

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A163/2014

In the matter between:-

ANDRÉ STEVEN BOTHA

Appellant

And

THE STATE

Respondent

CORAM:

MOCUMIE, J *et* SJ REINDERS, AJ

HEARD ON:

02 FEBRUARY 2015

DELIVERED ON:

26 FEBRUARY 2015

MOCUMIE,J

- [1] This is an appeal directed against sentence only. The appellant, a project manager at a construction company and an ex-police officer appeared in the regional court, Welkom, (Ms Ramdeyal) on several contraventions of the Films and Publication Amendment Act 3 of 2009, the Sexual Offences Amendment Act 32 of 2007 and one count of attempt to defeat the ends of justice. He pleaded guilty to all charges preferred against him and was convicted as charged on all. He was sentenced as follows:

- (a) Count 1: Creation or Production of Child Pornography- Section 24B(1)(a) of the Films and Publication Amendment Act, 3 of 2009: Sentenced to a term of 5 years imprisonment;
- (b) Count 2: Attempt to Commit a Sexual Offence- Section 55(a) of the Criminal Law (Sexual Offences and Related matters) Amendment Act, 32 of 2007: sentences to a term of 5 years imprisonment;
- (c) Count 3: Importation of Procuring Child Pornography- section 24(1)(a) of Act 3 of 2009: sentenced to term of 8 years imprisonment;
- (d) Count 4: Exposure of Display of or Causing Exposure or Display of Child Pornography to Person 18 years or older: sentenced to a term of 8 years imprisonment;
- (e) Count 5: Possession of Child Pornography- Section 24b(1)(a) and (c) of Act 3 of 2009: sentenced to term of 10 years imprisonment;
- (f) Count 6: Possession of Child Pornography- section 24B(1)(a) and (c) of Act 3 of 2009: sentenced to a term of 10 years imprisonment;
- (g) Count 7: Attempt to defeat the administration of justice: sentenced to a term of 3 years imprisonment.

Furthermore, in terms of section 280(2) of the Criminal Procedure Act 51 of 1977 (the CPA) the regional magistrate ordered that the sentences in respect of counts 1,2 and 7 run concurrently and the sentences in respect of counts 3,4 and 6 run concurrently. Thus the appellant was sentenced to an effective 15 years. The appeal is with leave of this court.

- [2] The appellant's main attack on the sentence is that the cumulative effect of the sentence of forty five years imprisonment imposed on him although reduced to an

effective term of fifteen years imprisonment is disturbingly inappropriate and induced a sense of shock. The sentence is out of proportion with sentences that have been imposed or confirmed in various similar cases which have come before the courts.¹

- [3] The State verily conceded, without diminishing the seriousness and gravity of the offences committed, that the sentence was harsh and inappropriate and not at all balanced and justified.
- [4] Child pornography is condemned universally for a good reason. It strikes at the dignity of children, is harmful to those children used in its production, and it is potentially harmful because of the attitude to child sex that it fosters and the use to which it can be put in grooming children to engage in sexual conduct.² It is a violation of the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person which incorporates the right to be free from all forms of violence and the right of children and other vulnerable persons to have their best interests considered to be of paramount importance.³ By promulgating this Act to deal exclusively and precisely with acts of child pornography in any form, affirms the seriousness with which the legislature and by extension society wants to eradicate all

¹ *S v Stevens* 2007 JDR 0637 (E). *S v de Klerk* 2010 (2) SACR 40 (KZP). *S v E* 1992 (2) SACR 625 (A). *S v Gerber* 2001 (1) SACR 621 (W). *S v McMillan* 2003 (1) SACR 27 (SCA). *S v Kleinhans* 2014 (2) SACR 575 (WC). *S v Mugridge* (657/2012) 2013 ZASCA 43 (28 March 2013).

² *De Reuck v DPP (Witwatersrand Local Division) and Others* 2003 (12) BCLR (CC) para 61.

³ Section 28 of the Constitution of SA provides that the best interests of the child shall be of paramount importance.

forms of discrimination and violence against women and children. This is in line with the State's obligation under several international legal instruments including the United Nations Convention of the Elimination of All Forms of Discrimination Against Women, 1979 and the United Nations Convention on the Rights of the Child, 1989.

- [5] Having said that, what needs to be borne in mind, however, is that while a court must inform itself sufficiently to be alive to the array of possibilities that present themselves in such cases ultimately it must assess the particular individual that is before it and not a statistical sample.⁴
- [6] The appellant is thirty nine years of age and divorced with two children aged between 22 and 6 years of age from his previous marriages. Although he is not staying with them. He is maintaining the youngest child. At the time of his arrest he was gainfully employed as a project manager for a construction company but has since lost his employment subsequent to his arrest. He was prior to this position a police officer for several years. He was arrested on 15 August 2011 and had been incarcerated for four hundred and sixty five days when he was sentenced on 28 November 2014.
- [7] Where the accused is being considered for sentence the spotlight must fall fully on the person in its entirety with all its

⁴ *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para 56.

facts. He is not regarded with a primitive desire of revenge but with humane compassion.⁵

- [8] The main object of sentence should be to strike a balance between his or her punishment and the possible rehabilitation. The latter being not only in his own interest, but in the interests of young children with whom (s)he might come into contact. The expert that testified on behalf of the appellant as well as the expert for the State although to varying degrees emphasised rehabilitation when dealing with this type of offenders. In other words they were equivocal that in appropriate cases of this nature, rehabilitation as an object of punishment should come more to the fore than retribution.
- [9] When viewed as a whole a term of imprisonment of forty five years although part thereof has been suspended to an effective term of imprisonment of fifteen years is extremely harsh; not balanced and is disproportionate that this court is entitled to interfere and substitute its discretion for that of the trial court. Crucially, the fact that the appellant had spent more than three years in custody while awaiting trial is also a factor that should have been taken into account in determining the appropriate sentence.⁶

⁵ Compare with *S v Maseola* 2010 (2) SALR 311 (SCA) 315 *a-b*. See also *S v Du Toit* 1979 (3) SA 846 (A) 857H-858A.

⁶ *S v Kruger* 2012 (1) SACR 369 (SCA) para 12.

[10] A case which comes close to the facts of this is *S v Kleinhans*⁷. In *Kleinhans* the accused was convicted of ninety five counts of contravening the Criminal Law Amendment Act 32 of 2007 arising principally out of the manufacture of child pornography as well as two related counts. He was sentenced to fifteen years imprisonment. Bozalek J (Pillay AJ concurring) made the following order:

“(a) Count 5-89, 94 and 95 taken together for purposes of sentence- 5 years imprisonment.

(b) Counts 1-4 & 90-93 are taken as one for purposes of sentence-3 years imprisonment

(c) 2 years of each of the above sentences are suspended for a period of 5 years conditionally.”

[11] The court on appeal considered that the cumulative effect of the sentences imposed were so inappropriate that it was permitted to substitute its discretion for that of the trial court.

[12] In this case, the only material feature that the evidence discloses as having aggravated what are inherently serious offences is the fact that these are directly or indirectly targeting children. However, forty five years is excessively longer than the appellant could reasonably be expected to survive. That is why in *S v Bull; Chavulla*⁸ the court was prompted to repeat its warning against the imposition of excessively long sentences. Another repetition was

⁷ *S v Kleinhans* 2014 (2) SACR 575 (WC).

⁸ *S v Bull; Chavulla* 2001 (2) SACR 681 (SCA) para 22.

subsequently required in *Nkosi*⁹, where the Supreme Court of Appeal stated:

“Thus under the law as it presently stands, when what one may call a Methusaleh sentence is imposed (ie a sentence in respect of which the prisoner would require something approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment which is proscribed by s12 (1) (e) of the Constitution of the Republic of South Africa Act 108 of 1996...”

[13] I however agree with the regional magistrate, although not stated categorically, that neither correctional supervision in terms of s276 (1) (h) or imprisonment in terms of s276 (1) (i) would have been appropriate considering the seriousness of the offences the appellant has been convicted of and the pervasive nature of the offences against the most vulnerable of our society, children, through the internet which is without boundaries. The appellant’s favourable personal circumstances should never be overemphasised to the point where extensive expert police work as well prosecution of cases of this nature is made to seem negligible.

[14] One last aspect that must be mentioned, in convicting the appellant on count 2: attempt to commit a sexual offence-section 55(a) of the Criminal Law (Sexual Offences and

⁹ *Nkosi v S* 2003 (1) SACR 91 (SCA) para 9.

Related matters) Amendment Act, 32 of 2007 and sentencing him to a term of five years imprisonment, the regional magistrate made no reference to the applicability of the Criminal Law Amendment Act 105 of 1997 (the Criminal Law Amendment Act). She consequently did not enquire into whether compelling and substantial circumstances existed which justified the imposition of a lesser sentence than the prescribed. This irregularity on its own vitiates these proceedings.

- [15] It is now settled that in terms of section 103(1) of the Firearms Control Act 60 of 2000 (the Firearms Control Act) an accused can be declared unfit to possess a firearm in the event that (s)he is convicted of crimes of violence in which a firearm was used sexual abuse, dishonesty and others listed in the section.¹⁰In *S v Phuroe*¹¹ the court held that the following factors must be considered in an enquiry of a convicted person possessing a firearm: (a) the accused's age and personal circumstances;(b) the nature of previous convictions or absence thereof;(c) the nature and seriousness of the crime of which the accused is found guilty of and any connection such crimes has with the use of a firearm;(d) whether any background suggests that the accused may make use of his or her licensed firearm(s) for the purposes of committing offences; and (e) whether it is in the interests of the community that the accused be declared

¹⁰ Offences of violence in which a firearm was used,sexual abuse,dishonesty.

¹¹ *S v Phuroe and 8 Others Similar Cases* 1991 (2) SACR 384 (NC) 387 para B.

unfit to possess a firearm because of the fact that (s)he may pose a potential danger to the community.

[16] First, the offences for which the appellant has been convicted of, do not warrant this declaration, as the State correctly conceded. Second, the regional magistrate did not even hold an enquiry to make the relevant determination based on the factors highlighted in *Phuroe*¹² suffice to state that these are serious offences and all are related to children. The section makes no reference to offences committed against children as a special category. The section prescribes a declaration only in respect of the listed offences.

[17] Having weighed up all relevant facts and in particular the appellant's clean record, non-use of a firearm in the commission of the offences he has been convicted of ,against the incidents of possession of pornographic material, I am persuaded that the appellant is not unfit to possess a firearm. I am accordingly satisfied that this means the declaration in this case is irregular and cannot stand.

[18] It will be remiss of me if I do not state that it was not befitting of the regional magistrate to display the disgust she felt in this case which justifiably gave the appellant the impression of bias on her part. As both counsel contended her conduct gave the impression that she lost her objectivity as well as the importance of balancing all factors in order to arrive at an

¹² *S v Phuroe and 8 Others* Similar Cases above

appropriate sentence. This conduct should be discouraged in the strongest terms possible, lest it be repeated.

[19] In the result, I make the following order.

ORDER

1. The appeal against sentence is upheld.
2. The sentence imposed on the appellant is set aside and the following sentence is substituted:

- ‘(a) For purposes of sentence counts 1,3-6 are taken as one and the accused is sentenced to seven (7) years imprisonment.
- (b) Count 2, the accused is sentenced to five (5) years imprisonment which term of imprisonment is to run concurrently with the sentence imposed in respect of counts 1, 3-6 as set out under paragraph (a) above.
- (c) In terms of section 282 of the Criminal Procedure Act 51 of 1977, the sentences imposed under paragraph (a) read with paragraph (b) above shall be deemed to have been imposed on 28 November 2014.
- (d) Count 7, the accused is sentenced to one (1) year imprisonment which is wholly suspended for five (5) years on condition that the accused is not convicted of defeating the administration of justice or attempt to defeat the administration of justice committed during the period of suspension.’

3. In terms of section 120 of the Children's Act 35 of 2008, the accused is automatically declared unsuitable to work with children.
4. In terms of section 50(2) (a) of the Sexual Offences Amendment Act 32 of 2007 the accused's name is to be included in the Register for Sexual Offenders.
5. The decision by the regional magistrate to declare the appellant not fit to possess a firearm in terms of section 103(1) of the Firearms Control Act is set aside and replaced by a decision that the court determines otherwise for the purposes of section 103(1) of the Firearms Control Act 60 of 2000.

B. C. MOCUMIE, J

I concur

S. J. REINDERS, AJ

On behalf of appellant: Adv A Coetzee
Instructed by:
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On behalf of the respondent: Adv. Steyn

Instructed by:

Director: Public Prosecution

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