THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 733/2015

In the matter between:

RUDOLPH JOHAN DU TOIT	**APPELLANT**
and	
MAGISTRATE JOHANNA NTSHINGHILA	**FIRST RESPONDENT**
REGIONAL COURT MAGISTRATE: P NEL	**SECOND RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS, NORTH GAUTENG	**THIRD RESPONDENT**
KAREL PETRUS JAKOBUS GELDENHUYS	**FOURTH RESPONDENT**
THE MINISTER OF THE SOUTH AFRICAN POLICE SERVICE	**FIFTH RESPONDENT**
THE MINISTER FOR ARTS AND CULTURE	**SIXTH RESPONDENT**

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

Coram: Ponnan, Cachalia, Petse, Mbha JJA and Victor AJA

Heard: **15 February 2016**

Delivered: **11 March 2016**

Summary: Criminal Law and Procedure – disclosure – accused charged with possession of child pornography – whether prosecution obliged to furnish accused with copies of images said to constitute child pornography as part of pre-trial disclosure.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Maumela J and Monaledi AJ sitting as court of first instance):

(a) The appeal is upheld.
(b) The order of the high court is set aside and replaced by:
'The application is dismissed.'

JUDGMENT

Ponnan JA (Cachalia, Petse, Mbha JJA and Victor AJA concurring):

[1] '[T]he use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole' (*New York v Ferber* 458 US 747 (1982)). *Ferber* observed that child pornography generates a set of harms distinct from those generated by pornographic depictions of adults – harms related to the sexual

abuse of children. The Films and Publications Act 65 of 1996 (the Act),[1] enacted to inter alia address the problem of child pornography, has, amongst its objects, the protection of children from exposure to disturbing and harmful materials and from premature exposure to adult experiences (s 2*(b)*) and to make the use of children in – and their exposure to – pornography punishable (s 2*(c)*). As it was put in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & others* [2003] ZACC 19; 2004 (1) SA 406 (CC) para 61:[2]

'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'.

[2] Pornography is notoriously difficult to define. In *Jacobellis v Ohio (No 11)* 378 US 184, Justice Stewart intuitively opined: 'I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core pornography], and perhaps I could never succeed in intelligibly doing so.' Defining child pornography is no less difficult.[3] 'Child pornography', according to s 1 of the Act,

'includes any image, however created, or any description of a person, real or simulated, who is or who is depicted, made to appear, look like, represented or described as being under the age of 18 years-

(a) engaged in sexual conduct;

(b) participating in, or assisting another person to participate in, sexual conduct; or

(c) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation.'

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[1] The Act repealed the Indecent or Obscene Photographic Matter Act 37 of 1967 and the Publications Act 42 of 1974 and created a new comprehensive regulatory framework for films and publications (*De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & others* [2003] ZACC 19; 2004 (1) SA 406 (CC) (*De Reuck*) para 7).

[2] At the time of *De Reuck* (above), child pornography was defined in s 1 of the Act as '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'. The Court confirmed (para 21) that on a proper interpretation, this definition contained an exhaustive list of what constitutes child pornography. The current definition of child pornography is wider.

[3] Per Langa DCJ, *De Reuck* (above) para 19.

In terms of s 24B(1):[4] 'any person who unlawfully possesses . . . 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'.

[3] On 13 May 2010 members of the South African Police Services, armed with a search warrant, conducted a search of the home of Mr Rudolph du Toit. 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 Act. On 8 July 2011 and before the commencement of his trial, Mr du Toit sought an order from the presiding 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. It was the position of Mr du Toit that he was entitled, without more, to be provided with copies of the images which are alleged to constitute child pornography. He accordingly refused to take up the prosecutor's offer of disclosure by private viewing: the prosecutor, who until then had objected to reproducing the images and furnishing copies thereof to the defence, offered to put arrangements in place for him, 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.

[4] The Magistrate ruled that the arrangement proposed by the prosecution was 'sufficient/adequate' and accordingly dismissed Mr du Toit's application. Aggrieved by that ruling, he applied to the then North Gauteng High Court (high court) for an order in the following terms:

'1. That the search warrant issued by the [Pretoria North District Magistrate] on 10 May 2010 be declared unlawful and be set aside.

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[4] Section 24B headed 'Prohibition, offences and penalties on possession of films, games and publications' provides:
'(1) Any person who-
(a) unlawfully possesses;
(b) creates, produces or in any way contributes to, 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.'

2. That [the Respondents] be ordered to forthwith restore to [Mr du Toit] all the assets seized as recorded in Annexure "RJ3".
3. That Section 24(B)(1) of the Films and Publications Act . . . be declared inconsistent with the Constitution and invalid.
4. That the decision by the [presiding Regional Court Magistrate] be reviewed and set aside.
5. That the Respondents who oppose the application be ordered to pay the costs of the application.'

Aside from the Director of Public Prosecutions, North Gauteng (the DPP), none of the other respondents participated in the proceedings before the high court.

[5] The high court issued the following order:

'1. That the application for the search warrant to be set aside is dismissed.
2. That the application for section 24(B)*(c)* of the Films and Publications Act . . . to be declared to be unconstitutional and invalid is dismissed.
3. That the application by [Mr du Toit] in the alternative for paragraphs 3.3 and 4.4 of the answering affidavit to be struck out is dismissed.
4. That the decision by the [presiding Regional Court Magistrate] be reviewed and set aside.
5. That each party is to pay its own costs.'

[6] Both Mr du Toit and the DPP sought and obtained leave from the high court to appeal to this court, the former against paragraphs 1 and 2 of its order and the latter against paragraph 4. No steps were taken by Mr du Toit to prosecute his appeal, which has accordingly lapsed. This appeal by the DPP, which is unopposed, is thus concerned solely with the correctness of the order of the high court to review and set aside the order of the presiding Regional Court Magistrate which was to the effect that the prosecutor did not have to furnish Mr du Toit with copies of the images constituting the charge.

[7] In arriving at its conclusion, the high court (per Maumela J, Monaledi AJ concurring) reasoned (paras 29-31 of its judgment):

'Section 35(3)(*b*) confers upon the Applicant, as a person who stands accused, the right to have adequate time and facilities to prepare a defence. It is to be expected that Applicant may seek to know exactly what the specific allegations are that the state aims to level against him

in the trial. To that end, the material or articles seized from him during the conduct of the search he complains about become objects of his focus.

Furthermore, Section 35(3)(*i*) of the Constitution confers upon him the right to adduce and to challenge evidence. Applicant cannot be expected to second guess in terms of the particular aspects that from the basis of the charges against him. He needs the same materials or articles to prepare his defence.

This court does not see a reason why in this instance the rights of the Applicant stemming out of Section 35 of the Constitution . . . should be subjected to limitation. It sees no reason why copies and not originals, cannot be availed to the Applicant, provided he shall be allowed to verify such copies against originals if that need arises. It is that verification that may be subjected to suitable conditions.'

[8] A useful starting point is the Canadian Supreme Court decision of *R v Stinchcombe* [1991] 3 SCR 326; 18 CRR (2d) 210; 68 CCC (3d) 1 (SCC), in which Sopinka J set out the following principles with regard to the prosecution's disclosure obligation:

'(a) Justice is better served by the elimination of surprise.

(b) The fruits of the investigation in possession of the prosecution are not the property of the prosecution but of the public to ensure that justice is done.

(c) The defence has no obligation to assist the prosecution and is entitled to be adversarial.

(d) The search for the truth is advanced by disclosure of all relevant material.

(e) The prosecution must retain a degree of discretion in respect of these matters.

(f) The exercise of the prosecution's discretion should be subject to review by the court.

(g) There is a general principle that disclosure is not to be withheld if there is a reasonable possibility that failure to disclose may impede or may impair the accused's right to make full answer and defence which is a principle of fundamental justice protected under the Constitution.

(h) And, it is undesirable to lay down fixed rules relating to disclosure, instead each case must be determined on its own merits.'

Stinchcombe set out three situations where the prosecution may properly exercise its discretion to refuse disclosure, namely if the information sought is: (a) beyond its control; (b) clearly irrelevant or (c) privileged. However, in applying *Stinchcombe*, *R v Beauchamp* 2008 CanLII 27481; 171 CRR (2d) 358; 58 CR (6th) 177 (ON SC) para 35, did point out that those three factors were not intended to be closed and limited.

[9] An allegation that prosecutorial disclosure is inadequate is an assertion that an accused person's right 'to make full answer and defence' – a right afforded protection under our Constitution (s 35(3)) – has been infringed. In *Shabalala & others v Attorney-General, Transvaal & another* [1995] ZACC 12; 1996 (1) SA 725; 1995 (2) SACR 761 (CC), the Constitutional Court (per Mahomed DP for a unanimous court) held that the blanket docket privilege formulated in *R v Steyn* 1954 (1) SA 324 (A) could not survive the 'discipline of the Constitution'. The court declared that the question was a fair trial question (rather than an access to information question), particularly one relating to the right to be informed with sufficient particularity of the charge. However, although entitlement to disclosure is a matter of constitutional right, the Constitutional Court stipulated (as did *Stinchcombe*) that such right was not an unqualified one. Instead, in each instance, it was for the court to exercise a proper discretion by balancing the degree of risk involved in attracting the consequences sought to be avoided by the prosecution (if access is permitted) against the degree of the risk that a fair trial might not ensue (if such access is denied).[5] What is essentially required is a judicial assessment of the balance of risk not wholly unanalogous to the function which a judicial officer performs in weighing the balance of convenience in cases pertaining to interdicts *pendente lite*.[6] Accordingly, a rather broad and flexible approach is envisaged against which to measure the opportunity of the defence in each particular case to present its case effectively to the court.

[10] What is sought in this case is disclosure of the fruits of the investigation, in the hands of the prosecution, upon which reliance will be placed to establish criminal liability. According to *Shabalala* (para 55):

'What the prosecution must therefore be obliged to do (by a proper disclosure of as much of the evidence and material as it is able) is to establish that it has reasonable grounds for its belief that the disclosure of the information sought carries with it a reasonable risk that it might lead to the identity of informers or the intimidation of witnesses or the impediment of the proper ends of justice. It is an objective test. It is not sufficient to demonstrate that the belief is

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[5] *Shabalala* (above) paras 36-39. See also Frank Snyckers & Jolandi le Roux 'Criminal Procedure: Rights of the Arrested, Detained and Accused Persons' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Revision Service 6, 2014) at 51-101 – 51-186.

[6] *Shabalala* (above) para 55; Snyckers & Le Roux (above) at 51-109; Etienne du Toit *et al Du Toit: Commentary on the Criminal Procedure Act* (Revision Service 54, 2015) at 21-1 – 21-3 and 23-42J.

held *bona* fide. It must be shown that a reasonable person in the position of the prosecution would be entitled to hold such a belief.'

It is the submission of the prosecution that its alternative proposal for a private viewing at a mutually convenient time at an office in the police station or court satisfies the prosecutor's disclosure obligations. And, that it does so in a way that permits Mr du Toit to make full answer and defence, yet does not further compromise any of the privacy interests of the persons portrayed on the images. This is thus a case where it is necessary to determine whether there are countervailing interests of significance that warrant a departure from the normal method of disclosure by copies.

[11] In an enquiry such as the present we are enjoined by the Constitution to promote values that underlie an open and democratic society based on human dignity and to consider international law.[7] In striking the appropriate balance adequate weight must be accorded to the interests of the children. Article 3(1) of the United Nations Convention on the Rights of the Child, 1989 (UNCRC)[8] requires that: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' Closer to home, this is echoed in art 4(1) of the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC).[9] To those international and regional instruments, must be added the

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[7] The relevant sections of the Constitution provide:
'**39 Interpretation of Bill of Rights**
(1) When interpreting the Bill of Rights, a court, tribunal or forum-
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.'
And:
'**233 Application of international law**
When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

[8] Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 44/25 of 20 November 1989, entered into force 2 September 1990, in accordance with Article 49. Signed by the Republic of South Africa in 1993 and ratified on 16 June 1995.

[9] Adopted by the Organisation of African Unity in 1990 and entered into force on 29 November 1999. OAU Doc. CAB/LEG/24.9/49 (1990). Signed by the Republic of South Africa on 10 October 1997, ratified on 7 January 2000 and deposited on 21 January 2000. Article 4(1) provides: 'In all actions concerning the child undertaken by any person or authority the best interest of the child shall be the primary consideration.'

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and pornography, 2000 (OPSC)[10] which in art 8(3), provides:

'State Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration.'

The Children's Act 38 of 2005 was drafted pursuant to South Africa's obligations under the UNCRC, the ACRWC and the Constitution. Sections 10, 14 and 15 of the Children's Act are a cluster of provisions designed to ensure that children's rights are protected and their dignity is upheld in any proceedings affecting them.[11]

[12] In terms of s 28(2) of the Constitution, in all matters concerning children (including litigation)[12] their best interests are of paramount importance. The Constitutional Court has stated that s 28(2) must be interpreted so as to promote the foundational values of human dignity, equality and freedom.[13] The reach of s 28(2) extends beyond those rights enumerated in s 28(1): it creates a right that is independent of the other rights specified in s 28(1).[14] Section 28(2), read with s 28(1), establishes a set of rights that courts are obliged to enforce.[15] In *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232; 2007 (2) SACR 539 (CC) para 15, the Constitutional Court observed that:

'The ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of s 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights. As Sloth-Nielsen pointed out:

"[T]he inclusion of a general standard ('the best interest of a child') for the protection of children's rights in the Constitution can become a benchmark for review of all proceedings in which decisions are taken regarding children. Courts and administrative authorities will be

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[10] Adopted and opened for signature, ratification and accession by UN General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002. Acceded to by the Republic of South Africa on 30 June 2003.

[11] *Centre for Child Law v Governing Body of Hoërskool Fochville & another* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA) para 23.

[12] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (2) SACR 130 (CC) paras 130 and 132; *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232; 2007 (2) SACR 539 (CC) para 14-26.

[13] *DPP, Transvaal v Minister of Justice and Constitutional Development* (above) para 72.

[14] *DPP, Transvaal v Minister of Justice and Constitutional Development* (above) para 72.

[15] *S v M* (above) para 14.

constitutionally bound to give consideration to the effect their decisions will have on children's lives.'"

[13] There exists in this case the reasonable privacy interests of the children who are depicted in the images. There is also a significant public interest in ensuring that no duplication or distribution occurs in the disclosure process. Those interests ought not to be further compromised by the copying, viewing, circulation or distribution of the images beyond what is reasonably necessary to give effect to Mr du Toit's constitutional right. The US Supreme Court has consistently upheld restrictions on First Amendment freedoms to combat the 'extraordinary problem' of child pornography (see *Osborne v Ohio* 495 US 103 (1990); *New York v Ferber* (above)). In *Ferber*, the US Supreme Court pointed out that: 'It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling' and that '[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.' It added that: 'the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance'. Likewise, in *De Reuck* (para 66), the Constitutional Court observed:

'The harm of child abuse is real and ongoing and the State is under a constitutional obligation to combat it. To hold otherwise would place the State in jeopardy of having to close the gate, as it were, after the horse has bolted and might signal a breach by the State of its obligation towards children.'

And it pointed out that (para 63):

'Children's dignity rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth. Society has recognised that childhood is a special stage in life which is to be both treasured and guarded. The State must ensure that the lives of children are not disrupted by adults who objectify and sexualise them through the production and possession of child pornography. There is obvious physical harm suffered by the victims of sexual abuse and by those children forced to yield to the demands of the paedophile and pornographer, but there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available. The chief purpose of the statutory prohibitions against child pornography is to protect the dignity, humanity and integrity of children.'

[14] The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials. A child compromised by a pornographer's camera has to go through life knowing that the image is probably circulating within the mass distribution network for child pornography. Because the child's actions are reduced to a recorded image, the pornography may haunt him or her long after the original recording. Citing a wealth of evidence, the *Ferber* court found that the distribution of child pornography abused children by creating a permanent record of the child's participation. This 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. (*US v Mathews* 209 F3d 338 (4th Cir 2000).) *De Reuck* (para 64) emphasised that: 'The psychological harm to the child who was photographed is exacerbated if he or she knows that the photograph continues to circulate among viewers who use it to derive sexual satisfaction.' It follows that the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled (*New York v Ferber*).

[15] Maintaining the integrity of the administration of justice is also an important principle of fundamental justice. According to *R v Corbett* (1988) 34 CRR 54 para 164, '. . . the principles of fundamental justice operate to protect the integrity of the system itself. . .' In *R v O'Connor* [1995] 4 SCR 411; (1995) 33 CRR (2d) 1; 103 CCC (3d) 1 (SCC), a case concerned with disclosure of therapeutic records of a sexual assault complainant, the Supreme Court of Canada held that the Charter guarantees individuals a fundamentally fair trial and not the fairest of all possible trials. As it was put in *R v Blencowe* [1997] 46 CRR (2d) 175:

'In *R v Stinchcombe* . . . the Supreme Court of Canada held that the constitutional entitlement of an accused to full disclosure of the prosecutor's case does *not* require *production* of documentary *originals*. The constitutional obligation may be answered, *inter alia*, by permitting *inspection* of originals. In other words, what the Constitution requires is prosecutorial disclosure. It does *not* insist upon a particular *form* of disclosure as a constitutional prerequisite.'

[16] The DPP pointed to its *Prosecution Policy Directive* (Part 24: Sexual Offences),[16] which provides:

'7. With regard to dockets that contain visual images of child pornography, prosecutors need only allow the defence access thereto and should not provide copies thereof unless so ordered by the court. Dockets containing child pornography must at all times be kept at the official workplace and stored in a secure locked location.'

That policy directive, which was invoked by the DPP and not challenged by Mr du Toit, did not merit even a mention in the judgment of the high court. In *Stinchcombe*, Sopinka J reserved for the prosecution a degree of discretion in respect of matters of this kind. It seems to me that the prosecution should be allowed to exercise that discretion, if necessary, to protect the privacy interests of members of the public or to protect the public interest by preventing the commission of further criminal acts, which could possibly occur, if it were ordered to disclose information without putting adequate safeguards in place. To deprive the prosecution of that discretion, could possibly, to borrow from *Shabalala* (para 55) impede the ends of justice. Importantly, the process for disclosure contemplated by Sopinka J, like the policy directive, has a built-in protection for the accused to ensure that the prosecution exercises its discretion in a fair and just manner by providing for review by the court. In my view given the pernicious and lasting damage caused to children by the distribution of child pornography, there is much to recommend the practice directive, which broadly accords with the approach postulated in *Stinchcombe.*

[17] In *Beauchamp* (para 52 and 55) – a case concerned with whether the prosecution was required to disclose encrypted files (that it had been unable to de-encrypt) – the Ontario Superior Court underscored the importance of the proper exercise of the prosecutorial discretion in relation to child victims in these terms:

'Consider the following example. If there was a reasonable possibility that the encrypted files contained child pornography, it would not be consistent with principles of fundamental justice to provide a copy of the encrypted pornographic material to the accused, in a form which could be used thereby committing further criminal acts and further denigrating the dignity and privacy of the child victims. To order disclosure of such encrypted information without adequate safeguards to prevent further use would bring the administration of justice into disrepute. The Crown would have a duty to view the material and exercise its discretion and

[16] Tabled in Parliament on 23 September 2010, made available on the National Prosecuting Authority website under Resources, Library, Prosecution Policy and Policy Directives.

ensure that the encrypted files were not used to commit further criminal acts or affect the privacy interests and dignity of the victims.

. . .

I find it would bring the administration of justice into disrepute in the eyes of reasonably informed members of the public, if the court ordered the Crown to release unknown information, which was seized under search warrants and which is the property of the public, when there is a reasonable possibility that the information released could be used to commit further criminal acts and to breach the privacy interests of the individuals whose credit and debit card information may be contained in the encrypted files.'

[18] In an all too brief a judgment, the high court approached the enquiry as if the entitlement to disclosure was an absolute one. It is clear that it is not. In the ordinary course of events, disclosure should be by copy. But, it is also fair to say that where there are other conflicting rights at stake, the constitutional requirement may be adequately met by providing an opportunity for private viewing. Given the secrecy inherent in the production and distribution of child pornography, it seems to me that the prosecution properly exercised its discretion, consistent with contemporary principles and values, to refuse to make the images available to the defence. And, that it did so on demonstrably justifiable grounds. I am thus satisfied that on the approach of the DPP the desired result and necessary balance has been achieved in this case. It follows that the appeal by the DPP must succeed.

[19] In the result:

(a) The appeal is upheld.

(b) The order of the high court is set aside and replaced by:

'The application is dismissed.'

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V M Ponnan

Judge of Appeal

APPEARANCES:

For the Appellant:	No appearance
For the Respondent:	A Coetzee Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein