



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Du Toit v Ntshinghila (733/2015) [2016] ZASCA 15 (11 March 2016)

The Supreme Court of Appeal (SCA) today handed down judgment relating to whether the prosecution is obliged to furnish an accused with copies of images said to constitute child pornography as part of pre-trial disclosure.

On 13 May 2010 the police conducted a search of the home of Mr Rudolph du Toit where various items including four mobile phones, compact disks, memory sticks and a laptop were seized. On 9 November 2010 he was charged with the possession of child pornography in contravention of the Films and Publications Act 65 of 1996 (the Act). On 8 July 2011, before the commencement of his trial, Mr du Toit sought an order from the magistrate in the Pretoria North Regional Court that the prosecution be directed to furnish him with copies of the images said to constitute the offence charged, arguing that he was entitled to be provided with copies of the images; accordingly refusing to take up the prosecutor's offer of disclosure by private viewing. The prosecutor, who had until then objected to reproducing the images and furnishing copies to the defence, had offered to put arrangements in place for Mr du Toit, his legal representatives and any expert for the defence to view the images at an office at either the local police station or the court.

The magistrate ruled that the arrangement proposed by the prosecution was sufficient or adequate and accordingly dismissed Mr du Toit's application. Aggrieved by the magistrate's order, Mr du Toit applied for an order reviewing and setting aside the magistrate's order in the North Gauteng High Court, which he was granted and the high court dismissed the other relief he sought.

Mr du Toit and the Director of Public Prosecutions (DPP) sought and were granted leave to appeal to the SCA. However, Mr du Toit did not prosecute his appeal and it lapsed. The DPP's appeal before the SCA which was unopposed only concerned the correctness of the high court's order reviewing and setting aside the magistrate's order: to the effect that the prosecutor did not have to furnish Mr du Toit with copies of the images constituting the charge.

The SCA found that this was a case where it was necessary to determine whether there are countervailing interests of significance that warranted a departure from the normal method of disclosure by copies. The court found that this was an enquiry in which it was enjoined by the

Constitution to promote values that underlie an open and democratic society based on human dignity and to consider international law.

In the light of the overarching constitutional protection given children in all matters concerning them in terms of s 28(2) of the Constitution and in terms of numerous treaties to which South Africa is party such as article 3(1) of the United Nations Convention on the Rights of the Child, 1989 and ss 10, 14 and 15 of the Children's Act 38 of 2005 – the SCA held that there existed in this case, the reasonable privacy interests of children who were depicted in the pornographic images.

The SCA held that given the extraordinary problem of child pornography, there was also a significant public interest in ensuring that no duplication or distribution occurs during the disclosure process; and that such interests ought not to be further compromised by the copying, viewing, circulation or distribution of the images beyond what was reasonably necessary to give effect to Mr du Toit's constitutional right to make full answer and defence in terms of s 35(3) of the Constitution, which latter right was not absolute.

The SCA further held that the prosecution should be allowed to exercise a discretion to protect the privacy interests of members of the public or to protect the public interest by preventing the commission of further crimes, which could possibly occur, if it were ordered to disclose information without putting adequate safeguards in place. The court held that to deprive the prosecution of that discretion, which is subject to judicial review, could possibly, impede the ends of justice.

The SCA thus held that in the ordinary course of events, disclosure should be by copy. However, that it was also fair that where there were other conflicting rights at stake as in this case, that the constitutional requirement could be adequately met by providing an opportunity for private viewing.

The SCA was satisfied that on the approach of the DPP the desired result and necessary balance had been achieved in this case. The DPP's appeal accordingly was upheld and the order of the high court was set aside and replaced with an order dismissing the Mr du Toit's application.

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