



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Malherbe v The State (1182/2018) [2019] ZASCA 169

Today the Supreme Court of Appeal (SCA) upheld an appeal by the appellant, setting aside the trial court's convictions and sentence, including the order in terms of s 120(4) of the Children's Act 38 of 2005. The appellant was convicted of seven counts of contravening s 24B(1)(a) and one count of contravening s 24B(1)(c) of the Films and Publication Act 65 of 1996 (the Act).

The appellant is a male person who was convicted by the Gauteng Division of the High Court, Mpumalanga Circuit Court, of being in possession of films, a book and images that depicted child pornography. These articles were seized following the search warrant issued by the magistrate. The appellant challenged the validity of the search and seizure warrant at the outset of the trial however, the trial court found that there was substantial compliance with the provisions of s 20 and 21 of the Criminal Procedure Act 51 of 1977 (the CPA).

Thereafter, the appellant made admissions in terms of s 220 of the CPA wherein he admitted being found in possession of images of child pornography. He was sentenced to nine months imprisonment, of which the sentence was wholly suspended for a period of 3 years on condition he does not violate s 24B(1)(a) and s 24B(1)(c) of the Act. The court further found that the appellant was unsuitable to work with children and ordered his name to be entered into Part B of the National Child Protection Register.

The issue for determination before the SCA was whether the search warrant was validly issued. The court found that the magistrate issued the search warrant on the basis of an unattested statement, given by the Captain of the South African Police Service, which does not comply with s 21(1)(a) of the CPA. The latter requires that a search warrant must be issued on the basis of information on oath. This means that the appellant's right to a fair trial was violated because the trial court admitted evidence which was unlawfully obtained. Furthermore, the court found that the appellant did not have the requisite *mens rea*, which entails knowledge of possession and of unlawfulness of his possession of the film, book and images. In addition, the court found that his admission was induced by the trial court's declaration that the search warrant was validly issued which he would have not, had the trial court come to the correct conclusion.