

SEXTING” – NOT A FUNNY GAME OR JOKE BUT A DANGER TO CHILDREN

1 Introduction

Recent reports[1][1] on cell-phone “sexting” activities by young people suggest that parents and young people are ignorant of the fact that ***taking a sexually-suggestive or semi-nude or nude picture of oneself and sending it via cell phone to friends amounts to the creation, possession and distribution of child pornography.***[2][2] Learners as young as 12 years are reportedly exchanging salacious pictures and messages through their cell phones. Young people may think “sexting” is fun but the consequences can be quite serious.

When teenager Phillip Alpert’s 16-year-old girlfriend broke off their relationship, Phillip decided to get back at her by “sexting” nude photos that she had previously “sexted” him to her parents, grandparents, teachers and other teenagers via e-mails. Phillip Alpert was charged with distributing child pornography. He was convicted, sentenced to 5 years probation and was registered as a sex-offender, a label he has to “wear” until he turns 43 years. He lost his friends because “they just don’t want to be friends with a sex-offender kid”, he explained. And he was kicked out of Valencia Community College because he is a registered sex-offender.[3][3]

“Also last month, a Brevard County teen was jailed after forwarding a cell-phone picture of his 16-year-old ex-girlfriend’s naked breasts to another teen. The girlfriend allowed the photo to be taken while the two were dating, police said. **And an Ohio teen hanged herself in May after her ex-boyfriend forwarded nude photos of her, sharing them with other high-school girls.**”[4][4]

Dalia Lithwick also reported, in an article *Teens, Nude Photos and the Law*, published in *Newsweek International* on 14 February 2009, that “three girls (ages 14 or 15) in Greensburg, Pa., were charged with disseminating child pornography for sexting their boyfriends. The boys who received the images were charged with possession. A teenager in Indiana faces felony obscenity charges for sending a picture of his genitals to female classmates. A 15-year-old girl in Ohio and a 14-year-old girl in Michigan were charged with felonies for sending nude images of themselves to classmates. Some of these teens have pleaded guilty to lesser charges. Others have not. If convicted, these young people may have to register as sex offenders, in some cases for a decade or two. Similar charges have been brought in cases reported in Alabama, Connecticut, Florida, New Jersey, New York, Pennsylvania, Texas, Utah and Wisconsin.”

2 What is “sexting” and is “sexting” an offence in South Africa?

2.1 “Texting” is the practice of sending text messages, usually through a cell phone’s “sms”[5][5] facility. “Sexting”, a combination of “sex” and “texting”, is the practice of sending sexually-suggestive text messages or photos mainly through cell phones.

2.2 The handling of the Northmead Secondary School case, reported in the *Sunday Times Extra* of 22 March 2009 under the heading ‘*Gang-rape teen tells of her ordeal*, by the police, the parents of the teenage victim and the teachers, as well as those who had knowledge of the distribution of the explicit footage, reveals a disturbing ignorance of anti-child pornography laws in South Africa..

2.3 “Child pornography” is, if one is to combine the definitions in the FPAAct and the SOAct-

any image, however created, or any description or representation of a person, real or simulated, who is depicted, made to appear, look like, represented or described or presented as being under the age of 18 years of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person-

- (a) *engaged in sexual conduct*
 - (b) *engaged in an act that constitutes a sexual offence*
 - (c) *participating in or assisting another person to participate in sexual conduct*
 - (d) *engaged in an act of sexual penetration*
 - (e) *engaged in an act of sexual violation*
 - (f) *engaged in an act of self-masturbation*
 - (g) *displaying the genital organs of such person in a state of arousal or stimulation*
 - (h) *unduly displaying the genital organs or anus of such person*
 - (i) *displaying any form of stimulation of a sexual nature of such person’s breasts*
 - (j) *engaged in sexually suggestive or lewd acts*
 - (k) *engaged in or as the subject of sadistic or masochistic acts of a sexual nature*
 - (l) *engaged in an conduct or activity characteristically associated with sexual intercourse*
 - (m) *showing or describing such person-*
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- (i) *participating in, or facilitating or assisting another person to participate in; or*
 - (ii) *being in the presence of another person who commits or in any other manner being involved in any act of a sexual nature*
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- (n) *showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within context, amounts to sexual exploitation or violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or in such a manner that it is capable of being used for the purpose of sexual exploitation or is capable of being used for the purpose of violating or offending the sexual integrity of that person, any person or group or categories of persons.*

The question of whether or not the sexual conduct depicted in the image was consensual or coerced is irrelevant – what is relevant is whether or not the image contains a person under the age of 18 years in an act or conduct of a sexual nature. Children do not “consent” to being sexually abused, raped, tortured, brutalised and even murdered for the production of child pornography.

2.3.1 According to reports, the teenager was filmed while being sexually violated. It would appear that the footage contains scenes of the teenager performing oral sex as well as being raped by a number of schoolboys. There seems no doubt that the footage contains images and scenes of explicit sexual conduct involving persons under the age of 18 years. In terms of the FPAAct and the SOAct, the footage clearly amounts to child pornography.

3 “Sexting” images of explicit sexual conduct is the distribution of pornography, and if the images are of persons under the age of 18 years, it is the distribution of child pornography. The distribution of pornography via mobile cellular phones or the Internet or mail order is an offence in terms of the FPAAct. Pornography in South Africa may only be distributed in accordance with section 24 of the FPAAct. In so far as child pornography is concerned, **in terms of both the FPAAct and the SOAct, it is an offence to create, produce, to be in possession of or distribute child pornography. There is no provision either in the FPAAct or the SOAct that allows for the creation, production and distribution of child pornography under any circumstances.**

4 Relevant offences involved in the Northmead Secondary School case

The Films and Publications Act, No 65 of 1996

- 4.1 **Section 27(1)(a)(i) – every person in possession of the footage in question**
- 4.2 **Section 27(1)(a)(ii) – all those involved in, or in any way, assisting or contributing to, the creation of the footage**
- 4.3 **Section 27(1)(a)(iii) – every person who distributed, or caused the distribution, of the footage**
- 4.4 **Section 27(2) – every person who, having knowledge of any of the offences set out in paragraphs 4.1, 4.2 and 4.3 above, failed to report that knowledge to the police**

The Criminal Law (Sexual Offences and Related Matters) Amendment Act, No 32 of 2007

- 4.5 **Section 10 – every person who intentionally exposed or displayed or caused the exposure or display of the footage to a *complainant* 18 years or older, without the consent of the *complainant***
- 4.6 **Section 19 – every person who intentionally exposed or displayed or caused the exposure or display of the footage to a child.**

Comments

5 Prosecution of those involved in the creation, production, distribution and possession of the footage involved in the Northmead Secondary School matter is important for several reasons, not the least being that it is important to send a clear message to young people, as well as parents, teachers and the public in general, that “sexting” is not a joke or fun but a serious criminal offence with severe consequences. The trauma suffered by the teenage victim is repeated each time the footage is viewed.

6 Parents and educators must also clearly understand that if they find images of a sexual nature on mobile cellular phones of learners, they should report that to the police immediately.

7 One could make the argument that criminalising “sexting” by children who think it is fun and a just a joke is too harsh because these children are not paedophiles or sexual predators. However, these young people must be made to understand, in the strictest way possible, that “sexting” can have dangerous consequences - especially since they are *“too dumb to understand that their seemingly innocent acts can harm them goes beyond paternalism.....that a dumb moment can and does last a life time in cyberspace.”* These images will end up on the Internet and in the hands of paedophiles.

8 Young people should be made to understand that it is no longer a fun or a joke when the “sexted” images end up in the hands of paedophiles and child sexual predators. Once on the Internet, the image can never be deleted or removed – not unless one destroys every single computer in the world!

9 It may be that a lifetime of “cyberhumiliation” from the exploitation of an image by paedophiles is enough of a punishment for what started off as fun, without suffering a real criminal record. But, until an effective alternative is found to make children appreciate the dangers of “sexting”, the criminal-justice system is the only option to the increasing problem of this convergence of technology and behaviour.

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