NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPLICANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE [2021] NZHC 2681. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 69/2022
[2022] NZSC 128

BETWEEN	DANIEL GEORGE Applicant
AND	THE KING Respondent

Court:	O'Regan, Ellen France and Williams JJ
Counsel:	A M S Williams for Applicant B J Thompson for Respondent
Judgment:	7 November 2022

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant shared a link with a number of other people to the manifesto of Brenton Tarrant. Mr Tarrant undertook a terrorist attack on two Christchurch mosques on 15 March 2019. When clicked on, the link took recipients to a full copy of the manifesto. The applicant was subsequently charged with seven charges of distributing

an objectionable publication under the Films, Videos, and Publications Classification Act 1993 (the Classification Act).[1]

[2] The applicant sought to have the objectionable publication charges dismissed under s 147 of the Criminal Procedure Act 2011. In the District Court, Judge Kellar dismissed the s 147 application.[2] Following a sentence indication, the applicant pleaded guilty to, relevantly, one representative charge of distributing an objectionable publication. After sentencing, he unsuccessfully challenged this conviction in the Court of Appeal.[3] He has now applied for leave to appeal to this Court.

Background

[3] The relevant offence is created by the combination of ss 123(1)(d) and 124(1) of the Classification Act. Section 123(1)(d) makes it an offence to supply or distribute an objectionable publication to any other person. Section 124(1) prohibits the carrying out of any act mentioned in s 123(1), "knowing or having reasonable cause to believe that the publication is objectionable". Every person who commits an offence against s 124(1) is, relevantly, liable to imprisonment for a term not exceeding 14 years. Here, the focus of the proposed appeal is on the conduct element described in s 123(1)(d). We need not say anything more in relation to s 124(1).

[4] "Distribution" is defined in s 122(1) in these terms:[4]

> (1) In sections 123 to 132, unless the context otherwise requires, **distribute**, in relation to a publication, means—
>
> (a) to deliver, give, or offer the publication; or
>
> (b) to provide access to the publication … .

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1 Additionally, he was charged with threatening to kill. That charge is not in issue.

2 *R v [George]* [2021] NZDC 17763 [DC judgment].

3 *George v R* [2022] NZCA 242 (Clifford, Venning and Moore JJ) [CA judgment]. The applicant has interim name suppression and "George" is the pseudonym adopted in the Courts below to protect his identity: see *George v R* [2021] NZHC 2681. The High Court in granting suppression noted the order applied until 16 December 2022 at which point it would be for the District Court to decide whether to extend interim suppression or to make a permanent order: at [55].

4 Section 122(1)(b) includes an example. The Courts below cite the example given in the version of the legislation that applied at the time the representative charge was laid, namely, "to make available digital content that is or includes the publication by means of a public data network". The example in the version in force at time of the offending is differently worded but nothing turns on this difference.

[5] Section 122(3) specifies the mere provision of a means, physical or digital (such as broadband), of delivery or transmission does not constitute distribution.

[6] Further, the Classification Act was amended in 2015 by adding s 131(2A) which provides that:[5]

> (2A) A person can have an electronic publication in that person's possession for the purposes of subsection (1) even though that person's actual or potential physical custody or control of the publication is not, or does not include, that person intentionally or knowingly using a computer or other electronic device to save the publication (or a copy of it).

[7] In dismissing the appeal, the Court of Appeal accepted the approach of the District Court Judge that possession is not an element of the offence. In this context the Court noted, amongst other matters, that the wording of the relevant provisions do not indicate possession is an element; possession of an objectionable publication for the purposes of supply or distribution is a separate offence; and if possession was an element it would have been referred to in s 122(2) which defines circumstances that do not constitute distribution.[6]

[8] The Court also saw the 2015 amendment as providing "strong support" for Judge Kellar's alternative conclusion, namely, that if possession was an element, the applicant possessed the manifesto.[7]

[9] As to whether the applicant had distributed the manifesto, the Court of Appeal agreed with the District Court that the applicant "had either offered the Manifesto or provided access to it".[8] The Court referred to the English dictionary meaning of the acronym URL and considered that supported the District Court's conclusion. That was because:[9]

> … the URL provides access to an internet document by constituting an address expressed in a format used by a browser to locate the document. Thus, by

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5 Section 131(2A) was inserted into the Classification Act by s 5(3) of the Films, Videos, and Publications Classification (Objectionable Publications) Amendment Act 2015.
6 CA judgment, above n 3, at [29]–[30].
7 At [33].
8 At [36]–[37].
9 At [39].

> "clicking" on the URL the user accesses the document. Sending the URL by way of a message, as Mr George did, provides that access.

The proposed appeal

[10] The proposed appeal to this Court would reprise the arguments rejected by the Court of Appeal, namely:

(a) that possession was an element of the offence; and

(b) that the applicant did not distribute the manifesto either by offering it or providing access to it.

Our assessment

[11] We see the proposed appeal as having insufficient prospects of success to justify a grant of leave. Assuming, without deciding, that the Court should construe the statue by reading in a requirement to prove possession as an element of the offence, the argument would fail on the facts. It is not possible to contend that the applicant did not possess the manifesto because, as Judge Kellar found, he had actual (or potential) control over the publication at the relevant time.[10]

[12] As to the argument on distribution, nothing raised by the applicant calls into question the assessment by the Court of Appeal on this issue. As the respondent submits, in reality, by sending the link the applicant provided his associates "with immediate and direct access to the manifesto in its entirety" and did so with the purpose of sharing the publication.

[13] For these reasons, there is also no appearance of a miscarriage of justice.[11]

[14] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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10 DC judgment, above n 2, at [20]–[21].
11 Senior Courts Act 2016, s 74(2)(b).