

Before the Film and Publication Review Board.

In re:

Referral of the film – It's Just Wrong- by the Deputy Minister of Home Affairs for an assessment as to whether it contains scenes of child pornography.

AWARD.

Professor K Govender

Introduction and Background.

1. "*It's just wrong*" is a pornographic film in DVD format which was given an X18 classification by a two person panel of examiners. This meant that the film could be distributed from designated adult premises. One of the examiners stated that there was "no animals, violence and children involved." The chief examiner's report concluded that there were "no elements as referred to in schedule 6.' Regrettably the reasons were extremely brief and did not address the core concern that some of the scenes appeared to depict persons under the age of eighteen having sex. After the film was classified, it was made available for sale in adult premises. A monitor, Mr. LA Tobo, having seen the film in adult premises alerted the secretariat to the possibility that the film may contain scenes involving child pornography. The Secretariat after considering the matter, shared the concern and initiated a referral by the Minister in terms of

section 19 of the Film and Publication Act 1966 (as amended.) The Review Board viewed the film and sat on the afternoon of Friday, 24th June to hear arguments and representations in this matter.

2. JT Publishers, the distributors of the film, were notified of the date set for the hearing, but no representations were received from them. Mr. Iyaver Chetty represented the Film and Publication Board and we express our appreciation to him for sharing his expertise in this field with us.

3. The film comprises five separate scenes or sequences of explicit sexual conduct. The film is advertised as depicting young persons, but the cover contains a caption claiming that all the actresses are over the age of eighteen. The issue before us was whether the film contains scenes that could be classified as child pornography in terms of the Act. Given the urgency of the situation and the need to act expeditiously in the public interest, we issued a unanimous order that the film contained scenes that depicted child pornography, after the hearing on the 24th June 2005. In the order, we indicated that detailed reasons would be submitted subsequently. These are our reasons.

The Provisions of the Act dealing with Child Pornography.

4. Section 27 (1) (a) 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,
a film or publication which contains child pornography or which advocates, advertises or promotes child pornography or the sexual exploitation of children.*

In effect this section makes the possession, creation, production, importation, exportation, broadcast and distribution of child pornography a criminal offence. Films can only be distributed in SA if they are classified by a classification committee.¹ Once classified, films are distributed in accordance with the classification. The classification committee assigned an X18 classification to the film “It’s just wrong”. This, until set aside, is a legal decision having legal consequences. This means that the film can be lawfully imported, distributed in adult premises and possessed by persons purchasing it. It also means that the distributors can rely on the decision to place orders, advertise and distribute copies throughout the country. The overturning of the initial decision operates prospectively it is very difficult to recall and trace copies that have been sold. Thus, as in this case, images deemed to contain child pornography, will be in the public domain. One can then anticipate legitimate criticism and concern from members of the public as the Review Board is obliged by statute and funded by state funds to protect the interests of children. Erroneous decisions also cause losses to distributors who make business decisions on the basis on the findings of the classification committee. Any classification committee assessing this film ought to have been alerted to the possibility that some of the scenes in the film may amount to child pornography. If they considered that these scenes did not amount to child pornography then there ought to have been some engagement with the issues and reasons submitted for their conclusion. On the facts of this case, all we have is a bald statement that

¹ . Section 18 of the Act.

the film does not contain scenes of child pornography. It may be useful for examiners, who suspect that the film contains images or scenes of child pornography, to refer it to the secretariat. The decisions made by the examiners are important decisions and have to be made after due consideration and deliberation. The CEO of the board is urged to take all necessary steps to minimize the chances of decisions of this nature being repeated. In this context, we need to mention that it was a monitor of the board that identified the DVD and it was the Secretariat that set in motion steps to rectify the situation.

5. Section 1(iv) of the act defines child pornography as:

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.*

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.

6. The definition includes the minor engaging in sexual conduct, participating in or assisting another person to participate in sexual conduct, and the sexual exploitation of the body of the minor.
7. 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 and the consequence is that if the classification committee is of the view that the film contains a scene of child pornography then they must refuse to classify. 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.
8. The Constitutional Court in *De Reuck v Director of Public Prosecutions*,² considered the earlier definition of child pornography in the Act. The definition of child pornography in the original legislation included:

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 the sexual exploitation or degradation of children.

² . De Reuck v Director of Public Prosecutions 2004 (1) SA 406.

9. The 2004 amendment makes the definition clearer and expressly includes images which depict persons as being under the age of 18. Further the new definition is broader in another respect. The previous definition, being restricted to an image, was held not to include written descriptions.³ The present definition expressly includes any description of a person who is or is depicted as being under the age of 18. This means that both images and written descriptions can amount to child pornography under the new definitions. Beyond that, the change in definition is not material and thus the comments made by the Constitutional Court in *De Reuck* are applicable and relevant.

10. The court⁴ adopted a definition of child pornography from The New Shorter Oxford English Dictionary⁵ and held that it means:

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.

The Court concluded that the general or primary definition is much wider than the statutory definition in the Act. This comment applies equally to the new definition which is broader, but not as broad as the dictionary definition. The Court concluded that, as a consequence, that the prohibited acts detailed in the definition are intended to be a closed list of what constitutes child pornography for the purposes of the Act. Thus for an image to amount to child pornography, it must fall with the list identified in the Act.

11. The court⁶ summarized its approach to the issue of whether an image constitutes child pornography for the purposes of the act as follows:

³ . Ibid at para 21.

⁴ . Ibid at para 20

⁵ . Volume 2, Clarendon Press, Oxford 1993.

⁶ . De Reuck above note 2 at para 38.

The overarching enquiry, objectively viewed, is whether the purpose of the image is to stimulate sexual arousal in the target audience. This entails considering the context of the publication or film in which the image occurs as a visual presentation or scene. The court conducts the enquiry from the perspective of the reasonable viewer. The image will not be of the child pornography unless one or more of the four prohibited acts listed below is explicitly depicted for this purpose. The person 'who is shown as being under the age of 18 years' in the image may be real or imaginary. The prohibited acts are:

- (a) a child engaged in sexual conduct;*
- (b) a child engaged in the display of genitals;*
- (c) a child participating in sexual conduct;*
- (d) a child assisting another person to engage in sexual conduct.*

As stated above, the present definition in the Act uses the same list of prohibited activities, but extends the definition to include any image or any description of a person who is or is depicted to be under the age of eighteen.

Assessing the Film in the light of the Relevant Legal Principles:

12. It is common cause that the film contains scenes of explicit sexual conduct. All the actors engage in these acts of sexual conduct. The issue is whether the film contains images of persons who are or who are depicted as being under the age of eighteen.

13. Very importantly and materially, four of the five scenes deal with adults engaging in sexual conduct with much younger persons. Persons having a particular interest and penchant for watching sexual intercourse between young persons and much older persons is the target market of this film. In

one particularly disturbing scene, a young Asian woman, Kitty, who looks much younger than eighteen years has explicit sex with an old man. The dialogue in the film expressly acknowledges her very youthful appearance. The male actor checks her age on the computer to confirm that she is over the age of eighteen. The sequence of scenes and the manner of depicting the female actresses leaves one with the uncomfortable feeling that this film may appeal to those with pedophilic instincts.

14. Mr. Chetty informed us that the adult entertainment market has been struggling for new ideas and themes and that recently there has been a proliferation of films depicting young persons engaging in sexual activity. He also drew our attention to the explosion in recent years of internet web sites dealing exclusively with child pornography and the responses both nationally and internationally to this. This Film and Publication Act dealing with child pornography was part of the national response to this problem.

15. Most of the actresses, from their physical appearances, appear to be very young. Mr. Chetty, in his submissions, argued that immature breast development, the lack of pubic hair etc were indications that were considered in determining age. A number of the actresses appeared to have underdeveloped and small breasts. Some of the actresses appeared to have emaciated bodies thus accentuating the impression that they were younger than eighteen years. This was particularly so in respect of Kitty. In addition, the pubic hair of many of the actress had been shaved off.

16. The dialogue was designed to create the impression that the actresses were very young. In the first scene there was references to "school", "boys", "my daughter's friends", "my daughter has gone to the mall." In the second scene, reference is made to the activities being "good practice for high school boys". All this is meant collectively to convey the impression that the actresses are teenagers rather than adults.

17. The dress and accessories of the actresses reveal a style that is popular with young teenagers. In the first scene, the actress is dressed in a school uniform, all of them wear underwear that appears to be preferred by children. The takkies, shoes, socks and even nail varnish contribute the impression that these are young girls. In addition, some of the actresses had their hair in plaits secured with baubles.
18. Equally significant, is the manner in which the actresses behave during the sexual activity. They appear naïve, sometimes confused and inexperienced. Their body language and behavior is in sharp contrast to that of the seasoned actresses who advertise sex chat lines during the breaks between the scenes.
19. Cumulatively, the impression is created that these are persons younger than eighteen being exploited for the sexual pleasure of much older and more manipulative persons. This occurs in four of the five segments. It is clear that this is the intention of the film. The actresses may or may not be under the age of eighteen, but they are depicted through the various methods described above as being under the age of eighteen. Their physical appearances directly contribute to the perception that the young actresses are under the age of eighteen. 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, the greater this risk of such a finding. The very important public interest of protecting children is highly relevant in this determination. It is our opinion that it could reasonably be construed that there are scenes in which actresses in the film are being depicted as being under the age of eighteen.

Conclusion

Given the definition of child pornography in the Act, we accordingly conclude that the film "It's just wrong" contains images of child pornography.

Concurred by:

Rev. M. McCoy.

Mr. J Phalane.

Mr. A. Verster.

Ms. Penny Marek.

Ms. R Smith.

Dated at Durban on the 5th July 2005