IN THE HIGH COURT OF THE REPUBLIC

OF SOUTH AFRICA, GAUTENG DIVISION

PRETORIA

CASE NUMBER: A340/19

In the matter between:

M N WAGENER Appellant

And

THE STATE Respondent

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED. ✓

02/02/2021

DATE SIGNATURE

JUDGMENT

Baloyi-Mere AJ

Introduction

1. This is an appeal by the Appellant against the sentence of ten (10) years direct imprisonment imposed by the Regional Court sitting at Brits on four charges of possession of child pornography in contravention of Section 24B(1)(a) of the Film and Publications Act 65 of 1996 as Amended ("the Act"), and on accessing of internet sites containing child pornography in terms of Section 24B(1)(c) of the same Act. The images comprised all-in-all almost 20 000 (twenty thousand) images.

2. The Appellant pleaded guilty as charged. All the counts were taken together for purposes of sentencing. An effective ten years direct imprisonment sentence was imposed. In addition the accused was declared unfit to possess a firearm.

3. The Appellant contend that the Magistrate in the *court a quo* failed, in imposing a sentence of ten years direct imprisonment, to accord sufficient weight to the Appellant's personal circumstances, and the *court a quo* accorded undue weight to the apparent lack of remorse of the Appellant, misconstrued the effect of deterrence and placed undue reliance on the reasoning of the court in **Director of Public Prosecutions Gauteng v Alberts**[1].

Summary of Facts

4. The Appellant was arraigned in the Brits Regional Court and charged with five counts of contravening the provisions of the Act. The offences in all the charges were alleged to have taken place during November 2012 – April 2015 in the area of Brits. The first count related to offences committed by the downloading of 1 669 (one thousand six hundred and sixty-nine) visual images and photos from the internet and the saving thereof on a micro SD card. In count two, the Appellant was charged with downloading 1 317 (one thousand three hundred and seventeen) visual images and photos from the internet and saving them in a Hitachi 320 hard drive. In count three, the Appellant was charged with downloading 16 400 (sixteen thousand four hundred) images and photos from the internet and storing them in a Seagate Baracuda hard drive. In count four, the Appellant was charged with downloading 37 videos and DVD's from the

[1] 2015 (2) SACR 419 GP

internet and saving them in a Seagate Baracuda hard drive. In count five, the Appellant was charged with visiting 335 websites on his Lenovo computer, which websites were of naked children and child pornography. The Appellant pleaded guilty to all five charges.

5. In mitigation of the Appellant's sentence, a Clinical Psychological Forensic report was submitted to the court authored by Dr Johnathan Geoffrey Scholtz a Clinical Psychologist. I will summarize the conclusions and recommendations of Dr Scholtz in the next few paragraphs.

6. Dr Scholtz dealt with the personal circumstances of the Appellant, in that he is a first time offender, 52 years old, has a support base in his nuclear family, has been financially impacted by the case, became addicted to pornography over a period of time which process was fuelled by boredom, social isolation, loneliness and the abuse of alcohol which was at that time up to a bottle of whiskey per day. He also indicated that the Appellant has a depressive disorder for which he has been undergoing treatment since 2012. Dr Scholtz further indicated that pornography, substance, gambling, food, sex or intense exercise often become a form of self-medication for depressive feelings and/or a sense of loneliness and meaninglessness, conditions that are both present in the life of the Appellant.

7. The Appellant also indicated concern when confronted with the fact that his actions might damage children because it creates a market for child pornography. Dr Scholtz observed that the Appellant was genuinely remorseful and fearful that he might inadvertently damage children. Dr Scholtz further observed that these observances bode well for personal rehabilitation.

8. The Appellant has taken responsibility for his actions although he explained the role that alcohol abuse, boredom and depression might have played in his life but he also accepted that he has only himself to blame. He declared himself willing and desirous of rehabilitation and change. It is also stated in the report that the Appellant understand the destructive role that alcohol and pornography have played in his life. He also indicated that he is desirous and willing to be rehabilitated for his addiction. He also stated his desire and willingness to undergo psychotherapy and other programs of rehabilitation.

9. Dr Scholtz concluded that the Appellant is not anti-social or psychopathic. In his report, Dr Scholtz dealt with recidivism rates amongst psychopathic and non-psychopathic prisoners and indicated that the psychopathic offenders are up to three times more likely to reoffend than the latter within a period of just one year. The doctor further indicated that the Appellant is not psychopathic.

10. Dr Scholtz further observed that the Appellant does not pose a risk of sexual offending. Based on the perspective gained by considering the characteristics and typologies of paedophiles in the literature, Dr Scholtz concludes that the Appellant cannot be considered to be paedophilic.

11. Dr Scholtz found, in relation to the Appellant's clinical condition and general mental health, that the Appellant has major depressive disorder, abuses alcohol and does not meet the criteria for a diagnosis of paedophilia. Currently pornography addiction is not classified as a mental disorder and the probability of neurological damage should also be considered in relation to the Appellant. Dr Scholtz further indicated that it has been established that executive functioning is adversely affected with long term abuse of substance. He further

indicated that executive function include self-monitoring and self-regulation. Frontal dysfunction would include impulsivity, compromised judgment, deficient self-awareness and inability to shift behaviour or attitude.

12. The Appellant, in his heads of argument, relied on the ***Alberts*** case and ***Beale v S***[2] **("Beale").** Both these cases are distinguishable from the case at hand. In the **Alberts** case the Appellant there had also downloaded and visited child pornography sites and pleaded guilty to contravention of Section 27(1)(9) of the Act. The distinguishing factor in that case is that the Appellant therein requested specific videos to his own preference and that preference included videos of sexual acts committed on children between the ages of nine (9) and twelve (12) and that he also wanted the children to look happy. The Appellant in the present case only downloaded the images and photos from the internet, stored and watched them. It was never argued that at any stage he requested videos and images to any particular preference. The court sentenced **Alberts** to five (5) years direct imprisonment which sentence was set aside in the Appeal Court and substituted with a sentence of ten (10) years direct imprisonment and that the Respondent's name be recorded in the register of sex offenders.

13. The **Beale** matter is also distinguishable from the present case. In the **Beale** matter, the Appellant, who engaged in what is termed "peer to peer file sharing of child pornography images", also pleaded guilty to contravention of Section 24B(1)(a) read with Sections 1 and 30B of the Act as amended. In paragraph 29 of the judgment the Court held as follows:

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[2] (A283/18)[2019] ZAWCH C 55 (03 May 2019)

"[29] The expert called by appellant recorded in his report that the appellant scored "extremely high" on the relevant test, supporting his impression that he has "strong anti-social personality traits" and that literature reports that such a personality type has a prominent risk factor for offending as well as recidivism for sexual offences. Colonel Stollarz noted in her report that individuals with this disorder are characterised by a pattern of disregard for and the violation of the rights of others, disregarding the feelings of others and that they rationalize their behaviour and show little remorse."

14. The Appellant in that case was sentenced to fifteen (15) years imprisonment in the Regional Court, George in the Western Cape. The appeal was heard by a full court and the sentence was set aside and replaced by a sentence of ten (10) years imprisonment and the remainder of the sentence imposed by the court a quo remained in place. That case is distinguishable from the present case in that the Appellant in that case acted after downloading the child pornography images and photos by sharing it in what is called "peer to peer file sharing" and also the psychologist found him to have paedophilic tendencies. In the present case the Appellant did not share the images with anyone and the psychologist who interviewed and wrote a report on his psychological state did not find him to be paedophilic in that he might harm children in future.

15. Although these two cases are, as indicated above, distinguishable from the present case, it is apposite to consider what was held in the **Beale** case at paragraph 15:

"[15] We accept that the Appellant was not convicted of manufacturing child pornography or of molesting children, but the argument that an accused only

possessed disturbing and disgusting images as a mitigating factor, ignores the reality that possession of the prohibited material creates a trading platform or market of this illegal "industry". Every image contained in a child pornography reflect abhorrent prohibited sexual conduct, often including violence, involving children. Every image reflects the sexual violation of and the impairment of the dignity of the child, every time that is viewed. As argued, children, including babies and toddlers, are the unidentified, voiceless victims of child pornography. It cannot be disputed that these victims will bear the emotional scars of the abuse for life."

16. This quotation still applies to the present case in that despite the fact that the children in the images and videos were never identified, still children somewhere out there have suffered this physical and emotional abuse and they are going to have to live, if still alive, with their emotional and physical scars for the rest of their lives.

17. Sentences in comparable matters are merely a guide to sentencing and the circumstances and facts in every case differ. Previous sentences in comparable matters are not to be taken as sentencing straightjackets.

18. The SCA has held in numerous cases, ***S v Prinsloo and Others*** [3] and ***Gcaza v S***[4] that a court on appeal will only interfere with a sentence if a trial court misdirected itself in passing a sentence, and even misdirection alone does not suffice for a court to interfere on appeal. The courts have held further in ***State***

[3] 2016 (2) SACR 25(SCA)
[4] (1400/2016) [2017] ZASCA 92 (09 June 2017)

v Malgas[5] that the Appeal Court may be justified in interfering in the sentence imposed if the disparity between the sentence of the trial court and the sentence which the Appellate Court would have imposed can be described as shocking, startling or disturbingly inappropriate. The courts have also held in **Prinsloo** *supra* that the trial court's finding of fact and credibility are presumed to be correct, because the trial court has had the advantage of seeing and hearing the witnesses and it is in the best position to tell whether the witnesses were telling lies or not. In every appeal against sentence whether imposed by the Magistrate or a Judge, the court hearing the appeal should be guided by the principle that the punishment is pre-eminently a matter for the discretion of the trial court and should be careful not to erode such discretion hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised. The test is whether the sentence is vitiated by irregularity or misdirection or disturbingly inappropriate[6].

19. In coming to our conclusion, we have considered a number of factors including the charges against the Appellant, the personal circumstances of the Appellant. We have also considered the facts and sentences imposed in comparable matters, the seriousness of the crimes, the purpose of sentencing and the balancing of mitigating and aggravating circumstances. We have also taken into consideration the caution that was given in **Malgas** *supra* that:

"[12] ... a court exercising appellate jurisdiction cannot, in the absence of the material misdirection by the trial court, approach the question of sentence as if

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[5] 2001 (1) SACR 469 (SCA)
[6] See also S v Sadler [2000] 2 All SA 121 (A).

it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. ... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling", or "disturbingly inappropriate"."

20. The other factor that has been taken into consideration is the forensic report prepared by the Clinical Psychologist, Dr Scholtz. In his report, Dr Scholtz did not find the Appellant to have paedophilic tendencies and therefore found that he does not pose a danger to society. Considering all the mitigating factors cumulatively, we believe that an effective sentence of five (5) years would be more appropriate and proportionate than the ten (10) years direct imprisonment imposed by the *court a quo*. The disparity in the sentences entitles this Court to interfere.

21. Accordingly we order as follows:

1. The appeal against sentence succeeds.

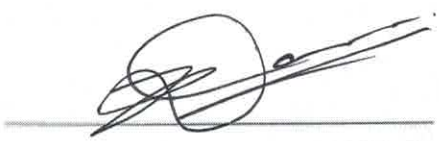
2. The sentence of ten (10) years imprisonment is set aside and replaced with the following: *The accused is sentenced to eight years imprisonment of which three years is suspended on condition that the appellant not be found guilty of contravention of the same crimes as in this matter, committed during the period of suspension*

3. The remainder of the sentence of the Magistrate will remain in place.

EM Baloyi-Mere

Acting Judge of the High Court

I agree and it is so ordered.



N Davis

Judge of the High Court

Date of hearing: 25 January 2021

Date of Judgment: 2 February 2021

Counsel for Appellant:	Adv J Moller
Counsel for the State:	Adv J J Kotze