



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR11/2022

In the matter between:

TAYYIB GALDHARI

APPELLANT

and

THE STATE

RESPONDENT

Coram: Mossop J and Nicholson AJ

Heard: 27 October 2023

Delivered: 10 November 2023

ORDER

On appeal from: Ntuzuma Regional Court (sitting as the court of the first instance):

1. The matter is remitted to the Regional Court, Ntuzuma for a decision to be taken on the appellant's application to lead further evidence.
2. In the event of the Regional Court granting the application, it shall proceed further in terms of the provisions of s 309B(5)(c)(ii) of the Criminal Procedure Act 51 of 1977.

JUDGMENT

Nicholson AJ (Mossop J concurring):

[1] On 13 August 2021, appellant was convicted of 50 counts of contravening sections 1, 2, 22, 24C and 30A of the Films and Publications Act 65 of 1996, read together with sections 92(2), 94 and 276 of the Criminal Procedure Act 51 of 1977 (the 'CPA'). The appellant's conviction followed upon a guilty plea which he had tendered in terms of s 112(2) of the CPA. These sections criminalise either video or still images of nude minor children or minor children performing sexual acts. In the circumstances, the seriousness and the gravity of the offences cannot be overemphasized.

[2] On 20 August 2021, after the matter was adjourned for the parties to view some of the images and videos, and the State's final submission being that a term of imprisonment was essential to send a strong message to the community, the appellant was sentenced to 7 years' direct imprisonment. Except for noting some of the ages of the children in the videos, nothing more was said about the images that were viewed.

[3] On 21 September 2021, the appellant, after acquiring a new legal representative, brought the following three applications in the court *a quo*:

- (a) an application for condonation in light of the fact that 14 days had elapsed between sentence being imposed and the bringing of the application for leave to appeal;
- (b) an application for leave to appeal against sentence only; and
- (c) an application to lead further evidence.

I shall collectively refer to these applications as 'the applications'.

[4] The applications were brought in terms of s 309B of the CPA, which reads as follows:

‘Application for leave to appeal

- (1) (a) Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any accused, other than a person referred to in the first proviso to section 309(1)(a), who wishes to note an appeal against any conviction or against any resultant sentence or order of a lower court, must apply to that court for leave to appeal against that conviction, sentence or order.
- (b) An application referred to in paragraph (a) must be made—
- (i) within 14 days after the passing of the sentence or order following on the conviction; or
 - (ii) within such extended period as the court may on application and for good cause shown, allow.
- . . .
- (5) (a) An application for leave to appeal may be accompanied by an application to adduce further evidence (hereafter referred to as an application for further evidence) relating to the conviction, sentence or order in respect of which the appeal is sought to be noted.
- (b) An application for further evidence must be supported by an affidavit stating that—
- (i) further evidence which would presumably be accepted as true, is available;
 - (ii) if accepted the evidence could reasonably lead to a different decision or order; and
 - (iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.
- (c) The court granting an application for further evidence must—
- (i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and
 - (ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.
- (6) Any evidence received under subsection (5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question.’

[5] In mitigation of sentence, no evidence was led by the appellant in the court *a quo*. However, it was submitted that the accused was 21 years old at the time of his

arrest and was 23 years old at the time of conviction. His highest education is matric, he is unmarried and gainfully employed as an assistant manager in a fashion store. He uses part of his salary to support his siblings, being two sisters aged 25 and 14, and a brother aged 16. His father had passed away when he was young and his mother is unemployed. Despite the appellant's legal representative requesting a noncustodial sentence in the form of correctional supervision, he did not seek to tender a probation officer's report or a correctional services report into evidence.

[6] It is relevant to mention that it is common cause that while the video images were sent to appellant's phone via WhatsApp, he did not solicit them. Furthermore, there was no evidence led in aggravation as to how many of the 50 images were actually viewed by anyone, or even by the appellant.

[7] The State did not prove any previous convictions, nor lead any evidence in aggravation, but submitted that considering the seriousness of the offence, a term of imprisonment was unavoidable.

[8] From a perusal of the record, it appears that the applications were properly before the court *a quo*, which was common cause between the parties.

[9] It further emerges from the record that during argument, the appellant's legal representative submitted that the decision on the application to adduce further evidence lay with the appeal court because the court *a quo* was *functus officio*. This view was shared by the learned magistrate.¹ Persuaded by the argument for condonation, and the application for leave to appeal, the court *a quo* granted the application for leave to appeal against sentence; however, nothing more was said about the application to adduce further evidence.² Accordingly, no decision was made on the application to adduce further evidence.

[10] In *S v WR*,³ the court observed:

¹ Record at page 40, lines 5 to 23.

² Record at page 65, lines 10 to 12.

³ *S v WR* 2015 (1) SACR 571 (GP) para 33.

'In ruling that the application to receive further evidence should be heard by this court on appeal, the regional magistrate erred. In my view the decision whether or not to receive further evidence under s 309B(5)(c)(i) is that of the court which has tried the applicant. Section 309B(5)(c)(ii) requires the court granting an application for further evidence to evaluate that evidence, with reference, amongst other things, to the cogency and sufficiency of the evidence and the demeanour and credibility of the witnesses who gave it. An appeal court hears such evidence only rarely and does not enjoy the well-known advantages of a trial court in relation to the evaluation of the evidence in the context of the trial as a whole.'

[11] Although only conceded to in the alternative by the respondent,⁴ it further emerges as common cause that the matter should be remitted back to the court *a quo* to consider the application to lead the further evidence.⁵

[12] It is apposite to mention here that it appears that the further evidence sought to be led by appellant is medical evidence in mitigation of sentence, which alleges that appellant was sexually abused, from a very young age and throughout his teens, by older boys with whom he attended school. The reason why this evidence was not initially tendered in mitigation is not clear from the record but perhaps there is an acceptable reason for this.

[13] It is trite that sentences are determined on the facts and circumstances known at the time of their imposition. Facts that become known after the imposition of sentence can only in exceptional circumstances be taken into account on appeal⁶. Further, in *S v Bezuidenhout*,⁷ the court held:

'[While] finality in litigation is an important consideration, this should not be at the expense of an accused person's fair trial rights.'

[14] Having perused s 309B of the CPA together with the various authorities, and having heard argument from both the appellant and the respondent, I share the views expressed by them that the matter must be remitted back to the court *a quo* to

⁴ Respondent's heads of argument paras 39 and 40.

⁵ Appellant's heads of argument para 5 to 7.

⁶ *S v EB* 2010 (2) SACR 524 (SCA) at [5] and *cf Reddi* (2010) 2 SACJ 227.

⁷ *S v Bezuidenhout* [2021] ZASCA 52 (unreported, SCA case no 41/2020, 23 April 2021) at para 32.

consider the application for the reception of the further evidence. This matter, obviously, should be dealt with expeditiously.

Order

[15] In the result, I propose the following order:

1. The matter is remitted to the Regional Court, Ntuzuma for a decision to be taken on the appellant's application to lead further evidence.
2. In the event of the Regional Court granting the application, it shall proceed further in terms of the provisions of s 309B(5)(c)(ii) of the Criminal Procedure Act 51 of 1977.

NICHOLSON AJ

I agree, and it is so ordered:

MOSSOP J

APPEARANCES

For the appellant	:	Ms Z Anastasiou
Instructed by	:	Legal Aid South Africa Pietermaritzburg
For the respondent	:	Mr K Radyn
Instructed by	:	Director of Public Prosecutions Pietermaritzburg
Date heard	:	27 October 2023
Date handed down	:	10 November 2023