REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: A232/2013

In the matter between:

JOHANNES ADOLPH KLEINHANS **Appellant**

Versus

THE STATE **Respondent**

JUDGMENT: 13 MAY 2014

BOZALEK, J:

[1] The appellant, then a 74 year old businessman, was convicted in the Regional Court Bellville on 93 charges of contravening the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 ('*the Act*'), arising principally out of the manufacture of child pornography, as well as two related counts, and sentenced, on 29 January 2013, to 15 years imprisonment. With the leave of the magistrate he now appeals against sentence only.

[2] The appellant, who was legally represented throughout the trial, pleaded guilty to the charges and made detailed admissions in a statement in

terms of s112(2) of Act 51 of 1977 (*'the Code'*). In the course of the appellant's evidence in mitigation of sentence, however, the magistrate expressed doubt as to whether the appellant in fact admitted all the elements of the offences and, acting in terms of s113(1) of the Code, recorded a plea of not guilty thus requiring the prosecutor to proceed with the prosecution. The State then led the evidence of two of the complainants and a number of other material witnesses. At the conclusion of this evidence the appellant was convicted on all 95 counts which were comprised as follows:

Count 1:	*contravening s5(1) of the Act – sexual assault;*
Counts 2 & 3:	*contravening s7(b) of the Act – compelled sexual assault i.e. engaging in an act having the effect of sexually arousing or sexually degrading another;*
Count 4:	*contravening s18(2)(a) of the Act – relating to the sexual grooming of children by supplying, exposing or displaying to a child complainant articles with the intention to encourage the child to perform a sexual act;*
Counts 5 – 89:	*contravening s20(1) of the Act – using children for or benefitting from child pornography i.e. using a child complainant for the purposes of producing images of child pornography;*
Count 90:	*indecent assault – i.e. the touching of the complainant's vagina;*
Count 91:	*contravening s24B(1)(b) of the Films and Publications Act, 65 of 1996 by producing child pornography in the form of naked photos of a child complainant;*
Count 92:	*contravening s5(1) of the Act – sexually assaulting the child complainant by touching her breasts;*
Count 93:	*contravening s18(2)(a) – relating to the sexual grooming of children by supplying, exposing or displaying to the child*

complainant vibrators and articles intended for sexual satisfaction or intercourse and pornographic DVDs;

Count 94: *contravening s20(1) of the Act – relating to the use of children for or benefitting from child pornography by taking a photograph of the child complainant's naked breasts;*

Count 95: *a contravention similar to the last mentioned in all respects.*

[3] The bulk of the charges, counts 5 – 89, involved the taking of photographs of a complainant whom I shall refer to as *B*, a young girl aged between 13 and 14 years, whilst she was either naked or only partially clothed. The child is in a variety of poses in these photographs, many of them highly suggestive, exposing at different times her breasts, vagina, buttocks and also at times the inner portions of her vagina and anus. In certain photographs vibrators were placed on or in her vagina. Of the total of 86 photographs involved in the charges, 83 were of complainant *B,* two of complainant C and one of complainant *A,* B's older sister. In this last instance the appellant was charged with contravening section 24(B) (1)(b) of the Films and Publications Act, 65 of 1996, presumably because its equivalent provision in Act 32 of 2007 was not in existence between 2004 and 2006 when the offence was committed.

[4] In terms of the provisions of Act 105 of 1997 the appellant qualified for a minimum sentence of 10 years imprisonment on each of the 86 counts involving a contravention of section 20(1)(b) of the Act. The magistrate found the existence of substantial and compelling circumstances, however, and, taking the counts together for the purposes of sentence, imposed a sentence of 10 years imprisonment.

[5] The remaining 8 counts i.e. those of sexual assault, compelled sexual assault, sexual grooming of children, indecent assault and contravening the Films and Publication Act, involved the same three children, namely, complainants *A* and *B* and a third child, *C*, who was also aged 13 or 14 years of age when the offence was committed. The magistrate took these counts together for the purposes of sentencing and imposed an additional term of 5 years imprisonment in respect thereof.

[6] The evidence led by the State, and for all intents and purposes not disputed by the appellant, was that he befriended the complainants over a period of some five years either directly or through their families. This he accomplished in no small part by financially assisting the complainants' families or the complainants directly with various expenses such as school fees, groceries, clothing expenses, tuition and by supplying them with gifts, in one case even going so far as to purchase a motor vehicle for one of the complainants when she was older. The appellant, a well to do businessman with a number of established companies in the tourism business, fitted out an unoccupied house which he owned with gymnasium equipment, ostensibly for use by himself and the complainants in the evenings. Although the appellant may well have used the gym equipment, in truth this was just a cover for the appellant's illegal activities and to assist him in procuring the complainants to pose for the pornographic pictures. The house was fitted out with a fridge stocked with liquor which was offered to the complainants, photographic equipment and the necessary equipment to view the pornographic images and other pornographic DVDs.

[7] The evidence of a neighbour called by the State was that she had become suspicious of the regular arrival of the appellant in a motor vehicle at the house in the afternoon and evening accompanied by one or more young girls sometimes dressed in school uniform. According to the neighbour these girls frequently looked nervous. On the first occasion when she notified the police and they tried to gain entry to the house the appellant sent them away with a profanity after opening the door. On the second occasion the police gained entry through a warrant and conducted a thorough search. They found numerous pornographic DVD's, risqué magazines, vibrators, condoms and other articles of a sexual nature on the premises. The appellant was found in the house with complainant *B* who eventually told a policewoman that there were pictures of her on a memory stick. The memory stick could not be found and the appellant denied any knowledge of its whereabouts. When he was searched it was found hidden on his person and contained the images which form the subject matter of most of the charges.

[8] The appellant was granted bail pending the outcome of his trial, *inter alia,* on condition that he did not directly or indirectly communicate with state witnesses including the child complainants. His bail was withdrawn, however, after an enquiry in terms of section 66 of the Code during which it emerged that the appellant had attempted to send gifts to certain of the complainants. The result was that the appellant spent 13 months in custody before his trial was concluded.

[9] Apart from his own evidence in mitigation of sentence the appellant presented the evidence of Dr Marcelle Londt, a social worker with extensive experience of working with juvenile sex offenders. She testified that she ran a

community-based sex offender treatment program at a psychiatric clinic which offered long term assessment and intervention to court-mandated participants convicted of sexual offences. She had consulted with the appellant at some length and presented a report concluding that the appellant could be treated effectively within a community-based program for sex offenders provided that there were comprehensive conditions attached to his sentence. The conditions which she suggested related largely to the appellant's access to any minors and his engaging in internet-based social networking sites.

[10] The appellant presented evidence that he had a tendency to develop malignant skin cancer which required regular treatment from a dermatologist and, on occasion, a plastic surgeon, and that he suffered from a leaking heart valve. He also presented the evidence of a pastoral therapist who had counselled him for a period of six months between his arrest and the cancellation of his bail. The therapist, Dr Bruwer, reported that the appellant had attended 12 sessions during the course of which he had expressed an appreciation of the seriousness of his offences and expressed intense remorse. Dr Bruwer recommended that the appellant remain in such therapy. A probation officer filed a report in terms of s276A(1)(a) of the Code advising that the appellant was a suitable candidate for a sentence of correctional supervision in terms of s276(1)(h) and suggesting appropriate conditions should such a sentence be imposed.

[11] For its part the State presented evidence in aggravation of sentence in the form of victim impact statements from complainant A, from the mother of the complainant sisters A and B and from the mother of complainant C. The contents of these statements were admitted on behalf of the appellant. From

them it emerged that the older complainant, A, who was 21 years of age at the time she testified, had ultimately dealt better with the psychological consequences of her experience. Amongst the statements she made were that when she posed for the pornographic images she had felt embarrassment and shock and burdened by a secret that she could not share with her girlfriends. She described herself as *'almost over it'* but stated that she would never forgive the appellant or forget what he had done. She added, however, that her younger sister, complainant B, continued to *'hurt herself'* as a result of what had happened, and had made several suicide attempts. The mother of complainants A and B also reported at least two suicide attempts by her younger daughter, B as well as the fact that she now suffered from depression and her schoolwork had also suffered badly. The mother of complainant C noted that her daughter had become withdrawn and quick to anger.

[12] In short these victim impact statements, as well as the evidence of the complainants A and B, clearly established that the effects of the activities into which the appellant had lured his young victims had caused them psychological trauma and scarring, most particularly in the case of complainant B, the most recent and youngest victim of the appellant. The State also presented a pre-sentencing report compiled by Dr Marina Genis, a clinical psychologist in the employ of the South African Police Services, based on her perusal of the case docket, including the statements and charge sheet, the appellant's detailed guilty plea, the record of the extensive bail application and the report of the appellant's pastoral therapist. The appellant refused to allow Dr Genis to interview him but the contents of her report were admitted on his behalf.

[13] Dr Genis described the process of the sexual grooming of children in general and, in particular, how the appellant had groomed his victims and in this way built the children's trust. He had started with what could be perceived as a non-sexual touching when helping them on the gym equipment. She detailed how he had used gifts, both to the victims and to their families, as a form of psychological manipulation. This included the appellant's use of a very expensive gold chain and diamond which one or more of the children had used as a prop in the photographs and which he had promised such child or children could have at some later stage. Dr Genis concluded that the appellant could be diagnosed with traits of paedophilia and that he was well aware of the wrongfulness of his behaviour but that this had not deterred him from creating opportunities to engage and interact with his child victims in a sexual manner. Based on this and other information it was Captain Genis' conclusion that the appellant remained at risk for sexual re-offending. She recommended that as part of his sentence the appellant be referred for a treatment program specifically designed for sex offenders who target children.

[14] In sentencing the appellant the magistrate described his offences as *'despicable, disgraceful and disgusting'* adding that he had severely exploited these young women, degraded them and stripped them of all dignity. The magistrate found further that the appellant had *'destroyed the lives'* of the three young women in question and had taken away their youth and the future that they may have had. She noted that the appellant had commenced his offences with complainant *A* when she was 13 years old but that after she had rejected him as she grew older he had turned to her younger sister. She observed that the bail enquiry had revealed that there were other young girls involved. The appellant had given their names to the magistrate but explained

that they would not testify in court because their parents did not want to put them through that process. She noted that the appellant's own witness, Dr Londt, had testified that he experienced difficulties with perceiving his offences as harmful compared with other sexual offences. She stated, furthermore, that Dr Londt testified that there were no guarantees for the appellant's recovery even if he attended her extensive rehabilitation program and also that it was not possible for him to be monitored 24 hours a day. The magistrate quoted from the report of Captain Genis who expressed the view that, in general, the prospects of rehabilitation of sexual offenders are poor or even non-existent and that the main aim of treatment in such cases was to prevent further abuse against children rather than changing the offenders sexual orientation towards children. The magistrate stated that although the appellant needed to attend a sexual offences program such programs existed in prison.

[15] The magistrate also expressed her reservations about the remorse which the appellant had articulated and her doubt as to whether the complainants would ever be able to recover, live normal lives or raise children in a normal environment. She found that substantial and compelling circumstances were present which justified a deviation from the minimum sentence applicable on each count. The magistrate concluded, however, that a sentence of correctional supervision was not appropriate because the chances of the appellant being rehabilitated as a sexual offender were not good and that there were as a result no guarantees the appellant, even if he attended an appropriate community-based program, would not re-offend.

[16] Besides the effective sentence of 15 years imprisonment the magistrate ordered that the appellant's name be recorded in the Sexual Offences Register. Finally, after a perfunctory enquiry, she declared the appellant unfit to possess a firearm

GROUNDS OF APPEAL

[17] On appeal it was contended that the magistrate had committed a variety of misdirections; principally, that she had overemphasized the seriousness of the offences and the community's disapproval thereof and had failed to find a balance between these interests and the appellant's personal circumstances. It was further contended that the magistrate had misdirected herself in various respects including the following: in failing to give sufficient weight to the rehabilitative aspect of sentence, in failing to accept the evidence of Dr Londt that the appellant was a suitable candidate for a community-orientated program for sexual offenders, in taking into account that there were more victims of the appellant's sexual predations than merely the complainants before the court and in regarding this as an aggravating factor for sentence purposes, in not approaching the content of the victim impact reports with greater caution given the lack of medical expert or independent evidence in this regard, in finding that long-term imprisonment as opposed to a sentence in terms of s276(1)(h) or (i) of the Code was the appropriate sentence for the appellant and finally, in the absence of any reasons, finding that the appellant was unfit to possess a firearm.

[18] Overall it was contended that the sentence fell to be set aside by virtue of one or more of these misdirections and, in any event, on the basis that it induced a sense of shock.

DISCUSSION

[19] As appears from earlier references, some of the observations in the magistrate's judgment on sentence were expressed in exaggerated terms. Given the stark nature of many of the pornographic images and the youthfulness of the victims strong feelings of outrage are understandable but even in such circumstances presiding officers must take care not to sentence in high emotion or anger lest this cloud their judgment[1]. Although the victim impact reports revealed some very disturbing consequences for the complainants, particularly complainant B, they were too sketchy to justify a finding that the appellant had *'destroyed the lives'* of the complainants or '*taken away the future they may have had'*. The testimony of complainant A alone, given six or seven years after her involvement with the appellant ended, suggested that these predictions would not necessarily eventuate.

[20] It is also evident that although the magistrate purported to take into account various personal circumstances in favour of the appellant she appeared to simultaneously discount a number of them. Thus, for example, she noted that although the appellant had already been in custody for 13 months this had been of his own making in that he had interfered with state witnesses and had his bail revoked. Noting that the appellant had various medical problems and still needed regular medical attention, the magistrate remarked that it was not uncommon that someone of the appellant's age would need medical attention.

[21] Notwithstanding the seriousness of the appellant's offences, a subject to which I shall return, as well as their sheer number, there were several

[1] As Schreiner JA stated in R v Karg 1961 (1) 231 (AD), albeit in the context of the role of retribution in sentence: 'Naturally, righteous anger should not becloud judgment' at 236 (B)

weighty mitigating factors in favour of the appellant. These included the fact that he pleaded guilty and made wide-ranging admissions, the period he had spent in prison awaiting trial, his age and health problems, his prior unblemished record, his apparent remorse and the public shaming he had undergone as a result of his arrest, imprisonment and conviction on these charges. Of these factors perhaps the weightiest was the fact that the appellant was, at the time that he was sentenced, 74 years of age. Having regard to all these factors including, most notably, his age, the sentence of 15 years direct imprisonment undoubtedly induces a sense of shock and, for this reason alone, falls to be set aside. Leaving aside the possibility of parole, the sentence imposed envisages a man in his late eighties being incarcerated for sexual offences none of which involve any significant element of physical violence or injury. On whatever view one takes of the seriousness of the appellant's offences, this would be neither a realistic nor a humane sentence.

[22] In short, the disparity between the sentence which the magistrate imposed and the sentence this Court would have imposed had it been the trial court is so marked that it can properly be described as *'shocking'* or *'disturbingly inappropriate'*.[2] In the circumstances we are at large to sentence afresh and there is no need to consider whether the various misdirections for which the appellant contends serve to vitiate the magistrate's exercise of her sentencing discretion.

AN APPROPRIATE SENTENCE

[23] The question which arises is what would be an appropriate sentence for the appellant. Mr Grobbelaar, for the appellant, argued, in the first place,

[2] See in this regard the restatement by Marais JA of the test for an appeal court's interference in the sentence of a trial court in *S v Malgas* 2001 (1) SACR 469 (SCA) at 478 D – G.

for a non-custodial sentence of correctional supervision in terms of s276(1)(h) of the Code or, alternatively, a sentence in terms of s276(1)(i) which would take into account the period of imprisonment already served by the appellant. He argued that any non-custodial sentence could be made conditional on the appellant attending the community-based program for sexual offenders run by Dr Londt coupled with other mechanisms to ensure that the appellant would not relapse into the commission of similar offences. He argued further that certain of the offences could be appropriately sentenced by way of a suspended sentence. Ms Kortje, on behalf of the State, supported the existing sentence unreservedly but contended that, should the Court interfere with sentence, a non-custodial sentence would be entirely inappropriate.

[24] In pressing for a non-custodial sentence appellant's counsel relied principally on *S v De Klerk*[3] and the unreported decision of this Court in *S v Appleton*[4]. It needs first be said that the circumstances in those two matters were quite different from those in the present not least in that they concerned mainly instances of indecent assault and did not deal with contraventions of Act 32 of 2007 for which minimum penalties were laid down. Furthermore, whilst consistency in sentencing is clearly an ideal which should be striven after, there is a limit to the value that can be gained from the exercise of trying to match the facts of one case to another in order to find an appropriate sentence. As was stated by Nicholas AJA in *S v Fraser*[5]:

> *'Decided cases dealing with sentence may be of value also as providing guidelines for the trial court's exercise of discretion … and they sometimes provide useful guidance where they show a succession of punishments imposed for a particular type of crime … but it is an idle exercise to match the colours of the case at hand and the colours of other cases with the object of*

[3] 2010 (2) SACR 40 (KZP)
[4] Case no A360/2011, 20 December 2011
[5] 1987 (2) 859 (AD) at 863 C – D

arriving at an appropriate sentence. "Each case should be dealt with on its own facts, connected with the crime and the criminal".'

[25] In *S v De Klerk* (supra), the Court imposed a sentence of three years correctional supervision on the appellant who had been convicted of three counts of indecent assault on sisters aged 6, 7 and 11 years old. In arriving at an appropriate sentence the Court conducted a thorough and useful review of sentences in similar matters. What emerges from these and other cases such as *S v Coetzee*[6], is that although the courts will look favourably at non-custodial sentences in cases of indecent assault involving juvenile victims, where the circumstances are sufficiently serious they will not hesitate to impose a custodial sentence.

[26] More relevant to the present matter, by reason of the similar facts is the unreported case of S v Stevens[7] in which the appellant was convicted of two counts of indecently assaulting two 5 year old girls and 8 counts of contravening section 27(1)(a)(i) and (ii) of the Films and Publications Act 65 of 1996 i.e. creating and possession of child pornography. The appellant removed the undergarments of the children while they slept in order to take photographs. He took some other photographs with more active participation on their part, in certain instances placing his finger on the vagina of the young girls. Some 71 photographs were taken but used by the appellant only for his own sexual gratification. There was no evidence that the girls suffered any physical harm nor had they showed any serious signs of psychological harm by the time of trial. The regional magistrate sentenced the appellant to a total of eight years imprisonment of which three years were suspended. On appeal

[6] 2010 (1) SACR 176 (SCA)
[7] 2007 JDR 0637 (E)

Froneman J (Liebenberg J concurring) altered the sentence to one of six years imprisonment, two years of which were suspended.

[27] In *S v De Klerk* it was found that the appellant was a regressed as opposed to a fixated offender i.e. he did not have a persistent continual and compulsive attraction to children. It was also found that the appellant fell into the category of an opportunistic rather than a predatory sexual offender. By contrast, in the present matter the appellant's activities were of a predatory and systematic nature. The offences of which he was convicted took place over a number of years and once complainant A had, after some years, refused to continue posing for pornographic pictures, the appellant turned his attention to her younger sister, grooming her and eventually commencing a similar process with her.

[28] The first enquiry must be whether a non-custodial sentence is appropriate for the present matter. This question can only be answered by having regard to, and balancing, the three main interests at stake, namely, the accused's personal circumstances, the seriousness of the offences and the interests of the community, as well as by having appropriate regard to the purposes of punishment, namely, prevention, retribution, deterrence and rehabilitation.

[29] Counsel for the appellant placed much emphasis on the aspect of rehabilitation, indeed directing most of his argument to this subject. In this regard he relied on the report and recommendations of Dr Londt. The primary focus of her assessment was directed at what she saw were the following key aspects: the appellant's dangerousness and risk to society, an analysis of the recidivism and risk factor and the appellant's prognosis or amenability to

treatment. Ultimately her conclusion, although apparently in favour of a non-custodial sentence, was cautious. She stated as follows:

> *'The results of the risk assessment instruments strongly suggests that (the appellant) can be treated effectively within a community based program for sex-offenders provided that there are comprehensive conditions attached to his sentence.'*

[30] Dr Londt proposed a wide range of conditions, many of them stringent, stating that it was possible to effectively manage specific sex-offenders in the community provided that a comprehensive and integrated management protocol was applied. As regards the appellant's prognosis or treatment amenability she assessed him as being in the *'medium'* category of risk for re-offending. In this regard she identified the number of the appellant's victims, the duration of his inappropriate responses to the complainants as well as his violation of the bail conditions as matters of concern. She described the prognosis for the appellant as *'guarded'* stating that if intervention management was tailored to the identified risks, which I take to be a reference to the conditions which she proposed, then it would be possible to achieve a *'successful outcome'*.

[31] Captain Genis, the clinical psychologist who furnished a sentencing report at the instance of the State was less sanguine, concluding on the basis of the information which she had reviewed that the appellant remained at risk of sexual re-offending against children. She recommended that the appellant be referred to a treatment program specifically designed for sex offenders who target children but only as one component of his sentence. In her report she emphasised that research indicated that the rehabilitation of sexual offenders had a poor prognosis and that the main aim of treatment of sexual

offenders is to prevent further abuse against children rather than changing the offender's sexual orientation toward them.

[32] What must not be lost sight of in regard to Dr Londt's report is that its primary focus related to the rehabilitation and monitoring of the appellant. As I understood the report it did not purport to opine on what, overall, was an appropriate sentence for the appellant and, indeed, it could not since this is the duty of the court after taking into account all relevant sentencing material. A further important point is that the sentencing process is, of course, not solely directed at establishing whether the offender can be rehabilitated through a non-custodial sentence. That is only one of the purposes of sentences, albeit an important one. In *S v Stevens* (supra) the principal argument on behalf of the appellant was that a non-custodial sentence should be imposed to allow him to receive private treatment for his sexual affliction under the supervision of his family, such facilities not being available in prison. In rejecting this argument Froneman J stated as follows:

> *'What is offered instead is a spurious argument that a convicted sexual offender, who is admittedly a danger to society, should have the benefit of private treatment for his sexual affliction under supervision of his family simply because he might not get adequate treatment in prison. In my judgment that would disregard almost totally the seriousness of the offences he has committed and the community expectations in that regard. It is true that offences of this kind evoke strong passions and that the courts must, dispassionately, weigh up those concerns against, amongst other factors, the appellant's personal circumstances. But due regard for personal circumstances cannot mean that the nature of the offences and the community expectations in regard thereto should be disregarded. In my view*

> *the magistrate was correct in finding that a custodial sentence was appropriate in the circumstances of this matter.*[8]

I find myself in respectful agreement both with the sentiments expressed by the learned judges in that matter and the approach adopted.

[33] Reverting to the appellant's personal circumstances, as mentioned he was 74 years old at the time of sentencing and is a first offender. His curriculum vitae indicates that he obtained tertiary education and has enjoyed a very successful career spanning more than 50 years in the transport and tourism industry. He is as a result, a wealthy man, one of his hobbies being the breeding of racehorses. The appellant has been married for more than 50 years and has 4 adult children and 10 grandchildren. As a result of his incarceration he was no longer able to run his various businesses and resigned at least one major directorship. The appellant spent 13 months in custody awaiting trial after his bail was withdrawn. This period of incarceration cannot be written off or discounted even if it were the appellant's breaches of his bail condition which led to the revoking of his bail[9]. The fact remains that as at the date of sentencing he had already spent a substantial period in custody.

[34] A further factor to be taken into account is the public shaming and fall from grace which the appellant suffered. Notwithstanding his plea of guilty the appellant's trial was drawn out and involved numerous appearances. The attendant publicity and its consequences for his family clearly took their toll on the appellant. Additional factors counting in his favour were the appellant's plea of guilty, his extensive admissions and his frequent expressions of

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[8] at para [5]

[9] See S v Kruger 2012 (1) SACR 369 (SCA) at para [11]

remorse. It must be said, however, that this last factor was weakened by the appellant's persistent tendency to cast himself as led astray by the complainants and his attempts to put a favourable gloss on his actions by stressing his charitable motives in giving gifts and making payments to the complainants and their families. It is clear, in my view, that the appellant has an inability to fully grasp the seriousness of his actions and their consequences for the victims.

[35] Turning to the seriousness of the offences, this can hardly be overemphasised. Many of the photographs taken by the appellant of the complainants are starkly pornographic and exploitative. An aggravating feature was the appellant's modus operandi of befriending the young girls through gifts to them and their parents, by offering them access to a gym, liquor and, in general, a lifestyle which they did not ordinarily enjoy. He clearly used his money as an on-going lure. In essence, the appellant embarked upon an elaborate and sustained process of grooming his victims and then exploiting them to satisfy his sexual fantasies. The appellant displayed his arrogance when the police first visited his premises and he contemptuously sent them packing. It was only through the persistent efforts of the neighbour whose suspicions were aroused by the appellant's frequent comings and goings with young girls that the police eventually obtained the search warrant which led to his arrest. The appellant's immediate reaction was to lie concerning the whereabouts of the memory stick containing the images which form the subject matter of the charges. Notwithstanding the appellant's claims that he was conscience-stricken by his activities and was on the point of calling a halt thereto, I have little doubt that, but for the police action, this would still be continuing. However, the factor which weighs the most heavily

as regards the seriousness of the offences is the evidence of its consequences for the victims. This emerged from the three victim impact reports to which I have already briefly alluded but which deserve further consideration.

[36] Complainant A, by then an adult, reported also that at the time she had posed for the appellant's pictures she had become very self-conscious and an introvert, feeling that she had the burden of a secret that she could not share with others. After the appellant's arrest, she had to identify her younger sister in the photographs on the memory stick and had nightmares of the images for a week. She described her feelings for the appellant as rage and pity and how she felt the appellant had made her dependent on his money but then had taken it away. Both complainant A and her mother reported that complainant B had attempted suicide. Her mother reported further that after B's first attempt at suicide she had been hospitalised for two weeks but had attempted suicide again by taking an overdose. The mother described this daughter as feeling very bitter and suffering from major depression. As was to be expected all this had a negative effect upon her schoolwork. The mother of a third complainant reported that her daughter suffered from mood swings, closed herself off in her room and did not want to communicate with people.

[37] Whilst it is correct that there were no reports from psychologists on the effect of the appellant's actions on the complainants, a reading of the victim impact reports and the evidence of complainants A and B makes it quite clear that these were far-reaching, serious and possibly of long duration.

[38] As an indication of the seriousness with which the Legislature views offences relating to the production of child pornography, a contravention of s20(1) of the Act qualifies for a minimum sentence of 10 years imprisonment by reason of its inclusion in Part III, Schedule 2, of Act 105 of 1997. As was said by Heher JA in S v RO[10] *'… the legislature has set its face against sexual offences in which children are victims, with unmistakable disapproval and draconian sanctions. The appropriate sentences must reflect that intention.'*

[39] The magistrate correctly found that there were substantial and compelling circumstances present which justified a deviation from the minimum sentence applicable on each of these counts. However, as was stated in *S v Malgas* [supra] at page 482, although the courts are entitled in appropriate cases to impose a sentence less than the prescribed minimum sentence *'… in so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the Legislature has provided'*.

[40] Apart from the indications provided by the minimum sentence legislation, there can be no doubt that the protection of society's interests require that offences such as those committed by the appellant are dealt with firmly by the courts in order to protect the interests of children who are by definition vulnerable to exploitation of this nature. One need look no further than the Bill of Rights in determining the value which our Constitution places on the interests of children. Section 28 of the Bill of Rights provides that every child has the right to be protected from abuse or degradation whilst sub-

[10] 2010 (2) SACR 248 (SCA) at para [40]

section 28(2) provides that a child's best interests are of paramount importance in every matter concerning the child.

[41] In the final analysis, notwithstanding the presence of considerable mitigating factors, principally in the form of the appellant's personal circumstances, I consider that a non-custodial sentence would not achieve an appropriate balance between the other interests at play, namely, the seriousness of the offences and the interests of society. A non-custodial sentence would, in my view, be unduly focussed on the rehabilitation of the appellant and would lose sight of the other purposes of sentencing, most notably retribution and prevention. However, in the light of the appellant's age, his health problems and the fact that he spent more than a year in custody awaiting trial, I consider that a much shorter period of imprisonment than that initially imposed, part of which is suspended, would be appropriate. The suspension of a portion of the sentence should have the salutary effect of reinforcing those conditions of suspension designed to ensure that the appellant refrains from similar activity in future. One such condition must entail the appellant attending the community-based sex offender program as advocated by Dr Londt, at his own expense.

[42] At the conclusion of argument counsel were invited to file a supplementary head setting out proposed conditions for a partially suspended sentence of imprisonment. This opportunity was granted in the light of the conditions contained in the various reports which served before Court and which appeared to be overly stringent. They included that the appellant could have only supervised access to his own grandchildren and would not be permitted to drive a motor vehicle. In my view these conditions are unduly

punitive and would serve only to unnecessarily hinder or humiliate the appellant for the duration of the suspended sentence. In the result the conditions ultimately imposed draw heavily on those proposed by the appellant's counsel particularly those relating to the appellant's attendance in the sex offender program.

[43] Appellant's counsel submitted that all the convictions should be taken together for the purposes of sentence. The magistrate saw fit to draw a distinction between the sundry counts of sexual assault, indecent assault, grooming etc and those dealing with the manufacture of child pornography which were by far the most numerous and potentially attract the heavier sentence, and to sentence them separately. Rather than lumping all the disparate convictions together, I consider it appropriate to maintain the distinction but to suspend portion of the sentences imposed.

[44] Finally, there is the magistrate's order declaring the appellant incompetent to possess a firearm. The offences of which the appellant were convicted rendered it necessary for the magistrate to enquire, in terms of s103(1) of the Firearms Control Act, 60 of 2000, whether the appellant was unfit to possess a firearm. The appellant's attorney pointed out to the magistrate that his client was the owner of four firearms, including a hunting rifle, and was winding up his late father's estate which also included firearms. He submitted that since no firearm had been used in the offences under consideration and that there had been no overt violence in the offences, the State had not laid a basis for the court to exercise its discretion against the appellant and declare him unfit to possess a weapon. The magistrate made such an order, however, without furnishing any reasons. Although the sexual

assaults of which the appellant was convicted by definition contained an element of violence, this was minimal and no firearm was used.

[45] In *S v Phuroe and 8 Other Similar Cases*[11] it was held that amongst the important issues that should be considered in an enquiry relating to the possible disqualification of a convicted person from possessing a firearm are: a) the accused's age and personal circumstances; b) the nature of any previous convictions or any absence thereof; c) the nature and seriousness of the crime of which he is found guilty and any connection that such crime has with the use of a firearm; d) whether there is any background which suggests that the accused may make use of his/her licenced firearm/s for the purpose of committing offences and e) whether it is in the interest of the community that the accused be declared unfit to possess a firearm because of the fact that he/she poses a potential danger to the community.

[46] When regard is had to these factors I can see no justification for the magistrate's declaration of the appellant as unfit to possess a firearm and this part of the order must be set aside. The declaration that the appellant's name is to be recorded in the Register of Sexual Offenders must, of course, stand.

[47] Taking all relevant factors into account I consider that the sentence of 15 years imprisonment must be set aside and be replaced with an effective sentence of four years imprisonment with a further four years imprisonment conditionally suspended. Those conditions will include requiring the appellant to attend an extended sex offender treatment program, circumscribe his unsupervised access to female minors and generally set limits to his

[11] 1991 (2) SACR 384 (NC)

opportunity to engage in activities conducive to his re-offending during the period of suspension.

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

1. *The appeal against sentence is upheld.*
2. *The sentence of 15 years imprisonment and the declaration that the appellant is unfit to possess a firearm are set aside and replaced with the following sentence:*
   "(a) Counts 5 – 89, 94 and 95 are taken together for the purposes of sentence and the appellant is sentenced to a period of five years imprisonment.
   (b) Counts 1- 4 and 90 – 93 are taken together for the purposes of sentence and the appellant is sentenced to a period of three years imprisonment.
   (c) Two years of each of the above sentences are suspended for a period of five years on the following conditions:
      i) the appellant is not found guilty during the period of suspension of contravening any provision of Act 32 of 2007 which involves a minor;
      ii) upon his release from a correctional centre the appellant shall participate for a period of at least 36 months in a sexual offenders program of a group therapy nature offered by the Child Abuse Treatment and Training Services ('CATTS') program in Kenilworth, Cape Town or, in the event that such course is no longer offered, an equivalent course;
      iii) the appellant shall attend all consultations, therapy, work and program sessions, including consultations and psychotherapy with any other professional third party providers that the director of CATTS may determine from time to time appropriate to assess and effectively manage the treatment of the appellant in preventing unlawful sexual recidivism against any adult or minor person;
      iv) the director of CATTS, or his/her designated facilitator(s), must compile and deliver to the Senior Prosecutor; Regional Court Bellville, a written report at intervals not exceeding

three months during the initial 12 months of the appellant's enrolment at CATTS and thereafter at intervals not exceeding six months for the duration of the appellant's attendance, that sets out the dates and particulars of the sessions attended by the appellant and the co-operation, compliance, risk assessment, prognoses and any other information that the director or facilitator of CATTS may find relevant in assessing the co-operation, compliance and the response to treatment of the appellant;

v) *the Senior Prosecutor, Regional Court Bellville shall consider the written report presented to him/her as provided for in (iv) above and in the event of the appellant failing to attend the CATTS program or not complying with the conditions imposed in respect of the appellant's attendance and participation in the sex offender program without just cause, the matter shall be referred to the Regional Court: Bellville to reassess, in the presence of the appellant and the director of CATTS, the appellant's continued participation in the community-based program and/or to make any other order in terms of the Criminal Procedure Act, 51 of 1977 and/or Correctional Services Act, 111 of 1998 with regard to the balance of the sentence imposed on the appellant that the Court may regard appropriate in the circumstances;*

vi) *the appellant shall bear the costs of his participation in the CATTS program;*

vii) *during the appellant's participation in the CATTS program, he will not:*

   a) *misuse alcohol or any other drug or substance having a narcotic effect;*

   b) *engage in, download, distribute or use pornography, whether adult or child pornography, in any form;*

   c) *engage in social networking sites (internet based) where there is a likelihood of contact with minors;*

   d) *engage with any of the complainants, their parents or caregivers;*

e) have unsupervised contact with female minors under the age of 18 years, excluding his own grandchildren; and

f) engage in any activity that will place him in unsupervised authority over minors.

(c) The appellant's name will be recorded in the Register of Sex Offenders"

3. *The sentence set out in para (2) of this order is antedated to 29 January 2013.*

_____

L J BOZALEK

JUDGE OF THE HIGH COURT

I agree.

_____

K PILLAY

ACTING JUDGE OF THE HIGH COURT