IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Henney, J *et* Thulare, AJ)

[Reportable]

Case No: A38/2019

In the matter between:

WESSEL WILMS Appellant

and

THE STATE Respondent

JUDGMENT: 11 SEPTEMBER 2019

Henney, J

Introduction

[1] The appellant was arraigned before the Regional Court sitting at George on 10 charges. Three of the charges were contraventions of section 24B (1) (b) of the Films and Publications Act 65 of 1996 ("the FPA") in that the appellant allegedly created or produced child pornography (Counts 1, 4 and 7).

[2] A further three of these charges were contraventions of section 24B (1) (a) of the FPA in that the appellant was allegedly in possession of child pornography (Count 3, 6, 9 and 10 were charges of *crimen injuria*). On 22 February 2016, the appellant pleaded not guilty to all the charges. On 8 February 2017, he was convicted on counts 1, 4 and 7 of contravening section 27 (1) (a) (ii) of the FPA (as amended by Act 18 of 2004), which was the provision that was in operation during the commission of the offence in December 2007.

[3] This was after the Regional Magistrate amended the charge sheet when it was realised that the provisions on which the appellant was originally charged i.e. contravention of section 24B (1) (b) of the FPA to which the appellant pleaded was not yet in operation at the time when the offence was committed. Section 24B (1) (b) only came into operation on 14 March 2010. And it seems that appellant was prosecuted in 2016 for offences that were not in the existence during 2007.

[4] The appellant was also convicted on counts 3, 6, 9 and 10 on the charges of *crimen injuria* and he was acquitted on counts 2, 5 and 8. On 19 April 2017 the appellant was sentenced on counts 1, 4 and 7, after all the charges are taken together for the purposes of sentence, to 4 years imprisonment which was suspended for a period of 3 years on condition that he is not convicted of any offence which relates to unlawful possession or manufacturing of child pornography and which is committed during the period of suspension.

[5] In respect of counts 3, 6, 9 and 10 the appellant was sentenced, also after all the charges were taken together for the purposes of sentence, to 24 months correctional supervision in terms of the provisions of section 276 (1) (h) of the Criminal Procedure Act 51 of 1977 ("the CPA"), on the conditions which inter alia included community service, attendance of programs and house arrest. The Regional Magistrate further made an ancillary order relevant to these proceedings in terms of the provisions of section 50 of the Sexual Offences and Related Matters Act, 32 of 2007 ("the SORMA"), that the particulars of the appellant be entered in the National Register of Sexual Offenders ("the register").

The Applicant and Respondent did not file heads of argument timeously and applied for Condonation which the court granted.

[6] With the leave of the court *a quo*, the appellant now appeals his conviction and sentence in respect of counts 1, 4 and 7 only. In respect of the *crimen injuria* convictions, the appellant during the proceedings in the court *a quo*, made admissions in terms of the provisions of section 220 of the CPA to the effect that he admitted that he created these videos; that video 1 and video 2 depicted "MB" and video 3 depicted "MM" and "AP" and that he took these videos of the respective complainants without their permission and knowledge, whilst they were naked and in the process, impaired them respectively of their dignity; and in so doing, he acted intentionally and unlawfully with the knowledge that his conduct was unlawful. He also appeals against the order made by the Regional Magistrate in terms of sec 50 of the SORMA.

Facts which underpins these charges

[7] These charges originate from video images that the appellant made of three young girls during December 2007, near Hoekwil, George, after placing a cellular phone with a camera in the bathroom at his residence, whereafter he created the video images of them, while they were in the bathroom and whilst they were naked. The appellant created three video images on three separate occasions of these female children.

[8] Two of these videos (video 1 and 2) were of "MB", on two separate occasions. "MB's" mother was involved in a relationship with the appellant which started in 2000. This happened while she was living together with her mother and the appellant in the same house, in December 2007. She knew the appellant since she was 7 years old and attended karate classes with him. The other video (video 3) was made of two other young girls, "MM" and "AP" who were the friends of "MB" and it was made also during December 2007 when they visited the house of "MB". "MB" testified that the incident happened when she was 17 years old when she at some stage observed that the appellant was downloading video files onto the computer from a cellular phone.

[9] She did not find this odd because she knew that he would regularly make videos while he was busy with his karate lessons and she thought that he was busy downloading some of those videos. She at a later stage, went to look for certain videos that she downloaded onto the computer and she came across three unnamed files, which she opened and saw herself naked on the screen. She then also opened

a second file, which also depicted an image of her being naked but the angle of the camera depicted a better view and in this video also she observed the appellant's face while he was busy recording.

[10] On the third video, she observed her two friends "MM" and "AP" whilst they were naked. Her friend "AP" was in the bath tub and her other friend "MM", was in the shower and they were also naked. She further testified that she felt violated when she saw these videos because as a young girl she did not expect someone to take images of her while she was naked in her own house.

[11] There were no other videos on the computer that were as explicit. These videos she copied and downloaded onto a DVD disc. She also showed these video images to her friend "MM", and at a later stage, she confronted the appellant and he said that he had never watched the videos and "he was doing it for a thrill".

[12] He further said that the recording of these videos was part of a thrill seeking experience that he was going through at that stage. Although he said that he did not watch the videos, she was not convinced about that because of the way he looked at them, which gave her a different indication. The appellant did not deny that he created these video images and said in his evidence that he made these video images of the complainants. He wanted to create a so-called "Big Brother" video, which would depict the daily lives of people that stayed in the same house. And he did not realise or properly think what harm it would cause in the relationship between him and "MB" and he felt very bad about it.

[13] He said that he made video images of all the people in the house without them knowing about it. When he was asked, that if it was some sort of a "Big Brother" video he created, why it was not shown to the people that was captured on video he said it was not really a "Big Brother" video but a version thereof. He later, without ever having looked at the videos, decided that it was not a good idea to further create these videos because it was a stupid thing to do which would insult and embarrass people. This was despite going through all the trouble to create these videos and even though he downloaded it onto the computer. And although it was his plan to edit the videos and to have a look at it afterwards. This he decided after he downloaded the videos onto the computer and it was incidentally in this time that MB came across these videos.

Grounds of Appeal

[14] The main attack on the convictions in respect of counts 1, 4 and 7 is that the State failed to prove that the appellant had indeed contravened section 27 (1) (a) (ii) of the FPA. Mr Webster submitted that because the pre-amendment provisions of the FPA applied the earlier definition of 'child pornography' which was applicable during 2007 is applicable in this case which differed from the definition of child pornography which prevailed in terms of the amended legislation. According to him this definition was narrower.

[15] He further submitted that the earlier definition of 'child pornography' fails to bring the conduct of the appellant within the ambit of the definition. And he submitted that it is for this reason and for the reason that the elements of the

offence in terms of section 27 (1) (a) (ii) were not established. In this regard, he referred to the decision of ***De Reuck v Director of Public Prosecutions, WLD 2004 (1) SA 406 (CC)*** where it was held at para *[32]* that child: "*The stimulation of erotic rather than aesthetic feelings is an essential element of the definition of child pornography. Any image that predominantly stimulates aesthetic feelings is not caught by the definition. It does require, however, that the image viewed objectively and as a whole has as its predominant purpose the stimulation of erotic feelings in certain human beings, who may conveniently be referred to as the target audience. How does one determine whether the predominant purpose of an image is to stimulate erotic rather than aesthetic feelings in the target audience? Evidence of the intention of the author is irrelevant to this determination. The purpose must be determined from the perspective of the reasonable viewer. The image must, therefore, be seen by the reasonable viewer as having as its predominant purpose stimulation of erotic rather than aesthetic feelings in a target audience. It must be emphasised that the image need not, and in most instances will not, stimulate erotic feelings in the reasonable viewer.*"

[16] Mr Webster further submitted that to convict the appellant on the charges of contravening section 27 (1) (a) (ii) in circumstances where the *actus reus* and the conduct justifying a conviction was dealt with on the basis of such conduct amounting to the offence of *crimen injuria* constitutes a duplication of convictions. Mr Webster in his heads of argument referred to the various decisions dealing with duplication of convictions. In this regard he also referred to a decision of **S v Whitehead and others 2008 (1) SACR 431 (SCA)** where the court said the

following at para [34] : "*The proper enquiry is whether in reality there has been a duplication of convictions. In order to address this issue it should be borne in mind that a single act may have numerous criminally relevant consequences and may give rise to numerous offences. Robbery, for example, may be committed by means of more than one act.*

[35] There is no infallible formula to determine whether or not, in any particular case, there has been a duplication of convictions. The various tests that have been prompted by our courts (to which Combrink JA refers) are not rules of law, nor are they exhaustive. They are simply useful practical guidelines and in the ultimate instance, if these tests fail to provide a satisfactory answer, the matter is correctly left to the common sense, wisdom, experience and sense of fairness of the court."

[17] Then at para [39] the court goes on to say: "*In contesting multiple convictions it is often submitted that they are premised on the same set of facts. This is, in fact, the so-called 'evidence test' sometimes applied by the courts in determining whether or not there is a duplication of convictions. This test enquires whether the evidence necessary to establish the commission of one offence involves proving the commission of another offence. In this regard, Bristowe J, in the case of R v Van der Merwe 1921 TPD 1 at 5 pointed out that … If the evidence necessary to prove one criminal act necessarily involves evidence of another criminal act, those two are to be considered as one transaction. But if the evidence necessary to establish one criminal act is complete without the other criminal act being brought in at all then the two are separate crimes.*

[18] A further important point that the court dealt with in this case was at para [42] where it was said: "*Another test which is sometimes applied by the courts in determining whether there is a duplication of convictions is a so-called 'intention test'. In terms of this test, if a person commits several acts, each one of which could be a separate offence on its own, but they constitute a continuous transaction that is carried out with a single intent, his or her conduct would constitute only a single offence."* [1]

[19] He further argued if the *crimen injuria* convictions were well-founded, which had been admitted by the appellant, there was no basis to justify punishing the same conduct by means of a duplication of convictions on additional counts of contravening section 27 (1) (a) (ii) of the FPA. In an additional note at the request of this court when Miss Kortje submitted that the crime of *crimen injuria* could only have been committed at the stage when the complainants became aware of the videos that had been taken of them, for their dignity to have been infringed or impaired, he submitted by referring to various authorities that the conduct of the perpetrator need not be known to the complainant for the offence of *crimen injuria* to have been committed[2], which among other things, dealt with cases relating to a "peeping tom", whose conduct was not known to the complainants at the time they were observed and where it was held that the complainant's right to dignity was violated by an accused person even if she was not conscious of the indignity.

[1] See also S v Maneli 2009 (1) SACR 509 (SCA) at para [8]; S v Hector 2017 (2) SACR 588 (ECG) .at 591

[2] in this regard he referred to R v Kobi 1912 TPD 1106, at 1110; R v Holliday 1927 CPD 395: R v Wallet 1939 TPD 195 at 197; S v Another 1971 (2) SA 293 (T) at 298 C-D

[20] He submitted therefore on the basis of these cases the crimes of *crimen injuria* were committed at this time, when the particular photographic images were recorded and that arose for the first time, when the complainants became aware of the fact that such an intrusion had occurred in respect of their privacy. The offences were committed independently of their knowledge. Regarding sentence, Mr Webster submitted that should the court find that the appeal on the convictions in respect of counts 1, 4 and 7 and automatically that sentence should fall away, as well as the entry of the particulars of the appellant onto the register.

[21] He further submitted that should the appeal against the convictions in terms of the FPA, not be successful that the appellant was not convicted in terms of any provision of the SORMA and he was also not convicted in terms of any other law of the sexual offence against a child. And he submitted that if regard should be had to the definition of 'sexual offence' as defined in section 1 of the SORMA which states '*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'.*

[22] He submitted that chapter 2 deals with offences related to sexual offences involving rape, compelled rape, sexual assault, compelled sexual assault, threatening conduct in respect of persons 18 years or older, incest, bestiality and sexual acts against a corpse. And none of the offences which the applicant had been convicted of falls within the ambit of the definition of chapter 2. Chapter 3 of the act deals with sexual offences against children and includes in section 20, using children for

child pornography. I will deal with this section at a later stage.

[23] According to Mr Webster, the question then arises, as to whether or not the appellant had used the complainants in the context of creating child pornography. He submits that the definition of 'child pornography' which is applicable to the charges in respect of which the appellant had been convicted, was the definition of child pornography referred to in the pre -amendment legislation. And according to him, if regard is to be had to the definition of 'child pornography' under the pre-amendment legislation it does not bring the appellant within the ambit of section 50 of the SORMA. And it therefore does not render them liable to have his name entered in the register of sexual offenders.

[24] He therefore submits that it had not been competent for the Regional Magistrate to enter the appellant's name onto the Register of Sexual Offences in terms of section 50 of the SORMA.

[25] In respect of the sentence imposed on counts 3, 6, 9 and 10, which is a sentence of 24 months correctional supervision he submitted that the sentence is unduly harsh and disturbingly inappropriate. In this regard, he submits that it seems that the complainant, "MB's" mother, failed to act at the time, when she became aware that this video footage had been taken, but rather utilised the footage over a period of time to put pressure on the appellant. After the incident, the appellant left the home that he had shared with the complainant's mother. And during the intervening period, before he moved back, he continued to support them.

[26] He further submitted that the complainant's mother had persuaded the appellant to move back into the shared home after she had reminded him of the existence of the DVD containing the footage in question. She also had threatened to publicly disclose the material if the appellant had not been agreeable to moving back with her. And it was only during 2014, after the appellant had ended his relationship with "MB's" mother during April, that the footage on the DVD was brought to the attention of the authorities, which led to the arrest of the appellant on 2 August 2014.

[27] He further submitted that the complainant (laughingly) testified that she had copied the footage to a DVD and kept it in a room from December 2007 until July 2014. He further submitted that when the appellant had earlier informed the complainant's ("MB's") mother, that he wished to end their relationship during 2008, she had informed him that she had the DVD and it was the only way she could protect him against it being publicly disclosed. And only in April 2014, after the appellant had terminated the relationship with her, she took steps to report the making of the footage to the authorities. In the intervening years, the appellant had continued to be supportive of complainant and her mother and continued with them in an ongoing relationship in a common home of the period for some time.

[28] He submitted that the fact that the complainant's mother has utilised the video material over a period of some 7 years to effectively blackmail the appellant and pressurise him into continuing the relationship with her, and continuing to provide for her, constitutes significant mitigation.

[29] Miss Kortje who appeared for the respondent, submitted that the appellant had been properly convicted by the Regional Magistrate and that the State based on the evidence, had shown that the conduct of the appellant falls within the definition of child pornography in terms of the provisions of section 27 (1) (a) (ii) of the FPA. And in this regard, she submitted that the court should have regard to the provisions of the FPA that was in operation at the time of the commission of the offence and not the provisions of the FPA which was in operation at the time the constitutional court handed down a decision in the *De Reuck* matter as referred to by Mr Webster.

[30] She furthermore submitted that if regard is to be had to the time when the offences of *crimen injuria* and the time the contravention of section 27 (1) (a) (ii) had been committed, there could not have been a duplication of charges. According to her, at the time when the appellant made the videos of the complainants, they were not aware of this and their dignity could not have been impaired at that stage, but only later when they became aware of it, their dignity was impaired and only at that stage the crime of *crimen injuria* was committed. She further submitted that if regard is to be had to the definition of the two offences, the two entirely separate offences were committed by the appellant. I will deal with these submissions of the parties, regarding the conviction of the appellant later in this judgment.

[31] She further submitted that if regard is to be had to the provisions of section 50 (1) (a) (i) of the SORMA, a person's name must be entered onto the register who has committed a sexual offence against a child, not only in terms of the SORMA, but also '*in terms of any other law*'. She further submitted that even though the

SORMA, only came into operation on 16 December 2007, and this offence was committed before the act came into operation, section 50 (1) (a) (i) provides that the person who has been convicted of a sexual offence against a child's, name must be entered into the register '*whether committed before or after the commencement of this Chapter'.*

Evaluation

The convictions in terms of section 27 (1) (a) (ii) of the FPA in respect of counts 1, 4 and 7.

[32] In order to determine whether the videos made by the appellant constitutes 'child pornography', regard must be had to the circumstances and facts surrounding this case. This includes the conduct of the appellant. The appellant's evidence as to why he made the videos is highly implausible and should be rejected. When he was confronted by MB as to why he made these videos he told her it was as a result of the thrill-seeking exercise. He actually denied in cross examination that he said that. In his evidence he fabricated a version and said that he made the videos because he wanted to emulate a situation similar to the so-called "Big Brother" television series, where videos are made of the people that occupied the house in the "Big Brother" television series. And when he was confronted in cross examination as to why the other occupants of the house were not made aware of this and when he was asked why it was necessary for him to take videos in a very secretive manner of young girls whilst they were naked in the bathroom, he was not so confident any more that it was indeed a so-called "Big Brother" video that he made.

[33] This version was never put to "MB" when she said that he told them that he had made the videos as part of the thrill-seeking exercise. On the objective evidence, it is clear that the videos were only made of the complainants and no other persons. Although the appellant in his evidence said videos were also made of all the occupants of the house, there was no evidence of such other videos. This is also in direct conflict with the evidence of "MB", who testified there were no videos of other persons in the house. The appellant never challenged this evidence of "MB" as only when he testified he raised this point for the first time. Once again this seems to be a fabrication in the version of the appellant.

[34] It furthermore seems that the videos were only made of the young female children while they were naked either in the bath or the shower. The evidence also shows that the camera in video 1 was shifted to create a better image of "MB" when an image of her once again being naked was made to produce video 2. The evidence clearly shows that these videos specifically honed in on the genitalia and breasts of these young girls. It was not made for the purposes that the appellant tried to convince the court. His evidence and version as to why and for what purpose he made the videos of these young ladies while they were naked in the bathroom and in secretive is unconvincing, and the Regional Magistrate, in my view, was correct to reject it, as not being reasonably possibly true.

[35] Miss Kortje argued, that the definition of child pornography in terms of the Films and Publications Amendment Act 18 of 2004 which amended the principal Act, broadened the definition of child pornography. This amended definition according to

her was in operation in 2007 when these offences were committed and finds application in this case. In this regard, she submitted that the definition of child pornography which was the subject of discussion in the *De Reuck* case was under the FPA 34 of 1999 ("the FPA 1999"), which has subsequently been amended by the FPA 18 of 2004 ("FPA 18 of 2004"). And according to her, the definition of "child pornography" in terms of the FPA of 1999 as interpreted by the Constitutional Court in the *De Reuck* case, was to the effect that the court defined "child pornography" as a visual presentation or a scene of a child, or a person who is depicted as a child, engaged in sexual conduct which stimulates erotic rather than aesthetic feelings. According to her the definition of child pornography as amended by the FPA 18 of 2004 has broadened the definition.

[36] This broader definition consists of, firstly, by including descriptions of child pornography whether textual or audio, and secondly, by including an image or a description of the body, or parts of the body of a child that was within context amounts to sexual exploitation or makes it capable of being used for the purposes of sexual exploitation. She therefore submits that where there is no conduct of a sexual nature but just the body or parts of the body of a child, it substantiates child pornography.

[37] In this particular case, she submits that the appellant made videos of the minor complainants with the knowledge that they will be naked in order to take a shower or bath, and which he thereafter downloaded to his desktop, a device with Internet accessibility and accessible to other inhabitants of his house. Based on this

she submits that the reasonable viewer looking at these videos where it was taken after the appellant intentionally placed the cell phone in the bathroom to record videos together with the downloading thereof onto the Internet accessible device, unmistakably will conclude that ***within context*** of this matter is that these videos amount to sexual exploitation or is capable of being used for the purposes of sexual exploitation.

[38] I agree with the submissions. I further agree with the submission that it is the existence of these videos that constitute the creation or manufacturing of child pornography. And I furthermore agree that these actions violated the complainants' dignity and privacy.

[39] I agree that the definition which the court should rely on of child pornography in terms of the amended Act is the following: *"Child Pornography"- includes any image, however created, or any description of a person, real or simulated, or who is, depicted or described as being, under the age of 18 years-*

(i) engage in sexual conduct;

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

(iii) showing or describing the body, or parts of the body, of 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 those purposes of sexual exploitation".

[40] And if regard should be had to the content of the videos taken when the complaints were exposed and vulnerable circumstances, where the videos of the complainants were made without their consent, whereby their dignity was impaired, and the angle of the camera which was rotated to include the bath and shower are indicative that the appellant intended to create child pornography to capture the naked bodies of the children.

[41] I also agree that a further indication of this intention was the fact that the videos were downloaded from the cell phone onto the computer and that a reasonable viewer looking at the videos would see a naked child exposed and vulnerable. She therefore submitted that the videos within the context amounts to sexual exploitation or in such a manner that it is capable of being used for the purposes of sexual exploitation.

[42] Furthermore, if regard is to be had to the fact that the camera was focused on specific parts of the body to which the camera was honed in, the only reasonable inference that this court can come to even if one should accept that the narrow definition of child pornography on which the court in *De Reuck* relied as, referred to earlier, it was clearly intended to stimulate erotic rather than aesthetic feelings. In my view the image viewed objectively and a whole of these female children 'has as its predominant purpose the stimulation of erotic feelings in certain human beings', such as the appellant. That is why he tried to mislead the court regarding the true purpose of why he created these videos. Based on these objective and undisputed facts, the only reasonable inference the court can come to, based on *R v Blom* 1939

AD 188, is that the appellant intended to create 'child pornography' as defined in the Act.

The duplication of charges

[43] In dealing with the question whether there are duplication of charges, especially with regards to the charge of *crimen injuria* it would be apposite to have regard to the elements of the crime of *crimen injuria*. And also have regard to the circumstances under which such a crime can be committed. This is especially important in the light of the fact Miss Kortje, submitted that the crime of *crimen injuria* in this particular matter was only committed after the accused committed the offence of contravening section 27 (1) (a) (ii) of the FPA, when the complainant "MB", and other complainants observed and became aware of the video images of them being naked.

[44] Mr Webster in this regard submitted that the crime of *crimen injuria* can also be committed under circumstances where a complainant was not even aware of it. According to **Snyman 6ed**; **Criminal Law** at **461**; the definition of *crimen injuria* consists of the unlawful, intentional and serious violation of the dignity or privacy of another. In other words the elements of the crime are:, a) *the infringement of the dignity or privacy of another, b) which is serious, c) unlawfulness and , d) intention.*

The act or *actus reus* consists of the violation of a person's dignity or privacy. In the case where the crime is committed in the form of the violation of a person's dignity, it is a requirement that the complainant should be aware of such violation. In this regard the author says at 463: "*The subjective test is the following: In instances of*

infringement of dignity (as opposed to infringement of privacy) Y must (a) be aware of X's offending behaviour and (b) feel degraded or humiliated by it. Dignity, self-respect and mental tranquillity describe subjective attributes of a person's personality. For example, the mental tranquillity of the timid will be more easily disturbed than that of the robust. In addition, an individual's self-respect is intimately connected with his particular station in life and his moral values. There is, however, the following exception to this rule: where Y is a young child or a mentally defective person, he would not be able to understand the nature of X's conduct, and consequently, would not be able to feel degraded by it. This, however, does not afford X a defence. For this reason the crime can be committed even in respect of a young child or a mentally defective person. (Footnotes omitted)"

And in the case where the crime is committed in the form of the violation of a person's privacy, it is not a requirement that the complainant should be aware of such violation.

[45] **Snyman** at page **465** says the following in this regard "*This manner of committing the crime merits separate treatment since some of its facets are governed by rules of their own, as will presently be seen. The most common form of infringement of privacy constituting crimen iniuria is the so-called "peeping tom" case, as where a man peeps through a window or other aperture at a woman undressing. Another illustration is the planting of a listening-in device in a person's private apartment and listening in to his private conversations. A person's privacy may conceivably be infringed in a variety of other ways, for example, by the opening*

and reading of a confidential postal communication addressed to him, and by generally prying into his private life in an unwarranted manner, by means of apparatus such as cameras, telescopes or "bugging devices".

[46] The learned author further at page **466** states: "*In cases of unwarranted intrusion on privacy, as opposed to cases where Y's dignity is violated, it is immaterial whether Y is aware of the intrusion. In addition, X is guilty of the completed crime even if, for example, the woman happens to be fully clad while she is being watched through her bedroom window, or the conversation which the "bugging device" overhears does not reveal anything shameful or scandalous. This is because the mere unwarranted intrusion on Y's privacy is here sufficient to constitute the crime." (Footnotes omitted)*

[47] Mr Webster therefore, is correct in his submission that for the crime of *crimen injuria* to be committed and in circumstances where there was invasion or violation of the privacy of the person, such person need not be aware in order for the crime to be committed. In other words this means that at the time when the appellant made the videos of the respective complainants on the occasions as shown, he also committed the crime of *crimen injuria* by seriously infringing on their privacy in an unlawful manner. And he did not commit the offence at the stage when the respective complainants became aware of the infringing videos. The question now to consider was whether the appellant also at that time, committed the offence of producing child pornography in contravention of section 27 (1) (a) (ii) of the FPA of

2004.

[48] I, however, do not agree with Mr Webster, that there is a duplication of charges. If one should have regard to the case law, it is clear that the requirements and elements of these two offences are distinct. In the case of *crimen injuria* which is a materially defined crime which means that what is punished is not a particular act or conduct but an act or conduct which results in the victim's dignity or privacy being impaired. In other words, if the act does not result in the impairment of the dignity or privacy of a person, then it cannot be regarded as a crime.

[49] In the case of the contravention of section 27 (1) (a) (ii) of the FPA of 2004, the conduct is more specifically circumscribed. In this case, the prosecution had to prove that the appellant manufactured or created child pornography, which is irrelevant for the purposes of the crime of *crimen injuria* to prove that the complainant's privacy was infringed. Furthermore, the prosecution had to prove that it was an image of a person, however created, or any description of a person real or assimilated who is, or was depicted and described as being under the age of 18 years. In addition to this the prosecution had to prove, that the image is; i) the showing or ; describing the body or parts of the body ; ii) of such person in the manner or in circumstances which, within context, amounts to sexual exploitation; iii) in such a manner that is capable of being used for the purposes of sexual exploitation.

[50] If regard should be had to the so-called 'evidence test' in determining whether there is a duplication of convictions, it is clear that the evidence necessary to prove the establishment of the commission of the crime of *crimen injuria* does not involve the proving of the commission of the crime of manufacturing or the creation of child pornography in terms of section 27 (1) (a) (ii) of the FPA. In the case of *crimen injuria* there would be an infringement of the privacy and dignity of a person irrespective whether or not such a person is a child under the age of 18 years or adult in the circumstances as has happened in this case. There is no need to further prove as is required in terms of section 27 (1) (a) (ii) of the FPA that when the dignity of privacy of the person was infringed, that it falls within the definition of child pornography as set out and that was broadened in terms of the amended provisions in Act 18 of 2004, which is applicable in this case and which is set out above.

[51] Furthermore, based on the so-called 'single intent test', it is clear that apart from having the intention to infringe on the privacy or dignity of the complainants, which led to the appellant having committed the crime of *crimen injuria*, the further intention of the appellant as shown above was to create 'child pornography' in contravention of section 27 (1) (a) (ii) of the FPA as amended by the 2004 Amendment Act. This is similar to the situation where a person would have the motive to commit a particular of offence for example like armed robbery of a bank, but in the process murders a security guard in order to achieve his goal. Similarly like in this case and trying to achieve his goal to create child pornography, the appellant in the process infringed on the privacy and dignity of the complainants

when he committed the offence of *crimen injuria*.

[52] I am therefore satisfied that the Regional Magistrate was correct in convicting the appellant on 2 separate offences for creating these videos of the respective complainants. The appeal against the convictions, in respect of count 1, 4 and 7 is dismissed.

The sentence

[53] I am not convinced that the Regional Magistrate in imposing a sentence in respect of the *crimen injuria* as well as the sentence imposed on the child pornography charges, that it was disproportionate, to the crime, the interests of society and the offender. In fact, in my view, the Regional Magistrate erred on the side of leniency when he imposed the respective sentences. The applicant was guilty of repulsive conduct by gravely invading or infringing on the privacy and dignity of these young innocent women.

[54] They were at their most vulnerable by taking a bath or shower and would not have expected that their privacy and dignity would be invaded in such an egregious manner. His conduct in my view, is inexcusable. The fact that the complainant, "MB's" mother, continued to have a relationship with him after the incident and that she used these videos as leverage to blackmail him into continuing having a relationship with him, does not make the conduct of the appellant less reprehensible. The fact that the charges against the appellant were only laid against him at a later stage, after the relationship between the appellant and her mother

came to an end, does not in any way affect the harm suffered by all the complainants who were young girls at that stage.

[55] The offences, were not committed against the mother of "MB", but against her and two other innocent young woman who visited the house of the appellant, when he took advantage of the situation and also made a video of these 2 young woman whilst they were at their most vulnerable when they were busy taking a bath or a shower. The court *a quo* was alive to these facts and this may very well have persuaded the court to impose the sentence it did. The sentences in my view, were not unduly harsh, and it was rehabilitative rather than retributive in nature. There is therefore no merit in the appeal against the sentences imposed. I would therefore dismiss the appeal against the sentences imposed by the Regional Court.

[56] The order that the appellant's particulars be entered into the National Register for Sex Offenders in terms of section 50 (1) (a) (i) of SORMA. Section 50 (1) provides as follows:

(1) *The particulars of the following persons* ***must*** *be included in the Register:*

(a) ***A person who in terms of this Act or any other law-***

(i) ***has been convicted of a sexual offence against a child*** *or a person with mentally disabled;*

(ii) *is alleged to have committed a sexual offence against a child or person with mentally disabled in respect of whom a court, has made the finding and given a direction in terms of section 77 (6) was 78 (6) of the criminal procedure Act ,1977; …*

whether committed before or after the commencement of this Chapter.' (*Emphasis added)*

[57] The commencement date of this chapter of the SORMA was on 16 June 2008. The offences in this matter were committed on an unspecified date in December 2007, about 6 months prior to the commencement of Chapter. And the appellant was charged for these offences on 2 August 2014. A person who in terms of the SORMA or any other law has been convicted of a sexual offence against a child or mentally disabled person's particulars must be entered onto the national Register for Sexual Offenders, whether such offence were either committed in terms of the SORMA or any other law, irrespective whether committed before after the commencement of this chapter.

[58] It therefore seems that a person, if he or she has been convicted of a sexual offence against a child or mentally disabled person, before or after 16 June 2008, his or her particulars must be entered onto the National Register for sexual offenders. It seems therefore, that Parliament with the enactment of this chapter, cast the net very wide to seek to include all persons even those who had committed sexual offences against children or mentally disabled persons long before the commencement of the Act, particulars be entered onto the register. It even makes provision for the entry of the particulars of every prisoner or former prisoner or prisoners who at the commencement of this chapter, was serving a sentence of imprisonment or served a sentence of imprisonment as a result of a conviction for sexual offence against a child including an offence as contemplated in section 14 of

the Sexual Offences Act (Act 23 of 1957), particulars to be entered into the register[3].

[59] It furthermore, places an obligation on the National Police Commissioner to submit, within 3 months of the of the commencement of this chapter, to the registrar all available particulars in his or her possession of every person who at the commencement of this chapter, had a previous conviction for a sexual offence against a child, including, as far as possible any offence contemplated in Section 14 of the Sexual Offences Act, 1957, and persons who has a previous conviction for a sexual offence committed against a person who is mentally disabled, to be entered into the register[4]. It furthermore goes so far as to provide for the entry of the particulars of any person, who in any foreign jurisdiction has been convicted of any offence equivalent to the commission of a sexual offence against a child or person who is mentally disabled.[5]

[60] The enactment of these provisions makes perfect sense, and is a very necessary weapon to the fight against the scourge of sexual exploitation of children and mentally disabled persons. The fact that a person has committed a sexual offence against a child or mentally disabled person before the commencement of this chapter and such case has become finalised does not mean that such a person is no longer a threat to children and mentally disabled persons merely because he committed the offence or had been convicted of the offence before the implementation of commencement of this chapter. And that children and mentally

[3] in terms of section 50 (5) (a) of the SORMA
[4] in terms of section 50 (6) of the SORMA
[5] in terms of section 50 (1) (b) (

disabled persons need not be protected against such persons. The purpose of the State was to protect children and mentally disabled persons from all persons known to have committed a sexual offence against a child and mentally disabled persons.

[61] The question now to consider is whether the Regional Magistrate was correct in having entered the name of the appellant onto the register. The appellant did not commit any offence in terms of the SORMA, but it seems in terms of another law which was the creation or manufacturing of child pornography in terms of the FPA he did. A sexual offence is defined in section 1 of SORMA 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.*

[63] Chapter 2 deals with offences related to sexual offences involving rape, compelled rape, sexual assault, compelled sexual assault, certain conduct in respect of persons 18 years or older, incest, bestiality and sexual acts with the corpse. It is clear that these offences listed in chapter 2 are not an offence of which the appellant had been convicted of.

[64] Chapter 3 of the act deals with sexual offences against children and includes, in section 20 the using of children for 'child pornography', which in Section 20 (1) provides as follows:

(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.

[65] In this matter, it is clear that the appellant is guilty of an offence equivalent to section 20 (1) of the SORMA, when he contravened section 27 (1) (a) (ii) of the FPA (18 of 2004), by making committing the offence of using a child for child pornography. And such offence is clearly included as a sexual offence of which he has been convicted of, against a child not in terms of the SORMA, but in terms of any other law which is the FPA. It is clearly the intention of the legislature that such an offence, be regarded as a sexual offence committed against a child for the purposes of the inclusion or entry of the particulars of the appellant into the register of sexual offenders.

[66] The Regional Magistrate therefore was correct to make an order that the particulars of the appellant be entered onto the register of sexual offenders in terms of section 50 (1) (a) (i) of the SORMA as he was obliged to do in terms of the Act.

[67] In the result therefore, I make the following order:

1) the appeal against the conviction of the appellant on counts 1, 4 and 7 is dismissed;
2) the appeal against the respective sentences imposed on all the charges is dismissed;
3) the appeal against the order of the Regional Magistrate that the appellant's particulars be entered onto the National Register for Sexual Offenders, is also dismissed.

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R.C.A. HENNEY
Judge of the High Court

I agree.

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D. THULARE
Acting Judge of the High Court