

Prevention of Child Pornography Bill **“Knowingly”**

Some members of the Bills Committee suggested the Administration to include an express mental element in the offence of possession of child pornography under clause 3(3) of the Bill.¹ Legislators' worry is that people may possess child porn in the form of SPAM mail, unsolicited films or possibly publications circulated in public but may not know that they contain child porn.

Proposed possession offence

2. The offence of “possession of child pornography” is set out in Clause 3(3) which reads :

“Any person who has in his possession any child pornography (unless he is the only person depicted in the child pornography) commits an offence ...”

3. The Bill at present does not provide for an express mental element but contains defence provisions in Clause 4(2) and (5) as follows² :

“(2) It is a defence to a charge under section 3 for the defendant to establish that he had not himself seen the child pornography and did not know, nor did he have any reasonable cause to suspect, it to be child pornography.

(5) It is a defence to a charge under section 3 for the defendant to establish that –

(a) the defendant believed on reasonable grounds that the person pornographically depicted in the child pornography was not a child at the time of the depiction and the person was not depicted as a child;

(b) the defendant took all reasonable steps to ascertain the age of the person; and

¹ In the previous paper "Overseas legislation on possession of child pornography", the section on "express mental element " mentions that United States is the only jurisdiction that includes in its offence provisions an express mental element. Offence provisions of the United Kingdom, Canada and New South Wales, Australia are all silent on the mental element. The paper also briefly discusses some court cases in these jurisdictions in which knowledge was in dispute.

² The Administration intends to submit separately draft amendments to Clause 4(5) for more logical presentation.

- (c) in so far as the defendant was able to influence in any way how the person was depicted, the defendant took all reasonable steps to ensure that the person was not depicted as a child."

Ingredients of the proposed offence

4. To establish that an offence under Clause 3(3) has been committed by the defendant, the prosecution must prove three essential ingredients of the offence beyond reasonable doubt. These ingredients are:

- (1) that the defendant possessed something in the sense that it was within his custody or control; (physical element of possession - see paragraph 6 below)
- (2) that the defendant knew that he possessed something; (mental element of possession - see paragraphs 7 to 8 below)
- (3) that the something possessed by the defendant was child pornography.

5. The intent of the proposed legislative scheme is such that the prosecution is required to prove the facts from which, in appropriate cases, the inference could be drawn that the accused was in possession of the thing, which upon examination, was shown to be child pornography. It leaves it to the accused to raise the question of lack of knowledge as a defence.

Physical element of "possession"

6. In order to be in physical possession of the child pornography in question, it must be proved that the defendant had some *degree of custody or control* over it. In *Bellerby v Carle* [1983] 2 AC 101, the House of Lords in the UK considered the meaning of possession within the context of the Weights and Measures Act 1963. Lord Brandon, whilst not finding it necessary to lay down an exhaustive definition of the expression 'has in his possession', stated that :

" A person cannot ' have in his possession' weighing and measuring equipment...unless he has some degree of control over it."

Mental element of "possession"

7. The mental element of possession is illustrated in possession of drugs cases. Lord Lane CJ of the UK Court of Appeal in *R v McNamara*

(1988) 87 Cr App R 246 at p. 252 identified the elements of the offence which the prosecution must prove. At page 252 of the judgment he said:

“The prosecution must prove that the accused had a bag [or some sort of container] with something in it in his possession or control; and that the something in the bag was a controlled drug. It is not necessary for the prosecution to prove that the accused knew that the thing was a controlled drug, let alone a particular controlled drug. The defendant may then seek to establish one of the defences provided...in the Act.”

8. *McNamara* was applied by the recent House of Lords decision in *R v Lambert* [2001] 3 WLR 206, a case which concerned a charge of possession of a controlled drug with intent to supply, contrary to section 5(3) of the Misuse of Drugs Act 1971, section 28 of the Act provided a lack of knowledge defence. The Law Lords stated in their reasons for judgment³ that for the purposes of sections 5 and 28 of the 1971 Act, where the prosecution proved that the accused had a container with something in it in his possession and control and that the thing in it was a controlled drug, it was not necessary for the prosecution to prove that the accused knew that the thing was a controlled drug.

Adding ‘knowingly’ to the offence provision?

9. One may ask, "If the intention is that the Prosecution needs to prove knowledge, why not expressly state *knowingly* in the offence provision for *possession of child pornography* in clause 3(3)?" The answer is that inclusion of "knowingly" would cause serious difficulties in prosecuting the offence, thus undermining the efficacy of the legislation. By adding "knowingly", the prosecution will have to prove not only knowledge of possession of the thing, that is in fact child pornography, but also knowledge of the nature of the thing possessed (that it is child pornography or, in other words, it contains (i) a pornographic depiction of (ii) a child). Lord Hope of Craighead in the *Lambert* case described similar difficulties in the context of possession of dangerous drugs cases that “the systems of control and prosecution might well be in jeopardy if there were to be an initial onus on the prosecution to establish that the accused knew these things. The right to silence and the covert and unscrupulous nature of drug-related activities must be taken into account in the assessment as to whether a fair balance had been achieved” (para 89 of the judgment).

10. At paragraph 125 of the judgment of the *Lambert* case, Lord Clyde

³ See paragraphs 16, 35, 61, 126 and 187 of the judgment.

illuminated *what difference the word "knowingly" makes* in the context of offences of possession:-

"But in the context of offences of possession, the matter is somewhat more delicate in so far as the substance of the knowledge involved may be of different kinds of things. Knowingly to possess something seems to my mind to require that there is knowledge of what the thing is, at least in its general nature, which one has in possession. The offence of knowingly possessing explosives implies knowledge that the things in possession are explosives: *R v Hallam* [1957] 1 QB 569. The distinction between that case and possession of drugs where the word "knowingly" does not occur was noted in *Lockyer v Gibb* [1967] 2 QB 243, where it was held that it did not have to be proved that the accused knew that what she had in her hold-all was a drug. The absence of the word "knowingly" in section 5(3) of the 1971 Act fits with the understanding that the word "possession" does not involve knowledge of the nature of the thing possessed."

Justification

11. Placing an evidential burden on the defence to prove lack of knowledge (the nature of the burden is explained in paras. 15 –17 below) is justified by the difficulties the prosecution will have if it were required to prove knowledge in the specific sense (i.e. knowledge of the exact nature of the thing possessed). This was acknowledged in various passages of the *Lambert* judgment (para. 36 - Lord Steyn; para 69 to 71 - Lord Hope of Craighead; para. 153 - Lord Clyde; para 190 -191 - Lord Hutton).

Per Lord Steyn -

“It is now necessary to consider the question of justification for the legislative interference with the presumption of innocence. I am satisfied that there is an objective justification for some interference with the burden of proof in prosecutions under section 5 of the 1971 Act. The basis for this justification is that sophisticated drug smugglers, dealers and couriers typically secrete drugs in some container, thereby enabling the person in possession of the container to say that he was unaware of the contents. Such defences are commonplace and they pose real difficulties for the police and prosecuting authorities.

Per Lord Hope of Craighead -

“I do not think that it is surprising that Parliament made that choice in view of the difficulties which the prosecution would face if it had to prove in every case that the accused knew that the thing was a controlled drug. Taken to its logical conclusion, a requirement to prove mens rea as to the gravamen of the offence would extend to proof of knowledge that it was a controlled drug of the class alleged, as different penalties apply to each class. The legislation has clearly not gone that far, as section 28(3)(a) shows. As it is not a defence for the accused to prove that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged, it is plain that this is not something that the prosecution need establish. Proof of possession of the substance or product is sufficient. Strict liability follows, subject to the defences which are provided for by the statute.

In most cases possession of a container such as a bag or a tin will enable the inference to be drawn that the accused was in possession of its contents, and in most cases where the substance or product is out in the open such as where it is found on the accused's mantelpiece or at his bedside there will be other facts and circumstances from which that inference can be drawn. The problem arises in regard to proof that he knew that the thing in the container, on the mantelpiece or at his bedside was a controlled drug. The fact that the tablet or powder was a controlled drug may be capable of being proved only after careful examination and analysis. Inferences can be drawn if it is found in the company of other material which is used in connection with the supplying or use of controlled drugs. But if it is found on its own and its appearance is all that there is to go by, it may be very difficult for the prosecution to prove that the accused knew that it was a controlled drug.

I think that there are sound reasons of policy for construing the legislation in such a way as not to put the initial burden of proving knowledge of that fact on the Crown.”

Per Lord Clyde -

“Reasons can readily be adduced to support the imposition of the burden of proof on the accused in the present context. Firstly, the question whether the accused was ignorant or had no reason to suspect that what he possessed was a controlled drug is a matter very much within his own knowledge. There are sound practical

reasons for imposing the burden on him to prove his ignorance. Secondly, the proof may be relatively easy for him, as I have already noted. Thirdly, there is a serious consideration of the public interest in the discouragement of what is well recognised as a grave social evil, the unlawful distribution of controlled drugs. Fourthly, the knowledge of the defendant of the nature of what he possessed is brought in as a defence, not as an ingredient of the offence. In some cases it may never arise. It can be strongly argued that a transfer of a persuasive burden of proof onto the defendant under section 28 could be compatible with article 6(2).”

Per Lord Hutton -

“Therefore in considering whether a rebuttable presumption of knowledge created by section 28(2) and (3) is compatible with article 6(2) a number of factors (which to some extent overlap) have to be considered.

- (1) Is the presumption created by section 28(2) and (3) directed towards a clear and proper public objective? In my opinion it clearly is. The taking of controlled drugs is a great social evil which causes widespread suffering and the possession of controlled drugs with intent to supply is a grave and frequently committed offence which ensures the continuation of this social evil.

- (2) Is the creation of the presumption a reasonable measure for Parliament to take and is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised? In considering this matter it is necessary, as Lord Hope of Craighead stated in *Brown v Stott*, to assess whether a fair balance has been struck between the general interest of the community and the personal rights of the individual. In my opinion the threat posed by drugs to the welfare of society is so grave and the difficulty in some cases of rebutting a defence that the defendant believed that he was carrying something other than drugs is so great that it was reasonable for Parliament to impose a persuasive burden as to lack of knowledge on a defendant. The question whether a fair balance has been struck depends in large measure on whether the creation of an evidential burden as opposed to a persuasive

burden on a defendant would be adequate to remedy the problem with which section 28(2) and (3) were intended to deal. That problem can arise in the type of case where the Crown proves that a man was carrying a container such as a bag and that the bag contained a controlled drug, or where the Crown proves that tablets, which were a controlled drug, were on a table in the bedroom of the defendant's house and the defendant raises the defence that he believed that the object in the bag was a video film or that the tablets on the bedroom table were painkillers. In such cases it will often be very difficult to prove guilt if the prosecution has to prove beyond a reasonable doubt that the defendant knew that the bag contained a controlled drug or that the tablets were a controlled drug.

It is clear from the decisions of the European Commission in *X v United Kingdom* and *AG v Malta* that the difficulty of proving knowledge on the part of the defendant is one of the factors which can justify the creation of a presumption against a defendant, where the presumption is neither irrebuttable nor unreasonable.”

12. Similar difficulties will be encountered if the prosecution is required to prove knowledge that the impugned material contains a pornographic depiction and knowledge that the depiction is of a child. Proof that a person depicted in a photograph is under 16 is possible. It is quite another matter to prove that the person in possession of the photograph knows the person depicted is under 16. Positive evidence of the accused's knowledge may be by the accused's admission of the knowledge, or if there is evidence that the accused is informed by another person of the age of the child. It is not easy to prove that the accused knows that he is in possession of something. It is even harder to prove that the accused knows of the *exact nature of the thing he possesses*.⁴

13. Incidentally, in *R v Land* [1999] QB 65, the Court of Appeal said in relation to the fear of innocent people being caught for possession of indecent photographs of children as follows -

⁴ Indeed, similar difficulties in proving knowledge in possession offences are catered for by presumptions, which enable the prosecution to discharge the burden of proof regarding the element of knowledge. Examples include ss.58 & 59 of the Dutiable Commodities Ordinance (Cap. 109); ss.8 & 47 of the Dangerous Drugs Ordinance (Cap. 134); ss.2A & 10 of the Control of Chemicals Ordinance (Cap. 145); s.8 of the Wild Animals Protection Ordinance (Cap. 170); s.55 of the Crimes Ordinance (Cap. 200); ss.13 & 24 of the Firearms and Ammunition Ordinance (Cap. 238).

"The anxiety expressed by [the defence counsel] for the individual who does not know that the material depicts someone who is in fact a child is misplaced. Ignoring members of the child's own family, who will know his or her age, it will be rare in the extreme for a complete stranger to be in possession of indecent photographs of someone who although appearing to be mature could nevertheless be proved by the prosecution to be a child. A glance will quickly show whether the material is or may be depicting someone who is under 16 and if it is or may be then prosecution will be avoided by destroying or having nothing further to do with it."

14. Therefore, while it is very important to protect the innocent, it is equally important to ensure that the legislation can be effectively enforced. The innocent should not be burdened with criminal liability or have his reputation ruined. Equally, vulnerable children should be protected from all forms of sexual exploitation, including child pornography. The Administration believes that the formulation of the proposed possession offence with the statutory defence clauses in the Bill strikes a fair balance between the protection of an individual's right to presumption of innocence and the need to protect children from sexual exploitation. Serious prosecution difficulties will arise if "knowingly" is added to the possession offence. A law that can hardly be enforced will be ineffective in protecting children from sexual exploitation.

The nature of the burden on the accused

15. The *Lambert* case held that there is justification for shifting the evidential burden to the defendant who raises a statutory defence, even though a general burden of proof remains on the prosecution. The House of Lords decided (by a 4-1 majority)⁵ that the defence provisions should be construed as imposing on the defendant an evidential burden but not a legal or persuasive burden⁶. Their Lordships adopted this construction to ensure consistency with the presumption of innocence guaranteed by article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, as incorporated by the Human Rights Act 1998.

⁵ Contrary to the Headnotes, Lord Hutton is in dissent on this issue, not Lord Steyn. Lord Hutton held that the defence has a legal or persuasive burden, i.e. proof on a balance of probabilities. The other four Law Lords held that the defence has an evidential burden.

⁶ Quoting from para. 182 of the *Lambert* judgment, "A persuasive burden is one where the matter in question must be taken as proved against the defendant unless he satisfies the jury on the balance of probabilities to the contrary. An evidential burden is one where the matter must be taken as proved against the defendant unless there is sufficient evidence to raise an issue on the matter but, if there is sufficient evidence, then the burden rests on the prosecution to satisfy the jury as to the matter beyond reasonable doubt."

16. Lord Clyde's judgment at paragraphs 157 and 158 is pertinent -

"...It seems to me that the proper way by which that harshness should be alleviated is to recognise that the accused should have the opportunity to raise the issue of his knowledge but to leave the persuasive burden of proof throughout on the prosecution. Respect for the "golden thread" of the presumption of innocence deserves no less.

I am not persuaded that this approach gives rise to any practical problem. In some cases no issue may arise at all about the accused's knowledge of the nature of the thing which he is alleged to possess. Section 28 then will not come into play and it would only distract a jury from the point in issue to give any direction, or certainly any detailed direction, about it. When the matter of the accused's knowledge (including in that word for convenience the matters of suspicion and reason to suspect which are detailed in section 28) does arise, such burden as there is on the defence is discharged by the defence expressly raising knowledge as an issue. Where that occurs the judge will require to explain the substance of section 28 to the jury but will also simply remind them that the burden of proving guilt is throughout on the prosecution. If the jury are satisfied on the matter of possession but are left with a reasonable doubt on the matter of his knowledge or suspicion of the existence of a fact which the prosecution has to prove, such as, for example, the existence of the controlled drug, then they should acquit. If the jury are satisfied beyond reasonable doubt that the accused possessed the substance or product in question but are not satisfied beyond reasonable doubt that he knew that it was a controlled drug (or suspected or had reason to suspect that it was) then again they should acquit him. They can only convict if they are satisfied beyond reasonable doubt that the prosecution has proved possession of the controlled drug and, if the issue is raised, that the lines of defence set out in section 28 are without foundation."

17. Applying Lord Clyde's judgment cited in paragraph 16 above to the context of child pornography, the respective burden of proof of the prosecution and the defendant in respect of "knowledge" in the context of child pornography is as follows -

- (a) There are cases where no issue may arise at all about the accused's knowledge of the nature of the thing which he is alleged to possess. It would distract a jury from the point in issue to give any direction, or certainly any detailed direction, about it. There is no initial burden on the prosecution to prove the accused's knowledge that the impugned material he possessed was child pornography.
- (b) On the other hand, the defence may adduce evidence sufficient to raise the issue of knowledge (in clause 4(2) of the Bill). Where that occurs, the judge will require to explain the substance of clause 4(2) to the jury but will also simply remind them that the burden of proving guilt is throughout on the prosecution. If the jury are satisfied beyond reasonable doubt that the accused possessed the impugned material in question but are not satisfied beyond reasonable doubt that he knew that it was child pornography (or suspected or had reason to suspect that it was) then they should acquit him. They can only convict if they are satisfied beyond reasonable doubt that the prosecution has proved possession of the child pornography and, if the issue is raised, that the lines of defence set out in clause 4(2) are without foundation.

18. Members further asked whether the offence of possession under clause 3(3) is a strict liability offence. A strict liability offence is an offence that does not require intention, recklessness or even negligence as to one or more elements in the actus reus. An offence of possession under Clause 3(3) of the Bill does not fit into this description and hence is not a strict liability offence. In this connection, paragraph 4(2) above identifies "that the defendant knew that he possessed something" as an ingredient of the offence of possession. Paragraph 17 above makes it clear that the defendant cannot be convicted if there is reasonable doubt as to the defendant's knowledge of the nature of the thing he is alleged to possess. Knowledge is therefore material to the issue of guilt.⁷

Proposed Refinement

19. The proposed provisions may be refined by stating expressly that the defendant's burden is an evidential one such that a construction of the provisions as giving rise to a legal burden is not possible. This can be achieved by replacing 'establish' in the defence provision by 'raise a reasonable doubt by adducing evidence' or a similar phrase. It should be pointed out that the

⁷ It should be noted that Lord Hope of Craighead in paragraph 69 of the judgment did mention strict liability but he seems to take it to mean "not to put the initial burden of proving knowledge [of the nature of the thing he possessed] on the Crown" (paragraph 71 of the judgment).

Administration has always intended a lower threshold by using ‘establish’ instead of ‘prove’ in Clause 4.

Conclusion

20. The Administration takes the view that, in the light of the recent *Lambert* judgment, the statutory objective and the proposed framework of the possession offence strike a fair balance between the protection of an individual’s right to presumption of innocence protected by Article 11(1) of the HKBOR and the public interest in protecting children from the harmful effects of sexual exploitation. We share the concern that a number of non-governmental organizations have expressed regarding the exploitation of children for making child pornography which causes not just physical harm but also permanent emotional and psychological damage to them. Furthermore, while it is observed child pornography we come across has been produced mainly with children outside Hong Kong, the attitudinal and other potential harm that may be caused locally should not be underestimated. The international community considers that combating child pornography is a worldwide cause. The introduction of the Bill is part of our effort to discharge this international obligation and it is essential that our legislation in this respect is effective.

Security Bureau
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