

3/2007

Before the Film and Publication Review Board.

In the matter between:

Phoenix XXX DVD CC

and

The Film and Publication Board

Decision

In re: ***Appeal against the non-classification of the film, "Instant Lesbian".***

Professor K. Govender

- 1) *Instant Lesbian* is a pornographic film containing scenes portraying explicit sexual activities. The film is divided into five segments, and primarily depicts lesbian sexual activity. The film, given its explicit sexual content, was designed for the adult entertainment market, and the distributors probably anticipated receiving an X18 age classification in common with most other pornographic films. However, when classifying the film, the examiners became concerned about the second segment, which depicts explicit sexual activity between two women and then between a man and one of the women. This scene is set in a school environment, and includes props that one would normally associate with a classroom. The dialogue, behaviour, and dress of the actresses attempt to convey the impression that they are school girls. While the examiners were satisfied that the actresses, given their physical appearance, were clearly over the age of eighteen, they were concerned

that the scene might depict child pornography, and therefore referred this film for an assessment by the Review Board. None of the other scenes warranted serious concern.

- 2) We applaud the caution displayed by the examiners. In instances such as this, it is advisable to err on the side of caution. Some members of the Review Board viewed the film on 22nd January 2007. Members were divided in their response to the film. It was subsequently decided that it would be prudent for all the members of the Review Board to participate in the deliberations and discussions. The DVD was sent to the various members, and a teleconference was held on 14th February 2007.
- 3) It is apparent to us that guidelines must be laid down to assist examiners in their deliberations and determination as to whether the film or publication contains scenes or images portraying child pornography. In our award regarding the film *It's just wrong*¹ we laid down certain broad principles. It is now necessary to expand further and elaborate upon these principles.

The provisions of the Act dealing with child pornography

- 4) Section 27 (1) (a) of the Film and Publication Act provides:

Any person shall be guilty of an offence if he or she-

- (i) *is in possession of;*
- (ii) *creates or produces or in any way contributes to, or assists in, the creation or production of;*
- (iii) *imports or in any way takes steps to procure, obtain or access; or*
- (iv) *knowingly exports, broadcasts or in any way distributes or causes to be exported, broadcast or distributed,*

¹. The award was handed down on 5th July 2005.

a film or publication which contains child pornography or which advocates, advertises or promotes child pornography or the sexual exploitation of children.

Child pornography is defined in the Act² as follows:

Child pornography includes any image, however created, or any description of a person real or simulated, who is, or who is depicted or described as being, under the age of 18 years-

- (i) engaged in sexual conduct;*
- (ii) participating in, or assisting another person to participate in, sexual conduct; or*
- (iii) 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 purpose of sexual exploitation.*

In this context, it is important to point out that films containing scenes of child pornography cannot be classified. In our award in *It's just wrong*, we described the present legal position thus:

Prior to the amendment of the Act in 2004, child pornography fell under Schedule 1 and would be classified as XX and prohibited from distribution. The amendment removed child pornography from the ambit of Schedule 1. The consequence is that if, a classification committee is of the view that a film contains a scene of child pornography, they must refuse to classify it. Their decision and refusal will be gazetted, and persons who possess these films will run the risk of criminal prosecution. Films that have not been classified by the Board cannot be distributed in South Africa.

- 5) Thus, if examiners come to the conclusion that the film contains scenes of child pornography, they must refuse to classify. Importantly, Section 27(1)(a) of the Act makes it a criminal offence *inter alia* to possess, create, or produce, or in any way contribute to a film or publication that contains child pornography. The importation, exportation, broadcast, and distribution of such a film or publication is also prohibited. The Act

² . Section 1(iv) of the Act.

utilizes the same definition of child pornography for the purposes of criminal prosecutions as it does for the purposes of classification. Thus, if a decision is made by the examiners that a film or publication contains scenes of child pornography, any person possessing such material is liable to prosecution by the National Prosecuting Authority and conviction by the Courts. This is a relevant factor when considering the definition of child pornography.

- 6) The relevant aspect of the definition of child pornography for present purposes is the inclusion of any image, however created, which is of a child, or which depicts a child. It is relevant to assess the meaning of the phrase 'of a person who is depicted as being under the age of 18 years'.

In our award in *It's just wrong* we stated:

The definition is broad and sweeping. It represents an attempt by the legislature to deal as effectively as possible with the scourge of child pornography. It prohibits any image depicting a person under 18 engaging in sexual conduct and further prohibits any image of a person who is depicted or described as being under the age of 18 engaging in sexual conduct. It is thus not necessary to establish that the actors are actually under the age of eighteen. A depiction of persons under the age of eighteen will suffice for the purposes of this section. Our view would be that the depiction must be such that the image can reasonably be construed as being that of a minor. Once this is satisfied, then regard must be had to the activity engaged in.

It is now necessary to elaborate upon this, and to provide firmer guidelines to assist examiners in the discharge of their responsibilities. The Constitutional Court in *De Reuck v Director of Public Prosecutions*³ interpreted the predecessor of Section 27 of the Act. As we indicated in *It's just wrong*, we are of the opinion that the change in wording of this Section does not make the comments in the judgment less apposite.

³ . *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC)

- 7) In attempting to bring some clarity to the definition of child pornography, the court held:⁴

In summary, I would say that the characteristics common to all images require simply that the image must be that of a child. I will reflect these essential characteristics by referring in this judgment to the child image.

In the absence of an image of a child engaging in the prohibited sexual activity, the film or publication is not child pornography. The court⁵ held that the primary meaning of pornography was:

*The explicit description or exhibition of sexual subjects or activity in literature, paintings, films, etc, in a manner intended to stimulate erotic rather than aesthetic feelings; literature etc containing this.*⁶

- 8) It went further to hold that 'child pornography' bears a corresponding primary meaning where the sexual activity described or exhibited involves children.⁷ The court concluded that the statutory definition was narrower, as it prohibited a closed list of prohibited acts. Applying the reasoning of the Constitutional Court to the present section, the closed list of prohibited acts are:

- An image that depicts a child/ children engaged in sexual conduct.
- An image that depicts a child/ children participating in, or assisting another person/ child to participate in, sexual conduct;
- An image showing or describing the body, or parts of the body, of child in a manner or in circumstances which, within context,

⁴. Ibid at para 26.

⁵. Ibid at para 20.

⁶. The definition was adopted from *The New Shorter Oxford English Dictionary* Volume 2, Clarendon Press, Oxford 1993.

⁷. De Reuck at para 20.

amounts to sexual exploitation, or in such a manner that it is capable of being used for the purpose of sexual exploitation.

It was suggested that the phrase, a person 'who is depicted as being under the age of 18 years', means that if the context, props, dialogue, and setting convey the impression that the actors are under the age of 18, then that would amount to child pornography. In our view this cannot be correct. It cannot be child pornography, for example, to depict two thirty-five-year-old adults engaging in sexual conduct while dressed as school learners. The legislature could not have intended to criminalize the possession and distribution of such material. The evil that the laws against child pornography were designed to eradicate was the exploitation and degradation of children. In *De Reuck*, the court repeatedly emphasized the necessity for there to be a child image. It would be unwise artificially to extend the definition of child pornography well beyond that which the court in *De Reuck* referred to as the primary definition. To do so may well render the definition unconstitutional. In *De Reuck*, the applicant challenged the constitutionality of the statutory definition of child pornography by arguing that it was overbroad and vague. The court found⁸ that the statutory definition was narrower and more precise than the primary definition, and held:

If, as in this case, the primary meaning already encompasses all the items in the list, then the purpose of the list is to make the definition more precise. In such a case 'includes' is used exhaustively.

- 9) An extremely wide definition of child pornography may be deemed overbroad, given the specific societal objective that it was meant to safeguard. The objective of the sections prohibiting child pornography was to prevent the exploitation, degradation, and abuse of children. It is for that reason that we readily conclude that any limitation on the freedom of expression and privacy is justifiable. That will not be the case

⁸ De Reuck at para 18.

if the definition is so wide that it journeys outside what the Court in *De Reuck* referred to as the primary definition of child pornography. Thus it is essential that the definition of child pornography include images of children or those of persons who could be deemed by a reasonable observer to be children.

- 10) Thus, in order to assist the examiners and those distributors who market DVD's and distribute films of this nature, we are proposing a two-stage analysis. The first stage is to enquire whether the image portrayed is that of a child, or whether a reasonable person objectively evaluating the image could conclude that it is an image of a child. The physical characteristics and maturity (or otherwise) of the persons portrayed will have to be considered in making this assessment. If the conclusion is that the image is not that of a child, and could not reasonably be construed as being that of a child, then the film or publication cannot be regarded as child pornography. If, on the other hand, the image is unequivocally and clearly that of a child engaging in the prohibited acts, then the film or publication would be regarded as child pornography. Thus if a child of six years (for example) is shown engaging in the prohibited acts, that amounts to child pornography.

- 11) In the event of examiners being uncertain as to the age of the actors, or being concerned that the images could reasonably be construed as being those of children, then the examiners must proceed to the second stage – to assess the context in which the image is presented. As the Constitutional Court pointed out in *De Reuck*:⁹

Indeed, it is not possible to determine whether an image as a whole amounts to child pornography without regard to context.

⁹ . De Reuck at para 33.

Issues such as props, dialogue, setting, imagery, theme, and context will be relevant in the second stage of the analysis. The question that has be considered is whether the context accentuates the impression of child pornography, or whether they detract from it. After the two stage analysis, the issue is whether the predominant impression conveyed is that the image depicted is that of a child engaging in prohibited conduct as defined in the Act.¹⁰ This assessment will have to be made on a case-by-case basis. As we pointed out in *It's just wrong*:

When film producers use a combination of physical appearances and other techniques to present the participants in pornographic films as teenagers, they run the risk of a finding that the film contains images of child pornography. The younger they portray the actors and actresses to be, the greater this risk of such a finding. The very important public interest of protecting children is highly relevant in this determination.

- 12) The members of the Review Board were of the view that a reasonable person would conclude (1) that the actresses in the scene that caused concern in *Instant Lesbian* were over the age of eighteen, and (2) that they could not reasonably be deemed to be children. Once this assessment was made, the film could not be regarded as child pornography. Had we concluded that a reasonable, objective observer could have concluded that the actresses were indeed under the age of 18, we would then have gone on to analyse the clothing, the setting, the dialogue, the props, and other factors to determine whether this amounted to child pornography.

13) Finding and Conclusion

For the above reasons, the film *Instant Lesbian* is given a restrictive classification of X18.

¹⁰. See Section 7(8) of the Children's Protection Act 1978.

Dated: 16th February 2007

Concurred by:

Ms R. Smith

Mr D. Kwindu

Adv. R. Lessick

Mrs P. Marek

Revd M. McCoy

Mr J. Phalane

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