

CITATION: [2009] NTMC 003

PARTIES: EMMA HILTON

v

KOVIT VILAISSONAH

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal (Cth. offences)

FILE NO(s): 20809138

DELIVERED ON: 18 February 2009

DELIVERED AT: Darwin

HEARING DATE(s): 16 & 17 December 2008

JUDGMENT OF: D Trigg SM

CATCHWORDS:

*Customs Act 1901 (cth)- s.231*

*Criminal Code (Cth)- 6(1) – strict liability*

*Criminal Code (Cth)- 9.2 – mistake of fact (strict liability)*

*Criminal Code (Cth)- 13.3(2) – evidential burden (defence)*

REPRESENTATION:

Counsel:

Complainant: Ms Cooper  
Defendant: Mr Lawrence

Solicitors:

Complainant: C.D.P.P.  
Defendant: Bill Piper

Judgment category classification: B  
Judgment ID number: [2009] NTMC 003  
Number of paragraphs: 145

IN THE COURT OF SUMMARY JURISDICTION  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20809138

[2009] NTMC 003

BETWEEN:

EMMA HILTON  
Complainant

AND:

KOVIT VILAISSONAH  
Defendant

REASONS FOR DECISION

(Delivered 18 February 2009)

Mr Trigg SM:

1. In this matter the Defendant was charged with two charges on Complaint as follows:
  1. On or about 3 March 2008 in Darwin in the Northern Territory of Australia, did import a prohibited import, namely films that describe, depict, express, or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be imported.  
  
*Contrary to s233(1)(b) and 233(1AA) Customs Act 1901 (Cth).*
  2. On or about 3 March 2008 in Darwin in the Northern Territory of Australia, did import a prohibited import, namely films that describe or depict in a way that is likely to cause offence to a

reasonable adult, a person who is, or who appears to be, a child under 18.

Contrary to *s233(1)(b) and 233(1AA) Customs Act 1901 (Cth)*.

2. The hearing in this matter commenced before me on the 16<sup>th</sup> day of December 2008 and continued through until the 17<sup>th</sup> December 2008 at which time the matter concluded. At the trial the Commonwealth was represented by Ms Cooper and the Defendant was represented by Mr Lawrence of counsel. Throughout the trial (and during his evidence) the Defendant was assisted by a qualified interpreter in the Thai language who was provided by the Commonwealth. At the conclusion of the trial I adjourned the matter for decision as I was taking leave from 19.12.08 until 30.1.09 (inclusive).

3. *Section 51 of the Customs Act (Cth)* states:

“(1) Goods, the importation of which is prohibited under s 50, are prohibited imports.”

4. *Section 50(1) of the Customs Act (Cth)* states:

“The Governor General may, by regulation, prohibit the importation of goods into Australia”.

5. *Regulation 4A of the Customs (Prohibited Imports) Regulations 1956* states (as relevant herein) as follows:

(1) In this regulation, unless the contrary intention appears:

“Film” includes a cinematograph film, a slide, video tape and video disc and any other form of recording from which a visual image, including a computer generated image, can be produced, but does not include a computer game.

“Publication” means any book, paper, magazine, film, computer game or other written or pictorial matter.

(1A) This regulation applies to publications and any other goods, that;

(a) describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be imported; or

(b) describe or depict in a way that is likely to cause offence to a person who is or appears to be, a child under 18 (whether the person is engaged in sexual activity or not).

(2) The importation of goods to which this regulation applies is prohibited unless a permission, in writing, to import the goods has been granted by the Attorney-General or a person authorised by the Attorney-General for the purposes of this sub regulation”.

6. In relation to charge 1, the prosecution bears the onus and burden of proving beyond all reasonable doubt each of the following matters:

- On or about 3 March 2008
- In Darwin in the Northern Territory of Australia
- The Defendant
- Did import
- A prohibited import
- Namely films (that describe etc. matters as alleged in the charge) that offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be imported
- And no permission in writing from the Attorney-General had been granted to the defendant under *Regulation 4A* of the *Customs (Prohibited Imports) Regulations 1956 (Cth)*.

7. In relation to charge 2 the Commonwealth bears the onus of proving beyond all reasonable doubt that:
  - On or about 3 March 2008
  - In Darwin in the Northern Territory of Australia
  - The Defendant
  - Did import
  - A prohibited import
  - Namely films
  - That describe or depict a person who is or appears to be a child under 18
  - In a way that is likely to cause offence to a reasonable adult
  - And no permission in writing from the Attorney-General had been granted to the defendant under *Regulation 4A* of the *Customs (Prohibited Imports) Regulations 1956 (Cth)*.
8. Pursuant to *s233(1AA)* of the *Customs Act* a person who contravenes subsection (1) is guilty of an offence punishable by (in accordance with *s233AB*) a penalty not exceeding one thousand penalty units.
9. Further, pursuant to *s233(1AB)* of the *Customs Act* “subsection (1AA) is an offence of strict liability, to the extent that it relates to paragraphs (1)(b)”.
10. Pursuant to *6.1(1)* of the *Criminal Code (Cth)*:

“If a law that creates an offence provides that the offence is an offence of strict liability:

(a) there are no fault elements for any of the physical elements of the offence; and

(b) defence of mistake of fact under s 9.2 is available”.

11. Accordingly, the prosecution does not have to prove any particular knowledge on the part of the Defendant as to the contents of the material he imported or whether they were or might be prohibited. Nor do they have to prove any intention (although as will appear later the Defendant admitted in his evidence that he knew he was bringing the 65 DVD's that were in his backpack into Australia).

12. 9.2 of the *Criminal Code (Cth)* deals with mistake of fact in cases of strict liability as follows:

“(1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if;

(a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and

(b) had those facts existed, the conduct would not have constituted an offence.

(2) A person may be regarded as having considered whether or not facts existed if;

(a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and

(b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion”.

13. Pursuant to 13.3 of the *Criminal Code (Cth)* it is clear that if the Defendant wishes to deny criminal responsibility by relying on 9.2 (supra) then he bears an evidential burden in relation to that matter. “*Evidential Burden*” is defined in 13.3 of the *Criminal Code (Cth)* to mean “in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist”.
14. Accordingly, if the Defendant passes the evidential burden and 9.2 is raised, then the prosecution have the legal burden of disproving it beyond all reasonable doubt. The legislature could have chosen to cast the legal burden of proving the defence upon the Defendant, but it has chosen not to do so.
15. It appears that the legislature has accepted that it would be very difficult (and at times impossible) for authorities to prove that a person had specific knowledge of the content of a film in their possession. Accordingly, the legislature has chosen to remove any fault element, and make it an offence of strict liability. The legislature clearly has also accepted that a person may have an innocent explanation for their possession, and accordingly have chosen to have a defence available where the reasonable possibility of a reasonable mistake is evidentially raised and then not disproved beyond all reasonable doubt. In my view, the reasonableness of the belief is to be assessed on the facts as known to the Defendant, as proven to have existed at the relevant time. In other words, the reasonableness of the Defendant’s actions needs to be assessed on an objective basis, but on the subjective facts within his knowledge.
16. To the extent that the court is being asked to rely on any “circumstantial evidence” then I bear in mind that the guilt of the Defendant should not only be a rational conclusion, but also the only



rational conclusion that can be drawn from the circumstances (*Peacock v The King* (1911) 13 CLR 619; *Plomp v The Queen* (1963) 110 CLR 234; *Grant v The Queen* (1975) 11 ALR 503; *Shepherd v The Queen* (1990) 170 CLR 573 @ 579). In other words, the trier of fact must find the Defendant not guilty if there is an inference consistent with innocence reasonably open on the evidence (*Knight v The Queen* (1992) 66 ALJR 860 @ 863). In the instant case the Defendant gave evidence as to the circumstances surrounding his purchase and bringing into Australia of the items in question herein. Accordingly, there is direct evidence as to the circumstances surrounding this matter, and his previous purchase of “X movies” in Thailand.

17. The prosecutor tendered (without objection) a statutory declaration from Donald McDonald declared on 12 March 2008. Mr McDonald declared that he was the Director of the “Classification Operations Branch, Attorney Generals Department” and based in New South Wales. He further declared that he was a person authorised by the Attorney General under *regulation 4A(2)* for the purposes of regulation 4A of the *Customs (Prohibited Imports) Regulations 1956*. He declared that he checked records held by his branch and the Defendant had not been granted permission to import goods to which *regulation 4A* applies under *sub regulation 4A(2)* of the *Customs (Prohibited Imports) Regulations 1956*. There was no evidence to challenge this evidence.
18. I find beyond all reasonable doubt that the Defendant had not been granted permission to import goods to which *regulation 4A* applies under *sub regulation 4A(2)* of the *Customs (Prohibited Imports) Regulations 1956*.
19. For reasons which appear later herein I find that the prosecution has proved each of the necessary elements in relation to both charge 1

and charge 2. The only real issue before me was whether the evidential burden to raise the defence available in 9.2 (as set out supra) had been discharged, and if yes, whether the prosecution had negatived it beyond all reasonable doubt (in relation to both charges).

20. I now turn to consider the facts in this matter, and the evidence.
21. On the 20<sup>th</sup> day of February 2008 the Defendant departed Darwin by aeroplane for Singapore (Exp2).
22. On 3 March 2008 the Defendant arrived back in Darwin on Tiger Airways flight TR702 from Thailand (Exp2). When the Defendant arrived in Darwin he presented an incoming passenger card relating to himself which he had signed (Exp3). The Defendant was identified by customs as a person whose baggage was to be searched. The Defendant was directed to a baggage inspection station where he was attended by Customs Officer Stephen Adams.
23. Adams had done one previous baggage examination this day and this was his second examination. Adams commenced the examination of the Defendant's baggage at about 0045 hours on 3 March 2008. Upon request, the Defendant handed over his passport and his passenger card.
24. Adams asked the Defendant if it was his signature on the card and whether he understood the questions on the card and the Defendant replied yes, to each of those questions.
25. Adams further asked the Defendant whether the bags belonged to him, whether he packed the bags himself and whether the contents of the bags belonged to him. Again the Defendant answered yes to each of those three questions.

26. The Defendant had three bags with him and the first bag that Adams inspected was a blue and white backpack. These events were captured on film and the film (with no sound) was tendered in evidence and became ExP8. No issue turned on the absence of sound in this case, but clearly it would be desirable if these sorts of searches could be audibly recorded in future. Further, Adams adopted the practice of placing the bag closest to the camera and emptying items away from the camera during his search. In this way, the items were actually obscured by the bag. It would be preferable if items were taken out of the bag and placed towards the camera as this would have better evidential quality.
27. In the backpack Adams located a plastic bag of DVD's with roughly 25 DVD's in them. He said they were in a shopping bag, they were all pornographic in nature and they had cheap covers. He said that all were similar in appearance. Adams spoke to another officer in relation to these (Burrell) and he asked Burrell to view some of these DVD's. Adams continued with his search. Adams then located another plastic bag of DVD's with about 40 DVD's in it. These DVD's had pictures of naked females and some females in school uniforms.
28. Adams asked the Defendant where the DVD's were from and the Defendant said Thailand. Adams asked who the DVD's were for and the Defendant said himself. Adams asked how much he bought them for and the Defendant replied words to the effect that he didn't know. Adams asked the Defendant where in Thailand he bought them and the Defendant replied a shop.
29. Subsequently during the search Burrell returned and spoke to Adams about what he had viewed on one of the DVD's and as a result Adams seized all the DVD's for further viewing and examination. Adams

completed a receipt of goods document in relation to the 65 DVD's that he seized. This document was tendered and became Exhibit P4.

30. Adams subsequently viewed all of the DVD's (that were viewable) and these were all tendered before me as three Exhibits in the case.
31. The first group of DVD's that were tendered was a bundle of five DVD's which became Exhibit P5. I was informed that these DVD's were not readable and accordingly the contents were unknown.
32. The second bundle of DVD's was a bundle of 50 which became Exhibit P6. I was informed that these DVD's were "standard" pornographic DVD's and did not contain any material that breached *regulation 4A*.
33. The remaining bundle of ten DVD's was tendered and became Exhibit P7. Adams said in evidence that he viewed all of these DVDs in full and interpreted them as having prohibited material in various amounts on various of the DVD's. Through Adams ten photocopies of each disc contained in Exhibit P7 (and any cover connected thereto) was tendered along with nine photocopies of a summary of the content as prepared by Adams. There was no objection to this tender. This exhibit became Exhibit P9. I was informed that there were only nine summaries because two of the DVD's were in fact identical (save that one had about two minutes of extra material on it).
34. The evidence of Adams was not shaken in cross-examination, and in fact Adam's evidence is substantially consistent with the video of events (Exhibit P8) and the subsequent evidence that the Defendant gave in his own defence. I accept the evidence of Adams generally.
35. In relation to the observations of Adams as set out in Exhibit P9 I will deal with this matter later in the evidence as I have personally viewed each of the DVD's set out in Exhibit P7 in order to confirm for myself

the contents and the likely attitude of reasonable adults to the contents of them.

36. The next witness called in the prosecution case was Senior Customs Officer Michael Burrell. His evidence was substantially non controversial and does not really advance the matter much further.
37. The final witness called in the prosecution case was Viwat Rerksirathai. He was a Customs Officer who was an accredited NAATI interpreter in the Thai language having been accredited on 27 September 2002. Rerksirathai has been employed by Customs for some 18 years and works in the compliance section dealing with imports and he translates importing documents from Thai into English. He has been doing that since 2002. He does not know the Defendant.
38. In relation to various of the discs and covers forming part of Exhibit P7 there was foreign writing on some of them. Rerksirathai identified this foreign writing as being in the Thai language and he translated the Thai writing thereon into English. This evidence and his translation was not challenged in cross-examination or any other evidence, and I therefore accept his evidence. I will return to this later in these reasons.
39. Just prior to the close of the Crown case a number of Admissions of Fact under s239 of the *Criminal Code (NT)* were tendered by consent as Exhibit P10. This document was dated 17 December 2008 and was signed by Mr Lawrence as Counsel for the Defendant. It was signed in Court in the presence of the Defendant. This document stated as follows:

KOVIT VILIASANOH admits that:

1. The items referred to in Schedule 1 are prohibited imports by virtue of Regulation 4A(1A)(a) of the Customs (Prohibited Imports) Regulations 1956 (Cth) in that they

describe, depict, express or otherwise deal with matters of sex, drug misuse or additional, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be imported.

2. The items referred to in Schedule 2 are prohibited imports by virtue of Regulation 4A(1A)(b) of the Customs (Prohibited Imports) Regulations 1956 (Cth) in that they describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or who appears to be, a child under 18 (whether the person is engaged in sexual activity or not).

#### Schedule 1

1. A DVD identified as "KO1". The DVD contains 2 films depicting the actual rape of 2 adult females. In both films the females are restrained, assaulted and appear distressed.
2. A DVD identified as "A30". The DVD contains a film depicting a female who appears to have been drugged. Whilst unconscious and restrained, the female is masturbated and has oral intercourse performed on her. The DVD also contains a film depicting a foot, water bottle and head inserted into a vagina. The DVD also contains a film depicting an adult female urinating into a jug. The DVD also contains a film depicting a naked adult female restrained inside a pig pen engaging in bestiality.
3. A DVD identified as "HO002" and entitled (in Thai) "Hidden camera. Peeking at children performing sensual act (after viewing one will be in a good mood. The children perform very well)". The DVD contains a film depicting the rape of a female who is restrained and assaulted.
4. A DVD identified as a newspaper containing Thai writing entitled (in Thai) "Four criminal ravaged year 6 students. Took video clip. For sale at KLONG THOM. Girl friend student accomplice lured victims to a gang rape. Uncle was in shock when he saw the clip. The story broke, and the police was notified. A hunt is on to find the video shop that processed the picture. Female aged 11 was

gang raped. She believed in her girl friend from another house who persuaded her to visit her home and became the victim of rape. And the gang boy". The DVD contains the same film as in "HO002" depicting the rape of a female who is restrained and assaulted.

## Schedule 2

1. A DVD identified as "A25" and entitled (in Thai) "Peeking at libidinous children. Quality guaranteed by Bung Bon". The film contained on the DVD depicts a person who appears to be a child under 18 years engaged in oral intercourse with an adult male.
2. A DVD identified as "12" and entitled (in Thai) "Hidden camera taken on Indian child Roti 12 years old". The DVD contains films depicting numerous female children under 18 years of age engaged in the masturbation of and by adult males.
3. A DVD identified as "HO517" and entitled (in Thai) "Fan Club: People who love children 3. Trick secondary student child for swinging". This film contained on the DVD depicts a person who appears to be a child under 18 years engaged in oral intercourse with an adult male.
4. A DVD identified as "HO516" and entitled (in Thai) "Fan Club: People who love children 2. Hairless and sensuous". One film depicts female children under the age of 18 years naked in a swimming pool who appear unaware they are being filmed. The DVD also contains a film depicting a female child under 18 years being masturbated by and having sexual intercourse with an adult male. The female child's vagina is also penetrated by a sex toy.
5. A DVD identified as "KO3". The DVD contains a film depicting a female child under the age of 18 years engaging in sexual intercourse with a male child under the age of 18 years.
6. A DVD identified as "FT021" and entitled (in Thai) "Hidden camera...two lustful sisters. Quality guaranteed by Bung Bon". The DVD contains a film depicting 2 female children under the age of 18 years masturbating an adult male. One female child in unconscious during

part of the film and while unconscious, is masturbated by an adult male. A sex toy is also inserted into her vagina. The female child also engages in sexual and oral intercourse with the adult male.

7. A DVD identified as "A30". The DVD contains numerous films. One film depicts 2 young boys under the age of 18 years engaging in sexual activity with an adult female.

40. I will return to this issue later in these reasons.

41. Prior to the charge herein being read (and in the presence of the Defendant and the interpreter) Mr Lawrence indicated that ten days after the entry on 3 March 2008 a Search Warrant was taken out and executed and a Record of Interview then took place. Mr Lawrence then invited the prosecution, on behalf of the Defendant and as a matter of fairness, to play the Record of Interview and tender it in Court. Ms Cooper advised that the Crown would not be leading the Record of Interview because they considered it all to be self serving statements made some ten days after the importation and therefore not forming part of the *res gestae*.

42. The Defendant gave evidence before me, through an interpreter, in his own defence. He gave the following evidence:

- He lived in Malak in Darwin.
- He was 47 years of age having been born on 18 February 1963 (but unless he meant "1960" he would actually have been "45" at the time he gave his evidence).
- He was born in Thailand.
- He went to school in Royit Province in Thailand and left school at about the age of 18 years old.



- After leaving school he was a carpenter and later did some building work for about 15 years.
- His then became a Chef in Korat Province near Bangkok.
- He has one daughter and was married but is now divorced.
- He first came to Australia in 2001 to visit his relatives in Darwin for a holiday and he stayed for three months on that occasion.
- He returned to Thailand to learn cooking and he applied for a job to become a Chef in Thailand.
- He did become a Chef in Thailand.
- He came to Australia in 2007 on a work visa, and that visa is for two years.
- It is something called a “457 Visa”.
- He has never been in trouble before with police in Thailand or in Australia.
- When he came to Australia last year he worked in Darwin as a Chef for about eight or nine months.
- In February 2008 he went to Thailand with two relatives and two friends for the funeral of his step-father in Royit Province. They attended the funeral and then travelled in Thailand, with the Defendant driving.
- The last day he was in Thailand he stayed one night in Bangkok in an apartment with the others.
- Whilst in Bangkok he bought some CD movies from a shop in a commercial centre near the place where he stayed (a shopping centre).

- He had been to this shop before as he used to go there, and he had been there about four or five times.
- The last time he was in that shop before this time was in 2006 or 2007.
- Q – these other times, what kind of CD movies had he bought from this shop?  
A - I bought some films in general, some music and also some X film.
- Q – those other times in that shop what did he ask for to buy?  
A – I told the owner of the shop that I wanted to buy the **adult X film**. I asked whether he had it or not and he said yes and he put them together for me.
- Q – those previous times what did he receive?  
A - I got what I asked for. They were the X films.
- Q – how long did it take to get what he asked for the other times?  
A – about half an hour. Between half an hour to an hour.
- Q – what were those X movies, what was on them?  
A – it was the adult X film showing the sexual intercourse between a man and a woman.
- Q – how many times had you bought CD sex movies like this from this shop?  
A - about four or five times.
- Q – did any of those CD sex movies have any children doing any sex acts?  
A – no, never.

- Q - those other times did any of those sex movies have nasty horrible things on them?  
A – no, never.
- Q – do you like watching children doing sex on movies?  
A – no, I don't like it.
- Q - have you ever bought any CD movies with children doing sex on them?  
A - never.
- Q – this year, the last night you went to that shop, is that correct?  
A – yes, that's right.  
Q – when you went to the shop what did you ask for?  
A - I asked for the things that I used to ask for in previous time, whether they had the X film or not.  
Q – what did they say?  
A - They said yes.  
Q – how many did you ask for?  
A – that time I asked to buy 50 of them.  
Q – what did they say?  
A - they said they don't have it there, but they could get it from somewhere else.  
Q – those other times, is that how it worked?  
A – yes.
- He went to get something to eat and then went shopping and then went back to that shop before they closed. He was away from the shop for almost two hours.
- Q – who was he buying 50 X movies for?  
A – I bought them for myself.  
Q - anyone else?  
A – no.
- A - I went to pick up my order and they gave it to me in a plastic bag.
- A - I paid 2,000 baht for those which was about \$70 Australian dollars.
- Q - did you look at the CD movies in the shop?

A - no I didn't look at them, but the salesman told me that he gave me some extra CD's for free".

- The Defendant left the shop.
- After leaving the shop he went to buy some clothes and then went back to where he was staying.
- His flight to Darwin left in the morning.
- Q - did you look at the CD movies in your apartment?

A - yes. I checked the CDs and I counted them to see if they were enough as I order, and I found there were some extra ones, but I didn't pay any attention, and then I packed them.

Q – show the court how he counted them?

A - I opened the bag and then look at them and then count them in Thai numbers 1, 2, 3, 4, 5.

Q – did you take them out of the bag?

A – no, I did not take them out of the bag".

- He confirmed that the movies were in two separate bags and he kept them in the same plastic bags he had received. He packed them in the backpack and brought the backpack with him into Australia when he caught the plane the next morning.

43. In relation to the portions of evidence that I have emphasised herein, it was the Defendant's evidence that previously he had dealt with "the owner" of the shop. However, on the occasion in question he did not suggest that he spoke to "the owner" at any time. Rather he identified the person or people he dealt with as "they" or "the salesman" or "the salesperson". He gave no evidence that he had ever dealt with this person or persons (if more than one) on any previous occasion. In addition, whilst previously he said he had asked for "the adult X films", on the occasion in question herein he made no mention of the word "adult" being used by him at all.
44. In Evidence in Chief the following questions and answers were given by the Defendant:

Q - did he do an interview with police before he got bail?

A - no. They only took my photograph and asked my name and kept the records.

Q - did the police ask him questions about the DVD's he brought into Australia?

A - no, the police asked me no questions re this.

45. Later Mr Lawrence sought to ask some further questions in Evidence in Chief as he suggested he may have confused the Defendant on this topic. He then asked these following questions and received the following answers:

Q - when officers came to your house to search it, what was the colour of their clothes?

A - blue.

Q - at the police station did any officers wearing blue ask him questions about these CD movies?

A - no.

46. Clearly this evidence from the Defendant cannot be true otherwise there would not have been a Record of Interview that Mr Lawrence was keen for the prosecution to lead and play.

47. In cross-examination the Defendant gave the following additional evidence:

- Thai is his native language. He can read and write in Thai.
- He can speak English (some) and can read some English words but some sentences he could not understand. He can understand spoken English if it is simple English.
- Q - on this occasion, on the 3<sup>rd</sup> of March, it was just X movies, pornography, wasn't it?

A – that’s right.

Q – you said you went into a shop in Thailand and asked for X movies, is that right?

A – yes, that’s right.

Q – when you asked for those movies did you ask for specific actors?

A – yes, I asked for the X films of Thai and Japanese performers.

Q – did you ask for specific titles?

A – no.

- He ordered the X films and then went away and returned two hours later to collect them.

- Q – so is it fair to say you made a special order?

A – yes.

Q – but you didn’t look at what you specially ordered?

A – no, I didn’t look at them.

Q – and you left first thing the following morning, is that right?

A – that’s right.

Q – you didn’t have time to return them?

A – yes, that’s right.

- Q - and the salesman told you that he had given you some extras for free, is that right?

A – yes.

Q – you didn’t look at what you had been given for free, had you?

A – no, I didn’t look at them.

- Q – did you notice the blank discs you had been given?

A – no, I didn’t know that.

Q – so you didn't know what you had got on those discs?

A – no, I didn't know.

- Q – and you didn't check the discs?

A – I only counted them, but I didn't check. I didn't see them what they are.

- Q – so you don't know if you got what you specifically ordered?

A - usually when I order things I got what I order.

Q - but you didn't check if you got what you ordered, did you?

A - yes that's right, I didn't check, I didn't check in detail.

Q - did you check at all?

A - what do you mean by that? You mean by opening them, looking at them?

Q - checking you got what you ordered?

A - I only checked and counted the numbers that I ordered, whether it exactly what I ordered or not.

Q - so you didn't check if you had been given films of Thai and Japanese performers?'

A - I didn't look at them because I didn't have time. I had to go home and pack things.

Q – and you packed those DVD's into your baggage is that correct?

A – yes. I put my clothes in first and then put the bag of DVD in.

Q – both bags of DVD's?

A – yes.

Q – did you see any of the titles to any of the DVD's?

A – no, I didn't look.

Q – not when you were counting?

A – no, I just used my fingers to count.

Q – you didn't see any of the covers?

A – no.

Q – but you knew all the discs contained X movies, is that

right?

A – yes, I think so.

Q – and you knew you had some extras as well?

A – yes, because the salesperson told me that.

48. I do not accept the Defendant's evidence that he did not have time to check or look at the DVDs. I find that this is simply not plausible or truthful. If he had said that he was a bit embarrassed and therefore did not want to inspect his purchases in the shop, then I could have understood that. But he did not say this or offer this as any part of his thinking. If he had said that he was a bit embarrassed and did not want his travelling companions to know about his purchase, then I could have understood this. But he did not say this, or offer this as any part of his thinking. On his own evidence he went to buy some clothes after collecting the DVD's before going back to the apartment. I was not told what time he got back to the apartment, nor was I told what time he had to leave the apartment in order to get to the airport. It wasn't suggested in his evidence that he was running late for his plane and had to rush to the airport. In my view he had ample opportunity to look at his purchase before deciding whether to pack it all to bring into Australia.
49. It is clear from the Defendant's own evidence and admissions that he deliberately packed the 65 DVDs into his backpack and he deliberately and consciously brought the 65 DVDs into Australia. He therefore imported the 65 DVDs into Australia and did so knowingly and intentionally.
50. Thailand is a country which is well known to have an "active" sex industry. Anecdotally, it is also reputed to be a destination for paedophiles and others with perverse and/or criminal sexual interest. It is a country where sexual exploitation is prevalent.



51. As such, in my view, any reasonable person would be extremely cautious before buying any pornographic DVD's from Thailand particularly if they were intending to bring them back into Australia (where the laws are considerably stricter).
52. In the instant case, none of the DVD's were packed in hard plastic cases as one would normally purchase such items from a legitimate source. Further, none of them were sealed in plastic as one would also expect if purchasing from a legitimate source. They generally appeared to be films that were copied onto readable CD's. They gave the clear appearance of being "bootleg" or "backyard" cheap copies. Those that did have covers comprised of a single sheet of paper which was with the CD in a plastic bag. Some of the DVD's had pictures or words written on them as well but most didn't.
53. I have gone through the process of visually inspecting the covers to cursorily scan the still images, and to simulate (as clearly I am not able to read Thai) reading the general descriptions on the covers, to ascertain how long it would have taken for a person to have reasonably identified what they might have received. It took me 4 minutes and thirty seconds to identify that of the 65 DVD's:
  - Twenty one of them had no cover or words to indicate what any of the contents might have been;
  - Seven of them had covers (with pictures or words or both) that would have raised a real concern in any reasonable person that they may contain offensive material and/or child sex material; and
  - Thirty seven gave the appearance of being "standard" adult pornography.

54. I do not accept that the defendant did not have at least five minutes available to him in order to perform a basic inspection of his DVD purchases.
55. In my view, no reasonable person would have brought into Australia cheap DVD's purchased in Thailand which did not have any cover, name or title or accompanying material to in any way suggest a possible content. To do so without viewing them, to verify their content, would be at best reckless.
56. Further, as noted above, a cursory inspection (of less than 5 minutes) would have clearly indicated to any reasonable person that at least seven of the DVD's were likely to be highly offensive and highly likely illegal in Australia. Accordingly, no reasonable person would have brought those into Australia. Given what a reasonable person would have quickly ascertained in relation to those seven, in my view, a reasonable person would not bring the twenty one CD's (with no identifying material) into Australia either, without checking their content first.
57. This would have left some thirty seven CD's for which he had paid about \$70. Accordingly, even if he had only brought these into Australia he would have paid less than \$2 a CD for them.
58. No evidence was lead as to whether the Defendant had any access to any DVD player. Accordingly, I do not know whether it would have been possible for him to have viewed any of the DVD's that he had purchased. In any event, given the large number of DVDs, and his pending departure from Thailand, a viewing might not have been reasonably possible.
59. I find that no reasonable person would have purchased some 65 cheap DVD's in Thailand for importing into Australia without having

spent at least five minutes checking their titles and pictures before deciding whether to pack them and bring them into Australia. However, the Defendant says that he didn't look at them.

60. The Defendant's explanation for not doing this is two fold:

1. Firstly that he didn't have time; and secondly
2. that he had purchased DVD's from this shop before and had always got what he had asked for and had not received child sex DVDs or offensive material in the past.

61. As already noted I reject the first explanation.

62. In relation to the second explanation the Defendant referred to his dealings with "the owner" in the past when he had ordered DVD's and received what he asked for. He specifically referred to his dealings with the owner. However, on this occasion immediately prior to 3 March 2008 he did not make any mention of "any owner" in his dealings with the shop on this occasion. I don't know if the same person owned the shop in any event, but the Defendant made no mention of any dealings with any "owner" on the occasion in question. Rather, he referred to "they" in relation to the people in the shop that he dealt with and the "salesman" in relation to the person he collected the DVDs from and the person who told him about the extras.

63. There was no evidence from the Defendant to suggest that the person or persons (or any of them) he dealt with at the shop in March 2008 were the same person or persons that he had dealt with on any previous occasion at that same shop. Accordingly, in my view, it is inherently illogical for a person to believe that because dealing with one person had a certain outcome that dealings with another person (even at the same shop) would have an identical or similar outcome.

64. The Defendant did not produce or have any receipt for the purchase of the DVD's. He said he paid in cash. The name of the shop that he allegedly purchased the DVD's from was not identified in evidence.
65. If the Defendant had taken any time (up to five minutes only) to look at the DVD covers and the DVD's that had any images or writing on them then it would have been apparent to him that a number of the DVD's in his possession may have contained highly questionable and offensive material.
66. Having viewed (at least in part) the various films contained on Exhibit P7 some of them are highly disturbing. Some involve adult sexual activity with children with some of those children being as young as perhaps nine. A number of the films show what appear to be actual rapes of females (some under the age of 18) by adult males.
67. In considering the question of the guilt or innocence of the Defendant I have put out of my mind the offensive and distressing content of the films in question to ensure that it does not colour my assessment of the evidence. The fact that there are people who would not only commit such terrible actions but then seek to film it (either for their perverse gratification, the perverse gratification of others or the total humiliation of the victims) and the distressing reality that anybody might want to sell, purchase or possess such offensive material, the presumption of innocence remains. I expressly bear in mind that the Defendant must be found guilty or not guilty purely on the evidence putting my personal abhorrence as to the contents out of my mind. The more horrible a crime, the more conscious a trier of fact has to be to remove emotion from the issue of guilt or innocence. The nature of the crime only becomes relevant if the matter properly progresses to a sentencing stage.

68. The Defendant relies upon a mistake of fact, namely that he believed the DVD's he purchased and that were in his possession and which he brought into Australia were pornographic DVDs between adults. Mr Lawrence submits that in that regard the Defendant was mistaken, and that his belief was reasonable.
69. On the evidence of the Defendant, he has, in my view, evidentially raised mistake of fact under 9.2 of the *Criminal Code (Cth)*. Whether I accept what the Defendant has said is a separate issue. Having been raised on the evidence, it is incumbent upon the prosecution to disprove it beyond all reasonable doubt.
70. In terms of 9.2(1) of the *Criminal Code (Cth)* the Defendant is asserting that:
- At the time he requested to purchase fifty DVD's;
  - He asked for X movies with Thai and Japanese performers;
  - He did not suggest in his evidence that he stipulated any age for any of the performers (ie "adult"), or excluded any particular age (ie "children");
  - He did not suggest in his evidence that he asked for any particular content or stated any lack of interest in any particular content;
  - The shop did not have DVD's on hand to complete his request;
  - The CD's were sourced from an unknown supplier away from the shop premises (and took about two hours to gather);
  - He was given two plastic bags containing a number of CD's;
  - He was told that he was getting some "extra ones" for free;

- He did not look at any of the CD's in the shop;
- He completed the purchase and left;
- Before packing the CD's for bringing into Australia he did not look at any of them, but he did count them to see how many he had;
- He believed that he had "adult" pornography.

71. Accordingly, the Defendant is asserting that he had the "mistaken" belief that he was not bringing any prohibited import into Australia.

72. On the evidence before me, I do not accept the Defendant's evidence that he did not at any stage look at or peruse any of the 65 DVDs that he purchased before packing them for bringing to Australia. I find this to be so implausible as to be not acceptable as a statement of truth. If I am wrong in this regard then I would be satisfied beyond all reasonable doubt that a failure to look at the DVD's and the covers before packing them to bring them into Australia would be so unreasonable an action (in the circumstances of this case) that no reasonable belief as to their possible contents could be formed or held.

73. I find beyond all reasonable doubt that the Defendant did not hold any mistaken but reasonable belief that of the 65 DVDs in his possession, none of them contained (or might have contained) material that would breach *regulation 4A*.

74. If I am wrong on this and the Defendant did hold a belief that of the 65 DVDs in his possession, none of them contained (or might have contained) material that would breach *regulation 4A*, then I am satisfied beyond all reasonable doubt that any such belief (which I do not find he actually held) was not reasonable.

75. The Defendant is also relying upon 9.2(2) of the *Criminal Code (Cth)*. In doing so he is relying upon his previous dealings with the shop, and his evidence that he had not received inappropriate material in the past. In my view, there are a number of reasons why this should be rejected beyond all reasonable doubt:

- There was no evidence to suggest that the Defendant knew the person who he dealt with in March 2008 (he did not mention any name, and only referred to him as “they”, the “salesman” or the “salesperson”);
- There was no evidence to suggest that the Defendant had ever dealt with this person or persons (if more than one) in relation to purchasing X movies on any previous occasion;
- There was no suggestion that the Defendant had ever been given any “extras” by the shop on any previous occasion;
- There was no evidence from the Defendant that on this occasion he specifically requested “adult X movies” as he apparently had before;
- There was no evidence to suggest that apart from requesting Thai and Japanese actors he had requested any particular content;
- There was no evidence to suggest that apart from requesting Thai and Japanese actors he had requested that any particular content not be included;
- On no previous occasion was it suggested that he had ever purchased “films” with the intention of bringing them into Australia.

76. I find as an objective fact (beyond all reasonable doubt) that the circumstances surrounding the present occasion were not the same or

substantially the same as those surrounding the previous occasions that he gave evidence about (assuming that this evidence is truthful). I find that the Defendant did not honestly and reasonably believe that the circumstances surrounding this purchase were the same, or substantially the same as those surrounding one or more of the previous occasions that he had purchased "X movies" from this shop.

77. I will now turn to consider the various DVDs which form part of Exhibit P7 and form the basis of the charges herein. I will deal with each of the various DVDs in turn.
78. In relation to the admissions of fact contained in Exhibit P10, as noted, these were signed by Mr Lawrence as counsel for the defendant. Mr Lawrence advised that he and his instructing solicitor had attended upon Customs and viewed the various DVDs (in the absence of the defendant). Having viewed the DVDs, certain advice was given to the defendant and hence the admissions were made. Mr Lawrence suggested that the defendant had not actually seen the contents of the DVDs.
79. *Section 379 of the Criminal Code Act (NT)* allows an accused person by himself or his counsel to admit on his trial "any fact" alleged against him. The admissions in Exhibit P10, in my view, go beyond admission of "facts". They go to matters of objective opinion and as such, I have reservations as to whether they are capable of being admitted. Hence, I decided that it was necessary for the Court to view the various DVDs in order to form its own opinion.
80. In other legislation dealing with films and images, the legislature has specifically provided for certificates to be tendered and such certificates to be prima facie evidence of the matters contained in them (see for example *s125B of the Criminal Code (NT)* relating to the possession of child abuse material). It was not suggested to me that



any such evidential assistance is available for offences against the *Customs Act*. The legislature has apparently opted not to avail itself of this option in relation to these offences, when it clearly could have done so.

81. I invited the prosecutor to take me to any authority from any Australian court which permitted the court to act on an admission without forming it's own view in a matter such as this. Ms Cooper was unable to find any such authority.
82. Accordingly, in my view, in any prosecution for an offence of this type, it would be necessary for the trier of fact to view the alleged offending material and form its own view. To not do so, but to rely upon the opinion or views of others (when there was no legislative support for doing so, and where the test is an objective one, of a reasonable adult and therefore not a matter on which expert witness evidence would assist) may, in my opinion, be to abrogate the Court's role.
83. For these reasons I consider that I had no choice other than to view the various discs relied upon by the prosecution, in order to satisfy myself of the content thereof. The various discs were:

**FT021**

84. The cover of this DVD has twelve pictures and some writing in Thai. Viwat Rerksirathai has translated the Thai writing on the cover to read as follows:

Hidden camera

Two sensual sisters

Quality guaranteed by Bung Bon

85. On the top line of the cover, the third image from left is of two females who would both appear to be significantly under the age of eighteen. Further images show sexual activity with the girl in glasses.
86. In my view, whilst the words on the cover may not alert a person to the content, the still images on the cover would alert any reasonable person to the real possibility that sexual activity with children under the age of eighteen might be displayed on the disc.
87. In Exhibit P9, Adams makes the following comments:

Filming of two females who appear significantly under eighteen  
Sexual activity by male on the two females

88. The film shows sexual activity and penetration of the girl with glasses (who appears to be aged between about eleven and thirteen) by an adult male. The other female (who appears to be pre-pubescent, probably aged between nine and eleven) is on the bed throughout the sexual encounter and at stages is wearing only her underpants whilst the other child is being sexually abused. The younger child appears oblivious to the seriousness of what is occurring and at times, is putting her face to the camera and waving to the camera and trying to engage with the other child. It appears that the younger child is perhaps being groomed for later activities. The film goes for over one hour and in my view, would clearly cause offence to a reasonable adult and is a film which clearly falls within charge 2 of the complaint.

### **H0516**

89. Viwat Rerksirathai has translated the Thai words on the cover of this DVD to read as follows:

Fan club

People who love children number 2

## Hairless and sensuous

90. In addition, on the cover of the DVD is one large picture of a semi-naked female and five smaller pictures which display female genitalia and penetration of female genitalia (with the females all being without hair).
91. In my view, the title by itself would alert any reasonable person who could read Thai to believe that the DVD may well contain sexual activities involving children and the presence of the still pictures would confirm this.
92. In relation to Exhibit P9, Adams comments on this DVD as follows:
  - Females who appear under eighteen being secretly filmed naked.
  - Female who appears under eighteen in school uniform being filmed up skirt.
  - Sexual activity by male on this female.
93. I agree with each of these comments and these images clearly appear on the DVD. I consider that the content of the film on this DVD would offend any reasonable adult and that the film clearly falls within charge 2 on the complaint.

## **K01-Sharila**

94. This DVD has no pictures or writing on it. It also has no cover to give any indication as to the likely content. As such, and given its source, in my view, no reasonable person could have any understanding as to its possible content. In particular, no reasonable person could believe that it would not (or might not) contain inappropriate images. It could contain anything.

95. In Exhibit P9, Adams makes the following comments in relation to the content of this DVD:

Female runs from car, actual rape

Male breaks into home and rapes female

Male rapes female in school uniform who appears to be under eighteen

96. In relation to these comments, I agree with the accuracy of each of them. In each of the three separate films, it appears that a male is actually raping a female (and it does not appear to be any form of acting) and that the male has an accomplice who attends for the purpose of filming the crime.
97. In my view, each of these three films would clearly offend against the standard of morality, decency and propriety generally accepted by reasonable adults and clearly each are a breach of charge 1 on the complaint.

### **H0517**

98. This disc had a cover with one main photo and five smaller photos. It also had some foreign writing across the cover. Rerksirathai translated the writing on the cover to be as follows:

Fan club

People who love children number 3

Three secondary school children for swinging

99. The pictures on the cover show two young teenage girls in school uniforms who are being undressed and touched by adult males. Accordingly, in my view, the combination of the title and pictures

would strongly suggest to any reasonable person the content of the DVD was likely to involve female children under the age of eighteen. The two females in the smaller photos appear to be fourteen or probably less in age.

100. In Exhibit P9, Adams makes the following commentary:

Chapter 1 - 10.01 onwards – two females engaged in sexual activity with a male. One female appears under eighteen.

Chapter 2 - 00.31 onwards – one female who appears under eighteen engaging in sexual activity with male.

Chapter 3 - 8.10 onwards – two females who appear under eighteen dressed in school uniforms. What appears to be actual rape by two males. One female crying uncontrollably at end.

101. Having viewed this DVD, I agree with the descriptions for chapter 1 and chapter 3. In relation to chapter 3, I agree with Adams' interpretation that it is filming of an actual rape. In my view, the distress of the two female children was too real to be acted.

102. In relation to chapter 2, the age of the female is not clear on the face of the video. She may well be under eighteen, but she also may not be. Given the words on the cover and the pictures on the cover, it is clearly intended to convey to the watcher the impression that the female is a child under eighteen.

103. I therefore find the content of these three films would likely cause offence to a reasonable adult as they depict persons who appear to be a child under eighteen. In relation to chapter 3 on this disc, it also in my view would be a clear breach of charge 1 on complaint, but the prosecution has elected (because this film would offend against both charges 1 and 2 and to avoid any duplicity), to rely on this film in relation to charge 2.

## 12

104. This DVD has a part cover with it which contains some foreign writing and the number 12. The CD itself has Thai writing and the number 12 across the top of it and one larger image and two smaller images and the cut-off part of a third smaller image.

105. Viwat Rerksirathai has translated the writing from Thai as follows:

Hidden camera

Taken on Indian girl

Lorti 12 years old

106. The main image on the DVD shows a pre-pubescent female lying down with legs apart and with an adult penis touching her genitals. The two smaller images show a pre-pubescent female naked. The top photo is a full frontal view and the second photo shows her lying on her back wearing only knee length white socks.

107. Clearly, in my view, the pictures by themselves would indicate to any person (let alone a reasonable adult) that the DVD was likely to contain images of a sexual nature involving a female child and this impression would be confirmed by the writing to anybody who could read Thai.

108. In Exhibit P9, Adams has summarised the content of the DVD as follows:

“Secrets of India 1 – 3.17 onwards – a female who appears significantly under the age of eighteen engaged in sexual activity with an adult male.

Secrets of India 2 – 22.15 onwards – a female who appears under eighteen engaged in sexual activity with an adult male.

Secrets of India 3 – 28.34 onwards – a female who appears under eighteen engaged in sexual activity with an adult male. At 33.05 - appears to struggle to try and remove vibrator”.

109. I generally agree with each of these three descriptions. In relation to the first movie, in my view, the female appears to be aged perhaps between ten and twelve years of age at most. In relation to films two and three, the two females involved in those appear to be aged maybe between twelve and fourteen years. In all instances, all three females are in my view clearly under the age of eighteen and significantly so.
110. I find that each of these three films are a breach of charge 2.

## **A25**

111. The cover of this DVD contains sixteen still images and foreign writing.
112. Rerksirathai has translated the writing from Thai to be as follows:

Peeking at libidinous children

Quality guaranteed by Bung Bon

113. The still pictures show females engaged in sexual acts with males, with another female and a female lying prone with her hairless genitals fully exposed and open with legs wide apart.
114. In my view, the pictures would indicate or suggest a child under eighteen was involved. The words by themselves would also indicate a child under eighteen was involved and the combination of the words and pictures would clearly represent to any reasonable adult that children under the age of eighteen were likely to be shown.
115. On Exhibit P9, Adams summarises this DVD as follows:

1.09 – two females engaged in sexual activity with each other and an adult male. One female appears under the age of eighteen

8.50 – activity continues

116. Having viewed this DVD, I agree generally with the summary of Adams. Whilst one of the females would appear to be an adult, in my view, the other female engaged in sexual activity appears to be a child under eighteen who is probably fifteen. In my view, this film constitutes a breach of charge 2 on complaint.

### **A30**

117. This DVD has no cover or writing on it. It is a recordable CD. Accordingly, the contents of this CD are not apparent from a visual inspection of the CD or packaging.
118. In Exhibit P9, Adams summarises the content of this DVD as follows:

Chapter 1 – opening scene – two males engaging in sexual activity with female who appears incapacitated/unconsciousness

Chapter 2 – opening scene – female who appears under eighteen being filmed in bathroom.

Chapter 3 – opening scene – male is inserting various items into a female's vagina, including a water bottle, hand, foot and his head (up to his neck).

Chapter 13 – opening scene – two males who appear significantly under eighteen in sexual activity with an adult female.

Chapter 20 – opening scene – female urinating into jug.

Chapter 26 – 00.41 – a female game show contestant is tied down in a pen and pigs are released and engaged in sexual activity with female.



119. Having viewed this DVD, I generally agree with the summaries provided by Adams. In relation to chapter 1, the female appears to be completely stupefied by the effects of either alcohol, drugs or a combination of the two. In relation to chapter 2, the female appears to be secretly being filmed. Chapter 3 is clearly revolting and would again fend against the standards of morality, decency and propriety generally accepted by reasonable adults. In relation to chapter 13, the adult female appears to be aged about forty and the two males would appear to be approximately ten and thirteen. They are both clearly under the age of eighteen. Sexual activity includes penile penetration of the female. Chapter 20 requires no further explanation. Chapter 26 involves the female lying on her back naked with her arms and legs tied down so that her legs are spread apart.
120. Whilst the film on chapter 2 and chapter 13 may well constitute offences against both charges 1 and 2, the prosecution have elected (in order to avoid any possible duplicity) to rely on these films in relation to charge 1 only.
121. I am satisfied that each of the six films referred to would be clear breaches of charge 1.

### **K03**

122. This is a plain recordable CD with no writing or pictures on the CD and no accompanying cover with the packaging. Accordingly, there is nothing on a visual inspection of the CD or packaging to indicate what the contents might contain.
123. In Exhibit P9, Adams describes the contents as follows:

Throughout DVD, three females depicted as school girls engaged in sexual activity with various males (examples at 01.55, 26.55, 41.27).

36.16 – depiction of a school girl being raped by two males.  
Female is punched in rib cage by one of the males.

124. Having viewed the DVD, I generally agree with the description by Adams. This DVD appears to have been more professionally made than some of the others and it is clearly intended to give the appearance that each of the females on the DVD is a child under eighteen. The prosecution relied upon this DVD in relation to charge 1 rather than charge 2. Given that the females in the DVD maybe anything from sixteen to twenty years of age (or thereabouts) I consider that the prosecution were right to make this election. In particular, the rape scene and the overall content of the DVD would, in my view, clearly constitute offences against charge 1 of the complaint.

#### **HO002**

125. This CD is again a recordable CD and has no pictures or writing on the CD itself. The packaging does have a cover which has four still images and some foreign writing. Rerksirathai has translated the writing from Thai into English as follows:

Hidden camera

Peeking at children performing sensual act

After viewing, one will be in good mood and the children perform really well

126. The four still images on the front depict what appears to be a hidden camera showing a male and female (both dressed in school uniforms) kissing and sexually touching.
127. Accordingly, in my view, the combination of the writing on the cover and the pictures would clearly indicate to any reasonable adult that

the content of the DVD was likely to involve children under the age of eighteen performing sexual acts.

128. I will return to the content of the DVD itself shortly because the content of this DVD is effectively identical to the content of the next DVD, save that HO002 is about two minutes longer.

### **131032**

129. The DVD is a recordable CD with no pictures or other identifying markings on it. It is accompanied by a cover which appears to be newspaper clippings in foreign language. Rerksirathai has translated two parts of the newspaper writing from Thai to read as follows:

Four criminals ravage year 6 student taking video clip and sell to place in Com.

Female student accomplice lure the student to be gang raped. The uncle saw the video clip was in shock. The story broke out and the police was notified and the hunt is on to track down the shop that processed the video clip. Female aged eleven was gang raped. She believed in her girlfriend from other school had persuaded her to visit the home and become the victim of the rape and the gang boy.

Clearly, the writing on the cover of this DVD would suggest to any person who could read Thai (such as the defendant) that this DVD may contain video of actual rapes and rapes of females under 18.

130. In relation to content of this DVD in Exhibit P9, Adams summarises them as follows:

Both DVDs carry same content with HO002 having two minutes extra footage in chapter one.

Chapter one opening scene. Appears to be actual rape of one female. Held down by at least four males. Consistently struggles and held by all limbs.

Chapter eight opening scene – Appears to be actual rape of one female. Held down by at least three males. Consistently struggles and held by all limbs.

131. Having viewed the DVD, I agree generally with the summary provided by Adams. The DVDs are distressing as they do appear to be actual rapes filmed whilst the crimes are being committed. Accordingly, in my view, these films would clearly both constitute offences against charge 1 of the complaint.
132. On the defendant's evidence, he had entered Australia on two previous occasions. No evidence was introduced in relation to any of those previous entries. Accordingly, I do not know if the defendant took part in any baggage search on any previous occasion. This may well have been relevant to the defendant's state of mind. If the defendant had his baggage searched on each (or any) of the two times that he had come to Australia previously, then he may have had a reasonable expectation of being searched again.
133. On the contrary, if he had not been searched previously, then he may well have had an expectation that the same would occur this time.
134. As the evidence is silent in this regard, I simply don't know.
135. In relation to "the shop", no further or better description was provided by the defendant, nor was any asked for from him. I know nothing about the actual location of the shop, its size, its layout or anything. I do not know if it was in a multi-storey building which was full of shops or whether it was part of some other structure.
136. I do not know what the shop had as display items for sale. I do not know if it only sold music and DVDs. I don't know if it sold properly packaged music and DVDs in hard covers sealed in plastic, or only sold cheap pirated copies of items.

137. In my view, the type of premises from which a person bought an item would affect the person's legitimate expectations. If a person went into a multi-storey shopping centre and went to a jewellery store with proper cabinets and displays then one would expect (or hope) that if a watch was purchased, that it would be genuine. However, if the same person went into a back street into a dingy store which had items in cardboard boxes, then a reasonable person would reasonably expect to be purchasing copies and would be actually surprised if it turned out to be a genuine article.
138. There was one matter that was not raised in submissions from either counsel, which I consider needs to be considered as it may be beneficial to the Defendant. If the Defendant had intentionally brought these offending items into Australia knowing what they were, then it would have been relatively easy for him to have camouflaged their contents. The Defendant could have thrown away any covers that might give a clue as to inappropriate content. He could then simply have moved the DVDs into packets with more general covers. Accordingly, the fact that he apparently made no attempt to do this may be consistent with his evidence that he didn't look at the DVDs at all to ascertain what he was or was not given, and his evidence that he didn't think he had anything inappropriate.
139. I have taken these matters into account in arriving at my decision, but am still left with no reasonable doubt that the Defendant is guilty of the two charges herein.
140. I find, that even if the Defendant did believe (as he says he did) that he was only bringing pornography showing sexual activity between adults into Australia, I am satisfied beyond a reasonable doubt this belief was not reasonable in all the circumstances. The circumstances (including the way he bought the items, the way the

items were packaged, the fact the items were clearly cheap copies, the fact that he had been “give extras”, the fact he paid cash and there was no receipt given, the fact the store had to go and get them from somewhere else, the fact they could have been sourced from anywhere, the fact they were loosely placed into two plastic shopping bags when given to him) would strongly suggest to any reasonable person that the items may not be legitimate.

141. Whilst the Defendant gave evidence that he had purchased X movies from the shop four or five times previously, he did not suggest that he had ever brought any such items into Australia previously. The thought processes when purchasing DVDs for viewing in Thailand would be completely different to the thought processes when purchasing DVDs for bringing into Australia.
142. In closing submissions, Mr Lawrence also pointed out that when a search warrant was executed on the Defendant’s home ten days after his entry, no other videos or DVDs were found which have been the subject of any further charges being laid. The Defendant also said that he did not obtain any legal advice prior to his arrest (which was after the search warrant was executed). Mr Lawrence therefore suggests that this confirms the Defendant’s evidence that he is not a person who enjoys watching these sorts of films as he had none in his possession. In my view, that may be so, but it is equally possible that he had ample opportunity to dispose of any other items before any search warrant was executed. Each inference is available, but I bear in mind that the defendant is entitled to the benefit of any inference consistent with his innocence which may be open on the evidence.
143. On the evidence in this case I am satisfied beyond a reasonable doubt that the prosecution have proved each of the necessary elements in charges 1 and 2 on the complaints for the various films on the various

DVDs in Exhibit P7. I am further satisfied beyond all reasonable doubt that the prosecution have negated the 9.2 defence which has been raised on the evidence on the basis that I find the Defendant did not hold the requisite belief and even if he did, such belief was not reasonable on the facts of this case. I make that finding in relation to 9.2(1) and also (2) of the *Criminal Code (Cth)*.

144. I therefore find the Defendant guilty of charges 1 and 2 on the complaint.

145. I will hear counsel on the question of sentencing and any other relevant matters, including whether any special order needs to be made in relation to ExP7.

Dated this 18<sup>th</sup> day of February 2009.

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D TRIGG  
STIPENDIARY MAGISTRATE