IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A54/2020
DPP REF NO: 10/2/5/1 - 2020/045
DATE OF APPEAL: 7 MARCH 2022

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

15/3/2022 .....
DATE SIGNATURE

In the matter between:

LOOTS, JUAN RYAN Appellant

and

THE STATE Respondent

JUDGMENT

SIDWELLAJ:

[1] This is an appeal against sentence only.

[2] The appellant was arrested for the possession and distribution of child pornography in contravention of the Films and Publications Act no 65 of 1996 ('the Act'). The section of the Act criminalising possession of child pornography was section 24B(1)(a), and the section criminalising distribution of child pornography was section 24B(1)(d).

[3] The appellant appeared before the Regional Magistrate sitting in Johannesburg and a charge of possessing 4489 contents of child pornography in contravention of the said section 24B(1)(a) was put to him. The appellant pleaded guilty to this charge and submitted a plea statement ('statement'), in terms of section 112(2) of the Criminal Procedure Act no 51 of 1977 ('the CPA'), to the court. In this statement, as amended, the appellant admitted all the elements of not only possessing child pornography, as charged, but all the elements of distributing child pornography in contravention of the said section 24B(1)(d). The appellant stated that he was pleading guilty to distribution of child pornography; however, no charge of distribution was ever put to him.

[4] The prosecutor accepted the plea and the plea statement.

[5] The Magistrate convicted the appellant of possession of 4489 contents of child pornography in contravention of section 24B(1)(a) and of distribution of four (4) contents of child pornography in contravention of section 24B(1)(d).

[6] On 28 March 2019 the appellant was sentenced to ten (10) years' imprisonment for the possession and to five (5) years' imprisonment for the distribution. The Magistrate ordered that the two (2) sentences run concurrently so that the effective sentence was ten 10 years' imprisonment.

The charges

[7] Before dealing with the merits of the appeal against sentence the procedure adopted in this case at the plea stage of the trial must be considered. As stated above, only one charge, that of possession of child pornography, was put to the appellant. No other charge and, in particular, no charge of distributing child pornography appears in the record.

[8] In his plea statement, the appellant set out the facts on which his plea of guilty to distribution was based. The appellant admitted the stated facts. They were that the appellant had distributed 65 contents of child pornography on a social media account on Instagram during 2016, six (6) months before his arrest in this case.

[9] The charge sheet in the record, form J15, states that the appellant was arrested on 24 August 2017, and refers to Annexure A thereto for the charge against the appellant. Annexure A alleges that the appellant was guilty of contravening section 24B(1)(a) of the Act, in that he possessed 4489 contents of child pornography, as tabulated, on 24 August 2017 at Elandspark. This was the charge put to him at his trial.

[10] The other references in the charge sheet to the charge against the appellant are:

[11] At the appellant's first appearance in court on 25 August 2017, the prosecutor told the court that the charge was possession and distribution of child pornography.

[12] At the postponement on 8 May 2018, the appellant's attorney told the court that the appellant did not dispute possession of the material.

[13] At the postponement on 16 July 2018, the 'charge sheet' was handed to the defence and the prosecutor stated that the State would proceed on 'all charge'.

[14] Whilst it is not clear from the record if this was a reference to the possession of 4489 contents of child pornography or a reference to charges of both possession and distribution, counsel for the State at the hearing before us informed the Court that the State never intended to prefer a charge of distribution against the appellant as the State could not prove it; furthermore, that it would have been unethical for the State to charge the appellant with distribution based on the appellant's guilty plea.

[15] The full charge sheet with all the appearances appears in the record but it does not contain any charge of distribution or any reference to distribution of child pornography, other than that stated by the prosecutor in court at the first appearance on 25 August 2017.

[16] In his judgement on conviction, the Magistrate stated that the appellant was charged with a contravention of section 24B(1) of the Act, in that on 24 August 2017 and at Elandspark the appellant possessed child pornography. He further stated that this charge was put to the appellant and he pleaded guilty to 'count 1 to 4489'. The Magistrate was satisfied on the plea statement that the appellant admitted all the allegations in the 'charge sheet' and he convicted the appellant of contravening section 24B(1)(a) and (d) of the Act, to wit, possession of 4489 contents of child pornography in terms of section 24B(1)(a), and distribution of four (4) images in terms of section 24B(1)(d) of the Act as reflected in counts 2222, 2247, 2270 and 2302.

[17] It was incumbent on the Magistrate to ensure that the admissions in the plea statement corresponded with the allegations in the charge. The Magistrate might put questions to the accused to resolve discrepancies between the two documents. In this

case, the Magistrate was unable to do so, in respect of the allegation of distribution, as there was no such charge. On record the Magistrate did not raise with the State or the defence the question of the existence of a formulated charge of distribution and he did not establish what the alleged number of contents was in any actual charge, four (4) or 65.

[18] The appellant stated in his plea statement that he was pleading guilty to distribution of 65 contents of child pornography. The appellant acknowledged that at the time of drafting the charge these 65 contents were not available to the State and therefore the State only charged him with distribution of the contents in counts 2222, 2247, 2270 and 2302.

[19] The prosecutor was granted a number of postponements to draft the charges. The completed charge sheet was handed to the appellant on 16 July 2018. The appellant had approximately six (6) weeks to examine the charge sheet, from 16 July 2018 to the date of his plea on 31 August 2018. In the event of a formulated charge in the charge sheet of distribution of the four (4) contents, it is surprising that he admitted that he was guilty of distributing 65 contents in his plea statement. This was in the appellant's initial plea statement. In his amended statement, the appellant again pleaded guilty to distribution of 65 contents and he added that the State was only able to charge the four (4) contents, as stated above. He also stated that the State was prosecuting him for the 65 contents.

[20] It cannot be inferred from the plea statement, as amended, that the appellant had had sight of or had knowledge of a formulated charge of distribution of the four (4) contents before he pleaded. In any event, it appears from the record that there was no such charge. The appellant's right to a fair trial in terms of section 35(3) of the Constitution, Act no 108 of 1996, included the right to know the details of such

distribution charge against him. The appellant could decide thereafter what his response to the charge would be.

[21] The appellant was entitled to deal in his plea statement with only the facts charged and to decline to disclose or admit anything more in respect of criminal conduct committed by him but not alleged in the charge. Moreover, it was not for the appellant to attempt to state in his plea statement the charge that he thought the State was preferring against him or to plead to a non-existent charge, on the basis of what he believed the State was prosecuting him for. Ms Ryan and Mr Maluleke were agreed that what the appellant said in his plea statement regarding distribution could not cure the irregularity in the proceedings and the conviction and sentence in respect of the distribution fell to be set aside.

[22] It is clear from the CPA that a charge must be in writing. The charge against an accused is identified in the charge sheet.[1] It is at the instance of the State that the accused is brought into court to answer criminal charges preferred against him by the State. Therefore, the charges must be put by the prosecutor and not anyone else.[2]

[23] In *S v Sithole and Others,*[3] the court stated at 230 c-d:

'To convict an accused on a charge he was not requested to plead to is in my view such a departure from the rules and principles governing the conduct of criminal proceedings that it cannot be countenanced. It is further a fundamental right in terms s 35(3)(a) of our Constitution...that an accused has a right to a fair trial which includes the right to be informed of the charge with sufficient detail to answer it.'

[24] In *Sithole* there were multiple charges. Some were put to the accused and some were not. The accused did not plead to the charges that were not put. Nevertheless, the

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1 *S v Mandlazi* GP case no A765/2016, 22 May 2018 at [11].
2 *S v ZW* 2015 (2) SACR 483 ECG at [41(c)].
3 *S v Sithole and Others* 1999 (1) SACR 227 T*('Sithole').*

court convicted the accused on the charges that were not put to him. Those convictions were set aside on review.

[25] There can be no verdict unless the accused has pleaded to the charge. Further, a conviction can only occur in respect of a charge on which the accused is indicted.[4]

[26] Given that there was no charge of distribution of child pornography in this matter, the plea of guilty to that offence by the appellant was a nullity. There being no charge and no plea, the conviction of distribution was irregular and amounted to a failure of justice. Accordingly, in terms of section 304(4) of the CPA, the conviction and sentence for the distribution of child pornography are set aside.

The appeal against sentence

[27] The appellant was sentenced to a term of imprisonment of ten (10) years for possession of child pornography in contravention of section 24B(1)(a) of the Act.

[28] The appellant's representative, Mr Maluleke, argued that the sentence imposed by the Magistrate was harsh and induced a sense of shock regard being had to the sentences imposed in similar decided cases in South Africa, that the Magistrate failed to take the personal circumstances of the appellant into account, and that the Magistrate failed to take cognisance of the pre-sentencing reports by the social worker and the correctional services officer, who also testified in mitigation, and the evidence of the appellant's therapist.

[29] Mr Maluleke contended that a wholly suspended sentence of imprisonment, alternatively, a sentence of correctional supervision in terms of section 276(1)(h) of the

4 *S v Bam* 2020 (2) SACR 584 WCC at [54].

CPA, further alternatively, a sentence of less than ten (10) years' imprisonment should have been imposed by the Magistrate. In addition, Mr Maluleke argued that the appellant was not a danger to society and that he would suffer punishment for his crimes as a result of his career being hampered by his criminal record.

[30] Counsel for the State argued that the sentence imposed by the Magistrate was appropriate and that the appeal should be dismissed. The Magistrate had taken the personal circumstances of the appellant into account as well as the evidence in mitigation. There was no misdirection by the Magistrate who, in assessing all the information before him, attached due weight to all the circumstances. The gravity of the offences committed by the appellant and the worldwide prevalence of sexual crimes against children called for a response from South African courts that was consistent with the approach adopted in foreign jurisdictions, and that was overdue in South Africa. The State's counsel referred to the *Director of Public Prosecutions North Gauteng v Alberts*[5] and *Essop v State*[6] in support of its argument.

[31] Sentencing is pre-eminently a matter within the discretion of the trial court and a court of appeal will not lightly interfere with the exercise of that discretion. The essential inquiry is not whether the sentence was right or wrong but whether the sentencing court exercised its discretion properly and judicially.[7]

[32] Where the disparity between the sentence imposed and the sentence that the appeal court would have imposed is so marked that the sentence can be described as disturbingly inappropriate, an appeal court will interfere.[8]

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5 *Director of Public Prosecutions North Gauteng v Alberts* 2016 (2) SACR 419 GP.
6 *Essop v State* (Case no 432/2020) [2021] ZASCA 66 ('*Essop*').
7 *R v S* 1958 (3) SA 102 AD at 104 B; *S v Pillay* 1977 (4) SA 531 AD at 535 E.
8 *S v Malgas* 2001 (1) SACR 469 SCA at [12].

[33] The Magistrate in this case took into account the personal circumstances and the childhood history of the appellant as well as the evidence presented by the defence in mitigation.

[34] The Magistrate had due regard to the purposes of punishment and the constitutional rights of children as well as the rights of the appellant. The court *a quo* was mindful not to over-emphasize any interest in the case against another and to strike a balance between the interests of society and the interests of the appellant.

[35] The Magistrate noted that the children in the pornographic contents possessed by the appellant were apparently mostly under the age of eight (8) years, and that legislation has been enacted in this country to protect these most vulnerable members of society from crimes such as those committed by the appellant.

[36] The Magistrate observed that the possession of child pornography promoted the production thereof and that the appellant had participated in an industry that fosters the sexual abuse of children. It was appropriate that the victims of the appellant's crimes receive some recognition in the sentence to be imposed. The remarks of the Magistrate regarding the disturbing nature of the contents in this case were not out of place and I find that the Magistrate's treatment of the question of sentence was not clouded by emotion.

[37] The Magistrate considered the various sentencing options. The court *a quo* found that a fine or a suspended sentence would not properly reflect the gravity of the offences or serve the purpose of sentence. Additionally, the court *a quo* found that correctional supervision in terms of sections 276(1)(h) or (i) of the CPA would not serve the aims of deterrence or reform adequately and would send the wrong message to the community regarding child pornography. The Magistrate in this matter did not misdirect

himself in finding that a non-custodial sentence to enable the appellant to receive treatment for his pornography addiction would focus unduly on the rehabilitation of the appellant and would reduce the retributive and deterrent elements of the punishment, to the extent that it would bring the administration of justice into disrepute.[9]

[38] The court *a quo* concluded that direct imprisonment would properly address all the aims of punishment. In coming to this conclusion, the Magistrate considered the totality of the information before him and I find that he evaluated it correctly. He did not misstate any of the facts or the law. The exercise of the court *a quo*'s discretion was not vitiated by any misdirection and the sentence imposed was not disturbingly inappropriate. It was not a misdirection to apply to this case what was stated in *Essop*[10] quoting the author Iyavar Chetty in 'The Trivialisation of Child Pornography Crimes in South African Courts', and in following *Alberts*[11] regarding the unsuitability of non-custodial sentences in child pornography cases. Nor did the Magistrate accord undue weight to what was stated in those authorities. Accordingly, the sentence imposed by the court *a quo* must be and is confirmed by this Court.

[39] In the result the following order is made:

1. The appeal against sentence for possession of child pornography in contravention of section 24B(1)(a) of the Films and Publications Act 65 of 1996 is dismissed.

2. The conviction of distribution of child pornography in contravention of section 24B(1)(d) of the Films and Publications Act 65 of 1996, and the sentence imposed therefor are set aside.

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9 *S v AR* 2017 (2) SACR 402 WCC at [50] – [52].
10 Note 6 above.
11 Note 5 above.

3. The appellant is ordered to submit himself to the South African Police Service, at Moffat Park Police Station or Johannesburg Central Police Station, within five calendar days from the date of this order, for the Station Commander or other officer in charge of that police station to ensure that the appellant is immediately delivered to a correctional centre to serve the sentence imposed in the Regional Court, Johannesburg on 28 March 2019.

4. The bail of the appellant pending appeal is cancelled. The bail money paid by or on behalf of the appellant is payable to the depositor.

SIDWELL AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree.

CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG