**Beale v State. Case no. A283/18. 3 May 2019. High Court of South Africa Western Cape Division. (Cape Town)**

| KEY CONCEPTS | |
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| Sentencing in child pornography | Possession of child pornography |
| Mitigating factors in child pornography | Aggravating factors in child pornography |

This was an appeal against a sentence of 15 years imprisonment for a conviction on an offence related to the possession of child pornography in terms of the provisions of the Films and Publications Act 65 of 1996 as amended by the Films and Publications Act 3 of 2009. One of the objects of the Amendment Act, contained in s2, is to regulate the possession and distribution of certain publications to protect children from exposure to disturbing harmful materials and to make the use of children, and their exposure to pornography, punishable.

The appellant was arrested following an international investigation into child pornography by Belgian and South African Police. An online child pornography network was discovered where the members engaged in peer-to-peer file sharing of child pornographic images. A user gained access to this network and the South African Police traced the user to an Internet cafe, belonging to the appellant, where they seized a laptop which contained images, films, publications and videos containing child pornography.

The appellant pleaded guilty to 18 644 contraventions of s24B(1)(a) of the Amendment Act and did not address the court on the merits. He called two witnesses in mitigation of sentence. The state, on the other hand, argued that the aggravating factors were the vast amount of images found on the laptop and the hardcore, violent nature of the child pornography. The images were described as horrific, gruesome, degrading, disgusting, abhorrent and involved material of babies, toddlers and teenagers being raped, sexually abused and tortured. Some file names were described in the charge sheet as follows: a stepdaughter who `cries really good' and a `baby girl fuck video,' vaginal sex with infant, toddler or female child or anal penetration with toddler or female child or objects inserted into their vaginas.

The magistrate sentenced the accused to 15 years direct imprisonment, the maximum sentence that can be imposed. This was one of the highest sentences imposed in South Africa on charges related to possession of child pornography to date. In addition, the appellant's name was also included on the Sex Offender Register in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

The court looked at the following facts when determining the sentence:

- Child pornography has increased at an alarming rate.

- Child pornography is a heinous crime, despicable crime that has resulted in public outrage.
- The fact that possessing or viewing child pornography creates a trading platform or marketing for this illegal activity.
- Every image reflects the sexual violation of and impairment of the dignity of the child every time it is viewed.
- Children, including babies and toddlers, are the unidentified, voiceless victims of child pornography who will suffer the emotional scars of their abuse for life.
- The Children's Act 38 of 2005 requires that all organs of government must respect, protect and promote the dignity and the rights of the children.
- The Constitution enshrines the rights of children to be protected from maltreatment, neglect, abuse or degradation.
- Child pornography is seen as an evil in all democratic societies.
- The promulgation of the Amendment Act affirms the seriousness with which the legislature and society wants to eradicate all forms of violence and discrimination against women and children.
- The community's reaction to a crime and their subsequent demands usually relate to the seriousness of the crime in society's view, and these considerations should be considered in the court's determination of a sentence for an offence.
- In **DPP North Gauteng v Thabethe** 2011 (2) SACR 567 (SCA) the court held that our courts have an obligation in imposing sentences to impose a sentence which reflects the natural outrage and revulsion felt by law-abiding members of society and that a failure to do so would have the effect of eroding public confidence in the criminal justice system (para 2).
- In **S v Blank** 1995 (1) SACR 62 (AD) at 73 E-F the court stated that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences which the courts impose, and if the sentences for serious crimes are too lenient, the administration of justice may fall into disrepute.

The court took into account the appellant's personal circumstances as presented by the clinical psychologists who interviewed the appellant:

- The appellant was subjected to severe abuse, emotional, physical and sexual which may have played a role in his deviant sexual interests.
- The appellant has a paraphilia, namely urophilia (related to urine).
- The appellant has a paedophilic disorder.
- The appellant has strong antisocial personality traits.
- The appellant has no history of contact offences.
- The appellant was using cannabis.
- The appellant stopped using opiates after he went to rehabilitation.
- The appellant experienced anxiety and depression after his arrest.
- There is no cure for paedophilia.
- The appellant has a good social support system from his family.

The court also took into account the aggravating factors relating to the appellant's personal circumstances:

- The appellant's motive was morally reprehensible, because he carefully planned the offences. He did not stumble upon the child pornography. He regarded the downloading of the images from the Dark Web as challenging and appeared to be proud of the fact that he was able to access locked sites, which he could only do by first supplying images of a shocking nature, to show that he could be trusted.
- The appellant showed no empathy or sympathy towards the children depicted in the downloaded images, indicating a lack of insight or remorse in the abhorrent nature of his conduct. He stated that he knew he was supposed to feel bad, but he did not. He did not think that therapy would cure him.
- The appellant admitted that he was addicted to viewing the downloaded images, and he would sometimes spend up to 8 hours viewing the images.

The High Court found that true remorse entails repentance and inner sorrow or a feeling of guilt. This can be a mitigating factor as a remorseful offender is generally unlikely to repeat an offence. A plea of guilty may be an indicator of remorse, but this is not the situation where the accused has pleaded guilty because they have been caught red-handed or had no other option due to the strength of the case against them. Then the plea of guilty is viewed as a neutral factor.

**Held**: The High Court held that a court of appeal will only interfere with a sentence if the trial court misdirected itself in passing sentence, and the misdirection must have been material. The court found that the disparity in sentencing was such that the court was entitled to interfere with the sentence, and accordingly the sentence of 15 years' imprisonment was replaced with a sentence of 10 years' imprisonment.

> "However, after a thorough consideration of the facts and the sentences imposed in comparable matters, the facts in the present case, including the seriousness of the crimes, the appellant's personal circumstances, the purposes of the sentence, the balancing of the mitigating and aggravating circumstances, an element of mercy, in view of the history of abuse suffered by the appellant in his younger days, as well as the interests of the community and ultimately the interests of children and their protection, we believe that a sentence of (10) years imprisonment would be more appropriate and proportionate than the fifteen (15) years imposed by the court a quo."