled to hold such a belief.

The prosecution has submitted that its alternative proposal for a private viewing at a mutually convenient time at an office in the police station or court satisfies the prosecutor's disclosure obligations. And, it does so in a way that permits the appellant to make full answer and defence, yet does not further compromise any of the privacy interests of the persons portrayed in the images.

The SCA, therefore, had to decide whether there were countervailing interests of significance that warrant a departure from the normal method of disclosure by copies. In striking a balance, the court must take into account the rights of the child. In so doing, the SCA referred to the following instruments:

- article 3(1) of the UN Convention on the Rights of the Child 1989 – the best interests of the child shall be a primary consideration;
- article 4(1) of the African Charter on the Rights and Welfare of the Child 1990;
- article 8(3) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Pornography 2000 – best interests of the child shall be a primary consideration;
- the Children's Act 38 of 2005 – sections 10, 14 and 15 are a cluster of provisions designed to ensure that children's rights are protected and their dignity upheld in any proceedings affecting them;
- s28(2) of the Constitution - best interests of children are of paramount importance, and this must be interpreted so as to promote the foundational values of human dignity, equality and freedom.

In this case, therefore, the reasonable privacy interests of the children who are depicted in the images is applicable. There is also significant public interest in ensuring that no duplication or distribution occurs in the disclosure process. Those interests ought not to be further compromised by the copying, viewing, circulation or distribution of the images beyond what is reasonably necessary to give effect to the appellant's constitutional right.

The SCA referred to the following points:

- the state is under a constitutional obligation to combat child abuse;
- 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 pornography;

- the Films and Publications Act 65 of 1996 has amongst its objects, the protection of children from pornography and to make the use of children in pornography punishable;
- the purpose of the legislation is to curb child pornography;
- the advertising and selling of child pornography provides an economic motive for the production thereof;
- a child who has been photographed has to go through life knowing that the image is circulating the Internet;
- it created a permanent record of the harm to the child, which was exacerbated every time the material was circulated;
- maintaining the integrity of the administration of justice is also an important principle of fundamental justice.
- the NPA have policy directives with regard to dockets that contain visual images of child pornography – prosecutors need only allow the defence access thereto and should not provide copies thereof unless ordered by the court; dockets must always be kept at the official workplace and in a secure locked location.

Accordingly, the SCA found that the prosecution should be allowed to exercise their discretion, if necessary, to protect the privacy interests of members of the public or to protect the public interest by preventing the commission of further criminal acts, which could possibly occur if it were to disclose information without putting adequate safeguards in place. To deprive the prosecution of that discretion could possibly impede the ends of justice. The High Court approached the enquiry as if the entitlement to disclosure was an absolute one. It is clear that it is not. In the ordinary course of events, disclosure should b by copy, but where there are other conflicting rights at stake, the constitutional requirement may be adequately met by providing an opportunity for private viewing. Therefore, the prosecution properly exercised its discretion to refuse to make the images available to the defence in the form of copies. Appeal upheld.