

**DE REUCK v DIRECTOR OF PUBLIC PROSECUTIONS,
WITWATERSRAND LOCAL DIVISION, AND OTHERS 2004 (1) SA 406
(CC)**

Headnote : Kopnota

The appellant had unsuccessfully challenged the constitutionality of certain provisions of the Films and Publications Act 65 of 1996 (the Act) in a High Court. He thereupon appealed directly to the Constitutional Court against the decision of the High Court. The appellant contended that the provisions of s 27(1) of the Act (which prohibited the creation, production, importation or possession of child pornography), read with the definition of child pornography in s 1 of the Act limited the right to privacy, freedom of expression and equality. He further contended that the limitation was not justifiable as they were overbroad and vague. The issues the Court was called upon to decide were what was covered by the definition of child pornography, whether the section limited the rights mentioned and whether any such limitation was justifiable. The definition of child pornography in the Act stated that it 'includes any image' . . . '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'. The appellant contended, *inter alia*, that a person who was a mere possessor (in terms of s 27(1)(a)) was treated more harshly than a distributor of as yet unclassified publications (under s 28(1) of the Act), who had additional defences not available to the mere possessor. It was also contended that s 27(1) was unconstitutional as it did not provide a defence for police officers, lawyers and judicial officers.

Held, as to the meaning of 'includes' in the definition, that the correct sense of 'includes' in a statute had to be ascertained from the context in which it was used. If the primary meaning of the term was well known and not in need of definition and the items in the list introduced by 'includes' went beyond that primary meaning, the purpose of that list was then usually taken to be to add to the primary meaning so that 'includes' was non-exhaustive. If, as in the present case, the primary meaning already encompassed all the items in the list, then the purpose of the list was to make the definition more precise. In such a case 'includes' was used exhaustively. Between these two situations there was a third, where the drafters, for convenience, had grouped together several things in the definition of one term, whose primary meaning - if it was a word in ordinary, non-legal usage - fitted some of them better than others. Such a list could also be intended as exhaustive, if only to avoid a quagmire of uncertainty in the application of the term. (Paragraph [18] at 418E/F - 419C.)

Held, further, that pornography was notoriously difficult to define and child pornography no less so. For this reason alone it was unlikely that the Legislature intended merely to add meanings to the term on the assumption that its primary meaning had been not in need of definition. Rather, the

purpose of the list would have seemed to be to have given the word a more precise meaning. (Paragraph [19] at G 419C - C/D.)

Held, further, as to the meaning of 'child pornography' in the definition, that, although erotic and aesthetic feelings were not mutually exclusive in that some forms of pornography could contain an aesthetic element and where the aesthetic element was predominant the image would not constitute pornography, the dictionary definition of pornography, namely that it was 'the explicit description or exhibition of sexual subjects or activity in literature, painting, films, etc, in a manner intended to stimulate erotic rather than aesthetic feelings; literature etc containing this', was a fair description of the primary meaning of pornography. 'Child pornography' bore a corresponding primary meaning where the sexual activity described or exhibited involved children. The s 1 definition was narrower than that primary meaning of child pornography. (Paragraph [20] at 419F/G - H.)

Held, further, that the s 1 definition was more precise than the primary meaning, in that it referred to 'any image', thereby excluding written descriptions; and it listed various forms of conduct that could not be depicted. This was narrower, and more precise, than the dictionary's reference to 'explicit . . . exhibition of sexual subjects or activity'. It followed that the prohibited acts were a closed list of what constituted child pornography for purposes of the Act. (Paragraph [21] at 419H/I - 420B/C.)

Held, further that child pornography was defined as images 'depicting' those prohibited acts. Legal certainty and the practicalities of proof favour an objective test based on the perspective of a 'reasonable viewer' over those tests that considered the subjective state of mind of the author or the accused. (Paragraph [22] at 420B/C - C/D.)

Held, further, as to the meaning of 'person' in the definition, that the image, which had to be 'real or simulated, however created', had to depict a 'person'. This included imaginary as well as real persons. (Paragraph [23] at 420D/E.)

Held, further, as to the meaning and effect of 'sexual exploitation' and 'degradation' in the definition, that child pornography was restricted to an image and s 27 was therefore aimed at conduct in relation to that image that fell within the ambit of the definition in s 1. The definition in s 1 contemplated two categories of images. There were certain characteristics which applied to all the images contemplated in the section while there were other characteristics which applied to one or other category of them and which assisted in defining that category. There were two characteristics which were common to all images: they could be real or simulated regardless of how they were created; and had to be that of a person who was or was shown as being under the age of 18 years. (Paragraph [25] at 421A/B - D.)

Held, further, that the first category of child images contemplated by the definition required that the image had to depict a child engaged in sexual conduct or the display of genitals; and the image had to be one which amounted to sexual exploitation. The second category of images

contemplated in the definition were those where the child had to be depicted as participating in, or assisting another person to engage in sexual conduct; and the image had to amount to sexual exploitation or to degradation of children. The conduct required to be depicted in each category of image was different. The second category of image embraced a broader category because it was caught in the definition even if it did not amount to sexual exploitation but to the degradation of the child. (Paragraphs [27], [28] and [29] at 421E - H.)

Held, further, that 'exploitation' had a negative characteristic and implied either a negative purpose or result or a negative cause by which the sexual urges of human beings were manipulated. (Paragraph [30] at 421I - I/J.) G

Held, further, that the stimulation of erotic rather than aesthetic feelings was an essential element of the definition of child pornography. Any image that predominantly stimulated aesthetic feelings was not caught by the definition. It did require, however, that the image viewed objectively and as a whole had as its predominant purpose the stimulation of erotic feelings in certain human beings. Evidence of the intention of the author was irrelevant to this determination. The purpose had to be determined from the perspective of the reasonable viewer, who would regard it as having as its predominant purpose the stimulation of erotic rather than aesthetic feelings in a target audience. (Paragraph [32] at 422A/B - C/D.)

Held, further, as to the use of context, that a court was not prevented from referring to context when determining whether a publication contained a visual presentation of child pornography. Indeed, it was not possible to determine whether an image as a whole amounted to child pornography without regard to context. The Act had to be interpreted to allow consideration of such contextual evidence when it was relevant since the statute did not preclude it. (Paragraphs [33] and [34] at 422D/E - I.)

Held, further, that an image that purported or was alleged to 'depict' a prohibited act had to do so explicitly. An image was 'depicted' if it was presented for the viewer to see, and was not merely suggested. (Paragraph [35] at 422I - 423A.)

Held, further, that the definition of 'sexual conduct' in Schedule 11 to the Act could be used within the definition of 'child pornography' in s 1 of the Act. (Paragraphs [36] and [37] at 423C/D - E.)

Held, further, as to the right to equality, that the scope of s 28(1) of the Act was wider than the material targeted by s 27, although it was narrowed somewhat by the exemptions in Schedule 5. Thus s 28(1) should be characterised as a measure which banned for distribution a range of publications that was broader, in most respects, than those banned for possession by s 27(1)(a). This differentiation was connected with the legitimate government objective of combating the harm caused by pornographic and violent materials by targeting those who distributed such materials. The differentiation thus scarcely manifested arbitrariness or a

naked preference for distributors. Moreover, a publication which contained child pornography had to have, as its purpose, the stimulation of sexual arousal among its target viewers through explicit visual depiction of any of the four prohibited acts. It was most unlikely, then, to be of a 'bona fide scientific, documentary (or) literary' nature so as to qualify for exemption under Schedule 5. Further, that in most cases someone who knowingly distributed a publication also knowingly possessed it, and she or he could therefore be charged under s 27(1)(a) instead of s 28(1). The challenge based on the right to equality had to fail. (Paragraphs [40], [41], [42] and [45] at 425C - 426A/B and 426E/F.)

Held, further, as to the right to freedom of expression, that the criminalisation of the creation, production, importation, distribution and possession of the material that fell within the definition of child pornography limited the right to freedom of expression. Whether the limitation was justifiable remained to be considered under a limitation analysis. (Paragraph [50] at 428A - B.)

Held, further, as to the right to privacy, that the impugned provisions infringed the right to privacy and their constitutionality would depend on whether the requirements of the limitation clause in s 36 of the Constitution of the Republic of South Africa Act 108 of 1996 were fulfilled. (Paragraph [52] at 428E/F - F.)

Held, further, as to the conflict between the rights of children in s 28 of the Constitution and the rights relied upon by the appellant, that constitutional rights were mutually interrelated and interdependent and formed a single constitutional value system. Section 28(2) of the Constitution, like the other rights enshrined in the Bill of Rights, was subject to limitations that were reasonable and justifiable in compliance with s 36. (Paragraph [55] at 429B - C.)

Held, further, as to the justifiability of the limitation of the right to freedom of expression, that the limitation of the right caused by s 27(1) of the Act did not implicate the core values of the right. Expression that was restricted was, for the most part, expression of little value which was found on the periphery of the right and was a form of expression that was not protected as part of the freedom of expression in many democratic societies. (Paragraph [59] at 430D/E - E/F.)

Held, further, that the State had established three legitimate objectives which the limitation aimed to serve, namely, protecting the dignity of children, stamping out the market for photographs made by abusing children and preventing a reasonable risk that images will be used to harm children. (Paragraph [67] at 432G - H.)

Held, further, that the relatively narrow infringement of expression was outweighed by the important legislative purposes performed by s 27 of the Act, together with the legislative safeguards provided, as well as the difficulty of legislating in that area at all. (Paragraph [70] at 433D.)

Held, further, that a blanket defence for any film-maker or researcher who reasonably needed to possess or import child pornography was not constitutionally required. (Paragraph [75] at 434E/F - F.)

Held, further, that the procedure set out in s 22 of the Act did permit the conducting of research into child pornography provided good cause was shown. What the provisions were concerned with were the narrow area of child pornography and the material connected with a market in which children were abused and which posed a reasonable risk of harm in the hands of the average possessor. In the result, the nature and extent of the limitation was not severe. (Paragraph 79 at 435C/D - D/E.)

Held, further, that it was reasonable and justifiable for the rights of researchers and film-makers in relation to possession and importation of child pornography to be limited by s 27(1) of the Act, read with s 22. (Paragraph [83] at 436E - F.)

Held, further, that even in the unlikely event of a finding that s 27(1) was inconsistent with the Constitution because it did not provide a defence for police officers, lawyers and judicial officers and others, it would not have resulted in s 27(1) being set aside. It would have been possible and less intrusive of the legislative function to address the inconsistency through notional severance or reading in. (Paragraph [87] at 437D - E.)

Held, accordingly, that it had been established that, s 27(1) constituted a reasonable and justifiable limitation on the right to freedom of expression. (Paragraph [88] at 437E/F - F.)

Held, further, as to the limitation on the right to privacy, that although possession and consumption of child pornography often took place in the inner sanctum of the home, the legislative purposes remained of great importance. It could not be overlooked that many of the resultant acts of abuse against children took place in private. In other words, where the reasonable risk of harm to children was likely to materialise in private, some intrusion by the law into the private domain was justified. Moreover, since child pornography was frequently being imported via the internet and possessed on computers, the ease with which such possessors could become distributors at the touch of a button, as it were, had to be taken into account. This exacerbated the risk of harm and further justified the intrusion of the Act into the private sphere. For those reasons and for those given in consideration of the justifiability of the limitation of the right to freedom of expression, the limitation of the right to privacy was also justifiable. (Paragraphs [90] and [91] at 437G - 438B/C.)

The decision in the Witwatersrand Local Division in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 389 (2003 (1) SACR 448; 2002 (12) BCLR 1285) confirmed.