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

Case: A283/18

In the matter between

WILLIAM ALEXANDER BEALE Appellant

and

THE STATE Respondent

JUDGMENT: 3 MAY 2019

STEYN J AND SIEVERS. AJ

[1] This is an appeal against a sentence of 15 years imprisonment imposed on the appellant in the Regional Court, George, following the conviction of the appellant to an offence related to possession of child pornography in terms of the provisions of the Films and Publications Act 65 of 1996 as amended by the Films and Publications Amendment Act, No. 3 of 2009 ('the Act').

[2] One of the objects of the Act (s 2) is to regulate the possession and distribution of certain publications to protect children from exposure to disturbing harmful materials and to make the use of children, and their exposure to pornography, punishable.

[3] Section **24B** of the Act deals with the prohibition, offences and penalties on possession 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;

(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.' (Own underlining here as elsewhere)

[4] It is common knowledge that sexual offences, including offences related to child pornography, are not easily detected. In this matter the appellant was 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 pornographic images; a term we deal with later. It was ascertained that a member of this network, with a known username, gained access to the network from South Africa. (We refrain from mentioning the names of the network or the username.) The South African Police established where the user gained access from and upon investigation seized a notebook computer of the appellant at an internet cafe belonging to him, discovering images, films, publications and videos containing child pornography.

[5] The appellant could not avoid pleading guilty in a Regional Court in George to 18 644 contraventions of s **24B (1) (a)** read with ss 1 and 308 of the Act, as amended, as well as ss 92(2), 94 and 276(1) of the Criminal Procedure Act 51 of 1977 ('the CPA'). He also pleaded guilty to the possession of 5 gram of *'dagga'.*

[6] The appellant did not testify on the merits of the matter or in mitigation of sentence. On his behalf a written statement in terms of s 112 (2) of the CPA was handed in, in which he pleaded guilty. The evidence of two witnesses was presented on behalf of the appellant who, together with his representative, put certain facts to the court in mitigation of sentence.

[7] In his s 112 statement the appellant recorded the following, set out in slightly abbreviated terms:

> '1. On the 13th January 2015 I was at home when the South African Police arrived ... with a search warrant ... to search the premises.... (The) police seized my ... notebook computer...;
>
> 2. I was informed ... that I was under investigation for being a member of a child pornography network ... where members of the network **engaged in peer to peer file sharing** of child pornography images;
>
> 3. I admitted ... that I am the owner/author of the username ... which I use ... to gain access to (the network) enabling me to engage in the viewing of child pornography images **and peer to peer file sharing;**
>
> 4. The police then proceeded to access (the network) on my ... notebook by using my username ... , after which I was immediately arrested ... and detained;
>
> 5. I was presented by the prosecutor with a report compiled by a forensic specialist ... who examined the storage device located in my ... notebook and discovered a number of files stored under both the visible directory structure and in the unallocated cluster (without a directory structure) of the storage medium;
>
> 6. The storage device contained images and multimedia files (videos) containing child pornography;
>
> 7. I accept the authenticity of the aforementioned report ... and its findings in as far as it relates to my ... (computer);
>
> 8. I admit that from the year 2013 to 13 January 2015 and at or near Plettenberg Bay ... I unlawfully and intentionally possessed photographs, publications, films and videos which contained depictions or scenes of child pornography as described in Annexure A to I, a detailed breakdown which is attached hereto as Annexure **WAB1,** and which was stored in the ... computer's hard drive. I acknowledge that at all times the images I possessed were in fact child pornography as defined in s1 of the Films and Publications Act 65 of 1996;
>
> 9. I acknowledge that at all times I knew that my actions were unlawful and if caught I could be charged with an offence and sentenced in a court of law.'

[8] The term **'peer to peer file sharing',** admitted by the appellant, was not explained by him or his representatives. The state argued that the term referred to the sharing

by peers of images with other peers or users of an internet site, in this case a site related to child pornography, as the term logically implies. File sharing is a known method applied by internet users to access media files of peers, such as movies and pictures, using software programs to connect to each other via the internet. The approach of counsel for the appellant was that the appellant was not charged with, or found guilty of distribution of images.

[9] As regards the charge of *'possession'* of child pornography, it was argued on behalf of the state that not only the vast number, but also the nature of the content of many of the images and videos, admittedly possessed by the appellant, often constituting hard core, violent child pornography, required that a heavy sentence be imposed. The magistrate and the representatives of the parties viewed some images. The magistrate recorded that the images and videos viewed were horrific and gruesome, degrading and disgusting in nature, depicting images where babies, toddlers and teenagers are raped, sexually abused and bonded. We did not view the images but, relying on the descriptions of the different images in the files before us, many images and videos can only be described as abhorrent, shocking and disgusting, including pornography of a sexual nature perpetrated, as noted, on babies, toddlers and young children. Some file names were described in the Preamble to the Charge Sheet including a description of a step-daughter who *'cries really good'* and a *'Babygirl Fuck Video'.* Some images were labelled in the annexures that include: vaginal sex with infant, or toddler or female child or anal penetration with toddler or female child or objects inserted into the vagina of the above. Some *'milder'* images are of *'children posing naked displaying their bodies to be used for purposes* of *sexual exploitation and child grooming'.*

[10] On behalf of the appellant the court heard the evidence of and received the reports of Mr L. Setsuna (with regard to correctional supervision) and Mr T van der Walt (a clinical psychologist). Colonel 8. Stollarz, employed by the SAP as an investigative/forensic psychologist, testified on behalf of the state.

[11] The magistrate took the 18 644 images/counts together for purposes of sentencing and sentenced the appellant to fifteen years direct imprisonment, the maximum term that could be imposed by the magistrate. This is one of the highest sentences imposed in South Africa on charges related to possession of child

pornography to date. The appellant was declared unfit to possess a firearm and it was ordered that the appellant's name be recorded in the National Register for Sexual Offences in terms of s 52 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 ('SORMA'). It is against the sentence of imprisonment in respect of the transgression of the Films and Publications Act that the appeal is directed. (The appellant was also sentenced to R 500- or 30-days imprisonment for the possession of dagga.)

[12] The appellant's counsel argued that a term of 5 years imprisonment would be appropriate. His previous plea for a non-custodial sentence was sensibly abandoned. The state argued that a sentence of 15 years imprisonment was proportionate, appropriate and just in the serious circumstances of the matter.

[13] It is no secret that in this digital age the existence and production of child pornography, constituting the vilest possible form of degradation, exploitation and abuse of children, abuse that has no geographic boundaries and that is perpetuated repeatedly, has increased at an alarming rate in South Africa and in this court's area of jurisdiction. The offence can hardly be over- emphasised. This crime is a heinous, despicable crime that has resulted in public outrage, explaining why the community and activist groups follow trials related to child pornography and publicly voice their concerns when they form perceptions that courts may be trivialising these offences, where many images constitute sexual exploitation of and appalling violent sexual crimes against children, including babies and toddlers.

[14] Mr van der Berg, who appeared for the appellant, acknowledged that the crime which the appellant has been found guilty of is a serious crime. He submitted however that *'possession'* is the least serious of the categories of offences created by s 248 (1) of the Act. (The court will disregard that the appellant in fact also admitted to s 248 (1) (c) and (d), the importation of child pornography and the sharing or making available, thereof.)

[15] We accept that the appellant was not convicted of manufacturing child pornography or of molesting children, but the argument that an accused *'only'* possessed disturbing and disgusting images as a mitigating factor, ignores the reality

that possession of the prohibited material creates a trading platform or market for this illegal *'industry'.* Every image contained in child pornography reflects abhorrent prohibited sexual conduct, often including violence, involving children. Every image reflects the sexual violation of and the impairment of the dignity of a child, every time that it is viewed. As argued, children, including babies and toddlers, are the unidentified, voiceless victims of child pornography. It cannot be disputed that these victims will bear the emotional scars of their abuse for life.

[16] The Children's Act, 38 of 2005, dictates that all organs of state in any sphere of government, must respect, protect and promote the dignity and the rights of children and that the best interests of children are of paramount importance in all matters where the interests of children are at stake. Section 28 of our Constitution also emphasises the paramountcy of the child's best interests in matters concerning the child. The Constitution enshrines the rights of children to be protected from maltreatment, neglect, abuse or degradation and prescribe that they should not be required or permitted to perform work or provide services that are inappropriate for a person of a child's age; or to place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.

[17] **Carolissen v OPP** 2016 (2) SACR 171 was a matter heard in this court as an appeal to an order following an extradition application to the USA, related to offences relating to child pornography, Gamble J (with Donen AJ
concurring) commented:

> 'The rights of children in South Africa are specifically addressed and protected in s 28 of the Constitution. Moreover, there is a plethora of legislation (including SORMA) which has been introduced in the constitutional era to give content to the protection afforded to children in the Bill of Rights. Our courts, too, have consistently sought to advance the *"paramountcy'* or *"best interests"* principle embodied in s 28(2) of the Constitution in all matters concerning children. For instance, in **Du Toit (v the Magistrate and Others** 2016(2) SACR 112 SCA) the Supreme Court of Appeal recently reiterated the importance of that approach in a case concerning a prosecution for possession of child pornography. In that matter the court cited extensively from the decision of the United States Supreme Court in **(New York v Ferber** 458 US 747 (1982))

stressing the immense harm which such matters causes to children when they are forced to be the subjects of such offences.'

[18] In the **Carolissen** judgment, supra, the magistrate at the court in Kuils River, Cape, ordered that the appellant was liable to be extradited to the USA to stand trial in the Federal Court in the state of Maine on charges relating to the production and dissemination of child pornography. The appellant was arrested pursuant to a request from the USA government. He had previously sought assistance for an addiction to internet child pornography and had been diagnosed with paedophilia. His offences were committed via *'cybercrime'* from Cape Town.

[19] We are aware of, and we were referred to, several other child- pornography related cases heard on appeal in the Cape Town High Court and other courts in South Africa over the last few years. Trials related to child pornography are usually, as in the present matter, conducted in the Regional Courts and as such this court may not be aware of the number of trials heard, or sentences generally imposed in such courts. We are aware of a matter that was heard in George, where early in 2016, about a year after the appellant was apprehended, another arrest was made in the George area of a 38-year- old man, a Mr James, who was in possession of a vast amount of child pornographic images on his computer and cell phone. He also pleaded guilty, was convicted and eventually sentenced in the George Regional Court in July 2018. We are not aware of full details of the matter, but we believe that he was sentenced to 12 years imprisonment of which 4 years were suspended.

[20] In **De Reuck v Director of Public Prosecutions** & **Others** 2004 (1) SA 406 (CC) para 61 the Constitutional Court considered charges relating to the possession and importation of child pornography under the previous legislative framework and stated that the purpose of the legislation was to curb child pornography which is seen as an evil in all democratic societies. Child pornography is universally condemned for good reason, as it strikes at the dignity of children, is harmful to children who are used in its production, and 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.

[21] In one of the matters heard in the Western Cape High Court, **S v AR** 2017 (2) 402

(SACR) Le Grange, J with Weinkove AJ concurring stated that: '[36] 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 forms of discrimination and violence against women and children. This is in line with the State's obligation under s 28 of our Constitution which provides that the best interests of the child shall be of paramount importance.'

[22] Section 30 of the Act, which previously provided for prescribed punishments, was deleted by the Amendment Act No 3 of 2009. Section 276(1) of the CPA authorises courts to impose sentences, whether at common law or under statute, where no other provision governs the imposition of a sentence. In the **Carolissen** judgment, supra, Gamble J referred to **Director of Public Prosecutions, WC v Prins and Others** 2012 (2) SACR 183 (SCA) para [38] and noted that the effect of the judgment is that in respect of those offences under SORMA with which a person is charged in the High Court, the maximum sentence which can be imposed is life imprisonment and if charged in the Regional Court, the maximum sentence is 15 years imprisonment.

[23] Mr van der Berg argued that the magistrate was unduly influenced by the reaction of members of the community who were present in court, expressing their interest (and according to the magistrate, their disgust) in relation to the violation and abuse of children. It is trite that the community's reaction to a crime and their subsequent demands usually relate to the seriousness of the crime in society's view, and these considerations should be considered in the court's determination of a sentence for an offence. **In S v Flanagan** 1995 (1) SACR 13 (A) at 17 e-f the court held that the interests of society are not served by a sentence that is too lenient, and that such a sentence is inappropriate. An appropriate sentence is neither too lenient nor too severe.

[24] In **OPP North Gauteng v Thabethe** 2011 (2) SACR 567 (SCA) at para 22 the court held that our courts have an obligation in imposing sentences to impose a sentence which reflects the natural outrage and revulsion felt by law-abiding members of society and that a failure to do so would have the effect of eroding public confidence in the criminal justice system.

[25] In **S v Blank** 1995(1) SACR 62 (AD) Grosskopf JA stated at p73 e-f, that it is not wrong, as stated in ***R v Karg*** 1961 (1) SA 231 (A) at 2368, that:

> '... the natural indignation of interested persons and of the community at large should receive some recognition in the sentences which the courts impose; and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute.'

[26] Ms Kortje, appearing for the State with Ms Marx, conceded that while the sentences imposed by different courts could not be compared with mathematical precision, sentences should generally not be disproportionate to other sentences for similar offences, where the accused's personal circumstances are similar. She referred to **S v Marx** 1989 (1) SA 222 (AD) at 2258 where Smalberger JA remarked that our courts generally attempt to punish in equal proportion equal participation in an offence, unless there was a disparity in the personal circumstances of the offenders, in which case unequal sentences were justified. The court emphasised that justice must be seen to be done in the eyes of the offender as well in the eyes of the public:

> 'Ongelyke strawwe op gelyke misdadigers ten opsigte van dieselfde misdryf druis in teen die algemene gevoel van geregtigheid. (Du Tait, *Straf in Suid-Afrika* op 118).'

[27] The appellant's personal circumstances were considered. The psychologist (Van der Walt) who was called on behalf of the appellant and the psychologist (Stollarz) who was called by the state submitted a joint minute agreeing upon the following:

1. The appellant was subjected to severe abuse, emotional, sexual and physical; this may have played a role in the development of deviant sexual interests;
2. The appellant has a paraphilia, (a condition characterized by abnormal sexual desires) namely urophilia; (The latter relates to a dependence or deviancy related to urine.)
3. The appellant has a paedophilic disorder;
4. The appellant has strong antisocial personality traits and the Minnesota Multiphasic Personality Inventory 2 indicates elevations of antisocial personality traits;
5. The appellant has no known history of contact offences;
6. At the time of his arrest, the appellant was using cannabis;

7. The appellant reported desisting in the use of opiates since being in a rehabilitation centre;
8. The appellant has one previous conviction for possession of cannabis;
9. The appellant is not currently a suicide risk;
10. Following the appellant's arrest, he experienced major changes in his circumstances, which led to symptoms of anxiety and depression;
11. The appellant's adoptive family members had no concerns with regards to him and his behaviour prior to his arrest;
12. There is no cure for paedophilia;
13. There is no international *'best practice'* programme for the treatment of paedophilia;
14. The appellant has a good social support system from his family members;

[28] About the joint finding that appellant showed strong antisocial personality traits: - The courts have been advised and accept that this term describes a personality disorder and that, as appears to be the case in this matter, people who suffer from this disorder:
'show a longstanding pattern of disregard for and the violation of the rights of others and they fail to conform to social norms with respect to lawful behaviour.'
See **Gcaza v S** (1400/2016) [2017] ZASCA 92 (9 June 2017) para [29).

[29] The expert called by appellant recorded in his report that the appellant scored *'extremely high'* on the relevant test, supporting his impression that he has *'strong antisocial personality traits'* and that literature reports that such a personality type has a prominent risk factor for offending as well as recidivism for sexual offences. Colonel Stollarz noted in her report that individuals with this disorder are characterised by a pattern of disregard for and the violation of the rights of others, disregarding the feelings of others and that they rationalise their behaviour and show little remorse.

[30] Both psychologists impressed the court *a quo* as witnesses. Van der Walt's interview with the appellant was more comprehensive, as he was able to spend more time with him. Van der Walt was of the opinion that the risk of recidivism by the appellant was relatively low, while Stollarz was of the opinion that it was medium. The magistrate found that a risk remains a risk, whether low or medium.

[31] The experts noted that the appellant had been subjected to abuse as a child, which may have played a role in his development of deviant sexual interests. **It was recorded by van der Walt that a clear association has been found between childhood sexual abuse and serious mental health disturbances.** (This is one reason why the effect on the victims of the appellant's conduct cannot be trivialised.) But, in this case, as noted by the magistrate, and apparent from the reports of both experts, the appellant himself adamantly denied that his dysfunctional history played a role in his conduct. The history of appellant's abuse had occurred many years before he was arrested for his offensive conduct in this matter.

[32] The appellant's motive was morally reprehensible. He carefully planned the offences he intended to commit. He did not inadvertently stumble on child pornography. He regarded the downloading from the *'dark web'* of the pornographic images as a challenge and appeared to be proud of the fact that he was able to access locked sites, which he could only do by himself first supplying images of a shocking nature, to show that he could be trusted. He was candid in admitting to Stollarz that he searched for content of a sexually violent, shocking nature.

[33] Of concern is that the appellant showed no empathy or sympathy towards the children depicted in the downloaded images, indicating a lack of insight or remorse in the abhorrent nature of his conduct. He agreed that he was addicted to viewing the downloaded images, images that he downloaded, deleted, uploading images again and sometimes he spent up to 8 hours at a time viewing. He stated that he knows that he is supposed to feel bad, but he does not. It was recorded that he did not think therapy would cure him. In any event the success of therapeutic intervention was reportedly questionable, although van der Walt maintained that long-term therapy may assist in rehabilitating the appellant.

[34] The appellant's personal circumstances, all considered by the presiding magistrate, include that he was a 39-year-old male, unmarried with no children, at the time of the offence(s). He was employed, earned a small salary and was self-supporting. As noted, it is clear from the reports that the appellant had experienced a dysfunctional, unhappy childhood, where he was subjected to abuse, emotional,

sexual and physical. Neither parent was a role model nor was his foster mother, who physically, verbally and emotionally abused him. It was concluded by the experts that the appellant tried to escape his childhood memories in adulthood, by living in his own world, distancing himself from the rest of the world. The deviant behaviour by the appellant demonstrates the permanent emotional scars left on an individual following abuse, although appellant downplayed the effect on himself.

[35] The appellant unavoidably pleaded guilty to the charges and accepted responsibility for his actions. However, he did not testify and accordingly the true extent of his remorse, if any, could not be established effectively, as noted by the magistrate. Stollarz recorded that the appellant *'shows no remorse'* for his actions, other than explaining that he was being rejected by the community and *' persecuted'* by the media, aspects that angered him.

[36] True remorse entails *'repentance and inner sorrow'* or a feeling of guilt. It may be considered as a mitigating factor as a remorseful offender is generally unlikely to repeat an offence. A plea of guilty may convince a court that an offender has remorse, but where an accused pleads guilty as he was caught red-handed or had no other option, because of the strength of the case against him, a plea of guilty is a neutral factor, which in our view is the case in this matter.

[37] In **S v AR** (supra) the court was seized with an appeal by the State against sentence in the following circumstances:

> '[39] ... The respondent pleaded guilty to 2 130 counts which *inter alia* included the contraventions of s 5(1) of Act 32 of 2007 (Sexual Assault), contraventions of s 20(1) of Act 32 of 2007 (the use of a child for the creation of child pornography) and various contraventions of s 248 (1) (a), (b) and (c) of Act 65 of 1996 (the possession, creation and the importation of child pornography). Counts 4-17 attracted the prescribed minimum sentence (at the time) of 1O years' imprisonment as contemplated in terms of s 51(2) of Act 105 of 1997. On the established facts there is no doubt that the respondent has a propensity to commit these offences. Each image of child pornography in whatever form is and remains a crime-scene. In the present instance the respondent also physically abused some of his victims whilst asleep. He was

> calculated and manipulative. He exploited his victims when they were at their most vulnerable. To suggest that he is not a danger to society is simply, misguided.'

[38] The court in AR, where the accused was sentenced to ten years imprisonment with two years suspended, had regard *inter alia* to the comments in **Kleinhans (v S)** 2014 (2) SACR 575 (WCC), where the appellant was a 74-year-old well-to-do businessman, who had been convicted of numerous contraventions of SORMA, relating to the manufacture of child pornography, sexual assault and sexual grooming. The charges related to three complainants, minor girls, whom the appellant had befriended over a period of five years. He was sentenced to an effective term of 15 years imprisonment. On appeal, despite argument and evidence that the appellant would benefit from a community-based treatment programme, the court held that the seriousness of the offences required a period of imprisonment. An effective term of four years' imprisonment was imposed with a further four years suspended on certain conditions.

[39] Ms Kortje referred to the sentence in the matter of **Director of Public Prosecutions North Gauteng v Gerhardus Johannes Alberts** (Unreported judgement of Gauteng High Court, Pretoria delivered on 30 June 2016). Alberts was a forty-one-year-old man with a life partner and no children. He collected pornographic material involving children online for several years. He did not have direct contact with the children, nor did he take any photographs himself. He was convicted of 481 counts of possession of child pornography. His sentence of direct imprisonment of five years in terms of section 276(1)(i) of Act 51 of 1977 was increased to ten years direct imprisonment by the court on appeal.

[40] The images possessed by **Alberts** were described by the court as depicting absolute depravity, many depicting very young children being raped. The contents of the images are comparable to some of those in the present matter. As in the present matter, it was considered that Alberts, by collecting the images, promoted the production thereof and so perpetuated the sexual abuse and violation of children. An aggravating factor in the Alberts case was that Alberts was in the process of ordering child pornography to be created to his specifications. Whilst this aspect is absent in

the present matter, the volume of the images collected by appellant, is far greater than that seen in comparable cases.

[41] In **AS Botha v the State** (unreported) Free State High Court A163/2014, the court dealt with an appeal against sentence where the accused had pleaded guilty to, *inter alia,* the creation or production of; the importation or procurement of; and the possession of child pornography. These three charges were taken as one for purposes of sentence and the accused was sentenced to 7 years imprisonment.

[42] In **D Binneman v the State** (unreported) Western Cape High Court A111/2018 the appellant pleaded guilty to 1137 counts of possession of child pornography. Appellant used chat rooms and internet sites to groom, expose to pornography and take pictures of children ranging from 2 to 14 years old. The accused was a first offender, 28 years old, gainfully employed with no children. The appeal court upheld the court a *quo's* sentence of ten years direct imprisonment.

[43] In **Director of Public Prosecutions: Gauteng Division, Pretoria v Hamisi** 2018 (2) SACR 230 (SCA) Dambuza JA (Lewis JA and Rogers AJA concurring) held as follows:

> '[15] It is trite that a wide discretion is allowed to a trial court in the assessment of punishment. In the absence of material misdirection by the trial court, the appeal court cannot approach the question of sentence as if the appeal court were the trial court, and then simply substitute the sentence of the trial court with that which it prefers. On the other hand, where the court of appeal finds **sufficient disparity** between the sentence imposed by the trial court and that which it would have imposed, the court of appeal is obliged to interfere.'

[44] As noted by the magistrate, sentences in comparable matters are merely a guide to sentencing, as the circumstances and facts in every matter differ. Previous sentences in comparable matters are not sentencing strait jackets. In the **Gcaza** judgment of the SCA, supra, it was emphasised that a court on appeal will only interfere with a sentence if the trial court misdirected itself in passing sentence, and even misdirection alone, does not suffice for a court to interfere on appeal. A misdirection should be material, as held by Trollip JA in **S v Pillay** 1977 (4) SA 531

(A) at 535 E-H and Marais JA in **S v Malgas** 2001 (1) SACR 469 (SCA) par 12:
'A court exercising appellate jurisdiction cannot in the absence of a misdirection by the trial court approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trail court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance... an appellate court is (then) at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trail court. It may do so when the **disparity** between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trail court, is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate" ... '.

[45] The court held that in the latter situation the appellate court may not substitute the sentence which it thinks appropriate:

> '... *merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets* of *the kind mentioned.'*

[46] The numerous aggravating circumstances in this matter are obvious. Counsel for the appellant had difficulty to point out any convincing material misdirections by the magistrate in the trial court. That the court should show mercy, was one of his pleas, but the appellant himself had not begged for mercy, a sentiment that should be earned, usually by showing remorse, which may have been better demonstrated if the appellant had testified in mitigation of sentence, a sentiment shared by the magistrate.

[47] We agree that the 18 644 counts constituting the first charges against the appellant should be taken together for purposes of sentence. However, after a thorough consideration of the facts and the sentences imposed in comparable matters, the facts in the present matter, including the seriousness of the crimes, the appellant's personal circumstances, the purposes of sentence, the balancing of mitigating and aggravating circumstances, an element of mercy, in view of the history of abuse

suffered by the appellant in his younger days, as well as the interests of the community and ultimately the interests of children and their protection, we believe a sentence of (10) ten years imprisonment would be more appropriate and proportionate than the fifteen (15) years imposed by the court *a quo.* The disparity is such that this court is entitled to and obliged to interfere.

[48] **Accordingly we order:**

1. The appeal against sentence succeeds. The sentence of fifteen (15) years imprisonment is set aside and replaced with the following:
2. **The accused is sentenced to ten (10) years' imprisonment**;
3. The remainder of the sentence of the magistrate will remain in place;
4. The sentence is anti-dated to 7 November 2017.

_____

E STEYN,J

Judge of the High Court

_____

F SIEVERS, AJ

Acting Judge of the High Court