IN THE SUPREME COURT OF NEW ZEALAND

SC 77/2009
[2009] NZSC 130

MALCOLM ALBERT SPARK

v

THE QUEEN

Court: Elias CJ, McGrath and Wilson JJ

Counsel: S Vidal for Applicant
S B Edwards for Crown

Judgment: 16 December 2009

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted by a jury on ten counts of making an "objectionable publication" under ss 123(1)(a) and 124(1) of the Films, Videos, and Publications Classification Act 1993. He was also convicted on 14 counts of possessing an objectionable publication under ss 131A and 131(1) of that Act. An element of each charge was that he knew or had reasonable cause to believe the publication in each case was objectionable. He was sentenced to two and a half years' imprisonment. The Court of Appeal dismissed his appeals against both conviction and sentence.

[2] The applicant seeks leave to appeal to this Court against his convictions on two grounds. The first is that the definition of "publication" in the legislation does not extend to material which the person charged holds privately, and has no intention of making available to others.

[3] The counts of making objectionable publications related to ten subdirectories, each containing a Word document relating to a girl between 9 and 16 years of age, which was found on the applicant's computer. The documents recorded chat sessions having sexual content between the applicant and the girl together with a summary added by the applicant. The summary recounted personal details concerning the girl including any sexual acts undertaken by her at the applicant's request in the course of their on-line relationship.

[4] The counts of possessing objectionable publications related to images depicting sexual exploitation or nudity of children or young persons and chat logs and text, written by the applicant, about sexual acts between an adult and young girls.

[5] In the present case, the material the subject of the charges was classified as objectionable, by the Office of Film and Literature Classification, because, in terms of s 3(2)(a) of the 1993 Act, it promoted the exploitation of children and young persons for sexual purposes. There is no challenge to the classification under the Act. In this Court the applicant would, if granted leave to appeal, confine his challenge to whether the computer files were "publications". The applicant's contention is that s 6 of the New Zealand Bill of Rights Act 1990 requires the broad statutory definition of "publication" to be read down in protection of freedom of thought, belief or expression by confining it to documents made available to or accessible by others. The applicant says that the computer files were private to him with access protected by encryption.

[6] We are satisfied that the proposed interpretation is not reasonably capable of argument. "Publication" is defined by the 1993 Act to mean anything which records or is capable of being shown (including by the use of a computer or other electronic device) as "one or more (or a combination of one or more) images, representations,

signs, statements, or words".[1] If covered by that definition on its ordinary meaning, the thing is a publication. There is no requirement of communication or accessibility by others and no basis upon which such substantial gloss could be introduced through judicial interpretation. Although it is not necessary to comment on the legislative purpose, since leave is sought only on the point of interpretation and the submissions do not raise the application of s 5 of the Bill of Rights Act, the offences of creating and possessing publications which are objectionable within s 3(2)(a) of the 1993 Act are clearly aimed at stopping the sexual abuse of children. In such circumstances, the premise that ss 13 or 14 of the New Zealand Bill of Rights Act are engaged at all is highly questionable.

[7] The second proposed ground concerns the circumstances in which the applicant disclosed to the police the password to his computer, which enabled officials to gain access and reveal the evidence used against him. The Court of Appeal, in a judgment delivered on an earlier interlocutory appeal, concluded that the passwords were not obtained by oppression, or otherwise improperly. Likewise, in the judgment on the appeal against conviction, the Court of Appeal was satisfied that the passwords had been disclosed without any oppression or self-incrimination. There is no basis for the submission that the interests of justice require a further appeal on this point.

[8] The application for leave to appeal is accordingly dismissed.

Solicitors:
Queenstown Legal Chambers, Queenstown for Applicant
Crown Law Office, Wellington

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1 Section 2.