**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**Not Reportable**

Case no: AR566/18

In the matter between:

**NICOLAAS JOHANNES CHRISTOFFEL VAN HELSDINGEN** **APPELLANT**

and

**THE STATE** **RESPONDENT**

**Coram:** KOEN et NKOSI JJ

**Heard**: 7 AUGUST 2020

**Delivered**: 17 AUGUST 2020

## ORDER

**On appeal from:** Regional Court, Newcastle (Mr T.C.L Colditz, sitting as court of first instance)

1. The appeal against the appellant's conviction on counts 1, 2, 6, 7, 29, 30 and 31 to 380 and the sentences imposed is upheld.
2. The part of the order of the Regional Court, Newcastle, convicting the appellant of those counts is set aside and is substituted with the following:
   'The accused is found not guilty and is discharged on counts 1, 2, 6, 7, 29, 30 and 31 to 380'.
3. The Registrar is directed to send a copy of this order and of the evidence of AW from page 54 to 70 in volume 4 of the record, drawing specific attention to the allegations by AW concerning Ms C[….] R[….] at pages 63 to 70, to the Head of the Department of Social Welfare, Newcastle, the Social Worker attached to the M[….] at Newcastle, and the Head of the M[….], Newcastle, for their consideration, investigation, and such further attention and action as may be required. Receipt of a copy of this order and the above parts of the record must be confirmed by the Registrar with all three addressees.

## JUDGMENT

**Koen J (Nkosi J concurring)**

[1] The appellant was charged with 1 225 counts of contravening various provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[1] (the Act)

[1] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

and the Films and Publications Act[2] in the Regional Court, at Newcastle. He was convicted of the following counts:

Counts 1 and 2:

Contravening s 15(1) of the Act – having consensual sexual intercourse with a complainant who was under the age of 16 but older than 12 years.

Counts 6 and 7:

Contravening s 18(2)*(a)* of the Act – encouraging, enabling, instructing or persuading a child to perform a sexual act.

Counts 29 and 30:

Contravening s 21(3) read with s 55*(c)* of the Act – aiding abetting, inducing or inciting, instigating, instructing, commanding, counselling or procuring a child to commit a sexual offence by taking nude photographs of other children.

Counts 31 to 380:

Contravening s 24B(1)*(a)* of the Films and Publications Act – possession of images that contained child pornography.

He was acquitted of all the remaining counts.

[2] Counts 1 and 2, counts 6, 7, 29 and 30, and counts 31 to 380 were in each instance taken together for the purpose of sentence and the appellant was in respect of each such combination sentenced to a period of imprisonment of 10 tears. The sentences on counts 1, 2, 6, 7, 29 and 30 and 5 years of the sentence in respect of counts 31 to 380 were ordered to be served concurrently, resulting in an effective period of imprisonment of 15 years.

[3] The appellant appeals against his aforesaid convictions and the sentences imposed with the leave of the trial court. No cross appeal was lodged by the State in respect of the appellant's acquittal on the remaining counts.

[4] The counts on which he was convicted are considered *seriatim*.

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[2] Films and Publications Amendment Act 65 of 1996.

**Counts 1 and 2**

[5] The charge sheet alleged that the appellant contravened s 15(1) of the Act in that during or about May 2014 and at Newcastle he unlawfully and intentionally had consensual sexual intercourse with AW,[3] who was under the age of 16 but older than 12 years, being 13 years old.

[6] Section 15(1) of the Act provides:

'Acts of consensual sexual penetration with certain children (statutory rape) – (1) A person ("A") who commits an act of sexual penetration with a child ("B") who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless A, at the time of the alleged commission of such an act, was

*(a)* 12 years of age or older but under the age of 16 years; or

*(b)* either 16 or 17 years of age and the age difference between A and B was not more than two years.'

Section 56(2) of the Act provides:

'Whenever an accused person is charged with an offence under

*(a)* section 15 or 16, it is, subject to subsection (3), a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older; . . .'

[7] Although s 15(1) does not refer to intention, the charge sheet alleged that the appellant had acted intentionally. Intention is undoubtedly an essential element of the offence. Snyman in his book *Criminal Law*[4] states that:

'It is submitted that, although intention is not specifically mentioned in the definition as an element of the crime, it is nevertheless impliedly required in the words "and the accused person reasonably believed that the child was 16 years or older" in section 56(2)*(a)*'.

The learned author continues:[5]

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[3] The initials of the children are used, following the decision of the Constitutional Court in *Centre for Child Law and others v Media 24 Limited and others* [2019] ZACC 46; 2020 (1) SACR 469 (CC); 2020 (3) BCLR 245 (CC) prohibiting reference to their names, as they are minors.

[4] C.R. Snyman *Criminal Law* 6th ed (2014) at 386.

[5] Ibid at 387.

'Furthermore, much depends upon how the courts will interpret the word "deceive" as it appears in the wording of the first special defence in section 56(2)*(a)*. A wide interpretation of this word is preferable, because such an interpretation will enable the courts to reach a conclusion largely compatible with the general principles applying to intention, and more particularly of X's knowledge. By a wide interpretation is meant an interpretation which does not limit the word "deception" to active, express deception, but which includes implied deception, that is, deception
by conduct. It is also submitted that "deceive" ought to be interpreted in such a way that Y need not necessarily consciously or intentionally have deceived X.'

[8] It was common cause in respect of these two counts that the appellant and AW had consensual sexual intercourse at the appellant's home and the home of a Mrs 'T[….] C[….]' R[….] (a lady AW apparently used to stay with during some weekends when she was away from the children's home where she ordinarily resided),[6] and that AW was born on 26 July 2000, which would mean that she was 14 years and 3 months (not 13 years as the charge sheet alleged) old at the time that the appellant had sexual intercourse with her on 2 October 2014. In the appellant's section 115 statement he alleged that he 'was not aware that she was under the age of sixteen'. This is accordingly the only issue for determination in respect of counts 1 and 2. On the authority of Snyman above, the question more specifically, is whether the State discharged the onus of proving beyond a reasonable doubt that the appellant could not reasonably have believed that AW was older than 16 years at the time the sexual intercourse occurred.

[9] The evidence of AW included inter alia the following: the appellant 'went out' with her second youngest sister, A[….], since 2009 when she (AW) would have been about 9, almost 10, years old, thus that the appellant knew her from then, that is for some 5 years by the time they first had consensual sexual intercourse; they started like 'friends

[6] AW testified that she and the appellant also had sexual intercourse on a third occasion on the floor of the garage at the home of Mrs Ramos, the latter having been suggested as a venue by Mrs Ramos, but this was denied by the appellant. Somewhat surprisingly, if this alleged third instance of sexual intercourse had been AW's version throughout, the State did not charge the appellant with a third count of contravening s 15, although the appellant was charged with virtually every other conceivable transgression possible.

with benefits'; she told the appellant her age; the appellant felt that she was too young for him; she placed a post on her Facebook page that she only wanted boyfriends, sex and money; aunty C[….] knew she (AW) was 'addicted to sex' and took naked photographs of her in the bath and other explicit photographs on a bed; these photographs were forwarded by aunty C[….] to AW and she (AW) in turn forwarded them to the appellant; the appellant sent AW a photograph showing his penis; she told the appellant she had a boyfriend; she told the appellant that she was once engaged; she was pregnant and required an abortion otherwise her baby would be taken away; she sent the appellant a photo of her child, which she said by then was able to walk, with the child's father, S[….] N[….].

[10] During cross examination AW confirmed the following: her Facebook page recorded that she is addicted to sex and that she gets people into trouble and tells lies; she has a friend, B[….] v[….] (who is 25 years old); from age 13 she conducted herself like a grown up and as a person older than her age; she did not dispute the appellant's version that he first met her family because of his relationship with her sister in 2012/2013 (when she would have been 12 to 13 years old, and not in 2009 as she had testified initially); she and the appellant did not know each other well before 28 March 2014; she visits her boyfriend at night and on 6 September 2012 she was with her fiancé; she was no longer a virgin; she was pregnant; she had two years left at school, a trade school, Tugela (where learners may apparently remain until age 21); she had a baby which was already walking with her former boyfriend Sheldon Nel; she agreed that she looked a lot older than other girls of 15 years (her age at the time she testified); she arrived at court with her hair blow dried, with earrings, wearing make-up, lipstick and her nails painted; she agreed that at the time she and the appellant had intercourse people could easily have believed that she was 18 or 19 years old; and their first consensual sexual intercourse occurred after they had arranged to meet and not because this was set up by the appellant.

[11] The appellant in his testimony added: he did not know that AW was under the age of 16 years; he did not ask her how old she was and she had not told him; on

Facebook she mentioned she had two years left in school, which, on his calculation, would place her in grade 11 and make her approximately 17 years old.

[12] The learned magistrate did not record any personal observation as to the appearance of AW. Presumably, if his observations of her did not accord with her concession that she looked a lot older than other girls of 15 years at the time when she testified, he would have said so. He concluded that although AW was willing to lie about inter alia the fact that she was pregnant, and other matters, she was 'an honest witness' and that 'quite frankly' she had no choice but to tell the truth as '(h)er whole life was laid bare in the messages that were produced in court'. As regards the appellant, the learned magistrate said that to describe him as a pathetic witness 'would be complimenting him'. The magistrate said that he did not believe the appellant when he said he did not know AW's age; the appellant knew her from 'before she turned 14'; the appellant's explanation that it would be rude to ask her age was ridiculous; and that the appellant knew her age.

[13] The trial court obviously had the benefit of observing the appellant and AW, a benefit this court does not have.[7] An appeal court should not lightly interfere with findings of fact made by a trial court.[8] But that benefit should not be overemphasized. On a reading of all the evidence the learned magistrate's assessment of the credibility of the appellant in regard to the evidence on some of the other counts, is justified. But that does not necessarily mean that the appellant was necessarily mendacious in regard to all his evidence, particularly that he did not know the age of AW.

[14] The conclusion of the learned magistrate that AW was honest, is open to serious doubt. The court did not comment on any specific aspect of her demeanour. It correctly observed that in many, indeed most, respects she was a single witness and that a cautionary approach had to be adopted in regard to her evidence.

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[7] *R v Dhlumayo and another* 1948 (2) SA 677 (A) at 706.
[8] *S v Francis* 1991 (1) SACR 198 (A); *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie & Others* 2003 (1) SA 11 (SCA).

[15] The trial court however failed to have any, alternatively sufficient, regard to the following: AW was an accomplice to some of the transgressions which resulted in her initially being a co-accused in the matter. The charges were then withdrawn against her. She thereafter testified for the State against the appellant. She is a self-confessed liar on many issues – that is apparent from the record. Her evidence is unsatisfactory in a number of respects material to the charge in counts 1 and 2. These included when she first met the appellant (2009 versus 2012/2013), that they had the sexual intercourse in May 2014 (as per the charge sheet, when she would still have been 13, hence younger and might have looked younger, as opposed to October 2014 when she was 14 years and three months old[9]), that she and the appellant had consensual intercourse on three occasions (which would have resulted in three counts if that was her version consistently throughout, yet the appellant was charged with only two counts); that on her own admission she stated on her Facebook page that she likes to use men for sex and money, and to have them charged with molesting, while she pleaded innocence.

[16] On those facts considerably more circumspection had to be applied in deciding whether to accept her evidence as honest. In particular one must guard against being influenced by AW's vulnerability and the extent to which she has been failed by society. One is reminded of the caution sounded by Yekiso J in *S v K*[10] that:

'But I have said it in the past, and I am saying it once again, the vulnerability of this section of our society should not be allowed to be a substitute for proof beyond reasonable doubt or to cloud the threshold requirement of proof beyond reasonable doubt. Judicial officers ought to and are expected to evaluate evidence properly and objectively as a whole and against all probabilities in order to arrive at a just and fair conclusion. Anything falling short of this test is nothing other than miscarriage of justice.'

[17] Proceeding on the assumption, as the learned magistrate did, that because the appellant knew AW's father and sisters he necessarily knew her age, ignores the fact

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[9] The allegation in the charge sheet was that the consensual intercourse occurred in May 2014, which allegation could only have been made on information obtained from her and would carry the implication that she was even younger, not yet 14 years old, whereas the evidence established that it occurred in October 2014, some six months later.

[10] *S v K* 2008 (1) SACR 84 (C) para 6.

that she was already 12 years old, yet already physically well-developed, when the appellant first met her. Similarly, the fact that she was accommodated in a children's home (from some time after her mother's death in 2014) is not inconsistent with her being reasonably possibly over 16 years, as persons above that age can still be accommodated at the children's home.

[18] Not asking AW's age is also not necessarily improbable where AW clearly deceived the appellant in so many respects and where her appearance and conduct was that of someone older than 16 years.

[19] The issue ultimately, accepting as we must that the evidence of AW and the appellant is contradictory, inconclusive and unreliable, is whether in all the circumstances it could be said that the appellant subjectively was aware beyond a reasonable doubt that AW was under the age of 16 years. Plainly, the circumstances which a court may have regard to in answering that question do not constitute a *numerus clausus*. In *S v M*[11] the court, in circumstances where the accused had not been informed of the complainant's age but instead relied on her appearance and conduct to infer that she was older than 16 years, had regard to the following in deciding whether the accused was deceived or misled as to her age: she made love as an adult; she was mature in her appearance; her friends were 17 to 18 years old; the accused would usually see her in casual clothing wearing make-up; they shared alcoholic drinks at the local clubhouse; schoolchildren in standard 5 were often 15 to 16 years old and the relationship began at the end of the complainant's standard 5 year; the complainant never told the appellant how old she was; and she did not deny that she gave the impression that she was older than 16.

[20] AW on the evidence at the relevant time looked older than 14 years, and closer to 18 or 19 years. She told the appellant that she was no longer a virgin; she said she had a baby; she spent evenings with her fiancé; her password on her phone was 'fuck you'; she said she only had two years of school left (which might suggest that she was

[11] *S v M* 1997 (2) SACR 340 (O).

in grade 11); she conducted herself like a grown up; she had the appearance and physical development of someone considerably older than her actual age; she looked much older than 15 years (being her age when she testified in court); she was wearing make-up and was groomed and clothed in a way which could easily cause one to believe she was 18 or 19 years old at the time she had sexual intercourse with the appellant; she admitted, contrary to her earlier testimony, that the appellant knew her only from 2012 when she was 12 years old and already physically developed, given that she was a fast developer; her 'relationship' with the appellant only started around 27 to 28 March 2014 when she was almost 14 years old and they started communicating on Facebook; in a general Facebook post she admitted looking for what older people had and that she wanted boyfriends, sex and money; she admitted to telling lies in order to achieve this; she made deceitful posts on Facebook which would give the impression that she conducted herself as an adult; she visited her boyfriend regularly in the evenings and would be accompanying him to the Oval track, she was with her fiancé on 6 September 2014, she was pregnant; she had 2 years left at school; she had a baby and her baby was already walking; and she asked the appellant to take her with him when he goes shopping.

[21] The overall impression one is left with is that AW was a physically well-developed young woman with a physical appearance and a professed life experience well beyond her true age, and that she conducted herself as would a young woman older than 16 years of age.

[22] The appellant should have been on his guard, because AW resided at a children's home (a fact he initially falsely denied being aware of), and can be criticized in that respect. His failure to make further enquiries, does not however mean that he could not have been deceived as to her age and reasonably believed her to be older than 16 years. I have reservations and am left with a distinct feeling of unease as to whether it can be said that such a failure would negative the deceitful conduct of AW.

[23] Ultimately, the onus is decisive and the appellant must be afforded the benefit of any reasonable doubt. The trial court should rather have erred on the side of the appellant in deciding whether his version might be reasonably possibly true. I am disposed to concluding that the trial court, on a conspectus of all the evidence, failed to afford the appellant the benefit of the doubt. Accordingly his conviction and the resultant sentence in respect of counts 1 and 2 fall to be set aside.

**Counts 6 and 7, and counts 29 and 30**

[24] These counts are all dependant on the contents of WhatsApp exchanges between AW and the appellant, with some photographs, a video and voice notes attached. The evidence in this regard need not be set out in any great detail in this judgment in view of the technical defects in the charges and the conclusions I have reached.

[25] In this regard it is important to be reminded of the provisions of s 84 of the Criminal Procedure Act[12] which provide:

'Essentials of charge. — (1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.'

***Counts 6 and 7 – sexual grooming***

[26] Section 18(2) of the Act under the heading, '**Sexual grooming of children**', provides

'A person ("A") who

[12] Criminal Procedure Act 51 of 1977.

*(a)* supplies, exposes or displays to a child complainant ("B")

(i) an article which is intended to be used in the performance of a sexual act:

(ii) child pornography or pornography; or

(iii) a publication or film,

with the intention to encourage, enable, instruct or persuade B to perform a sexual act.'

[27] The charge sheet alleged that the appellant contravened s 18(2)*(a)* of the Act by encouraging, enabling, instructing or persuading a child to perform a sexual act, by unlawfully and intentionally engaging the services of two child complainants, MW and AL respectively, at Newcastle on or about 20 January 2015 for 'child pornography or pornography **to wit photos of explicit sexual intercourse sent via WhatsApp**' (my emphasis).

[28] Of the two young children, only MW testified. She never stated that she and AL were shown photographs of or were involved in explicit sexual intercourse – only that AW showed her and AL a video of a boy and a girl (either the girl was naked, or both were naked) 'besig om te vry' and 'toe het hulle bed toe gegaan'. The description that the video showed the boy and girl 'besig om te vry' does not describe 'explicit sexual conduct.' Furthermore, MW was not asked for what purpose or intention the video was shown to her and AL. AW also did not say that she showed MW and AL photographs of explicit sexual intercourse, or that what she showed them and which was sent to her via WhatsApp was shown with the intention to encourage, enable, instruct, or persuade them to commit a sexual act.

[29] There accordingly was no evidence to sustain a conviction on counts 6 and 7 and the appellant should have been acquitted of these counts.

***Counts 29 and 30***

[30] The charge sheet alleged that on or about 19 January 2015 at Newcastle, the appellant contravened s 21(3) read with s 55*(c)* of the Act by unlawfully and intentionally aiding, abetting, inducing, inciting, instigating, instructing, commanding, counselling or

procuring AW to commit a sexual offence by taking nude photographs as per his instructions of MW and AL from 'onder oop dat jy in die gatjie kan sien.'

[31] Section 21(3) of the Act under the heading **'Compelling or causing children to witness sexual offences, sexual acts or self-masturbation'** provides:

'person ("A") who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ("C") or not, compels or causes a child complainant ("B"), without the consent of B, to be in the presence of or watch A or C while he or she engages in an act of self-masturbation, is guilty of the offence of compelling or causing a child to witness self-masturbation.'

[32] The taking of a nude photograph of MW and AL obviously does not amount to self-masturbation.

[33] When this difficulty was raised with counsel, the respondent sought to rely on s 55*(c)* of the Act, which the two charges did make reference to. Section 55*(c)* of the Act under the heading '**Attempt, conspiracy, incitement or inducing another person to commit a sexual offence**' provides:

'Any person who

*(a)* attempts;

*(b)* conspires with any other person; or

*(c)* aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,

to commit a **sexual offence** in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.' (my emphasis)

[34] Section 1 of the Act defines 'sexual offence' as:

'. . . any offence in terms of Chapters 2, 3 and 4 and section 55 of this Act and any offence referred to in Chapter 2 of the Prevention and Combating of Trafficking in Persons Act, 2013, which was committed for sexual purposes'.

[35] The respondent argued specifically that s 20 of the Act, being part of chapter 3 of the Act would find application. Section 20 under the heading '**Using children for or benefitting from child pornography'** provides:

'(1) A person ("A") who unlawfully and intentionally uses a child complainant ("B"), with or without the consent of B, whether for financial or other reward, favour or compensation to B or to a third person ("C") or not

*(a)* for purposes of creating, making or producing;

*(b)* by creating, making or producing; or

*(c)* in any manner assisting to create, make or produce,

any image, publication, depiction, description or sequence in any manner whatsoever of child pornography, is guilty of the offence of using a child for child pornography'

[36] The respondent argued that the taking of a photograph from 'onder oop dat jy in die gatjie kan sien' would constitute a sexual offence as contemplated in s 20 of the Act.

[37] The charge sheet referred to s 55*(c)* having to be read with the provisions of the primary offence, namely a contravention of s 21(3), that is to include any attempt or conspiracy etc. to commit the offence in s 21(3), and not as giving rise to a primary offence. The charge, as formulated, did not refer to s 20 at all. Insofar as the narrative to the charge may suffice in terms of s 84(3) of the Criminal Procedure Act, the narrative of the charge declared that nude photographs were taken 'onder oop . . .'. It is common cause that no such photographs were taken and there was no evidence that AW ever attempted to take any such photographs. The high water mark of the State's case in that regard was that such a request was, or might have been made.

[38] Accordingly, the appellant was also entitled to be acquitted on these counts.

**Counts 31 to 380**

[39] Section 24B(1) of the Films and Publications Act, introduced by s 29 of the Films and Publications Amendment Act,[13] with effect from 14 March 2010 provides:

[13] Films and Publications Amendment Act 3 of 2009.

'Prohibition, offences and penalties on possession of films, games and publications. — (1) Any person who –

*(a)* unlawfully possesses;

*(b)* creates, produces or in any way contributes to, or assists in the creation or production of;

*(c)* imports or in any way takes steps to procure, obtain or access or in any way knowingly assists in, or facilitates the importation, procurement, obtaining or accessing of; or

*(d)* knowingly makes available, exports, broadcasts or in any way distributes or causes to be made available, exported, broadcast or distributed or assists in making available, exporting, broadcasting or distributing, any film, game or publication which contains depictions, descriptions or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children,

shall be guilty of an offence.'

[40] Section 1 of the Films and Publications Act provides:

'"child pornography" includes any image, however created, or any description of a person, real or simulated, who is or who is depicted, made to appear, look like, represented or described as being, under the age of 18 years —

(a) engaged in sexual conduct;

(b) participating in, or assisting another person to participate in, sexual conduct; or

(c) showing or describing the body, or parts of the body, or such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation'.

Sexual exploitation is not defined. Sexual conduct is defined but the definition is not relevant to this judgment and is accordingly not quoted.

[41] Two considerations arise in respect of the convictions on these counts:

(a) The charges, and hence resultant convictions, were defective because they did not identify the specific images;

(b) The State could not rely on the alleged images as they were discovered as a result of a search conducted pursuant to an unlawful search warrant.

***Were the charges sufficiently specific?***

[42] The charge sheet alleged that during January 2015 and at Newcastle, the appellant was unlawfully in possession of pictures/photos/images (the images) that amounted to child pornography. Judging by the number of counts, counts 31 to 577, and assuming that each count relates to a separate image, there would be 547 such images.

[43] The appellant's counsel recorded that '. . .the first file contained I think 557 entries, 308 of them are . . . child pornography . . . and the second file contained 42 images and all 42 images are child pornography.'

[44] The individual charges did not however identify the specific image forming the subject of each count. The learned magistrate convicted the appellant of counts 31 to 380 without identifying to which alleged pornographic image each related. Such identification is a crucial requirement, as absent clear identification, it is impossible on appeal to identify the particular image giving rise to the conviction on each of 350 separate counts (counts 31 to 380) and hence to adjudicate whether the individual convictions were correct. Each count must be capable of being linked to a particular and distinct pornographic image. The images also do not appear to have been included in the record.

***The search warrant***

[45] The alleged child pornographic images were discovered at the appellant's home as a result of a search conducted pursuant to a search warrant having been issued in terms of the provisions of s 21 of the Criminal Procedure Act. The search warrant did not comply with the prescripts outlined in amongst others *Minister of Safety and Security v Van der Merwe & Others.*[14] In particular it did not specify the offence allegedly committed and the name of the appellant.

[14] *Minister of Safety and Security v Van der Merwe & Others* 2011 ZACC 90; 2011 (5) SA 61 (CC); 2011 (9) BCLR 961 (CC); 2011 (2) SACR 301 (CC).

[46] After a trial within a trial to determine the admissibility of the search warrant the learned magistrate concluded that the warrant was invalid, but that having regard to the provisions of s 35(3) of the Constitution, it would not render the trial unfair or detrimental to the administration of justice.

[47] In S v *Malherbe*[15] it was held that the law requires strict adherence to the requirements of s 21(1)*(a)* of the Criminal Procedure Act. The Supreme Court of Appeal concluded that wrongly allowing the admission of images seized pursuant to an invalid warrant, caused or compelled the appellant to make admissions that the images were child pornography. A similar position obtained in this appeal.

[48] The State was in the circumstances not entitled to rely on the images seized and the appellant was also entitled to an acquittal on counts 31 to 380 on that basis.

**Ms R[….]**

[49] The evidence of AW as to the involvement of Ms R[….] has been referred to briefly in paragraphs 8 and 9 and footnote 6 above. Her detailed evidence appears at pages 54 to 70 of the record. The specific paragraphs which I find disturbing appear at pages 63 to 70. They are not set out in this judgment but will be apparent from a reading of those pages. If the allegations at these pages are true, then Ms R[….] should, prima facie, not be entrusted with the temporary care of children, including children from the M[….]. This is an aspect which the Head of the Department of Social Welfare, Newcastle, the Social Worker attached to the [….] at Newcastle, and the Head of the M[….], Newcastle, should consider and investigate, in order that such action may be taken as may be required. I intend directing the Registrar of this Court to request such an investigation.

**Order**

[50] The following order is granted:

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[15] *S v Malberbe* [2019] ZASCA 169; 2020 (1) SACR 227 (CC).

1. The appeal against the appellant's conviction on counts 1, 2, 6, 7, 29, 30 and 31 to 380 and the sentences imposed is upheld.
2. The order of the Regional Court, Newcastle, convicting the appellant of those counts is set aside and is substituted with the following:
   'The accused is found not guilty and is discharged on counts 1, 2,6,7,29,30 and 31 to 380'.
3. The Registrar is directed to send a copy of the evidence of AW from page 54 to 70, drawing specific attention to the allegations by AW concerning Ms C[….] R[…] at pages 63 to 70 of volume 4 of the record, to the Head of the Department of Social Welfare, Newcastle, the Social Worker attached to the M[….] at Newcastle, and the Head of the M[….], Newcastle, for their consideration, investigation, and such further attention and action as may be required. Receipt of a copy of this order and the above parts of the record must be confirmed by the Registrar with all three addressees.

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KOEN J

Appearances

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|---|---|
| For appellant: | Mr J. Howse SC |
| Instructed by: | Silvia da Silva and Associates |
| | 411 Jabu Ndlovu Street |
| | Pietermaritzburg |
| For respondent: | Ms S Senekal |
| | Director of Public Prosecutions |
| | Pietermaritzburg |