CITATION: *Lovelock v "T"[2010]* NTMC 004

PARTIES: RENAY CAROL LOVELOCK

v

"T"

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Customs Act (CW); Justices Act (NT)

FILE NO(s): 20826761

DELIVERED ON: 13 January 2010

DELIVERED AT: Darwin

HEARING DATE(s): 30 September 2009; 8 October 2009, 28 October 2009 & 7 December 2009

JUDGMENT OF: Jenny Blokland CM

CATCHWORDS:

CRIMINAL RESPONSIBILITY – "IMPORTATION" – VOLUNTARINESS – WILLED ACT – STRICT LIABILITY – HONEST AND REASONABLE MISTAKE

s 233(1)(b), s 51 *Customs Act* 1901 (Cth)
s 4.2, 5.1, 6.1, 9.2 *Criminal Code Act* (Cth)

Murray v The Queen (2002) 211 CLR 193
McGee v Marinov (2005) 159 A Crim R 128
He Kan Te v The Queen (1985) 157 CLR 523
Mayer v Marchant (1973) 5 SASR 567
Australian Fisheries Management v Mei Ying Su NTD19 of 2008, (unreported), Federal Court, 21 May 2009
Vilaisonah v Hilton [2009] NTSC 28
R v Clarke (2008) 100 SASR 363

Odgers, "Principles of Federal Criminal Law", Thomson/Law Book Co (2007)
Leader-Elliott "Guide for Practitioners to the Criminal Code"

REPRESENTATION:

Counsel:

Complainant:	Mr Sharma/Mr McCarthy
Defendant:	Mr G Maley

Solicitors:

Complainant:	DPP (CW)
Defendant:	Maleys

Judgment category classification:	B
Judgment ID number:	[2010] NTMC 004
Number of paragraphs:	25

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

No. 20826761

[2010] NTMC 004

BETWEEN:

RENAY CAROL LOVELOCK
Complainant

AND:

"T"
Defendant

REASONS FOR DECISION

(Delivered 13 January 2010)

JENNY BLOKLAND CM:

1. This is a contested hearing on two counts of importing a prohibited import contrary to s 233(1)(b) *Customs Act* 1901 (Cth). The first count alleges the importation of photos:

> "On or about 5 December 2007 in Darwin in the Northern Territory of Australia, did import a prohibited import, namely images, that depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18".

The second count alleges the importation of three films on the same date:

> "did import a prohibited import, namely films, that 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".

2. The prosecution case primarily comprises formal admissions of fact under s 379 *Criminal Code* (NT) and, by consent the admission into evidence of the photographs and films. I thank both counsel for their co-operation in the preparation of the evidence received by consent. By virtue of that evidence

I am readily able to find to the required standard that the Defendant was a passenger on board a Tiger Airways flight TR 702 travelling from Singapore to Darwin on 5 December 2007. On that date the Defendant imported an MVIXMV5000V Multimedia Player into Australia which contained a Seagate HDD with serial number 6QFO2KFK. The Seagate HDD contained the images and video files the subject of the charges. It is also an admitted fact the Defendant did not have permission to import the photographic images and video files. Further, it is an admitted fact the Defendant participated in a formal record of interview with the Australian Customs Service, however this fact assumes no significance as the Record of Interview was not tendered in evidence.

3. The statutory provision, s 233 *Customs Act* (CW) – **Smuggling and Unlawful importation and exportation** relevantly provides: "(1) *A person shall not*: (b) *import any prohibited imports*". Section 233(1AB) provides that the offence is one of strict liability pursuant to s 6.1 of the *Criminal Code* (Cth). The relevant statutory regime providing content to the term "prohibited imports" is provided by s 51 *Customs Act* (Cth) that states: "*goods, the importation of which is prohibited under section 50 are prohibited imports*". Section 50(1) *Customs Act* (Cth) states: "the Governor General may by regulation prohibit the importation of goods into Australia". The relevant part of that regulation provides:

> **"4A Importation of objectionable goods**
>
> (1) In this regulation, unless a 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:
>
> (b) 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)".

4. Pursuant to s 6.1(1) *Criminal Code* (Cth): the effect of an offence being declared to be one of strict liability is: "(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*".

5. In terms of the content of the images, the photographic images the subject of charge one (Exhibit P2) show a very young woman or girl in a pink singlet and brief pink pants which are part way down her thighs while in a seated position. The other two images show the same very young woman or girl posing naked with her breasts exposed and in one image part of her genital area exposed. At the bottom right hand side of the images is the notation "Laura loves Katrina and more friends". The first and longest of the videos, (the subject of the second charge), involves three young women or girls, (one appears to be particularly young), consecutively performing fellatio on a man, followed by the man having sex with each of the girls or young women. At various stages the man masturbates. Of the three young women or girls, the young woman in the light crop top or tee shirt that is pulled up exposing her breasts is the young woman who looks particularly young. The next film depicts two young women or girls together each masturbating a male. One young woman or girl has no clothes on and the other is clothed. The third film involves a young woman not wearing a top masturbating a man.

6. On the basis of the photographs and films tendered in evidence, I found a prima facie case. In my view and based on my own experience and judgement, a number of the persons depicted in the photographs and films were apparently at least under 18. At the stage of the end of the prosecution

case, there was no evidence as to their actual age, however the section provides for criminal liability if they "appear to be" a child under 18. In relation to the still images, it is arguable that a photo of a child under 18 posing in the photographs would be likely to cause offence to a reasonable adult, primarily because of the age or apparent age of the child. In relation to the films, the images convey a strong sense of exploitation of the young women or girls. The faces of the male participants are not shown in contrast to the women or girls depicted who appeared in my view to be under the age of 18. This factor adds to the sense of a circumstance of exploitation and offence when the exploitation is coupled with sexual acts. I concluded there was a case to answer.

The Defendant's Evidence

7. Although the Defendant effectively admits to possession within Australia of the images and films, his evidence was that he didn't know that when he did a back-up of personal files prior to going overseas, without realising it, several of the images the subject of the charge ended up being copied on the hard drive that was on the laptop he took overseas. He said those images would have remained in Australia when he went overseas but they got caught up in the back-up process. In relation to the pictures he downloaded from the website "Laura loves Katrina", he said:

> "When – well, this goes for the whole – the whole lot of these pictures and videos. I did a back-up of my personal files and all that stuff got caught up in the back-up, as it says, "back-up" and I didn't even think that it – I didn't know it was in the back-up otherwise it would have remained in Australia while I went overseas, but I got it caught up in a back-up".

When asked about the particular charge of importing a prohibited import involving images of a person who is or appears to be a child under 18 years of age the Defendant said:

> "I knew it was illegal to import those videos, right". (T at 22).

His counsel asked:

> "What do you mean?"

The Defendant said:

> "I mean child pornography videos, right or of them images. But I didn't know about the "appears" bit. I mean I know what the law is in this country regarding that sort of thing, so obviously you can't import it".

He was then asked whether by virtue of having the images and films in his "possession" whether he was aware that he was breaking any laws and he answered "no". As to whether it was a mistake he said:

> "Yeah, like I said they shouldn't have been on there in the first place, so just when I backed up my person files to take with me because sometimes you need personal information, everything got caught up in the back-up, that's why the back-up. I think the back-up file was a zip file too or I – and – but I wasn't trying to hide anything because there was no password or anything on any – on any of my computers, I don't – so it just got caught up in the back-up".

When asked if it was an honest mistake he said:

> "Well I think so, yes".

When asked for clarification of what he was mistaken about he said:

> "The fact that the images were on a – on a hard drive in the first place. It was just a mistake on my behalf backing up my personal files and zipping them up into a zip folder and somehow and another I've to those files in the zip as well so they have all zipped up together".

In my view this evidence which has not been controverted in any significant way potentially raises a number of defences that I will discuss later. There is no evidence at all to suggest that the Defendant's belief that these were mistakenly on the hard drive was not genuine. There is no evidence they are sourced elsewhere than as described by the Defendant; that they needed a

password to be accessed or that they were specifically concealed on a path on the HDD.

8. The Defendant's evidence in relation to his practice of downloading images is that he relies on the *Google anti child porn policy* and a U.S. regulatory body that governs the relevant sites. This U.S. Department of Justice Federal Register document was tendered by consent as Exhibit D6. (The transcript indicates after Mr Maley asked "Your Honour, can I tender that document?" Mr Sharma said "no" and the document was admitted. My recollection is by saying "no" Mr Sharma was actually signalling there was "no" objection to the tender and I treated the tender as by consent).

9. From what I can see of this document it does not list any publications as such but concerns certification and record keeping by the U.S. Federal Department of Justice in relation to visual depictions of sexually explicit conduct and inspection of records relating to depictions of simulated sexually explicit performance.

10. In relation to the still images, the Defendant tendered more photos from the same website "Laura loves Katrina" (Exhibit D7). That document states: "18U.S.C.2257 record keeping – requirements compliance statement" and then states "all models are at least 18 years of age". The web page is dated 17 June 2009. He said he understood that statement of compliance was to mean that it complied with U.S. Federal law. In his view the girl "Laura" looked the same as the girl in Exhibit P2. In relation to Exhibit P4, the lengthier sixteen to seventeen minute film, noted in its own file name as "Exploited Asian Teens" the Defendant produced the compliance notice from the website for that film (Exhibit D8). That notice states as follows:

> "<u>Webmasters Make Money</u>
> All models were 18 at time of filming. Content is made with their written consent.
> Copyright 2008 ExploitedTeensAsia.com – All Rights Reserved.
> Exploitedteensasia.com is owned and provided by WebTwo B.V.

Webtwo LLC Terms & Conditions ETA-Bill
Designed by Orchid Designs.
18 U.S.C. Section 2257 Compliance Notice"

11. The Defendant said he understood that this compliance note meant "it is a legal site to watch". He said "according to the Federal law it is OK to visit that site". He said the video P4 came from that site and he could have downloaded the video from that site but he couldn't remember if he had in fact downloaded it. In relation to the last two shorter films, the Defendant identified "Kitty Yung" who he described as a Korean American pornographic star who has a fan club on the web; he said her DVDs can be bought in Darwin and she is "quite famous". He said he bought one of her DVDs in Darwin the day before he gave evidence in these proceedings. He produced an extract from her fan club site which amongst other information notes her birthday as "24th October 1984, 21 years old as at 1st November 2005". That extract became Exhibit D9 in these proceedings. The Defendant said this meant she was an adult.

12. The Defendant said he wasn't aware he was breaking any laws by having the images and films in his possession, given his knowledge of the actual ages of the young women, but said he knew it was illegal to import them if they were child pornography. He said he didn't know about the "appears" to be part of the offence that he is charged with. Obviously a mistake of law is no defence but his belief about the age based on the evidence produced about the *actual age* of the persons depicted in the images have assumed some relevance. In cross-examination about how old the Defendant thought the girls were he said the European girl in the still images was 18, he said "that was her 18th birthday present was her web site". He said they all appear young. He said the girls apart from Kitty Yung would be "Thai bar girls, I would say they would be between 25 and 30 years old". He was asked what he thought of the title "Exploited Asian Teens, Three Thai Girls 14 years" he said he didn't know where the "Three Thai Girls 14 years" came from but he said it didn't come from him and that "Exploited Asian Teens" was the

name of the web site. He said that to determine that web sites are authorised he uses US2577 (noted above) and says he doesn't know whether those laws apply in Australia but says they are similar to Australian rules. He says he usually checks to see if the U.S. number is underneath, "but maybe sometimes I don't, I can't say". He says he uses both *Google* (to ascertain site legitimacy). He says *Google* have a good policy and he said he has never heard complaints about *Google*. He said he then uses the U.S. authorisation as "a double back up".

Discussion of the Issues

"Importation"

13. As noted above, these offences are designated *strict liability* offences and consequently the prosecution is relieved from proving fault elements – *intention, knowledge, recklessness or negligence*: (s 5.1 *Criminal Code Act* (Cth)). The conduct must however be voluntary. Section 4.2 *Criminal Code Act* (Cth) provides:

> "(1) Conduct can only be a physical element if it is voluntary.
>
> (2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is."

14. Stephen Odgers in "Principles of Federal Criminal Law", Thomson/Law Book Co. (2007) notes that this section imposes a "minimal mental component" where conduct is a physical element – the conduct of the person must be "willed" (at 24). While s 4.2 *Criminal Code Act* (Cth) gives text book or classic examples of conduct that is *not* voluntary: (spasm, convulsion, unwilled bodily movement; an act performed during sleep or unconsciousness or impaired consciousness); there is no guidance beyond that concerning a determination of whether the conduct is "willed". This point was not argued in the initial hearing before me and I called the matter on to seek further submissions. I thank both counsel for those submissions.

15. I have no problem accepting it is proved the Defendant "willed" to bring his computer back into Australia, including of course the hard drive, but given his largely unchallenged evidence that the images and films the subject of the charge had somehow become mixed up with the backing up of his personal files and his belief the impugned images and films were left in Australia, the question of whether his "will" was to import the images must be scrutinised. It is after all the images, not the laptop that is the subject of the charge. Relying on *Murray v The Queen* (2002) 211 CLR 193, Odgers concludes (at 25):

> "Whether or not particular conduct was willed or not is a question for the tribunal of fact. It is not necessary for the absence of will to be traced to a condition that can be described in medical or psychological terms. It will be relevant that consideration be given to that conduct in the context of the person's antecedent acts".

16. I raised with counsel the authority of *McGee v Marinov* (2005) 159 A Crim R 128 where His Honour Hasluck J (SC) WA was dealing with a case involving importation under the *Quarantine Act.* He held that "proof of knowledge is an essential element of the prosecution case". His Honour noted that:

> "By s 67(2) strict liability applies to such an offence. However, the prosecutor was of the view at the subject hearing that the provision concerning strict liability did not give rise to any issue in the circumstances of the present case. It seems that counsel on both sides and the learned Magistrate proceeded accordingly and I will do the same (para 6.). I note in passing that by s 6.1 of the Schedule to the Criminal Code at 1995 (Cth). If a law that creates an offence provides that the offence is an offence of strict liability, there are no fault elements for any of the physical elements of the offence and the defence of mistake of fact is available. The existence of strict liability does not make any other defence unavailable. These considerations do not bear upon the issues in the present case".

17. On behalf of the prosecution before me it was submitted with respect that His Honour was in error in his approach. Certainly and with great respect, His Honour's analysis does not readily accord with my understanding of the

legal architecture under the Criminal Code (Cth). It is more akin with the common law approach exhibited by the majority in *He Kaw Te v The Queen* (1985) 157 CLR 523. Of course, *He Kaw Te* is the major authority on criminal responsibility in this area but was decided well before the introduction of the Criminal Code (Cth) which in some respects alters the common law. I must bear firmly in mind that none of the fault elements of "intention, knowledge, recklessness or negligence" apply to the importation offence before me. The physical elements of s 233(1)(b) are that the Defendant has imported goods and those goods in this instance are images or films that depict in a way that is likely to cause an offence to a reasonable adult, a person who is, or who appears to be a child under 18. I agree with the submission that it is not an element of the offence that the Defendant intended or knew or was reckless or was negligent as to whether the things were imported. The prosecution must prove however pursuant to s 4.2(1) of the Code that the conduct, being the importing of the images must be proved to have been voluntary. "Conduct" pursuant to s 4.1(1) Criminal Code (Cth) means "an act, an omission to perform an act or a state of affairs".

18. The prosecution submission is there is no doubt that the importation of the Seagate HDD must be proven to be voluntary and I agree there is no doubt about that. I accept that is the case. The prosecution submits however that the presence of the prohibited images and video files on the HDD at the time of importation, which it is submitted is a simultaneous importation of those files is a *state of affairs* which will be considered voluntary only "if it is [a state of affairs] over which the person is capable of exercising control". (See s 4.2(5) Criminal Code (Cth)). I note also by analogy that Odgers considers possession of a thing with particular characteristics is best characterised by being considered a "state of affairs", [at 40]. It is further submitted there can be no doubt the Defendant was a person capable of exercising such control as he had admitted to downloading the pictures in Australia and copied the files onto the HDD when he "did a back-up" of his

personal files. As it is the Defendant who is solely responsible for the fact the files were present on the HDD and that the presence of the files was a state of affairs over which the Defendant was capable of exercising control, it is submitted the importation is a voluntary act. I tend to agree as to hold otherwise in a fact situation such as this would amount to imputing an element of knowledge or intention when the very classification of the offences as *strict liability* precludes such elements from the proof process, save the very minimal control element as discussed. The example submitted on behalf of the prosecution by Ian Leader-Elliott in the *"Guide for Practitioners to the Criminal Code"* is also instructive by analogy in terms of capacity to exercise control:

> Section 230 of the *Migration Act* 1948 imposes strict liability on the master, owner, agent and character of a vessel if a person without a visa is concealed on board the vessel arriving in Australia. Since the offence does not require proof of intention, knowledge, recklessness or negligence, the Defendant can escape liability only by a plea that the presence of the stowaway was beyond their control or by reliance on a defence of reasonable mistake of fact, duress, sudden or extraordinary emergency or the like. In most, and perhaps all situations, the master could be said to have the capacity to exercise control over the ship and its occupants. That is not necessarily true, however, of the owner, character or agent. So far as those individuals are concerned, the state of affairs might be involuntary.

Honest and Reasonable Mistake of Fact

19. Section 9.2 *Criminal Code* (CW) provides a person is not criminally responsible for a strict liability offence if the person was under a mistaken but reasonable belief about a fact or facts that if they had existed, the conduct would not have constituted an offence. Once raised legitimately on the evidence, the prosecution must negative the asserted defence beyond a reasonable doubt. To summarize the Defendant's evidence, he is effectively saying he backed up his personal files in a particular way which did not involve (he assumed) the impugned files, although somehow those files too were copied to the hard drive. The prosecution argues this amounts only to

an admission that he did not realise the files were present and not to a "mistake" as defined in the Criminal Code (CW).

20. For the Defendant to succeed on this point there must be some evidence he considered whether or not the relevant facts existed and is under a mistaken but reasonable belief about those facts. I note the commentary in Odgers (cited above) that even an assumption that certain facts exist based on previous experience is a consideration on whether or not such facts exist. The learned author draws attention to the development of honest and reasonable mistake of fact stating that the Model Criminal Code Committee considered it was appropriate to codify the rule in *Mayer v Marchant* (1973) 5 SASR 567 regarding a belief that a state of affairs is continuing. There the Court held in relation to a charge of an overweight truck in circumstances where the owner had previously calculated that the truck would not be overweight with a particular volume of distillate, the defence was open even though he did not advert to the possibility of a denser distillate on the occasion giving rise to the charge. That was said to be a point relevant to the reasonableness of the belief. For the defence to apply, it was sufficient for the person to consider whether or not the facts existed and was under a mistaken belief about those facts. While it is true the Defendant did not specifically advert to the presence or non-presence of the images the subject of the charge, by analogy with the reasoning in *Mayer v Marchant* he was under the belief that his personal files that he intended to take with him overseas were the ones he had backed up and were taken overseas on the laptop. On that belief he was mistaken as somehow the others were included by copying.

21. The belief must be reasonable for the defence to be successful, however, I take that to be the reasonable belief of the Defendant and whether his belief is based on rational or reasonable grounds. In my view, it complies with the approach taken by the Federal Court in *Australian Fisheries Management v Mei Ying Su* NTD19 of 2008, 21 May 2009, para [41]. In my view the

Defendant has given a rational explanation of why he believed other personal material and not the images should have been on the drive. I respectfully disagree with the submission that the Defendant would need to show some evidence that he made a positive attempt to avoid copying the offending files, possibly accompanied by a malfunction in the backing up process. There would be a danger of reversing the onus of proof to insist on such a requirement. He has not been able to explain by what mechanism the files ended up being copied but his evidence is sufficient in my view of pointing to a mistake made by him in the mechanism he used. This is not a case where the evidence is so implausible it should be rejected and I note the approach taken by His Honour Mildren J in *Vilaisonah v Hilton* [2009] NTSC 28. I accept the submission made on his behalf that it is open to argue that had he backed-up his computer in the manner he expected, there would not be the presence of the prohibited imports in the hard disk of the computer. Although the Defendant's evidence is not in detail on this point, it is sufficient to ground the defence. Defendants are not expected to give evidence that specifically accords with the wording of legislation. Triers of fact are necessarily reliant on interpretations of evidence on whether a defence is made out. To hold that all the Defendant is saying in his evidence is that he was ignorant of the presence of the images would not, in my view, be a fair representation of the process he went through before going overseas. In my view the prosecution has not negatived honest and reasonable mistake.

22. I held a further hesitation in applying honest and reasonable mistake and sought submissions on the question of whether this was in fact exculpatory as the defence requires that "had those facts existed, the conduct would not have constituted an offence." I thought there may have been an offence committed for example of possess child pornography under Northern Territory law (eg Offences under Subdivision 1, Division 2 of the *Criminal Code* (NT)) that would alternatively be open, however, the elements of that

offence are substantially different and there would need to be some particularity about dates of the past possession and consideration of defences under the *Criminal Code* (NT). If charged as a complaint there is also the time issue. It is the importation that is the central element of the charge under consideration and I am not satisfied beyond reasonable doubt that the facts as believed by the Defendant would have constituted another offence.

Further Considerations

23. Although not necessary finally to resolve this matter as I have found honest and reasonable mistake to apply, I confirm that in other respects I would have found the images fulfilled the requirement that the persons "appear to be" under 18 years of age. I do so in the knowledge that there can be differences in perspective to due to racial features or simply individual differences. In my view the images are likely to cause offence to a reasonable adult. Part of the reason for causing that offence is because the persons appear to be under the age of 18 years – had the still images for example charged in count one been images of an adult in the same pose, I doubt whether it would constitute "offence" to a reasonable adult. The films, particularly the longer film appear to be exploitative and I reject the submission on behalf of the Defendant that because the sexual acts appear "consensual" and without violence they could not cause offence to a reasonable adult.

24. The Defendant may well have open to him a defence of honest and reasonable mistake in relation to the actual age of the actors, however, in my view that is not a defence open to that part of the charge that concerns a person who "appears to be" under the age of 18 years. I am mindful that unusually he had produced evidence of the actual ages of the actors. A further question is what use is to be made of actual evidence about age that despite appearances may indicate the person is actually older than 18 years.

A further issue is whether both “appears to be” and “is…a child under 18” can fairly and successfully without duplicity or ambiguity be tried together when there is evidence of actual age. I note the decision of Doyle CJ in *R v Clarke* (2008) 100 SASR 363 based on South Australian legislation that honest and reasonable mistake is not open in circumstances where the tribunal of fact (as here) must make its own conclusion on the apparent age of the children. It remains an open question in my view whether positive evidence of the age of the person being over 18 years can provide a defence that is a different question in some respects to that pursued in *R v Clarke*. Given the conclusion I have come to on honest and reasonable mistake, I take that matter no further.

25. I will make a formal order dismissing the charges and ask whether any further orders are sought.

Dated this 13th day of January 2010.

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Jenny Blokland
CHIEF MAGISTRATE