

## **Before the Film and Publication Appeal Tribunal**

In the matter between:

**Crystal Brook Distribution (Pty) Ltd**

and

**The Film and Publication Board**

**4/2011**

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### **Award**

In re: Appeal against the classification of the film

### ***Trust***

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**Professor K. Govender**  
**Chairperson**

### **Introduction**

A two-person classification committee unanimously assigned this film a restrictive age classification of 18(V). From the Chief Examiner's final report, it appears that the cumulative effect of complex themes, scenes suggesting that a sexual assault had occurred, and implied violence, justified the classification of 18(V). Particularly disturbing to the classification committee were the scenes portraying how a 35-year-old sexual predator grooms a fourteen-year-old girl to have sexual intercourse with him.

### **Arguments and submissions**

This is a somewhat unusual appeal. It has been brought by the distributor, Crystal Brook Distribution (Pty) Ltd, but is supported by the Film and Publication Board (FPB), Childline SA, and Rape Wise South Africa. These bodies propose to launch a cyber-safety initiative, and want to use this film to teach important lessons. In their correspondence, the appellants argued for the importance of communicating these lessons to persons aged between 12

and 16 – the most vulnerable group. Children in this age group use social networking media without being fully aware of the serious risks and dangers associated with them. However, the 18(V) age classification would prevent the educational use of this film with persons under 18.

In a letter on behalf of Childline SA, Ms Dumisile Nala and Ms J. van Niekerk submitted that the film should be shown to children aged 14 and over. They confirmed that they receive many calls for information on these issues, and have received reports of children being groomed through the internet. In addition, they make the point that the viewing of a film of this nature will more effectively convey the real extent and nature of the dangers posed by internet predators than simply reading pamphlets or articles.

Rape Wise is an organisation that aims to educate children, teenagers, parents, and educators about the dangers that face young people in South Africa. They sought a 13 or PG classification for the film, as the majority of social networking victims are under the age of 18. They contended that the film was a valuable educational tool that should be viewed by every high school learner as part of their life orientation programme. Finally, and in support of their argument, they pointed out that there is no explicit nudity in the film.

The main argument of these organisations is that this film conveys a powerful message about the dangers of grooming, and could help to educate children and so result in fewer of them falling prey to sexual predators on the internet. The classification of 18(V) assigned to the film prevents them from using the film for that purpose. Beyond this, no other argument was made as to why this film should be classified differently.

The classifiers, in an additional report, argued that one of the objectives of classifying is to protect children from exposure to disturbing and harmful material and from premature exposure to adult experience. The raping of a 14-year-old girl by a 35-year-old man justifies, in their opinion, the higher rating. They justify their decision to impose an '18' classification by pointing out that a '16' age classification may be used when consensual sex is portrayed; however, as the film depicted rape, it justifiably fell outside the 16 category. In addition, they questioned the wisdom of using this film as a teaching medium. Finally, they pointed out that this appeal had been lodged well beyond the 30 day period prescribed in the Act.

When the appeal was heard on 10 September 2010, neither the appellants nor the classifiers appeared before the Appeal Tribunal. The Tribunal viewed the film, and subsequently submitted our decision and undertook to provide reasons. These are the reasons for our decision.

### **Is this appeal out of time?**

The relevant portion of section 20(1) of the Films and Publications Act (the Act) provides that the person entitled to appeal “may within a period of 30 days from the date on which he or she was notified of the decision, in the prescribed manner appeal to the Appeal Tribunal”. In addition, section 25 of the regulations provides:

An appeal against a decision contemplated in section 20(1) of the Act shall be made on Form FPB/AP/ and submitted to the Board with proof of payment of the prescribed fee within 30 days from the date on which the applicant was notified of the decision of the Board.

The issue that we had to consider was whether the 30 day period denies the Appeal Tribunal discretion as to whether or not to admit appeals lodged after the 30 day period has expired. Whenever a period such as this is stipulated, generally a power is afforded to the body hearing the appeal to condone non-compliance in defined circumstances. This gives it the necessary flexibility to hear appeals when it is in the interests of justice to do so, even when the 30 day limit has elapsed. We are of the opinion that the sections do not preclude the Appeal Tribunal from hearing an appeal even after the 30 day limit, irrespective of the circumstances. The guidelines must be read consistently with the Act; and the latter does not categorically state that no appeals can be lodged after the expiry of 30 days. As a rule, appeals must be lodged within 30 days; but in exceptional circumstances the Appeal Tribunal may, if it is in the interests of justice to do so, condone non-compliance with the 30 day rule after having regard to the following factors:

1. An explanation for the delay in submitting the appeal;
2. Prejudice caused to any other parties by the delay in lodging the appeal after the 30 day period.
3. The strength of the appeal on the merits;

#### 4. Whether the broader objectives of the FPB will be served by the Appeal Tribunal hearing the matter and ruling on it.

No explanation was provided for the delay, but there is no evidence that the hearing of this appeal after the 30 day period would cause prejudice. It is apparent to us that material errors were made in the assessment by the classifiers, and that these need to be corrected. On the merits, the appellants have a strong case. In addition, this is an appeal on the basis that the broader distribution of this film would promote the best interests of children and thus advance the public interest. Section 2 provides that one of the objectives of the Act is to regulate the distribution of films so as to ensure that children are protected from premature exposure to adult experiences. The main ground of appeal is that, if this film were distributed more broadly, children would become aware of the dangers of chatting on social websites, and be alerted to the pernicious schemes and devices that are used to groom children for sexual activity. Given the views of a number of child rights activists that this film could teach valuable lessons that might prevent children from being prematurely exposed to adult experiences, and given the strength of the appeal on its merits, we are of the view that this appeal should be entertained, despite its being lodged months after the 30 day period.

#### **A description and analysis of the film**

This is a film about a stable, comfortable, middle class family with educated parents who give their 14-year-old daughter, Annie, a notebook computer as a birthday gift. She starts communicating on-line with a sexual predator, known to her as Charlie, who wins her trust by pretending initially to be a 15-year-old. Their conversations are initially innocuous, but eventually degenerate into explicit sexual discussion over a period of two months. As the predator gains her trust and affection, he confesses that he is not 15 but 20; later he admits to being 25. When he is confident that Annie completely trusts him, 'Charlie' initiates a meeting. When they meet, Annie realises that 'Charlie' is in fact 35 years old; but despite her serious misgivings, he is able to use their previous interactions and communications to allay her fears and overcome her resistance. She accompanies him to what appears to be a seedy motel, and we witness a child-like Annie change into seductive red underwear that 'Charlie' has given her. There are no scenes directly depicting the sexual activity that occurs, but it is strongly implied. We hear the predator undoing the belt on his trousers, there are other sounds suggesting that sexual activity is occurring, and we see fleeting images of Annie's face during the act of statutory rape.

The incident is revealed to the authorities by a concerned friend of Annie's, and family relations are thrown into disarray. Annie's father falls apart as he becomes obsessed with seeking retribution (rather than supporting his daughter). Annie still trusts 'Charlie', and only fully understands that she is a victim when she learns that 'Charlie' has groomed and had sexual relations with other girls, some as young as 12. We witness the police struggling to catch the predator, and realise at the end that he is outwardly a respectable family person who teaches high school physics.

The general consensus was that this was a psychologically compelling and honest film that tells the story from within the characters. The film is powerful, moving, and realistic. We witness the intensity of the events from the perspective of Annie and her father. It was felt that this is an enormously edifying film, one that is not exploitative in the slightest, and that deals with a variety of themes. After discussion, we are of the view that the film operates at a number of levels and has many lessons to offer. It deals with the dangers of unlimited access to the internet, issues of rape, adolescent sexuality, parenting in times of crisis, family conflict, feelings of revenge and rage, and coping with a sense of absolute helplessness.

Primarily it informs about the modus operandi of sexual predators who insidiously gain the trust of naïve young girls, and then manipulate them to engage in sexual activities. It also teaches lessons about parenting, about parental involvement in the lives of their children, and then providing support when it is most needed. We are unanimous that this film does not exploit sexual activity, nor in any way appeals to prurient interests. Its unequivocal purpose is to warn about the dangers of children communicating on the internet, and to show the viewer the consequences for the family and the child of being subjected to the evil machinations of sexual predators.

Importantly for classification purposes, there are no scenes of explicit or near-explicit sexual activity. We are not shown the rape or other sexual activity. This message is conveyed through other means.

## **An appropriate classification**

The classifiers stated in their reasons that, judged within context, this film is artistic and dramatic. The classifiers were clearly referring to Section 18(3)(a), (b), and (c) of the Act.

A 'refused classification' is assigned if a film contains child pornography or advocates hatred based on any identifiable group characteristic. An XX classification is assigned if the film depicts explicit sexual conduct that shows disrespect for human dignity; bestiality, incest or rape; conduct that constitutes incitement of, encourages, or promotes harmful behavior; the explicit inflicting of sexual or domestic violence; or the explicit visual presentation of extreme violence. An X18 classification is assigned if the film contains explicit sexual conduct.<sup>1</sup>

Classifiers are given the discretion to depart from a refused classification, XX, or X18 when the film or game, judged within context, except with regard to child pornography, is of scientific, dramatic, or artistic merit or is a matter of public interest (the exception). However, the exercise of this discretion is limited to those films which, but for the exception, would have been classified as 'refused classification', XX, or X18.

The classifiers themselves accept that there are no scenes of explicit sexual conduct, and no visual presentation of the rape and assault. There is nothing that could justify this film being classified as 'refused classification', XX, or X18.

It appears from their reasoning that the classifiers applied the exception, and on that basis decided on an 18 (V) classification. However, it was not legally appropriate to apply the exception in this case, as this film patently could not be classified as a 'refused classification', XX, or X18 in the first instance.

We now turn to the appropriate classification. The classifiers made the point that the film deals with statutory rape, and that the '16' classification only permits brief scenes of consensual sexual activity. As statutory rape cannot be described as consensual sex, they decided to assign the film a classification of 18. We agree that there are no visual images depicting statutory rape. When the guidelines refer to "brief scenes of consensual sexual activity", reference is being made to the actual visual depiction of the sexual activity. If the film visually depicts sexual activity, then it must be consensual if it is to fall within a

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<sup>1</sup> Chapter 4 of the Act.

'16' classification. There are no visual scenes of the rape, and the fact that the rape occurs is communicated through sound, by fleeting images, and by subsequent statements. The guidelines therefore do not prevent the classifiers from assigning a '16' classification.

In their supplementary reasons, the classifiers point out that the impact of a 35-year-old man raping a 14-year-old girl is strong and potentially harmful to children. However, the guidelines in respect of impact provide:

Impact: Strong and of an intensity that may be disturbing to persons under the age of 16.

Thus, even if the impact of the themes and messages is strong, a restrictive classification of 16 may be more appropriate than one of 18. Further, given the important educative role that this film can play in informing young persons of the dangers of online interactions, a less restrictive classification than 18 would have been more appropriate. After their initial meeting, we see 'Charlie' manipulate Annie, based on the trust relationship that he has carefully cultivated over a period of two months. We watch them move almost inexorably towards the sex scene. In the scene in which the statutory rape occurs, we witness a child-like Annie in red underwear, clearly unsure and nervous. Sound and other imagery is used to communicate that statutory rape has occurred. We watch family relations deteriorate, culminating in Annie's attempted suicide.

After discussion, and on the basis of the film's impact, language, and themes, it was decided that '16(L)' would be a more appropriate classification than '18'. We were of the view that a lesser classification than 16 would not be appropriate. Thus, if the film is to be distributed commercially, it will have to be broadcast and distributed as a film classified as 16(L).

### **Application to use this film as a medium to educate about the dangers of online interactions**

The information placed before us is that some child rights experts are of the view that the film could be a very valuable teaching medium in their quest to alert children to the dangers of online chatting. Having viewed the film, we are of the view that there is much merit in their arguments. In terms of section 20(3) of the Act, the Appeal Tribunal has wide powers, including the power to 'impose other conditions in respect of the distribution or exhibition of the film,

game or publication'. We are aware that a restrictive age classification of 16 would prevent the film from reaching the target market that the activists have identified as the most vulnerable.

We accept that this film could be very useful in warning of the dangers of online chatting, and that it should be seen by persons younger than 16; but this needs to take place in controlled settings. To achieve that objective, we have decided to apply a less restrictive classification of '13' to the film when it is being shown for educational purposes. However, this is subject to the requirement that application must be made for a special exemption for the film to be shown to children aged from 13 to 15. A single exemption can be made to show the film in a particular province or district, provided that the educational authorities consent and that the conditions listed below are satisfied. We anticipate that the film will be shown to children at schools, educational institutions and at other venues. Thus, in order not to overburden the applicants, a single application can be made prior to the film being shown at various venues. i An application must be made to the Chairperson through the Board. The written motivation must:

- Indicate why it is in the best interests of children aged from 13 to 15 to view this film;
- Indicate to whom the film is to be shown and over what period;
- Provide proof that guardians or persons exercising legal authority over the children consent to their viewing the film. A general approval by the Provincial Department of Education or the principal of the school will suffice for this purpose.
- Provide proof that the viewing will be in the context of a workshop, and that the various themes of the film will be explained.
- Provide proof that the reassuring presence of an adult with appropriate skills will be present throughout the viewing and the discussions.
- Provide an undertaking that the primary purpose is to educate about cyber-safety.

If these requirements are met, the film will be assigned a restrictive age classification of 13(L) for the purpose of the viewing or the series of viewing that is covered by the application.



## Conclusion:

1. Given the strength of the appeal on the merits, and the public interest involved, we have decided to condone the late filing of the appeal.
2. The classification of 18(V) is set aside and replaced with a classification of 16(L).
3. In instances where the film is to be shown for educational purposes, application can be made for a classification of 13(L). This application must be made in writing to the Chairperson through the Board.
4. The application must :
  - Indicate why it is in the best interests of children aged from 13 to 15 to view this film;
  - Indicate to whom the film is to be shown and over what period;
  - Provide proof that guardians or persons exercising legal authority over the children consent to their viewing the film. A general approval by the Provincial Department of Education or the principal of the school will suffice for this purpose.
  - Provide proof that the viewing will be in the context of a workshop, and that the various themes of the film will be explained.
  - Provide proof that the reassuring presence of an adult with appropriate skills will be present throughout the viewing and the discussions.
  - Provide an undertaking that the primary purpose is to educate about cyber-safety.
5. If the application is granted, the film will be deemed to be classified 13(L) for the purposes of broadcast and distribution in respect of the broadcast or series of broadcasts in respect of which the application is made.

Concurred by:

Adv. D. Bensusan

Mrs H. Devraj

Prof. A. Magwaza

Mrs P. Marek

Revd M. McCoy

Ms D. Terblanche

Durban, 19 September 2011