JOBNAME: Gibraltar Law Report PAGE: 268 SESS: 212 OUTPUT: Mon Feb 14 11:22:33 2011

[2007–09 Gib LR 268]

R. (Application of KLINKIEWICZ) v. STIPENDIARY MAGISTRATE

SUPREME COURT (Dudley, Ag. C.J.): October 9th, 2008

Criminal Law—obscene publications—publication of obscene matter—"matter to be read or looked at or both" includes child pornography downloaded and distributed via Internet—amounts to "publication" within Criminal Offences Act 1960, s.153—keeping "record," within s.152 of Act, of matter includes storage of electronic version on disc or computer

The claimant was charged in the Magistrates' Court with publishing obscene material contrary to s.153(1) of the Criminal Offences Act 1960.

The claimant downloaded and distributed a large amount of child pornography via the Internet. The material was stored electronically on the hard drive of a computer before being distributed by the claimant. The claimant was brought before the Stipendiary Magistrate who decided that he should be committed for trial.

The claimant submitted, *inter alia*, that (a) the material in his possession was in electronic form and was neither capable of publication within the Criminal Offences Act 1960, s.153(1), nor was it an "article" within the definition in s.152 of the Act (which had been amended to include publication of photographic negatives but, in the absence of specific wording, did not cover electronic data); (b) the Gibraltar legislation was not as wide in scope as the English legislation which had been amended to include anything intended "for use for the reproduction of obscene articles" and it followed that without equivalent phrasing in the Gibraltar legislation, the electronic storage and sharing of the material he possessed did not amount to the publication of obscene material; and (c) his electronic storage and distribution of the material was not equivalent to the publication of an article within s.153(1) of the Act since it was simply data being uploaded and downloaded electronically.

In reply, the Crown submitted that (a) the claimant's electronically stored material was an article capable of publication since s.153(1), although it did not specifically mention electronic material, should be

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 10 / Date: 8/9

JOBNAME: Gibraltar Law Report PAGE: 269 SESS: 213 OUTPUT: Mon Feb 14 11:22:33 2011

given a broad interpretation; and (b) his storage and distribution of the material was unlawful regardless of its format since s.152 of the Act provided that obscene material could include "any description of article containing or embodying matter to be read or looked at or both" and this did not specifically exclude electronic storage or distribution of data.

Held, dismissing the appeal:

(1) The decision of the Stipendiary Magistrate would be upheld and the claimant committed for trial since he had downloaded and distributed obscene material via the Internet which amounted to "publication" of the material contrary to the Criminal Offences Act 1960, s.153(1). Section 153 was not limited in its scope to the hard copy versions of obscene material, and obscene material on a disc or computer's hard drive could be an "article" capable of publication within the meaning of the Act (para. 9; para. 11)

(2) The language of s.152 of the Act should be given its ordinary meaning. The phrase "any description of article containing or embodying matter to be read or looked at or both" was drafted in sufficiently broad terms to cover the download and distribution of obscene material via the Internet and its storage on a disc or computer's hard drive. Similarly, the "record" of any sound or picture included the electronic storage of audio or visual material since, following the ordinary meaning of this word, the form in which the material was preserved was unimportant (para. 11).

Cases cited:

(1) *Att.-Gen.'s Ref. (No. 5 of 1980)*, [1981] 1 W.L.R. 88; [1980] 3 All E.R. 816; (1980), 72 Cr. App. R. 71; [1981] Crim. L.R. 45, referred to.

(2) *R.* v. *Fellows*, [1997] 2 All E.R. 548; [1997] 1 Cr. App. R. 244; [1998] Masons C.L.R. 121; [1997] Crim. L.R. 524, *dicta* of Evans, L.J. applied.

(3) *Straker* v. *D.P.P.*, [1963] 1 Q.B. 926; [1963] 2 W.L.R. 598; [1963] 1 All E.R. 697, referred to.

Legislation construed:

Criminal Offences Act 1960, s.152: The relevant terms of this section are set out at para. 3.

s.153(1): The relevant terms of this sub-section are set out at para. 2.

Obscene Publications Act 1964, s.2: The relevant terms of this section are set out at para. 4.

E. Phillips and *M. Zammit* for the claimant;

The defendant did not appear and was unrepresented;

R.R. Rhoda, *Q.C.*, *Attorney-General* and *Ms. K. Khubchand*, *Crown Counsel*, for the Attorney-General, an interested party.

1 **DUDLEY, Ag. C.J.:** Michael Klinkiewicz ("the claimant") stands indicted with one count of publishing obscene material contrary to

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 11 / Date: 21/9

JOBNAME: Gibraltar Law Report PAGE: 270 SESS: 212 OUTPUT: Mon Feb 14 11:22:33 2011

s.153(1) of the Criminal Offences Act ("the Act"). For present purposes it is sufficient to say that the prosecution's case is that the claimant downloaded and distributed a substantial amount of child pornographic material through the Internet.

2 Section 153(1) of the Act, which creates the offence, provides "subject as hereinafter provided, a person who, whether for gain or not, publishes an obscene article is guilty of an offence . . ."

3 The issue that falls to be determined is whether electronically stored and transmitted data is an article capable of being published within the meaning of the section. Mr. Phillips's submissions require analysis of s.152 of the Act and also of the English legislation on which it is based. Section 152 of the Act provides:

> "(1) For the purposes of this Part an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.
>
> (2) In this Part 'article' means any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures *and includes the photographic negative of such film or record.*
>
> (3) For the purposes of this Part a person publishes an article who—
>
> (a) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire; or
>
> (b) in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projects it." [Emphasis supplied.]

4 Save for the phrase I have emphasized, s.152, in effect, mirrors s.1 of the English Obscene Publications Act 1959. In *Straker* v. *D.P.P.* (3), it was held that negatives did not come within the ambit of the 1959 Act since they were not shown played or projected. To overcome the defect in the 1959 Act, it was amended by the Obscene Publications Act 1964 and for present purposes, the relevant section, s.2, provides:

> "(1) The Obscene Publications Act 1959 (as amended by this Act) shall apply in relation to anything which is intended to be used, either alone or as one of a set, for the reproduction or manufacture therefrom of articles containing or embodying matter to be read, looked at or listened to, as if it were an article containing or

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 12 / Date: 8/9

JOBNAME: Gibraltar Law Report PAGE: 271 SESS: 213 OUTPUT: Mon Feb 14 11:22:33 2011

embodying that matter so far as that matter is to be derived from it or from the set.

(2) For the purposes of the Obscene Publications Act 1959 (as so amended) an article shall be deemed to be had or kept for publication if it is had or kept for the reproduction or manufacture therefrom of articles for publication; and the question whether an article so had or kept is obscene shall—

(a) for purposes of section 2 of the Act be determined in accordance with section 1(3)(b) above as if any reference there to publication of the article were a reference to publication of articles reproduced or manufactured from it; and

(b) for purposes of section 3 of the Act be determined on the assumption that articles reproduced or manufactured from it would be published in any manner likely having regard to the circumstances in which it was found, but in no other manner."

5 The commentary in 12(1) *Halsbury's Statutes*, 4th ed. (Reissue), at 306, footnote, makes clear that the section overcame the defect in the Act of 1959 by providing that ". . . this Act shall apply to anything, e.g., photographic negatives, duplicator stencils or moulds, which is intended for use for the reproduction of obscene articles."

6 The Gibraltar legislature dealt with the *Straker* (3) point through the phrase "and includes the photographic negative of such film or record" in s.152(2) of the Act. Mr. Phillips submits that whilst the Gibraltar legislature responded to *Straker*, it did not go as far as the English 1964 Act and that electronic data or uploaded or downloaded data are not "articles" capable of being published under s.153(1).

7 Mr. Phillips points out that the position in England further evolved by virtue of the Criminal Justice and Public Order Act 1994, which amended s.1(3) of the Obscene Publications Act 1959 by inserting after the words "projects it" "or, where the matter is data stored electronically, transmits that data." He argues that this supports his proposition that (i) the Gibraltar legislation does not cover publication through the electronic transfer of data; and (ii) that if the position were otherwise, the English Parliament would not have introduced these amendments and therefore that the learned Stipendiary's decision to commit should be set aside and the claimant discharged from the indictment preferred against him.

8 *R.* v. *Fellows* (2) was a case involving facts very similar to the allegations which have been made against Mr. Klinkiewicz. In that case the English Court of Appeal considered the provisions of the Protection of Children Act 1978, which is not relevant for present purposes, but also the

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 13 / Date: 21/9

JOBNAME: Gibraltar Law Report PAGE: 272 SESS: 214 OUTPUT: Mon Feb 14 11:22:33 2011

Obscene Publications Act 1959, as amended. The court in that case relied upon and endorsed the earlier decision of the Court of Appeal in *Att.-Gen.'s Ref. (No. 5 of 1980)* (1), a case involving screen images derived from a video tape, in which it was held that the object of s.1(2) of the 1959 Act was to bring all articles which produced words, pictures or sounds within the compass of that Act.

9 In *R.* v. *Fellows*, it appears from the report that the court did not specifically consider the English 1964 amendments but rather, relying upon the definition of "article" in s.1(2) of the 1959 Act, as amended, it held that a computer disc was an "article" and furthermore, as regards publication, Evans, L.J. said ([1997] 1 Cr. App. R. at 256):

> "In our judgment, the reasoning in *Attorney-General's Reference (No. 5 of 1980)* which we have referred to extensively above is entirely appropriate in this case also. The 1959 Act has to be interpreted as it was understood by 'ordinary literate persons' when it was passed, and the data stored in the disc was 'shown, played or projected' to those who gained access to the archive by means which, though not available in 1959, nevertheless can be regarded as within the ordinary meaning of those words."

10 Earlier, Evans, L.J., specifically dealing with the argument of subsequent amendments as an aid to interpretation, said (*ibid.*, at 253):

> "The amendments, he submits, were introduced in order to extend the scope of the statutes; therefore, without the amendments the statutes had a narrower scope. This submission, in our judgment, must be rejected. First, because the scope of the original statute was established by the true construction of the words used at the date when the statute was passed. That meaning was not altered by the later introduction of amendments, even if (which is not suggested here) the effect of the amendments was such as to change the context of the original words and therefore to modify their original meaning with effect from the date when the amendments were introduced. Secondly, the true construction of the original un-amended statutes has to be determined as a matter of law by the courts, not by the later views of Parliament, unless some form of retrospective legislation is then introduced (which, again, is not suggested here). And in any event, the intention of later Parliaments is at least as speculative, and irrelevant, as Lawton, L.J. held was that of the Parliament by which the original legislation was passed."

11 It is therefore necessary to look at the language of s.152 of the Act: The phrase "any description of article containing or embodying matter to be read or looked at or both" is, in my view, drafted in sufficiently broad terms to cover, without any strain of the language, a disc or the hard drive of a computer in which electronic data is stored. Similarly, the "record" of

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 14 / Date: 21/9

JOBNAME: Gibraltar Law Report PAGE: 273 SESS: 212 OUTPUT: Mon Feb 14 11:22:33 2011

any sound or picture must relate to the preservation in some form of the sound or picture—that in the present case it is stored as electronic data is, in my view, of no consequence.

12 In the circumstances, the claim is dismissed and consequently the learned Stipendiary's decision to commit the claimant for trial and the bill of indictment preferred following committal stand.

13 I shall make orders accordingly and I shall hear the parties as to costs.

Application dismissed.

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 15 / Date: 8/9