

S v Malherbe 2020(1) SACR 277 (SCA)

KEY CONCEPTS	
Child pornography	Warrant to search for pornography
Warrant based on statement made under oath	

FACTS: The appellant, Malherbe, appeared in the regional court, Nelspruit, on seven counts of contravening s24B(1)(a) and one count of contravening s 24B(1)(c) of the Films and Publication Act 65 of 1996 (the Act). Four of these counts related to the possession of four films and one to the importation of another film. The sixth count related to his possession of a book, the 7th - 17th images discovered on his laptop and the last five images found on his notebook. Each of the films, the book and the images were depictions of child pornography, as defined in s1 of the Act. All of these items had been seized as a result of a search warrant issued by a magistrate in respect of Malherbe's home. Malherbe pleaded not guilty to all counts.

The trial began with a trial-within-a-trial in which the appellant challenged the validity of the search warrant. The trial court found the search warrant to have been validly obtained. The appellant made admissions in terms of s220 of the Criminal Procedure Act 51 of 1977 (the CPA) and he admitted that he had been found in possession of three images of child pornography in counts 3, 7 and 8, of which one was from the movie that he had purchased from an online company called Amazon. He was convicted of counts 3, 7 and 8 and sentenced to three months' imprisonment in respect of each count. The sentences were suspended for a period of three years on condition that the appellant was not to be convicted of contravening s 24B(1)(a) of the Act, during the period of the three years' suspension. The court also made an order in terms of s 120(4) of the Children's Act 38 of 2005, that the appellant's name be entered into part B of the National Child Protection Register. In accordance with s 34 of the CPA, the images were forfeited to the state to be destroyed.

The appellant appealed against both the conviction and sentence to the High Court, which set aside the sentence imposed by the regional court and remitted the matter to the regional court for reconsideration. The appellant is now appealing both conviction and sentence.

ISSUE: Whether the trial court was correct in holding that the search warrant issued in terms of ss20 and 21(1) of the CPA was valid.

DISCUSSION: In terms of s21(1)(a) magistrates and justices of the peace can issue search warrants on the basis of information received under oath. The following factors must be taken into account when issuing a warrant:

- there must be a reasonable suspicion that an offence has been committed

- there are reasonable grounds to believe that an item that has a bearing on or might have a bearing on the investigation is on the premises or suspected to be on the premises
- the judicial officer must consider whether it is appropriate to issue the search warrant.

However, the problem in this case was that the trial court accepted that the statement made by the police officer was a sworn statement, but the statement simply certified that the deponent knew and understood the contents of the statement and signed to that effect.

This did not comply with s21(1)(a) of the CPA, which requires that the information must be on oath and that there must be reasonable grounds for believing that the item is in the possession or under the control of any person. The police officer testified that no oath was administered to him.

FINDING: The law requires that s21(1)(a) of the CPA be strictly adhered to, and any search warrant issued on the basis of a statement not made under oath will be invalid. The magistrate should have found the warrant to have been issued unlawfully and, therefore, to be invalid. On that basis none of the material seized under the warrant would have been admissible. It was the failure of the trial court to declare the warrant invalid which caused the appellant to make admissions in terms of s 220 of the CPA.

In terms of s35(5) of the Constitution, evidence obtained in a manner that violates the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. It was the court's decision that the search warrant was valid that resulted in Malherbe making the admissions. Therefore, the evidence obtained through the invalid search warrant rendered the trial unfair and should have been excluded.

As a result, the appeal succeeded and convictions and sentence were set aside, including the order in terms of s 120(4) of the Children's Act 38 of 2005.