



[REPORTABLE]

**OFFICE OF THE CHIEF JUSTICE
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NUMBER: A226/23

CLINTON CALDER

Appellant

v

THE STATE

Respondent

JUDGMENT DELIVERED ON THIS 26th DAY OF JUNE 2024

KAHANOVITZ, AJ:

[1] The appellant was convicted of 3195 counts of possession of child pornography. He was also convicted of the following further offences:

1.1. Count 3196 - contravention of various provisions of the Film and Publications Act 65 of 1996 - distributing child pornography.

1.2. Count 3197 – contravention of various provisions of the Film and Publications Act 65 of 1996 - importation of pornography.

1.3. Counts 3198 – 3217 - contravention of various provisions of the Film and Publications Act 65 of 1996 – creation of child pornography.

[2] These charges are elaborated on in what follows. On 29 November 2018 the appellant submitted a written guilty plea and plea explanation which was accepted by the court below. He was sentenced to 10 years imprisonment in the Regional Court Wynberg by Magistrate Pillay. He is currently serving his sentence at Brandvlei Prison, Worcester.

[3] His effective sentence was eight years direct imprisonment as two years of the 10-year sentence was suspended for five years. On 1 September 2023 he applied to the Regional Court Wynberg for condonation for the late filing of his application for leave to appeal. Condonation was granted.

[4] The appellant initially sought leave to appeal against part of the judgement on conviction but in the course of the leave to appeal application he indicated that this leg of his appeal would not be persisted with. Leave to appeal was then only sought in respect of the finding on sentence. The magistrate granted leave to appeal on sentence. The accused applied for bail pending the appeal, but bail was refused as a custodial sentence would, in the view of the court, be imposed on appeal even if the higher court found the initial sentence to be inappropriate.

[5] The appeal was heard in the Cape Town High Court on 26 April 2024. The appellant represented himself in the appeal. The state was represented by Adv Kortje. The appellant filed comprehensive written submissions. For part of the proceedings in

the court below and until he ran out of funds, he had private legal representation. He was subsequently legally represented by a legal aid lawyer in the submission of his guilty plea and during part the sentencing phase.

STATUTORY FRAMEWORK

[6] The appellant was found guilty of 3195 contraventions of section 24B(1)(a) read with Section 1, 2, 22, 24C, 30A of the Films and Publications Act, No. 65 of 1996 and further read with Sections 92(2), 94, and 276 of the Criminal Procedure Act, No. 51 of 1977 – Possession of child pornography.

[7] The relevant provisions of the Films and Publications Act, No. 65 of 1996 were replaced by Act 19 of 2020 with effect from 1 December 2021.¹ The appellant was however convicted on 10 December 2018 that is prior to the repeal of section 24B.

[8] Section 24B of the Act dealt with the prohibition, offences and penalties on possession of certain categories of films, games and publications. It states that:

“(1) Any person who—

(a) unlawfully possesses;

(b) creates, ...or assists in the creation or production of;

¹ S 24B was repealed by the Cybercrimes Act 19 of 2020 with effect from 1 December 2021 (Proc R42 in GG 45562 of 30 November 2021).

- (c) *imports or in any way takes steps to procure, obtain or access or in any way knowingly assists in, or facilitates the importation, procurement, obtaining or accessing of; or*
- (d) *knowingly makes available, exports, broadcasts or in any way distributes or causes to be made available, exported, broadcast or distributed or assists in making available, exporting, broadcasting or distributing, any film, game or publication which contains depictions, descriptions or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children, shall be guilty of an offence.” (Emphasis added).*

[9] Count 3196 concerned a contravention of section 24B(1)(d) read with Section 1, 2, 22, 24C, 30A of the Films and Publications Act, No.65 of 1996 and further read with Sections 92(2), 94, and 276 of the Criminal Procedure Act, No. 51 of 1977 – Distributing child pornography.

[10] Count 3197 concerned a contravention of section 24B(1)(c) read with Section 1, 2, 22, 24C, 30A of the Films and Publications Act, No. 65 of 1996 and further read with Sections 92(2), 94, and 276 of the Criminal Procedure Act, No. 51 of 1977 – Importation of child pornography.

[11] Counts 3198 to 3217 concerned contraventions of section 24B(1)(b) read with Section 1, 2, 22, 24C, 30A of the Films and Publications Act, No. 65 of 1996 and further read with Sections 92(2), 94, and 276 of the Criminal Procedure Act, No. 51 of 1977 – Creation of child pornography.

BACKGROUND

[12] The appellant's arrest emanated from information gathered by Chief Inspector Tim van Eester, Belgian Local Police, in the city of Antwerp who was assigned to the Criminal Investigation Department, in the section Crimes Against Persons and Team Sex Crimes.

[13] Part of the regular duties of Chief Inspector van Easter were to investigate areas offline and online, that are known for trading child abuse images, discussing child abuse, or luring children for contact offences.

[14] Van Easter noted that some of the Internet traffic on the child pornography sharing platform came via South Africa and he shared this information with the relevant authorities in South Africa.

[15] The appellant was then arrested following an international investigation into child pornography by Belgian and South African police. An online child pornography network was discovered where members of the network engaged in peer-to-peer file sharing of child pornography images. It was ascertained that a member of this network had gained access to it from South Africa. His location was established, and SAPS seized a laptop found at his home containing child pornography,

THE MAGISTRATE'S FINDING

[16] The accused had one previous conviction for drunken driving. He testified in mitigation and called as witnesses Dr Hoosain and Dr Londt. The state called Col Clark, Sister Rululu and Warrant Officer Grobler-Koonin to testify on sentencing issues. The witness testimony is discussed in what follows.

[17] The magistrate sets out and discusses case law concerning the rights of children and the harm to children, resulting from the creation, possession and distribution of child pornography.

[18] The personal circumstances of the appellant were found to include the following factors: he was born in 1969 and was unmarried; he had a 24 year old daughter and worked as a broker for a courier; at the time of the commission of the offence, he had just come out of a 10 year relationship; he described his conduct involving child pornography as a moment of madness; he said he had been doing "*crazy things*"; he added that he was currently seeing a psychologist, was suffering from depression, and had suicidal thoughts.

[19] The accused was diagnosed on 20 March 2017 by Dr Hoosain with chronic obstructive pulmonary disease ("COPD"). Dr Hoosain said the appellant was still smoking cigarettes when he examined him. After obtaining the diagnosis, he did not see Dr Hoosain again.

[20] Col. Clark, Section Commander - Investigative Psychology Unit Western Cape, SAPS, diagnosed the accused with a paedophilic disorder. She testified that not all

people with paedophilic disorders are paedophiles, although all paedophiles have a paedophilic disorder. The accused was sexually attracted to children but was not “hands on” in committing his offences.

[21] Dr Londt, a clinical social worker who testified for the appellant, was of the opinion that his profile was typical of a Child Sexual Exploitation Material (“CSEM”) offender. Dr Londt recommended a non-custodial sentence. She could not, with certainty, express a view on whether the accused would or would not re-offend.

[22] The court held that it did not need to make a finding on whether or not the accused was a paedophile. The point was that *“in this digital age the existence and production of child pornography [constitutes] the vilest possible form of degradation, exploitation and abuse of children. This abuse has no geographic boundaries and is perpetrated repeatedly and has increased at an alarming rate in South Africa and in this court’s jurisdiction.”* The crime, held the magistrate, is *“heinous and despicable, [and] it has resulted in a market for this illegal industry.”*

[23] The frequency and consistency of the offender’s downloading of the child abuse material was notable, said the magistrate. The sexual violation of the children is multiplied every time it is viewed. The accused, found the magistrate, showed no remorse but merely felt sorry for the position he found himself in. Pleading guilty when one is caught red-handed said the magistrate is not evidence of remorse but a neutral factor.

[24] There are no penalty clauses as such for these offences and therefore the sentences were at the discretion of the court. Looking at the sentences imposed in comparable matters, the only appropriate sentence in the circumstances was one of direct imprisonment.

[25] All four counts were taken together for purposes of sentence. The accused's name was entered on the register of sexual offenders, and he was also declared unfit to possess a firearm.

CHILD PORNOGRAPHY: THE SERIOUSNESS OF THE CRIME

[26] Appeal courts have on a number of occasions been required to consider the purpose of the prohibition as well as the question of appropriate sentencing in child pornography cases. Some of these cases are now discussed.

The De Reuck decision

[27] **De Reuck v Director of Prosecutions, Witwatersrand Local Division and Others** 2004 1 SA 406 (CC) spells out the purpose of legislation prohibiting possession of child pornography² and related offences:

² The Films and Publications Act 65 of 1996 (the Act) defines child pornography as follows: "*child pornography*' includes any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children".

“In determining the importance of section 27(1) of the Act, it is necessary to examine its objective as a whole. The purpose of the legislation is to curb child pornography which is seen as an evil in all democratic societies. Child pornography is universally condemned for good reason. It strikes at the dignity of children, it is harmful to children who are 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. I will deal with each of these in turn.”

The Alberts decision

[28] In **Director of Public Prosecutions North Gauteng v Alberts** 2016 (2) SACR 419 (GP) the appellant was convicted of 481 charges of possession of child pornography and sentenced to two 5-year terms of imprisonment which were all ordered to run concurrently. The appellant did not have direct contact with the children in the images or take the photographs himself. The state appealed against the sentence.

The constitutional court said this in **De Reuck** about the definition (at paragraphs 27 and 28):

“The first category of child images contemplated by the definition contains the following characteristics:

- 1. The image must depict a child engaged in sexual conduct or the display of genitals; and*
- 2. The image must be one which amounts to sexual exploitation.*

The characteristics of the second category of images contemplated in the definition are that:

- 1. the child must be depicted as participating in or assisting another person to engage in sexual conduct; and*
- 2. the image must amount to sexual exploitation or to degradation of children.”*

[29] The **Alberts** decision cautions against the trivialisation of the offence in South Africa. Reference is made to a law journal article by Iyavar Chetty³ where the author described the approach of some South African courts having a preference for handing down suspended sentences (in other words imposing a slap on the wrist), as standing in contrast to the example set by some courts in the USA sentencing persons convicted to several hundred years of imprisonment by treating each possession of each pornographic image of a child as a serious crime with each count attracting a prison sentence in its own right.

[30] There is without any doubt a strong level of public outrage against the makers of such images. The court in Alberts and a number of other decisions have emphasised that such images can only be made if a child is sexually abused.

[31] The question that then arises is whether merely possessing such images should be treated as a lesser evil and therefore treated more leniently than related crimes. A further category of offence, for example, concerns a person who, although not the maker of the images, does not merely possess them, but also distributes them to others.

[32] The court in **Alberts** also quoted with approval Chetty's view and explanation of the approach taken in the UK:

³ "The Trivialisation of Child Pornography Crimes in South African Courts" by Iyavar Chetty, KINSA Africa, 2014 (<http://kinsa.neUnews/trivialisation-child-pornography-crimes-south-african-courts-iyavar-chetty/>).

"The advice of the United Kingdom's Sentencing Advisory Panel to the Court of Appeal on Offences Involving Child Pornography should, therefore, be followed by South African Courts:

*'... it is fundamental that sentencing for these offences should reflect the harm suffered by the children who are abused and exploited by the production of indecent photographs. An offender sentenced for possession of child pornography should be treated as being in some degree complicit in the original abuse which was involved in the making of the images. Sentences for possession should also reflect the continuing damage done to the victim or victims, through copying and dissemination of the pornographic images. Those who make or distribute the images bear a more direct responsibility for the eventual use as well for encouraging further production.'*⁴

[33] The images possessed by the appellant in **Alberts** also included images of very young children being raped in different positions.⁵

[34] The statutory offence in South Africa is a legislative response to the constitutional right of children to be protected. Section 28 of the Constitution provides that every child has the right to be protected from maltreatment, neglect, abuse, or degradation.

[35] In the **Alberts** case, the state had appealed against the effective sentence of five years imprisonment. The sentence was too light, said the state. Aggravating features argued the state included the following: he respondent possessed a vast

⁴ Cited with approval in the **Albert's** case at paragraph 60.

⁵ Paragraph 18.

amount of child abuse images; he collected these over an extended period of time; the crimes at hand are not victimless; the victims of the offences are children who have not only been sexually abused but who have to live with the knowledge that images portraying them being raped or sexually violated will remain in the public domain forever, reminding them of the abuse and perpetuating the infringement of their rights to privacy, dignity, bodily and psychological integrity.

[36] The court accepted and stressed that for each image to be produced a child was sexually abused. Accordingly, for purposes of sentencing, the court accepted that the offence had consequences for 481 victims and their families and in its view this feature had not been given sufficient weight by the court below. The sentence of the court below was accordingly set aside, and the respondent sentenced to 10 years imprisonment without any period of suspension. This, in a context where he was found guilty only of possession not of distribution.

The Ntshinghila decision⁶

[37] Possession and distribution of child pornography are distinct crimes. The distribution of child pornography abuses children by creating a permanent record of the child's participation.⁷ This permanent record in turn permitted the harm to the child to be exacerbated each time the material was circulated and led to the creation of distribution networks that fostered further exploitation.⁸ He or she knows that the photograph continues to circulate among users who use it to derive sexual satisfaction.

⁶ **Du Toit v Ntshinghila** (733/2015) [2016] ZASCA 15 (11 March 2016) at paragraph 14

⁷ paragraph 14

⁸ *ibid*

The distribution network must accordingly be closed if the production of material that requires the sexual exploitation of children in order to be produced is to be effectively controlled.⁹

The AR decision

[38] The **State v AR** 2017 (2) SACR 402 (WCC) is another matter where the state appealed against the sentence imposed by the court below. The accused pleaded guilty and was convicted on 2130 counts relating to child pornography and sexual exploitation of children. Apart from downloading images from the Internet, he also took photographs of the children of his friends and neighbours' children. They were all used for his own sexual gratification, as viewing them would normally result in him masturbating. The court below found that the accused was clearly not a danger to the community, and since his arrest, he has been to seek help from M Londt (who apparently specialises in an anti-child abuse treatment programme called child abuse therapeutic and training services (CATTS))¹⁰. When he was sentenced, he was still in the process of attending programmes to discourage him from committing offences of this type.

[39] Expert evidence was led that the appellant was not a person with paedophilia but someone with a paedophilia disorder. The purpose of the distinction was to draw a line between those who had physical contact with the victims and those who chose a particular kind of pornography corresponding to their sexual interests. The court of

⁹ *ibid*

¹⁰ Londt also testified for the appellant in this matter.

appeal set aside the decision of the magistrate, who had imposed a sentence of eight years of imprisonment wholly suspended on certain conditions.¹¹

[40] The appeal court altered the sentence to an effective term of 10 years imprisonment of which two years was conditionally suspended. In the court below the appellant had put up a case that a non-custodial sentence was appropriate given his clean record, personal circumstances and his submission that he needed to receive private medical treatment for his sexual affliction (as such specialised facilities are not available in prison). The appeal court said the following about this aspect of his case:

“[48] 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 sentence, albeit an important one. In S v Stevens, supra, the principal argument 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, as such facilities are not available in prison. In rejecting this argument the court held as follows:

‘[5] ... 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.’

¹¹ At paragraphs 31 to 32.

[49] We find ourselves in agreement both with the sentiments expressed by the Court in that matter and the approach adopted.

[50] In the present instance, we are in agreement that the magistrate was correct, on a conspectus of all the evidence to have found that there were substantial and compelling circumstances present which justified a deviation from the minimum sentence applicable on counts 4-17. Notwithstanding the presence of considerable mitigating factors, principally in the form of the Respondent's personal circumstances, we consider that a non-custodial sentence would not achieve an appropriate balance between the other equally important factors namely, the seriousness of the offences and the interest of society. A non-custodial sentence would, in our view, unduly focus on the rehabilitation of the Respondent and would lessen the retribution and prevention elements of sentence, to the extent that it would bring the administration of justice into disrepute."

The Beale matter

[41] The decision in **Beale v S**¹² (2019) is also relevant. Beale was apprehended during the same international investigation that led to the arrest of the appellant in this matter. In that matter the appellant was initially sentenced to 15 years imprisonment and on appeal the sentence was replaced with a sentence of 10 years taking into account inter alia the history of abuse suffered by the appellant in his younger days. Beale was found guilty of being in possession of 18644 images of child pornography.

¹² (A283/18) [2019] ZAWCHC.

[42] The decision in **Beale** is also discussed in **Wagener v S**¹³ (2021). There the appellant appealed against a sentence of 10 years direct imprisonment for possession of almost 20,000 child pornography images. He argued that his case should be distinguished from inter alia the decision in **Beale** as in contrast to Beale he had only downloaded the images and photos from the internet stored and watch them, whereas **Beale** had engaged in what is termed “peer-to-peer file sharing of child pornography images”¹⁴. The court agreed with the sentiments expressed in Beale that possession only is a less serious offence ignores the reality that possession of the prohibited material creates a trading platform or market for this illegal industry where every image reflects the sexual violation of an impairment of the dignity of a child every time it is viewed.¹⁵ The children targeted by this industry include babies and toddlers.¹⁶

APPEALS AGAINST SENTENCE - THE TEST TO BE APPLIED

[43] A court on appeal will only interfere with a sentence if a trial court misdirected itself in passing a sentence, and even misdirection alone does not suffice for a court to interfere on appeal. **State v Malgas**¹⁷ held that the Appeal Court may be justified in interfering in the sentence imposed if the disparity between the sentence of the trial court and the sentence which the Appellate Court would have imposed can be described as shocking, startling or disturbingly inappropriate. **Prinsloo**¹⁸ holds that the

¹³ (A340/19) [2021] ZAGPPHC 65 (2 February 2021).

¹⁴ Paragraphs 13 and 14.

¹⁵ At paragraph 15.

¹⁶ Ibid.

¹⁷ 2001(1) SACR 469 (SCA).

¹⁸ **Prinsloo & others v State** (2016 (2) SACR 25 (SCA)

trial court's finding of fact and credibility are presumed to be correct, because the trial court has had the advantage of seeing and hearing the witnesses and it is in the best position to tell whether the witnesses were telling lies or not. In every appeal against sentence whether imposed by the Magistrate or a Judge, the court hearing the appeal should be guided by the principle that the punishment is pre-eminently a matter for the discretion of the trial court, and should be careful not to erode such discretion, hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised. The test is whether the sentence is vitiated by irregularity or misdirection or disturbingly inappropriate.

CHILD PORNOGRAPHY: THE PREVALENCE OF THE OFFENCE

[44] The State called Delene Grobler-Koonin, a Warrant Officer in the Hawks who was previously attached to the Gauteng Serial and Electronic Crime Investigation Unit (SECI). This unit was formed in 2013 to deal with international linkages in child pornography crimes. At the time South Africa lacked capacity to properly investigate crimes involving producing, manufacturing and distributing online child pornography. After the formation of this unit international agencies would contact it to alert the South African authorities to South African links in their investigations.

[45] This particular investigation concerned sharing of child pornography images through a file sharing application called Gigatribe. At the time of her testimony the investigations had led to 203 arrests worldwide including 15 cases in South Africa. The investigation was ongoing. She testified that with the increase in SAPS resources and

attention to these investigations more and more arrests are taking place and approximately every fifth person arrested is also a hands-on abuser of children also manufacturing child pornography. She testified that the users of child pornography also need to be eliminated as they create the market which results in children being raped to produce the images.

[46] In this case she said distribution meant making the images in his possession available to other people. To do this the offender needed to be provided with a password. One cannot obtain access to these images simply by searching on the internet. Although she is personally aware of investigations into more than 180 suspects in South Africa, this in her view represented only the tip of the iceberg.

[47] As to the prevalence of the offence the magistrate found the following:

"In this digital age the existence and production of child pornography [constitutes] the vilest possible form of degradation, exploitation and abuse of children. This abuse has no geographic boundaries and is perpetrated repeatedly and has increased at an alarming rate in South Africa and in this court's jurisdiction."

[48] The crime the magistrate said was *"heinous and despicable [and] it has resulted in [a] market for this illegal industry"*.

FACTORS IN AGGRAVATION OF SENTENCE - THE EXTENT AND DURATION OF THE APPELLANT'S INVOLVEMENT IN THE CRIME.

[49] The appellant operated under a pseudonym RATTEX 69 on the Gigatribe platform. He had been a user between 23 September 2014 and 7 June 2015. The State compiled an annexure with brief descriptions of the 3195 files found on his computer. A few examples of these descriptions are cited for purposes of this judgement:

“man ejaculating in face of a girl child”;

“female child engaged in oral sex”;

“girl child being sodomised by adult male”;

“adult male sexually penetrating girl child with penis in vagina”;

“naked girl child exposing her genitals”;

“naked male and female children engaging in sexual intercourse and oral sex.”

[50] A spreadsheet of approximately 80 pages - with approximately 40 entries per page - is provided and attempts to describe, in brief, the nature of the images stored on the seized laptop. The pornographic themes noted in the paragraph above (images reflecting the violation of naked children) are largely repeated throughout the document.

THE COPD AND RIGHT TO HEALTH ARGUMENT

[51] The appellant mounts an argument based on his health condition and in support of an argument as to why the magistrate erred in not imposing non-custodial punishment. The one line of argument concerns treatment for his addiction to child pornography. The other concerns his pulmonary condition. Both conditions would be

better treated, so he argued, outside of prison. He contends the magistrate failed to acknowledge this adequately in the terms of the sentence.

[52] The magistrate found that he continued to commit the offence over a substantial period of time. In her view he displayed no genuine remorse. It was only after he had been caught red-handed that he appeared to develop an interest in being treated for his habits.

[53] Dr Hussein who testified for the appellant stated all that he suffers from COPD and that this condition can be aggravated by smoke. Appellant had not stopped smoking by the time he saw Dr Hussein. Dr Hussein conceded that the applicant can live a normal life.

[54] Sister Rululu, an experienced qualified nurse currently employed at Pollsmoor Prison, was called by the state. She testified that there were other prisoners that Pollsmoor with the same condition and they were treated in prison. As far as smoking in prisons is concerned and the possible impact on him of this given his condition the magistrate observed that *“you are standing here before me breathing quite well on your own with no further support systems, no oxygen tank”*.

[55] An argument was presented in the court below and on appeal that because incarceration was harmful to the appellant's health (given his pre-existing COPD condition) a non-custodial sentence was called for. In sentencing him to prison the magistrate, so he argued, had breached his constitutional right to health. Although smoking is not permitted in prison, this rule, he submitted is ignored and he is generally surrounded by smoke. He argued that a custodial sentence was inappropriate as the

magistrate had other options available to her. She could instead have imposed correctional supervision.

[56] I am of the view that even if this condition could be better treated or less aggravated outside of prison the evidence was that the condition could be treated in prison. It is not uncommon for a person who is to be sentenced to imprisonment to be afflicted with a condition which would best not be monitored or treated in overcrowded prison conditions. This fact in itself obviously cannot justify a conclusion that incarceration is prohibited in serious cases where a prison sentence is as a matter of law required. This is not a borderline case where no imprisonment might in all the circumstances be suitable sentence and the health of the appellant could tip the balance in favour of a non-custodial sentence.

[57] If appellant or another prisoner's rights have been breached by the prison authorities permitting smoking by others - or by the authorities failing to offer appropriate medical treatment - then the appellant can enforce his constitutional rights as a prisoner to be properly treated. These considerations do not point to a misdirection on the part of the magistrate in imposing imprisonment as a sentence.

[58] It was in either event not shown that he had a life-threatening condition that could not be adequately treated in Pollsmoor Prison.

[59] The prevalence of Covid at the time also raised a further reason why a non-custodial sentence was required, so he contended. This is discussed below.

CORRECTIONAL SUPERVISION AND REHABILITATION

[60] **S v R** 1993 (1) SA 476 (A) holds that correctional supervision is a non-custodial option which can be imposed as an alternative to imprisonment if the convicted person is not a danger to society. The legislature distinguishes between two types of offenders viz those who ought to be removed from society by means of imprisonment and those who, although deserving of punishment, should not be so removed from society. Correctional supervision is a punitive option available without imprisonment.

[61] The magistrate, although noting that the defence had presented witnesses who had testified that the appellant was a suitable candidate for correctional supervision, was of the view that the serious nature of the offences required direct imprisonment. She also noted that in her view the offender in his testimony demonstrated no remorse for his actions but merely felt sorry for the position he now found himself in. He had, the court found, only pleaded guilty because of the extent of the state case against him. The psychologists and psychiatrists who had testified for him were mainly concerned about diagnoses and the rehabilitation of the individual concerned. The court must however also consider the well-being of society.

[62] The court below noted that during the nine months of growing his child pornography collection he had never considered his behaviour reprehensible but merely referred to it as “*a crazy time doing silly things*”. This inappropriate phrase was repeated by the appellant when he advanced his argument in this court. This court also did not gain the impression that he was genuinely remorseful.

[63] The state on appeal submitted that any non-custodial sentence would reflect a lack of deterrence for these prevalent offences. He had - so the state submitted - a propensity to commit the offence. Col Clark had diagnosed the appellant with a paedophilic disorder. The prospects for his rehabilitation from this disorder are slim. The obvious question which arises is how he would be prevented from accessing the internet if he were outside prison.

[64] Emphasis was also laid on Covid and that his incarceration could prove fatal. This he argued should have influenced the court below to approve a non-custodial sentence.

[65] The magistrate records that as far as Covid is concerned measures were put in place in the prisons. Certain people were released. The appellant was not one of them. As far as smoking is concerned the magistrate notes that *“you are standing here before me breathing quite well on your own with no further support systems, no oxygen tank”*.

[66] I accordingly find that the magistrate did not fail to have regard to the medical conditions of the convicted accused. It is apparent from her reasons that she clearly considered his medical conditions and concluded that this notwithstanding incarceration was the only appropriate sentence.

DECLARATION OF UNFITNESS TO POSSESS A FIREARM

[67] The appellant was declared unfit to possess a firearm in terms of section 103 of the Firearms Control Act 60 of 2000.

[68] The appellant submits that this declaration was made erroneously by the court below.

[69] Section 103(1) of Act 60 of 2000 provides that “*unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of [the offences then listed]*”.

[70] **Mkhonza v S 2010** (1) SACR 602 (KZP) holds at paragraph 34 that the correct approach is to start from the proposition that unless the court determines otherwise the legislature has provided that conviction of a crime referred to in section 103(1) leads to the result that the accused is unfit to possess a firearm. Accordingly, the onus of satisfying the court that it should determine otherwise should rest on the accused. As this part of the enquiry by the court is separate from the criminal trial and the decision on sentence the accused can discharge that onus on a balance of probabilities.

[71] The disqualification to possess a firearm will therefore apply as a matter of rote although the court has a discretion to not apply the disqualification if factors are placed before the court which go to show that the accused should not automatically be disqualified.

[72] There is some discussion in the case law about the role of a court in that process in the case of an unrepresented accused but that jurisprudence is not here relevant as at the relevant time in the proceedings the appellant was represented.

[73] The appellant was found guilty of an offence listed in s103(1) of the Firearms Control Act number 60 of 2000 to which the disqualification applied. Although possession and distribution of child pornography is not explicitly defined as a listed offence "*sexual abuse*" is in 103(1)(g). I find that the appellant was found guilty of an offence falling within the definition of sexual abuse. Otherwise stated the legislature intended that unless decided otherwise by the trial court, persons convicted of the manufacture and distribution of child pornography, should be declared unfit to hold firearm licences.

[74] No case was presented to the magistrate by the appellant to show why a court should determine otherwise and the magistrate accordingly correctly declared the appellant unfit to possess a firearm,

[75] I mention that the decided cases where a court was called upon to determine otherwise seemed to involve persons who needed firearm licences to be employed and the consequences of a declaration of unfitness became a live issue pertinently raised at the trial. A declaration of unfitness is also not permanent as, subject to section 9(3)(b), after a period of five years calculated from the date of the decision leading to the status of unfitness to possess a firearm, the person who has become or been declared unfit to possess a firearm may apply for a new competency certificate, licence, authorisation or permit in accordance with the provisions of the Act.

CONCLUSION

[76] I accordingly find that the magistrate did not fail to have regard to the medical conditions of the convicted accused. She clearly considered his medical conditions and concluded that this notwithstanding incarceration was the only appropriate sentence.

[68] I also find that the sentence is not too severe and disproportionate to other cases. This much is apparent from the other cases discussed in this judgement.

[69] Accordingly, we order as follows:

1. The appeal is dismissed.
2. The sentence imposed by the trial court is confirmed.

KAHANOVITZ, AJ

I agree and it is so ordered.

FORTUIN, J

DATE OF HEARING:	26 APRIL 2024
DATE OF JUDGMENT:	27 JULY 2024
COUNSEL FOR APPELLANT:	IN PERSON
COUNSEL FOR RESPONDENT:	ADV E KORTJE
	NPA