

LM (NAME SUPPRESSION)

Appellant

v

THE QUEEN

Respondent

Hearing: 17 June 2014

Coram: Elias CJ
McGrath J
William Young J
Glazebrook J
Arnold J

Appearances: C T Patterson for the Appellant
M D Downs and K E Courteney for the Respondent

CRIMINAL APPEAL

MR PATTERSON:

Yes, may it please Your Honours, counsel's name is Patterson, I am here for the appellant.

ELIAS CJ:

Thank you Mr Patterson.

MR DOWNS:

Yes may it please the Court, Downs and Ms Courteney for the respondent.

ELIAS CJ:

Thank you Mr Downs, Ms Courteney. Yes Mr Patterson.

MR PATTERSON:

Yes thank you Ma'am. The appellant's case is obviously that section 144A does not create secondary party criminal offences via section 66 of Crimes Act 1961.

WILLIAM YOUNG J:

Does it matter?

MR PATTERSON:

It does matter, Sir.

WILLIAM YOUNG J:

Why, has your client not done enough to be with or on the complainant's anyway?

MR PATTERSON:

Yes, Your Honours have probably had the benefit of my friend's submissions and he has made that point very strongly and the answer to that is quite simple and that is, that an essential element of any criminal justice system is that an accused must know what they are charged for and as a fundamental aspect of that, an accused will frame their defence, presumably to that charge. Now the appellant in this case was charged as a secondary party and I think the safe course would be to presume that his defence was run on that basis.

WILLIAM YOUNG J:

Well let's not, what other, how else could it have been run?

MR PATTERSON:

Well it could have been run on the basis that the acts that took place, that were undertaken by the accused or by the appellant, were acts that wouldn't infringe the criminal prohibition for a primary offender as opposed to a secondary offender.

WILLIAM YOUNG J:

But is that credible in relation to what was said by this Court in *Y (SC 40/2013) v R [2014] NZSC 34*.

MR PATTERSON:

Each case turns on their facts and the facts are derived from the way in which the case is presented. I don't think that I can put it any other way Sir, with all respect, that when an accused runs a defence, they will run the defence based on the charge that they face.

WILLIAM YOUNG J:

Yes but there is a proviso.

MR PATTERSON:

Yes but I think it Sir, is too simplistic to simply say, "Well anyone who is a party to an offence will naturally be liable as a principal."

ELIAS CJ:

I suggest that before we get on to the proviso, we might actually hear the appellant on the provisions.

MR PATTERSON:

Thank you. It is a key point I understand.

ELIAS CJ:

It is a key point that you will have to come on to.

MR PATTERSON:

Absolutely. The key submission, Your Honours is that this offence creates an extraterritorial adjudicative jurisdiction for New Zealand and as such it is a special class of offence, it is a unique class of offence. One of the unique aspects in my submission and very much the appellant's case will stand or it will fail unless this is

accepted, is that the presumption that secondary offending via section 66 will always apply is displaced. That is the first key point. I have six others which I will build upon.

My next point that segues into that is the wording of section 6 Crimes Act which limits the extraterritorial effect of the Crimes Act except as expressly provided in the legislation. Now there would be no need for any consideration of secondary offending in terms of section 66 with extraterritorial offences if one was to simply find that it was the intent of the legislature that when enacting section 66, every time a primary extraterritorial offence was created, section 66 would come in and tuck in behind and therefore capture secondary offending. Section 6 in my submission makes it very clear that extraterritorial offences are in a special class.

My third point which I say is an example of that in play.

ELIAS CJ:

Sorry, what in particular do you rely on to say that it's in a special class, simply that it is an exception?

MR PATTERSON:

Yes.

ELIAS CJ:

To the principle of non-application extraterritorially?

MR PATTERSON:

Correct, Ma'am, absolutely.

GLAZEBROOK J:

Is the point really that it is not expressly provided in the legislation, that there is party liability and therefore section 6 would pull it out. Is that the submission?

MR PATTERSON:

That is the submission. It requires Ma'am, in my submission that if the intention of the legislature is to bind the actions of individuals while overseas, it requires express statutory provision to enable that. It can't be taken simply as a catch all, in particular secondary liability via section 66.

ELIAS CJ:

Isn't the problem that you face that section 66, it purports to be ubiquitous throughout the Act, attaching to all offences?

MR PATTERSON:

Yes it does and the counter argument is that well –

ELIAS CJ:

And indeed, offence. I haven't got the full Act here unfortunately but offence, how is it defined?

MR PATTERSON:

That is a good question. I don't have the Act in front of me but my understanding is an offence is because the Crimes Act is a code, an offence is any provision in breach of the statutory provisions contained in that.

ARNOLD J:

Well offence is defined to mean any act or omission for which anyone can be punished under this Act, whether on conviction, on indictment or summary conviction, so any act or omission for which anyone can be punished, is an offence.

MR PATTERSON:

Yes and hence the codification of these offences.

ELIAS CJ:

But the terms of section 66 then are attached to any offence under the Act.

MR PATTERSON:

Yes but also we have to remind ourselves that section 66 isn't an offence in itself. It is an enabling provision.

ELIAS CJ:

No but you seem to be arguing really that it is.

MR PATTERSON:

Well no, no I am not Ma'am, what I am arguing is that enabling provision can only apply to domestic offences unless the extraterritorial offences expressly provide that party offences will apply.

ELIAS CJ:

Well section 144A is an offence under the Act.

MR PATTERSON:

It is an offence.

McGRATH J:

But why expressly, are you saying that we cannot apply the normal principles of interpretation under the Interpretation Act here and look at the purpose of the provision and ascertain what the words used, mean in that context.

MR PATTERSON:

Well yes, but it also Sir, has to be in the context that this is a special class of offence. This is an extraterritorial offence and as such it needs to be interpreted in that context.

McGRATH J:

Well it requires a provision with extraterritorial effect before an offence was created. Are you going any further than that?

MR PATTERSON:

I am going further than that and it goes back to my first submission and that is the presumption that secondary party liability will attach, via section 66, is rebutted or displaced with extraterritorial offences. And in particular this section 144A and unless there is something in the wording of the section which enables an interpretation to be derived from it, that section 66 will apply, then in my submission if that is not there, it is a primary offence only of which secondary party liability does not attach.

Your Honours that then leads nicely into my third of my seven points and that is that an example of an express capture of secondary liability is found in section 144C.

Now that section, using my words just broadly to describe it, is the prohibitions against being involved in sex tourism.

ARNOLD J:

But does that really help you because it says whether or not any such offence is actually committed by any person. In other words, what section 144C does is not create party liability because you assist somebody else, it creates an offence of helping somebody.

MR PATTERSON:

It does. There is two parts to that section. There is, in my submission there is a primary offender part which you know, simply providing these services is an offence in itself and then it can also be interpreted as capturing because of the special nature of extraterritorial offences as capturing and saying, "Well this is an express attempt by the legislature, Parliament to - and I will develop this a little bit later Sir, "To meet its obligations under the United Nations Convention rights of the child and the optional protocol, to expressly prevent this type of facilitation offence where the individuals are making the facility available so that the primary offenders can undertake the core offence.

ELIAS CJ:

But it does not seem to me that section 144C – you will have to convince me that section 144C is referring to parties at all, party offences at all. The party provisions simply could certainly attach, it seems to me, to section 144C. Those offences simply make it clear that organising travel with the intention of facilitating a commission of offence is an offence whether or not the person organising it participates in the offence.

MR PATTERSON:

Yes.

ELIAS CJ:

So I do not understand why you say it has anything to do with the application of section 66.

MR PATTERSON:

Well it doesn't have anything – you see this is the whole point of my argument is in extraterritorial offences, section 66 doesn't have any implication at all. You see what it requires is that when Parliament is trying to remedy the mischief that these provisions relate to, in compliance with its international obligations, it is expressly providing the exact type of behaviour that is to be addressed and to create offences.

ELIAS CJ:

Well is that different from the creation of any offence?

MR PATTERSON:

Well it is because what I submit is that legislature could have quite easily said well we don't need section 144C because section 66 will apply. Anyone who is organising these things, they will be facilitating the commission of an offence or attempting to do so and they can be captured that way. Now I don't think it is a matter of, well this is a clarification provision to try and just put it beyond doubt that New Zealand won't tolerate these people that organise these trips. I think it goes further than that. It is not that at all. It is simply saying, when we are legislating to address the behaviour of individuals overseas, we need to be very express as to what behaviour will amount to an offence.

McGRATH J:

It might have been though that those drafting the legislation or setting up the policy, felt that the circumstances of section 144C were so preliminary and so distant from an actual offence, that they might not be caught by the general provisions as to who commits an offence under the Crimes Act in section 66.

MR PATTERSON:

Sir it is possible and I don't have a response to that argument, it is very hard to step into the minds of the legislature of the time. I have read the *Hansard* and really it hasn't given me any – it certainly hasn't indicated to me that it was in the mind of Parliament that it would capture secondary liability, other than to the effect as we find in section 144C.

McGRATH J:

I think when we look at section 66, Mr Patterson, we have to bear in mind that it is not solely concerned with secondary liability. I mean section 66 (1) states who is guilty of an offence and paragraph (a) is the person who actually commits it.

MR PATTERSON:

Yes.

McGRATH J:

So it is not solely a secondary party provision which it seems to me sort of doesn't help your argument.

MR PATTERSON:

Well look I have to accept that it doesn't help my argument, all I can make the point is, it is an enabling provision and it enables the Courts to say, well here is a primary offence and what was once the common law of secondary offending is now being captured in part in section 66. Thank you Sir.

ELIAS CJ:

What is the, I can't remember, what is the term of imprisonment, what is the liability under 144A?

MR PATTERSON:

I don't know the answer to that Sir, Ma'am, rather I can only advise that the appellant in this case was convicted to three years.

WILLIAM YOUNG J:

It is 10 years for the offence under section 132.

ELIAS CJ:

132. So 144C is a lesser offence, arranging travel?

MR PATTERSON:

Yes.

ELIAS CJ:

So it has an explanation, both in that way and also on the basis that has been put to you by McGrath J, that it may have been thought that arranging travel was too preliminary to come within the liability.

GLAZEBROOK J:

And also as Justice Arnold said, it applies whether or not the primary offence is committed.

MR PATTERSON:

Yes and Ma'am, I have to accept that that is one interpretation that can be made. My next point, which is my fifth point is that I submit that the appellant's argument that extraterritorial offences do have a special, they are in a special class. That argument's consistent with the approach that has been taken in a number of other countries and, in particular, I'm going to focus just very quickly on Australia and the United Kingdom. Both parties are signatories to the Convention and, in fact, Australia was, I think, one of the first, if not the first signatory, and moved very quickly to enact its offence legislation.

There are two offences of, I'll just broadly call it, facilitation and assistance, which has found in the Australian Criminal Code 1995, and that is sections 272.14, which is procuring a child to engage in sexual activity, and in the same section, section 272.19, encouraging the committing of offences, but under that group of overseas child sex offences.

Now, in my submission, both of these provisions, which you can find in the appellant's bundle of authorities, a very short bundle which I'm pleased to be able to present, both of those provisions are what could be broadly called capturing those that provide assistance, aide, abet, assist, facilitate, procure, encourage, all of those synonyms.

ELIAS CJ:

Sorry, where do we find those in your bundle? Under what tab?

MR PATTERSON:

Yes, actually, sorry, they have been excluded but I've –

McGRATH J:

They're in your submissions.

MR PATTERSON:

I've reproduced them at page 5 of my written submissions.

ELIAS CJ:

Yes.

MR PATTERSON:

Thank you. Sorry, Ma'am.

ELIAS CJ:

That's all right.

MR PATTERSON:

It's my submission that this is an example of where at least the Australian legislature has gone, because of the special class of extraterritorial offences, we are going to enact a piece of – some provisions which, as I say in broad terms, are those that stand behind the principal offenders so - and make those offences. And that's rather than relying on the type of enabling provision that we find in our section 66.

Likewise, the same approach was taken by the United Kingdom in schedule 2(3)(b) of the Sexual Offences Act 2003 which, just in short, expressly defines an offence as including aiding, abetting, counselling, procuring the commission of that offence. New Zealand just hasn't gone that far and –

ARNOLD J:

As I understood the international obligations that New Zealand signed up to, we are obliged to impose liability for those who aid and abet as well as those who directly commit, is that right?

MR PATTERSON:

The optional obligation which came in after the Convention, Sir, and you are – look, the short answer is you're correct, is that there is an expectation will take steps to curtail those that assist. That's the expectation.

ARNOLD J:

All right, so then on your interpretation New Zealand would not have lived up to its international commitments?

MR PATTERSON:

Well there is a limitation in that optional article, and the limitation is subject to the nation state parties' laws and in my submission that limitation is a – enables New Zealand to decide how far it will go. Certainly the conventions do not provide an absolute prescriptive model to follow. They're broad in their terms. I think my friend accepts that that is the case. It is – there are examples, and my friend will address the Canadian position as a good example where there are differences between state parties to the Convention as to how far that they've gone. My submission is, is that New Zealand on the, I guess the spectrum, is sitting very much at a more stand-off approach and being less prescriptive and not going as far as other countries, for example Canada.

ARNOLD J:

So did you find anything in the legislative history to support that and did anybody indicate we'd made a deliberate decision here to restrict the scope of liability?

MR PATTERSON:

No I didn't, Sir. There has been some academic commentary, particularly around Canada's meeting of its obligations, and my friend does refer to one of the articles which addresses that.

The Australian academic commentary has been significantly more light. Party offending as such, if one was to describe it as that, just doesn't seem to attract a lot of attention. Whether that is because the focus has been on the primary offenders due to the extraterritorial nature of it, but certainly if I can say this one point and that is, Australia and the United Kingdom have gone some way down the road towards, I guess the, you know, meeting all of the objectives that the Convention has. Canada's gone further. New Zealand hasn't gone anywhere near that far and, Sir, really, in many respects that, then, in my view, leads a question that, depending on the outcome of this case, is whether or not some consideration needs to be re-given to how far New Zealand has gone and whether, even under the legislation and even if the appellant loses this appeal, whether it's actually going far enough because, certainly, there are examples of other nations who have made it very clear, in black

and white law, that those who facilitate, assist, aid, abet, whatever synonym wants to be applied, will commit an offence and it's clearly there and one doesn't need to then go back to enabling provision to say well there's a party offence.

GLAZEBROOK J:

Can I just check? I'm not convinced that subject to the provision of the national or the social will apply to an attempt actually gives you an out for you to decide you don't apply it to an attempt, or to a complicity or participation unless under the national law attempts are generally not caught.

MR PATTERSON:

Yes.

GLAZEBROOK J:

Which is possible under certain national laws.

MR PATTERSON:

It is possible and –

GLAZEBROOK J:

Because, in fact, you're allowed to have a civil or administrative penalty as well because it's not assumed that these will be criminal penalties if, in fact, in certain of the issues it's not criminal penalty, although one can't imagine – for instance, forced labour may well come within a category where you have to have an administrative thing but it's not actually a crime to have child labour, for instance.

MR PATTERSON:

Yes, I'm with you on that, Ma'am. I simply only say that the way in which the Optional Protocol has been put in place is to leave it to the state parties under their own domestic laws to decide how far they wish to go, and simply because one country hasn't gone as far as another doesn't mean that one of those countries is not consistent or their laws aren't consistent with the objects of the article.

I have two – I actually now only have one more point because I've kind of captured my point 7 in that discussion.

The last point in my primary submissions is simply that if my primary argument's accepted that it requires express wording before capturing these types of facilitation offences, or a party offence, then the word "does" in section 144A (1) where the offender "does" with a child, that makes it very clear that the section is a section intended to be a primary offender's offence. There is nothing in the wording that one could imply that there was an intention that parties would be captured by it, in its wording.

GLAZEBROOK J:

That must be the case with most of the provisions though, because most of the provisions say, you commit the offence if you do X don't they?

MR PATTERSON:

Yes.

GLAZEBROOK J:

In the whole of the Crimes Act, that is why you need an overriding 66.

MR PATTERSON:

And this is why it goes back to my primary submission, that the Crimes Act is domestic law, where section 66 will apply, save where via section 6 specific extraterritorial offences have been expressly created and therefore because of that, the wording has to, if secondary party liability is to attach, has to either be somehow expressly stated or even as an alternative, caught by implication in the wording.

Unless Your Honours have any questions for me, they are my primary submissions. I would like an opportunity to respond to any matters that my friend may raise.

ELIAS CJ:

Yes thank you Mr Patterson. Yes Mr Downs?

MR DOWNS:

Yes may it please the Court. There are, of course two issues for adjudication. The first and primary one is whether section 144A of the Crimes Act incorporates party liability.

The second and more confined one is whether there has been a substantial miscarriage of justice in relation to this case, and the latter I suggest, turns on the application of *Y (SC 40/2013) v R* [2014] NZSC 34, a recent decision of this Court. As to the primary issue, it is the Crown's argument that the *R v M* [2008] NZCA 193, a decision of the Court of Appeal which is the only decision on point, was correctly decided. The Court will recall that in that case the Court of Appeal concluded, albeit in an obiter observation that party liability was likely to attach to section 144A.

The logical starting point, as always, is perhaps the statutory scheme. That's reproduced at page 7 of the Crown's submissions. Your Honours will observe that the section operates to create extraterritorial liability to an act that, if done in New Zealand, would be an offence against the offence provisions identified in the section and the respondent makes the simple, but hopefully not simplistic proposition, that if this conduct had occurred here, then undoubtedly the appellant would be captured as a party.

It is the intent or it was the intent of the legislature, in my submission to ensure that this offence provision in its full brief, is extended to extraterritorial situations and that is confirmed, I suggest, by subsections (5) through (7) inclusive. The Court will have discerned that what those subsections do is ensure that the same penalties are applicable in an extraterritorial setting as they would be domestically and in terms of subsections (6) and (7) that any limiting provisions equally apply. That brings us, I suggest, to section 66. This has been described by Your Honour, the Chief Justice as ubiquitous; the Crown respectfully endorses Your Honour's observation. It is, of course at the heart of the Crimes Act and it is a provision of general application because it criminalises not such party liability but liability for a principal offender as is apparent from section 66(1)(a), that is the person who actually commits the offence.

GLAZEBROOK J:

You probably don't need that in a way do you because most of the other sections say, you shall commit an offence if you do something or other so while it does say that, it is not the primary criminalising part of the act, that's not what criminal liability rests on. It can rest on the individual sections that say you commit an offence, punishable by X if you do Y.

MR DOWNS:

We respectfully agree. Section 66, as Your Honour observes does not create an offence as such. It simply confirms that the person who actually commits the offence is guilty, as is anybody who assists in the manner identified in the various paragraphs and then in subsection (2). But it is, we respectfully contend, a ubiquitous provision of general application. We derive some support from that from the learned authors of *Adams on Criminal Law*, who observe “That there is a very strong,” which is their language, “Very strong presumption in favour of the application of section 66 and that it would need to be excluded by expressly or by implication.” Now as we apprehend, the appellant’s argument, he contends that this is a situation in which by implication, section 66 does not apply.

It may be of assistance to consider for a moment the ramifications of that proposition and these usefully connect to the purposes of the provision that is section 144A. On the appellant’s case, New Zealand would not be complying with its obligations at international law. With great respect that is a singularly unattractive proposition and it is difficult to reconcile with the sentiment expressed in *Hansard* when section 144, as it then was, a bill was before the House. We have included in our bundle the observations in the House and it is plain that international concerns were at the forefront of this particular piece of legislation.

The other aspect of note and it’s been the subject of discussion of between bar and bench, is article 2 of the Optional Protocol. This is reproduced at page 11 of the Crown submissions. This contains the definitions in relation to the sale of children, child prostitution and child pornography. As with other relevant definitions, it is extremely broad. Child pornography at paragraph (c) means any representation by whatever means of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of the child, for primarily sexual purposes. I suggest it is in the nature of this offending that it is frequently committed by persons who would otherwise be parties. Someone, for example, to operate equipment whether in the same room or elsewhere, someone who is not actually engaged in physical contact with the child and hence there are grave difficulties in reaching the conclusion that party liability doesn’t attach to section 144A.

WILLIAM YOUNG J:

Can I just ask a question. Mr V did not commit an offence for the purposes of New Zealand law, the supposed principal?

MR DOWNS:

He couldn't be prosecuted, we accept because he is neither a New Zealand national nor resident.

WILLIAM YOUNG J:

So the appellant is not a party to an offence which, on this analysis, is susceptible to the New Zealand criminal justice system.

MR DOWNS:

The answer in my respectful submission to that proposition is that section 144A presupposes that the act is done in New Zealand. So if we look for example at (2), this is again at page 7 of our submissions,. "This subsection applies to an act that, if done in New Zealand, would be an offence against".

WILLIAM YOUNG J:

Yes, sorry, just going back. Mr V didn't commit an offence under subsection (1).

MR DOWNS:

Well he couldn't be prosecuted.

WILLIAM YOUNG J:

Well he is not a New Zealand citizen I take it.

MR DOWNS:

Correct, correct.

WILLIAM YOUNG J:

So his behaviour wasn't criminalised under section 144A (1).

MR DOWNS:

The Crown's response is that the section requires us to imagine that the offence is committed here, so whereas it was, we know, committed in an apartment in Moscow, the legislation requires us to imagine that it was committed within the jurisdiction of New Zealand.

WILLIAM YOUNG J:

But I mean I'm not particularly persuaded by the principal party distinction in this case but leaving those sort of carping criticisms aside, he, what troubles me slightly is that the key section is section 144A(1). That's the section that creates the crime which you rely on but, in fact, that crime wasn't actually committed.

MR DOWNS:

Yes, Your Honour's proposition, if I re-state it, is that in order to be a party there has to be an offence committed –

ELIAS CJ:

A principal.

MR DOWNS:

– by a principal offender, hence the derivative liability nature of party liability and as we understand it, the proposition is because Mr V was Russian presumably and not a New Zealander, there hasn't, in law, been the commission of the primary offence. With respect, we resist that analysis because the section, as we interpret it, says, "Presuppose that the act is done here." If it were done here Mr V would have no defence. He couldn't maintain in New Zealand that he had some immunity by virtue of being Russian and so that, with respect, is the Crown's response to Your Honour's proposition.

ELIAS CJ:

But why do you imagine that it was done here? It has to be an offence which, if committed in New Zealand, would be an offence under New Zealand law but the offence is doing it outside New Zealand.

MR DOWNS:

It is. It's just that subsection (2) says, "This applies to an act that if done in New Zealand would be an offence," and I've identified that phrase because, to the Crown's mind, it answers the proposition of Justice Young.

WILLIAM YOUNG J:

But what's, on your approach, we're looking at this on the basis that there is a principal offender who's committed an offence against section 144A.

MR DOWNS:

Yes, well that's the Crown's primary argument in relation to the issue on which leave was granted.

WILLIAM YOUNG J:

Okay, and so – and that principal offender is Mr V, or however you pronounce his name?

MR DOWNS:

Yes, Mr V.

WILLIAM YOUNG J:

Mr V, but he's not liable under section 144A(1).

MR DOWNS:

No, no, no, I respectfully agree but that may very well mischaracterise the analysis.

WILLIAM YOUNG J:

Well I think in the whole thing it's mischaracterised but I don't think it is a party issue. I think it's a direct liability issue.

MR DOWNS:

Well that is we apprehend is the –

WILLIAM YOUNG J:

It's where you wind up at the default.

GLAZEBROOK J:

Although the Crown's concern would be that there may be instances where there isn't liability under the principles in *Y v R* and the example you gave was somebody who was just operating the equipment who says, "I'm a cameraman and I photograph whatever it is that's put in front of me. I don't even look at it. I just do what I'm told."

MR DOWNS:

Indeed, and the respondent, with respect, is troubled at the proposition that New Zealand has not lived up to its international obligations.

ELIAS CJ:

Well that may though be a drafting error. I mean it does seem to me that this is quite a formidable point and a much better argument than that section 66 has no application.

MR DOWNS:

Well I invite attention to subsection (2). It does appear to require the analysis that the act, if done in New Zealand, would be an offence, and on that analysis Mr V, of course, would be amenable to prosecution. But there may be another answer.

WILLIAM YOUNG J:

But I mean you can't – say he made the mistake of coming out to New Zealand for a holiday, he couldn't be arrested could he?

MR DOWNS:

No, no, no, we accept that. We accept that. We have to accept that.

ELIAS CJ:

Well your problem, though, is in the application of section 66, it seems to me.

MR DOWNS:

Well –

WILLIAM YOUNG J:

Party to an offence that's not an offence under New Zealand law. I suppose we're just going round in circles aren't we, because it's re-stating the proposition?

MR DOWNS:

It is, with respect. It's the same proposition, albeit in different nomenclature as is essentially advanced by the appellant that this section doesn't entail –

ELIAS CJ:

Well if he had been a New Zealander –

MR DOWNS:

Mr V?

ELIAS CJ:

Yes.

MR DOWNS:

Yes.

ELIAS CJ:

Then it seems, at the moment, to me that section 66 would apply to the appellant –

MR DOWNS:

Yes.

ELIAS CJ:

– but since Mr V is not a New Zealander he hasn't committed an offence under section 144A and that being so, I'm troubled about how you can apply section 66.

MR DOWNS:

Well, the point I'm seeking to make, admittedly, perhaps not with the clarity that it deserves, is that we need to look at subsections (1) and (2) of section 144A together. They need to be construed, I suggest, in tandem. So whereas, for example, His Honour, Justice Young, appears to suggest (1) is the primary provision and subsection (2) attaches subject to the terms of subsection (1), I invite an interpretation that reads the two together. So for the purposes of liability, we imagined that the act is done in New Zealand. Now we –

GLAZEBROOK J:

Well it clearly does relate to that.

McGRATH J:

Which act? I mean are we talking about the acts of the appellant or are we talking about the acts of the Russian? It seems to me you're aligning the two.

MR DOWNS:

Well, this case perhaps serves to illustrate the difficulties in drawing a sensible distinction between the act.

GLAZEBROOK J:

Well you say the act is the act of Mr V – sorry, I've forgotten his name.

MR DOWNS:

Mr V.

GLAZEBROOK J:

Mr V, so you'd say the act is the act to which subsection (2) applies because you have to read the two together –

MR DOWNS:

Yes.

GLAZEBROOK J:

– because they clearly – because it only refers to an act which relates to subsection (2) or (3) or (4) depending upon which you're in. So the act is, of Mr V, and the part liability attaches via section 66 to somebody who's a party to that act, imagining that the act has occurred in New Zealand.

MR DOWNS:

Yes.

GLAZEBROOK J:

That's the submission. That's as far as you can take it, essentially, because what you say is subsection (2) says you're imagining all of this is in New Zealand. So the fact that Mr V was Russian, and the submission may be that you would rob the section of just about all of its effect if you don't take it that way.

MR DOWNS:

Well, that is the submission because necessarily it's only concerned with New Zealanders. It's, of course, for other jurisdictions to deal with their nationals and their residents. So we can only attach liability to New Zealanders overseas.

GLAZEBROOK J:

Now if they happened to do it with somebody who's a New Zealand resident, whether they know it or not, then they might be a party liability and otherwise they're not which doesn't seem a sensible interpretation of the section.

MR DOWNS:

Yes, and moreover, section 375A of the Crimes Act which has now been reproduced by section 199 of the Criminal Procedure Act, expressly refers to party liability in the context of section 144A. So Parliament, in my respectful submission has –

WILLIAM YOUNG J:

Sorry where – can you just take me to that, I'm sorry?

MR DOWNS:

Yes, Your Honour, we'll find it reproduced in the Crown's submissions, paragraph 40, page 13 of the Crown's submission. I should just give the context while the Court turns to that.

This is a provision that provides protection during the evidence of the complainant in a case of this nature, and it requires the Court to be cleared. Now it applies to cases of a sexual nature and they are defined in section 199(3). Now this language has been taken wholesale from section 375A of the Crimes Act, which is, of course, now repealed by the enactment of the Criminal Procedure Act. But the significance is that paragraph (d) being a party to the commission of any offences referred to in paragraphs (a) through (c) and, of course, paragraph (b) refers to the specific offence provision we're concerned with. Now this amendment, or I should say, the amendment to the Crimes Act to include reference to party liability and section 144A was made at the same time as the amendments were made to extend extraterritorial liability for these offences.

Now, with respect to the appellant, his argument has to be, well Parliament has made an error when its legislated in this respect.

WILLIAM YOUNG J:

But not necessarily an error because it's just a list of things isn't it, and you... could be a party to offending that is committed in New Zealand.

MR DOWNS:

Except that the difficulty with that is that the inclusion, where it is, plainly presupposes party liability otherwise Parliament could have reproduced it in such a way that party liability didn't attach. I mean it wouldn't have been difficult with respect

for paragraph (b) to come later so that it wasn't caught by the party provision. I should make one other observation.

WILLIAM YOUNG J:

Oh I see. Well I suppose it does assume you could be prosecuted as a party to (b) "Any offence against section 144A."

MR DOWNS:

Yes.

ELIAS CJ:

I am still, sorry; I am probably very slow about this.

MR DOWNS:

Your Honour is never that.

ELIAS CJ:

I don't have a problem with party liability attaching. My problem is the application of section 66.

MR DOWNS:

I understand the proposition.

ELIAS CJ:

If you don't have a principal offender.

MR DOWNS:

I understand the proposition to which the Crown's response, such as it is, remains that section 144A and in particular subsection (2), essentially creates a legal fiction.

ELIAS CJ:

So you have to say, as if there were, as if an offence had been committed in New Zealand.

MR DOWNS:

As if the act occurred in New Zealand.

GLAZEBROOK J:

Which, if it did, would certainly be able to be prosecuted.

MR DOWNS:

Yes.

GLAZEBROOK J:

No matter whether it was a New Zealand national or not.

MR DOWNS:

Yes, in my respectful submission. The related point about section 375A and its successor provision, section 199 of the Criminal Procedure Act is this. Section 199 was enacted after the *R v M* was decided.

WILLIAM YOUNG J:

Sorry, section 1?

MR DOWNS:

Section 99 of the Criminal Procedure Act was enacted, after *R v M* was decided and that appears to confirm, in my respectful submission an intention on the part of Parliament, to capture party liability in the context of section 144A and I acknowledge that doesn't deal with Your Honour, the Chief Justice's point. It deals with the more general proposition. Subject to further discussion as to the derivative liability aspect, those are the submissions on the principal aspect, and I can turn if the Court pleases then to the no substantial miscarriage of justice point.

As to this, it is our case obviously as an alternative argument, that the appellant is captured by the with or on criterion that was the subject of discussion by this Court in *R v Y (CA 321/2012)* [2012] NZCA 458. Now before going further, the appellant says, "I wasn't prosecuted on that basis." With respect, we'd agree, it is clear.

WILLIAM YOUNG J:

Well how clear is it? The indictment says section 66, the Court of Appeal says party, the Judge says, "Took the photographs and posed them, therefore guilty."

MR DOWNS:

Well –

WILLIAM YOUNG J:

It just wasn't an issue was it?

MR DOWNS:

It wasn't.

WILLIAM YOUNG J:

Now just common ground that if he took the photographs and posed them, then he was guilty.

MR DOWNS:

And indeed the issue of party liability not being applicable, wasn't live before either the District Court or the Court of Appeal. It was a point, the Court will recall, that was raised by the appellant in his leave submissions to this Court. But even if I am misconstruing what happened in the Courts below.

WILLIAM YOUNG J:

Sorry can you take it any further than that. Could I just look through it very quickly, I haven't sort of analysed it.

GLAZEBROOK J:

Have we got the indictment?

WILLIAM YOUNG J:

Yes it just refers to section 66, it doesn't say which provision.

GLAZEBROOK J:

It would normally mean that if –

WILLIAM YOUNG J:

Well it can mean as a principal or a party.

GLAZEBROOK J:

- It can but –

WILLIAM YOUNG J:

I mean in a murder case where there are a number of parties, you would normally see all sections referred to.

MR DOWNS:

Your Honour, the indictment is reproduced at page 25 of the case on appeal.

WILLIAM YOUNG J:

It rather reads a bit as though he is a principal doesn't it?

MR DOWNS:

Well –

ELIAS CJ:

“Sexual conduct with children and young persons,” I think.

WILLIAM YOUNG J:

“Did an act to a child which if done in New Zealand would constitute an offence.”

MR DOWNS:

And the particularisation is in the taking of the photograph.

WILLIAM YOUNG J:

Yes.

MR DOWNS:

And the Crown case was based on the proposition that it was the taking of the photograph that gave rise to liability because the only issue before the Judge, as the Judge acknowledges in his decision, was whether there had been established beyond reasonable doubt.

ELIAS CJ:

But on Y, that would still be the key question.

GLAZEBROOK J:

I suspect if this was before Y though, on the basis of whatever that Court of Appeal was, where they were posing, there might have been some doubt about principal liability.

WILLIAM YOUNG J:

Yes they may have been right for the wrong reason.

GLAZEBROOK J:

Actually I can't remember what the Court of Appeal case was, but it was an old Court of Appeal case where there was a photo posing, provision of underwear.

ARNOLD J:

R v S CA 273/91 20 December 1991 I think.

GLAZEBROOK J:

Yes, yes it was *R v S*.

MR DOWNS:

R v S is the case to recapture that decision. The defendant in that case did, it appears, essentially what the appellant did in this case, but the Court of Appeal held there and this is going back some time, that the mere act of taking a picture could not amount to the conduct of an indecent act because on its reasoning it was merely capturing what had occurred.

GLAZEBROOK J:

That's right.

MR DOWNS:

But it did hold, in ordering a retrial that the setting of the poses, as it put it, and the arrangement of the young girl's clothing might attract liability in terms of with or on and the commission of an indecent act. Now as the Crown reads *Y v R*, it appears to hold that taking of photograph in these circumstances could amount to the commission of an indecent act with or on the child or young person, providing, of course the terms of the provision are met.

WILLIAM YOUNG J:

Well Y would almost appear to have been written by reference to the facts of this case.

MR DOWNS:

Indeed it would, indeed it would.

GLAZEBROOK J:

And also what was being photographed was much more clearly unacceptable than merely posing in a negligee which is what had happened in *R v S*. Much more clearly of a sexual nature as against merely a photograph of a person dressed in a particular manner.

MR DOWNS:

And that is probably buttressed by the Judge's, that is Judge Field's conclusion, that this scene had been posed by the appellant, "Clearly posed", I think we will find is the expression used by the Judge, at paragraph 3 of His Honour's decision in the District Court.

So to return to the initial question, how did the Crown present its case? Perhaps the better way of answering the question is to say that it presented its case on the basis that taking a photograph, in these circumstances, including the setting of the scene, amounted to the commission of an offence. That said there is an explicit reference to party liability in the indictment.

ELIAS CJ:

But the only issue at trial was whether he took the photo.

MR DOWNS:

Your Honour, yes and his case on that was he sometimes lent the distinctive camera, the Nikon essentially, it is a photographer's camera.

ELIAS CJ:

Yes and that wasn't believed. Can we just go quickly to the decision of the Judge because I read it earlier but not with this in mind.

MR DOWNS:

So it is in the case on appeal, unsurprisingly.

ELIAS CJ:

Did he deal with party –

MR DOWNS:

Your Honour, no.

WILLIAM YOUNG J:

It was a common ground, that if he did it, he was guilty.

ELIAS CJ:

Yes it was common ground.

MR DOWNS:

So it was essentially on a set of agreed facts that if the appellant was the photographer he was guilty, but if there were doubt about that, then he was entitled to an acquittal.

ELIAS CJ:

So your point is that there is no prejudice in the way the trial was conducted.

MR DOWNS:

That is my submission, now the Crown listened carefully to my learned friend's response to the proposition from the bench in the course of his argument. No prejudice was identified with respect.

ELIAS CJ:

He may be intending to raise it in reply, perhaps I should have asked him before and I will give you an opportunity if there is anything further that emerges.

MR DOWNS:

What I would say is that it is not clear how the case could be defended in terms of a defence to *Y v R* because if the appellant was the photographer, which there is of course the issue before Judge Field, then it would seem to follow that this was an act with or on the child in terms of this Court's decision.

WILLIAM YOUNG J:

Can I just go back, at the risk of covering ground. Section 66 (1) (b) and (c) which you rely on.

MR DOWNS:

Yes.

WILLIAM YOUNG J:

They make someone a party who does or omits an act for the purpose of aiding someone to commit the offence.

MR DOWNS:

Yes.

WILLIAM YOUNG J:

Abets any person in the commission of the offence.

MR DOWNS:

Yes.

WILLIAM YOUNG J:

The offence is defined as meaning an act or emission for which anyone can be punished under this Act.

MR DOWNS:

Yes.

WILLIAM YOUNG J:

So that's the problem isn't it, that perhaps it is just a restatement of the problem in terms of the statutory language.

ELIAS CJ:

You have to read words into section 144A.

MR DOWNS:

Well on our argument, subsection (2) deals with this aspect because if that act were done in New Zealand.

WILLIAM YOUNG J:

Yes but can't it be read as presupposing an act performed by a New Zealand citizen or resident overseas. Doesn't it presuppose that that's the situation it is dealing with. I agree it is rather a blinkered approach because of the way people obtain sexual gratification but that's the most natural reading of it isn't it?

MR DOWNS:

Well I have to acknowledge it is a possible interpretation but I do invite attention to the term, blinkered because it is apparent, not just from the provision but from the extrinsic materials and more particularly, *Hansard*, that there was grave concern about the international position and these provisions were enacted on the basis that New Zealand had to do all it reasonably could in order to prevent the proliferation of child pornography in the commission of sexual offences overseas by New Zealanders and so if the conclusion is that, party liability couldn't attach in these particular circumstances because the principal, for want of a better term, is a foreign national.

ELIAS CJ:

Well because the principal hasn't committed an offence under New Zealand law.

MR DOWNS:

Well to the respondent's mind, that will almost always be the case.

WILLIAM YOUNG J:

Unless it is sort of a group of New Zealanders overseas.

ELIAS CJ:

Yes.

MR DOWNS:

Yes, so it is necessarily reaching only New Zealanders in the context of principal offenders or New Zealanders in the context of assisting a principal, a New Zealand principal to commit an offence.

WILLIAM YOUNG J:

So what are the words that we have to read in?

MR DOWNS:

Well I am not sure, I'm not sure that we do have to read words in, I may have been a little loose.

ELIAS CJ:

Well what is your argument again. Restate it on subsection (2).

MR DOWNS:

Well let me try and work this through. The subsection, I'm reading subsection (2) obviously applies to an act that if done in New Zealand would be an offence against. So I suppose the critical question with respect is this, what is the act and whose is the act.

WILLIAM YOUNG J:

Well isn't it the act, I mean, I don't like the interpretation but isn't "the act" or "an act" in subsection (2), a reference back to the "an act" in – oh I suppose, no.

ARNOLD J:

Well don't you have to look, I mean it is sort of artificial. Let's assume it is the act of the New Zealand resident that's been talked about.

MR DOWNS:

Yes, so in this case it's the appellant taking a photograph in the circumstances as described.

ARNOLD J:

Right, it is completely artificial to pretend that he's in New Zealand but the principal offender is not, so one has to, it seems to me, that your point has a good deal of force that what the section is requiring us to do, is to imagine that the whole incident occurred in New Zealand and in those circumstances – now if the principal offender is not susceptible to the New Zealand jurisdiction, because he is not a New Zealander or not ordinary resident in New Zealand, that, I must say to my mind at this stage doesn't matter because that's what the section is asking us to imagine has occurred.

ELIAS CJ:

It is very oddly expressed because if you are looking at it as a standalone provision, subsection (2). Where does it go? It just says that it applies to an act. I mean it must refer back to subsection (1), otherwise you have got no offence in that.

MR DOWNS:

Well dealing with the analysis of Justice Arnold first. Obviously we endorse that, that analysis and so the act in the context of this case, would be the act of photographing the event or the sequence that is an issue before the Court.

WILLIAM YOUNG J:

But that means he is a principal which I tend to agree with.

MR DOWNS:

Well that may be where the dye rolls in this particular case but it doesn't, in my respectful submission, detract from the strength of the Crown's argument.

GLAZEBROOK J:

Well what you would say is the act is photographing, if it is an act as a party, it would be an act which if committed in New Zealand, under subsection (2) so you actually don't have to worry about the Russian at all, because the act is the act of photographing. If it is an act as a party, if it occurred in New Zealand it would be an offence.

MR DOWNS:

Indeed, and subsection (2) –

GLAZEBROOK J:

Because he would be party to an offence that occurred in New Zealand so you don't need to, it is not that you are imagining that the principal offender was in New Zealand or even that he committed an offence. It is what you are imagining is what would have happened.

ARNOLD J:

The conduct that constitutes the offence by the Russian, occurred in New Zealand, yes.

GLAZEBROOK J:

Because it is the act, not the offence that is at issue.

ELIAS CJ:

Oh sorry, I see subsection (5) does pick up what happens.

MR DOWNS:

Mhm, indeed, in my submission that is the response to the issue of derivative liability.

WILLIAM YOUNG J:

It presupposes, doesn't it, that the defendant who was a New Zealander, does an act.

MR DOWNS:

Yes, indeed.

WILLIAM YOUNG J:

And that must be an act with or on a child.

MR DOWNS:

That if done in New Zealand.

WILLIAM YOUNG J:

And that such act, if done in New Zealand would be an offence under section 132.

MR DOWNS:

Yes.

GLAZEBROOK J:

Well no, 132 encompasses – my argument was that 132 encompasses section 66 so it actually, the act itself can be encouraging.

WILLIAM YOUNG J:

But it has got to be under subsection 1(a). The act itself has to be with or on a child not necessarily encouraging someone else to do an act, with or on a child. I mean if you push it and stretch it, you can get there, I agree.

MR DOWNS:

Well we would characterise that pushing and stretching as, with respect.

ELIAS CJ:

Appropriate interpretation.

GLAZEBROOK J:

In line with the purpose, its international origins, the obligations of New Zealand, the purpose to comply with those international obligations and the absurdity of having a situation that depends on whether you know or not, someone, the principal offender or one of the principal offenders presumably being a New Zealand citizen or resident.

MR DOWNS:

Indeed, the respondent acknowledges that the drafting is awkward but nonetheless it is clear what Parliament has intended and I suggest that there is no unfairness that arises because it is clear from subsections (5), (6) and (7) that the same penalties and the same protections apply.

McGRATH J:

You have to say, be able to say that the text can be read that way.

MR DOWNS:

Yes.

McGRATH J:

And that if it can be read that way, the international obligations are such that it should be read that way.

MR DOWNS:

Indeed, and we derive some albeit modest support for that proposition from *R v Karpavicius* [2004] 1 NZLR 156 (PC) which of course the Court will recall that the old approach to penal statutes –

McGRATH J:

Well that's the purpose of interpretation isn't it?

MR DOWNS:

Yes.

McGRATH J:

I accept that's so but it's also the general principle that Justice Keith was announcing for some years in New Zealand Courts, that legislation should be interpreted consistently with international obligations if the text allows.

MR DOWNS:

We endorse that. I suspect that the reason that there has been confusion is that I, I, rather awkwardly earlier said that we need to add words to the section, in fact we don't.

ELIAS CJ:

It is very badly drafted because subsection (5) doesn't refer to the act at all.

GLAZEBROOK J:

Well the difficulty is, I suppose, is that in many of these instances, the principal offender won't be liable if they, for instance, think the child is over 16, on reasonable grounds. I am not sure – but there are those aspects where you would actually not have a principal offender because of a mens rea requirement or because of a reasonable belief in different ages. In fact I think we have got one coming up.

McGRATH J:

Thursday's case.

GLAZEBROOK J:

Thursday's case

McGRATH J:

Well not Thursday's case, that is over.

MR DOWNS:

We see some of those issues in sections 134 and 134A of the Crimes Act. So for example, a reasonably grounded belief on the part of the defendant that the victim is in fact over 16 years old can give rise to a defence.

ELIAS CJ:

Mr Downs, I am sorry to be really slow on this but can you just once more tell me how you say that 144A(2) and (5). Who are you saying that that gets attached to in the circumstances here, where you have proceeded on a party basis?

MR DOWNS:

Well it attaches to the New Zealand party and it attaches in this way. So looking at subsection (2), it applies to an act and the issue as we have discussed is, well whose act and what act.

ELIAS CJ:

And remind me what your answer to that is.

MR DOWNS:

Yes indeed. So in this case it is the act of the appellant in taking a photograph.

ELIAS CJ:

But that is principal liability you are talking about there.

MR DOWNS:

Well that is our alternative argument.

ELIAS CJ:

Yes, I understand that.

MR DOWNS:

Based on *Y v R*.

ELIAS CJ:

Yes, but how are you saying that the interpretation you urge on us, establishes party liability in the circumstances of this case, even accepting that section 66 applies to the offence, under 144A?

MR DOWNS:

Well I wonder if we need to imagine a slightly different set of facts because the issue may be coming confused because on the facts as they are before the Court, it would

appear or indeed it is the Crown's alternative argument that the appellant is liable as a party, on the with or on –

ELIAS CJ:

I am not worried about that one. I am worried about the section 66 act.

GLAZEBROOK J:

Well say the act of the appellant in posing the child.

ELIAS CJ:

But that's a direct –

GLAZEBROOK J:

Well the act of the appellant in saying let's set up this really good and encouraging commission of the offence but without actually being there.

MR DOWNS:

So if we imagine that he's in another location, for example.

GLAZEBROOK J:

And he has booked the hotel room, he has booked the camera man, and he said this is a really good idea.

WILLIAM YOUNG J:

The question then is, is that – there are two with's or on's aren't there. There is a with or on in section 144A (1) and there is a with or on that is in the definition that ties in with section 132. So the case you are advancing is that when he aiding the offending by Mr V, he did an act with or on a child, in breach of section 132.

GLAZEBROOK J:

Because of section 66 which brings in party liability.

MR DOWNS:

Yes.

GLAZEBROOK J:

Is that?

MR DOWNS:

Yes, that is the argument.

WILLIAM YOUNG J:

But the question is, is he doing, does he actually have to really do an act with or on the child or is it sufficient that he procures or counsels someone else to do an act with or on a child.

MR DOWNS:

Well I wonder whether that's – the issue is to how with or on a child is understood in subsection (1) as against –

WILLIAM YOUNG J:

Are you saying it might mean something different?

MR DOWNS:

Well we have alluded to that possibility in our written submissions.

GLAZEBROOK J:

Well if your argument is right, it means being a party to an act with or on a child because under section 132 (1) if you are a party you are actually guilty of the act itself as a principal. It's a pretence anyway in relation to section 66 liability because you haven't actually done those acts but you are guilty as if you had because you've done these other acts that have made you a party.

ELIAS CJ:

I don't have any problem in seeing how this section applies and party liability applies in cases where an offence has been committed under New Zealand law by the principal party. There's plenty of scope for all of that. What I want to know is, where is the principal party liability on your argument. Leaving aside the fact that you are probably right on Y, that there is a direct principal liability. Suspending that for the moment, where is the party liability hanging off an offence committed by a principal?

MR DOWNS:

Well we would have to accept that Mr V can't be liable.

ELIAS CJ:

Well it's not liability; he hasn't committed an offence under New Zealand law.

MR DOWNS:

We acknowledge the force of that proposition but we necessarily return to subsection (2) which invite us to presuppose that the sequence was committed in New Zealand.

ELIAS CJ:

But why would that apply in terms of subsection (2) and not subsection (1)?

GLAZEBROOK J:

Well it does though.

ARNOLD J:

Well subsection (1) incorporates – it refers to subsection (2) and brings it in.

GLAZEBROOK J:

So it does actually apply to subsection (1) because the two have to be read together.

ELIAS CJ:

Well I accept that, yes.

McGRATH J:

You are really stretching the word "act" in subsection (2) to be something like scenario, or something of that kind, aren't you, with the logical meaning is, it is referring back to subsection (1).

ARNOLD J:

Well are you really stretching the meaning of "act?" You are still focussing on the act of, in this case, the appellant but I mean you have to give the context for the act otherwise the act doesn't make any sense. It is just taking photographs or doing whatever it is in the abstract. So to give it any context at all, you have to include the surrounding behaviour.

ELIAS CJ:

If you can have a principal party who commits an offence under section 144A, then there is no problem about party liability. It is as if you don't have someone who has committed the offence.

ARNOLD J:

No I understand that but it does seem to me that that then considerably narrows the scope of the section.

ELIAS CJ:

Well maybe they should have drafted it better but happily there is the *R v Y*.

GLAZEBROOK J:

Which is not going to capture all of the type of secondary liability.

MR DOWNS:

No that is true, yes.

GLAZEBROOK J:

And even in terms of *R v Y*, there is an issue about the motivation in terms of – my camera man who says, I just do my job, somebody pays me for photographing things and I do what I want, might – if believed or if thought there is a reasonable possibility, that is the case, may escape liability under this.

MR DOWNS:

Indeed we understand *Y* is being limited to those who are, in essence, immediately present and participants in that immediate scene. We don't understand that it applies to others who are more remote but nonetheless involved.

WILLIAM YOUNG J:

And that really requires you to treat with or on, in section 144A (1) (a) as meaning something different from what it means in section 132.

MR DOWNS:

Well I suggest it needs to be read differently in any event because if it is not there are difficulties with the Prostitution Reform Act offences, identified in subsection (4) because all of those are very broad offences and they don't necessarily involve any

conduct with or on in the *Y* sense, in relation to a victim and that is the difficulty. Those are offences that are concerned with the entering into an arrangement for prostitution with an underage person, their offences.

GLAZEBROOK J:

Which could be over the telephone and not consummated.

MR DOWNS:

Indeed, they, for example under section 20 of that act, “assisting or facilitating a person to become an underage prostitute.” In the *Y v R* sense, all of those things could be committed, I should say sorry. All of those things could be committed and not forth in the rubric of *Y v R*. So with or on in the Crown’s respectful submission in subsection (1) necessarily means something different from that as concerned with the commission of indecent act in subsection (2).

Beyond provoking more consternation, I am not sure that there is much with which I can assist, unless there are further questions.

ELIAS CJ:

No thank you, Mr Downs.

MR DOWNS:

May it please the Court.

ELIAS CJ:

Mr Patterson, do you want to be heard in reply?

MR PATTERSON:

Yes Ma’am, just three very quick points that just relate to this overarching issue of miscarriage of justice.

The appeal has taken a little bit of a change that I hadn’t anticipated just due to the way the question was framed but certainly there is a key issue here which is what the effect is, if there is no principal offender and of course it is trite in terms of the nature of secondary liability, that if there is no principal offender, then there can be no party.

The legislation in my submission is poorly worded because of the problem that this appeal now faces, that is where you have a primary principal offender who for the reasons which we are aware of, is not prosecuted. Now to bring in the primary offender, that is why the section is worded to take a place as if the acts were committed in New Zealand, but that is the bringing in of the primary offender. My submission is, is that the section doesn't bring in secondary part liability.

The second point. My friend referred to section 199 of the Criminal Procedure Act. Now bearing in mind this is just framed for how to deal with witnesses in sexual offence cases. There is a reference to parties and there is a reference to section 144A but it is possible that you could have a New Zealand resident here in New Zealand possibly in Wellington, who is charged as a party, for an offence under section 144A because the principal offender may very well be located overseas in another country but the defendant secondary party has facilitated, aided, abetted etc from New Zealand.

My third party, it goes to the issue of the actual acts that took place in this case.

GLAZEBROOK J:

Why would you do an offence under 144A as a party in those circumstances and not generally?

MR PATTERSON:

Okay, well one reason –

GLAZEBROOK J:

Under your argument, you say the party liability doesn't attach to 144A.

MR PATTERSON:

- Well if we took the scenario that Mr V was not a Russian, and he was a New Zealander and he was brought to New Zealand and he was prosecuted, then you would have a section 144A factual scenario taking place and it may have been that someone aided and abetted him from New Zealand. Now it could be, in my view, open to prosecution to charge the secondary party under section 144A, if the secondary party happened to be here in New Zealand, that is one scenario that could occur. It would be open to prosecution to go either way.

Reference was made to the findings of Judge Field and this is my last point. In the District Court and my friend took the Court to paragraph 3 of the judgment if Your Honours have that in front of you.

ARNOLD J:

Just give us the reference again.

MR PATTERSON:

Yes it is paragraph 3 – 225 Sir. If we take the factual findings as all being correct, other than obviously this issue of who took the photo, but that is now beyond challenge. What we know is what is contained in that paragraph and it is actually all of, other than the first sentence. The key point and you will find this is in the last sentence. “The image has been clearly posed.” What Judge Field doesn’t say is he doesn’t say posed by who. The finding is, is a photograph and this is image K.

GLAZEBROOK J:

But it also does specifically refer to acted as a party and that is the basis upon which –

MR PATTERSON:

Yes but the party is, is in relation to the taking of the photograph.

GLAZEBROOK J:

- no, no I understand that. It’s just that it is just on the indictment, it was also in paragraph 3.

MR PATTERSON:

Yes. Very late on the flight back last night, I had the joy of reading through the additional bundle for the appeal of the interviews and the photographs but I just do want to make the point that it is image K, was the image where the conviction was sustained upon. Unfortunately what we don’t know from the reasons for verdict, is the extent of the involvement of the appellant, other than he was the one who took the photograph and that was enough to find party liability.

WILLIAM YOUNG J:

But he posed the photograph too.

MR PATTERSON:

Well –

WILLIAM YOUNG J:

The Judge says that, page – the last page.

ELIAS CJ:

The photograph was posed and he was the photographer.

WILLIAM YOUNG J:

“The accused took the photograph, it was posed at his direction.”

ELIAS CJ:

Where is that?

WILLIAM YOUNG J:

It is the last page of the case, there are two numbers, 179 and 229.

MR PATTERSON:

Now that was enough for the Court to find that secondary party liability attached. I think it would be unsafe to naturally assume that the posing and the photograph in itself would be enough for the Judge to find that primary liability would attach, on the basis that that is not the way in which the case appears to have been run.

ELIAS CJ:

But it is the proviso point.

WILLIAM YOUNG J:

It is the proviso point and it wasn't run that way because your client is now taking a point that it had not taken. Had it been taken, it is inevitable that the case would have been run that way.

MR PATTERSON:

Correct Sir and it is unfortunate but it goes to my counter argument on the miscarriage and that is and I can see the attractiveness and that it would be certainly open for this Court to say, “Well there is no miscarriage because he would have been

found as a primary offender.” It doesn’t appear that that is the way the case was run and as a consequence of that, it could create – it creates a miscarriage.

ELIAS CJ:

But on a proviso point, you really have to – the point is not what would have happened, the point is, are all the elements of the offence made out to our satisfaction. Why do you say they are not?

MR PATTERSON:

Well an indecent act is a mixed question of law and fact and we only have the factual aspects that are contained in this judgment. Those factual findings have been derived from the way in which the case was presented, based on a charge of a breach under section 66.

ELIAS CJ:

But we have the photograph.

MR PATTERSON:

We do have the photograph.

ELIAS CJ:

And we have the Judge’s findings of fact, that it was posed and photographed by the appellant. What else is needed for viability?

MR PATTERSON:

Well there is nothing else needed Ma’am. The difficulty, and if I can articulate it this way is if the matter was reheard on the basis of primary offending, would the concessions have been made by the defence, that the only issue at stake was that of who took the photo. If the appellant was confronted with, “You are being charged as a principal offender, as opposed to being a party to the offence,” would he have run the case such that it would have been accepted that he posed the photograph.

WILLIAM YOUNG J:

But he didn’t accept it.

ELIAS CJ:

No.

MR PATTERSON:

Well I can't see anything in the judgment that indicates that the posing was a challenged point.

WILLIAM YOUNG J:

I thought he denied the posing of the photograph.

ELIAS CJ:

Yes he denied taking the photograph.

GLAZEBROOK J:

Well he denied taking it, so he denied.

MR PATTERSON:

But that is just a straight denial. What I am saying is that had the defence been run, perhaps more effort or focus would have been applied to the issue of the posing. For example, there doesn't appear to be any suggestion that there was cross-examination of any of those that were there at the time, including the fact that it doesn't appear the principal offender was even called as a witness. But he may have been called by the defence if they had of known that the charge would have been as a principal offender, as opposed to secondary.

GLAZEBROOK J:

Well isn't taking the photo enough. Let's assume no posing whatsoever, the R v S has gone. So let's assume he just took the photo. Wouldn't that be enough in itself?

MR PATTERSON:

Not always, Ma'am.

GLAZEBROOK J:

Well not always, but in these particular circumstances, given who the child is, wouldn't that clearly have been enough, just totally passively taking the photo that Mr V posed and set up, wouldn't that have been enough?

MR PATTERSON:

Ma'am I am going to accept and concede that if at the trial, and the charge had been as a principal offender, the finding was then made that he had posed the photograph.

GLAZEBROOK J:

No, no I'm saying, it doesn't matter he didn't pose the photo, he managed just to raise a reasonable doubt about posing in these particular circumstances, in terms of Y, isn't merely taking the photograph enough? He is in the room, there's a sexual act going on.

McGRATH J:

And he has a relationship indicating control.

GLAZEBROOK J:

And he has a relationship over the child.

MR PATTERSON:

Oh look I can think of one scenario where it would be arguable to possibly create a reasonable doubt and that one scenario Ma'am, would be as if he was intending to take a photograph of the apartment without appreciating the significance of what was taking place in part of that photograph.

ELIAS CJ:

She is turning and smiling at him.

WILLIAM YOUNG J:

And there is a whole lot of photographs, I mean this is ludicrous isn't it.

MR PATTERSON:

Look I am certainly not going to say that I have a strong argument on this point and it would be open to this Court to say, that in itself is enough, however, on the issue of miscarriage, it doesn't appear to me that this was contested point as to whether or not the taking of the photograph alone would amount to an indecent act. Thank you Ma'am. If that pleases the Court, I don't have anything further.

ELIAS CJ:

All right, we will take time to consider our decision in this matter, thank you.