Prevention of Child Pornography Bill
The Judgement of *R v. Land*

The Chairman requested the Administration to provide a copy of the judgement of *R v. Land* at the 6th Bills Committee meeting on 17 October 2002 (that UK case was referred to in paragraph 13 of the paper on "Knowingly"). A copy of the judgement is at Annex.

2. In *R v. Land*, the defendant and his partner ran a mail order business dealing in the supply of obscene video tapes. The police raided their business addresses and found a large quantity of pornographic material, including video tapes depicting young males engaged in various forms of indecent sexual activity. The defendant was charged with and convicted of possession of indecent photographs of a child contrary to s.1(1)(c) of the Protection of Children Act 1978. The defendant challenged his conviction on the grounds, among others -

(a) that the jury was not directed that the prosecution had to prove that the defendant knew that the persons depicted were children; and

(b) that there was no direct evidence as to the age or identity of the youths depicted.

3. The Court of Appeal dismissed the appeal. The Court said -

".. The object is to protect children from exploitation and degradation. Potential damage to the child occurs when he or she is posed or pictured indecently, and whenever such an event occurs the child is being exploited. It is the demand for such material which leads to the exploitation of children and the purposes of the [Protection of Children Act and s.160 of the Criminal Justice Act 1988] is to reduce, indeed as far as possible to eliminate, trade in or possession of it. At the same time statutory defences provide a framework protecting from conviction those whose possession of such material is not prurient."

4. The Court of Appeal said in relation to the fear of innocent people being caught for possession of indecent photographs of children as follows -

"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."

5. Incidentally, it should be noted that while the defence in clause 4(2) of our bill is similar to that under s.1(4)(b) of the UK Protection of Children Act (see p.68 part H of the judgement in *R v. Land*). Clause 4(2) of our bill is in fact more liberal -

(a) Under clause 4(2) of our Bill, a person will have a defence if he had not himself seen the material and did not know, nor did he have any reasonable cause to suspect, it to be *child pornography*.

(b) Under s.1(4)(b) of the UK Act, a person will have a defence if he had not himself seen the material and did not know, nor had any reasonable cause to suspect, it to be *indecent*.

(c) If a person has reasonable cause to suspect the material is pornographic, does not have reasonable cause to suspect that it involves a child, then he has NO defence under the UK Act (see p.70 part G of the judgement in *R v. Land*), but has a defence under clause 4(2) of the HK Bill.

6. On the need to prove the age of persons depicted, the Court of Appeal referred to the obvious difficulty of making any positive identification of an unknown person depicted in a photograph, hence his or her age. The Court therefore took the view that the question whether a person depicted was a child is one of fact based on inference without any need for formal proof.

7. *R v. Land*, hence, supports the proposal that the offence of possession of child pornography need not include an express mental element. Bearing in mind the compelling interest of protecting children, the risk of harm posed by child pornography, hence the need to "dry up" the market for child

pornography, the statutory defences available, the approach taken in the Bill has struck the right balance between combatting child pornography and protecting the innocent.

8. It should be emphasized that, under the Bill, the prosecution still has a heavy burden of proof to discharge before a person can be convicted. Applying Lord Clyde's judgement in *R v. Lambert* (at paragraphs 157 and 158 of the judgement) to the context of child pornography: 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 of the accused's knowledge that it was child pornography is raised, that the defence is without foundation. An innocent person should have no difficulty adducing evidence to raise a reasonable doubt as to whether he knew he possessed child pornography. He need not even prove on a balance of probabilities (i.e. that it is more likely than not that he did not know). The jury *cannot* convict even if the Prosecution proves that the accused *more likely than not* knew he possessed child pornography. They should acquit the accused unless they are satisfied that there is *no reasonable doubt* that the accused knew.

9. Paragraph 23 to 27 of the Administration's earlier paper on the subject of "*Overseas legislation on "possession of child pornography"*" surveys legislation and cases in other jurisdictions on the question of mental element. The issue of whether possession of a pornographic visual depiction of a person who appears to be a child should be an offence was argued in depth in the US Supreme Court decision of *Ashcroft, Attorney General, et al v. Free Speech Coalition* and the decision of the Supreme Court of Canada in *R v. Sharpe*. These cases and the overseas legislation and cases on the issue are discussed in the Administration's earlier paper on "*The judgement relating to child pornography by the Supreme Court of the United States on 16 April 2002 and its implications on the Prevention of Child Pornography Bill*".

Security Bureau
November 2002

Q.B.

[COURT OF APPEAL]

A

REGINA v. LAND

1997 Oct. 7; 10

Judge L.J., Poole J. and Judge Rant Q.C.

B *Crime—Child, indecent photograph of—Possession with view to distribution—Defendant in possession of videotapes containing indecent photographs of youths—No evidence as to age of youths—Whether proof required that defendant knew person depicted was child—Whether expert evidence admissible as to age—Protection of Children Act 1978 (c. 37) (as amended by Criminal Justice and Public Order Act 1994 (c. 33), ss. 84(2), 168(2), Sch. 10, para. 37(2)), ss. 1(1)(c), 2(3)*

C

The defendant and his partner ran a mail order business dealing in the supply of obscene video tapes. The police raided their business addresses and found a large quantity of pornographic material, including video tapes depicting young males engaged in various forms of indecent sexual activity. The defendant was charged in an indictment containing, inter alia, three counts of possessing indecent photographs of a child contrary to section 1(1)(*c*) of the Protection of Children Act 1978.[1] The defendant denied knowledge of the obscene nature of the videos. There was no direct evidence as to the age or identity of the youths depicted. The judge withdrew the third count from the jury, having formed the view that it was not clear that the participants were under the age of 16, but refused to withdraw the other counts, reminding the jury that their factual conclusions on those counts should be made without any consideration of his ruling on the third count. He did not direct the jury that the Crown had to prove that the defendant knew that the photographs depicted in the videos which were found to be indecent were photographs of a child or children but he did direct them that in the absence of evidence as to the age of the persons depicted they could use their own experience to decide whether it was proved that the photographs depicted children. The defendant was convicted.

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F

On appeal against conviction:—

Held, dismissing the appeal, that the continued retention or distribution of an indecent photograph, once it was or should have been appreciated that it was indecent, was an offence under section 1(1)(*c*) of the Act of 1978 if any of the persons depicted proved to be a child, and it was not necessary for the prosecution to prove that the defendant knew that any of those persons was a child; that by section 2(3) of the Act the question whether an unknown person depicted in a photograph was a child for the purposes of the Act was one of fact based on inference without the need for formal proof; that expert evidence as to the subject's age was inadmissible because the jury was as well placed as an expert to assess whether the prosecution had established that the photograph's subject was less than 16 years of age; that in the circumstances the jury could not have treated the judge's direction

G

H

[1] Protection of Children Act 1978, as amended, s. 1(1)(4): see post, p. 68F, H. S. 2(3): see post, p. 69A–B.

to acquit on the third count as an indication that the persons depicted in the photographs to which the other counts related were children; and that, accordingly, the judge's directions to the jury were not open to criticism and the conviction was not unsafe (post, pp. 70C–E, 71B–D, F–G). A

The following cases are referred to in the judgment of the court:

Pepper v. Hart [1993] A.C. 593; [1992] 3 W.L.R. 1032; [1993] 1 All E.R. 42, H.L.(E.) B

Reg. v. Smith (William) (1986) 85 Cr.App.R. 197, C.A.

Reg. v. Warner [1969] 2 A.C. 256; [1968] 2 W.L.R. 1303; [1968] 2 All E.R. 356, H.L.(E.)

No additional cases were cited in argument. C

The following additional cases were referred to in the skeleton arguments:

Reg. v. Graham-Kerr [1988] 1 W.L.R. 1098, C.A.

Reg. v. Owen (Charles) [1988] 1 W.L.R. 134, C.A.

APPEAL against conviction. D

On 31 January 1997 in the Crown Court at Lewes before Judge Scott-Gall and a jury the defendant, Michael Land, was convicted on counts 1 to 7 of an indictment of having an obscene article for publication for gain, contrary to section 2(1) of the Obscene Publications Act 1959 (as amended by section 1(1) of the Obscene Publications Act 1964) and on counts 8 and 9 of possessing indecent photographs of a child, contrary to section 1(1)(*c*) of the Protection of Children Act 1978. He was found not guilty by the jury on the judge's direction of one further count (count 10) E of possessing indecent photographs of a child. On counts 1 to 7 he was sentenced to six months' imprisonment, suspended for two years; on counts 8 and 9 he was sentenced to nine months' imprisonment, suspended for two years, all terms to run concurrently; and he was ordered to pay £1,000 towards the costs of the prosecution.

The defendant appealed against conviction on counts 8 and 9 only, by F leave of the single judge, on the grounds that the judge (1) had erred in failing to withdraw those counts from the jury in the absence of evidence as to the identity and age of the persons depicted in the photographs; (2) had erred in telling the jury that he had withdrawn count 10 on the ground that it would not be safe to conclude that the participants were under 16, thereby effectively expressing his own view on the age of the participants on the other counts and indicating that they could safely G conclude that they were under 16; and (3) had failed to direct the jury, as to the ingredients of the offence under section 1(1)(*c*) of the Act of 1978, that the prosecution needed to prove not just that the defendant had an indecent photograph of a child but that the defendant knew that the photograph was of a child.

The facts are stated in the judgment of the court. H

James Wood (assigned by the Registrar of Criminal Appeals) for the defendant. In order to establish an offence under section 1(1)(*c*) of the Protection of Children Act 1978, the prosecution had to prove not only

that the defendant knew that he possessed a photograph which was indecent but also that he knew the photograph depicted a person under 16 years old. Where there is no direct evidence of age, the Crown should prove it by calling expert paediatric evidence.

In accordance with the principles in *Reg. v. Warner* [1969] 2 A.C. 256 the judge should have directed the jury that before they could convict the defendant they had to be sure that he knew that the indecent photographs were photographs of a child or children. The judge failed to give such a direction.

Peter Walsh for the Crown. There is no requirement on the prosecution to call expert paediatric evidence as to age where the persons concerned are obviously under the age of 16. The jury are entitled to use their own common sense and experience in assessing age. The wording of section 1(1)(*c*) and (4)(*b*) of the Act of 1978 makes it quite plain what has to be proved and by which party.

Wood replied.

Cur. adv. vult.

10 October. JUDGE L.J. read the following judgment of the court. On 31 January 1997 in the Crown Court at Lewes before Judge Scott-Gall and a jury the defendant was convicted of seven counts of having an obscene article for publication for gain, contrary to section 2(1) of the Obscene Publications Act 1959 (as amended by section 1(1) of the Obscene Publications Act 1964) and two counts of possessing indecent photographs of a child, contrary to section 1(1)(*c*) of the Protection of Children Act 1978. On 21 February he was sentenced to six months' imprisonment for having obscene articles for publication for gain and nine months' imprisonment on each of the counts of possessing indecent photographs of a child. All the sentences were to run concurrently and they were suspended for two years. There were the usual orders for destruction and forfeiture and the defendant was ordered to make a contribution towards the costs of the prosecution. On the judge's direction he was found not guilty of a further offence of possessing indecent photographs of a child.

He now appeals against his convictions on counts 8 and 9, possessing indecent photographs of a child, with leave of the single judge. There is no appeal against the remaining convictions.

The facts need very little recitation. The prosecution case was that the defendant and his partner, a man not charged because he was outside the jurisdiction, ran a mail order business which dealt in the supply of obscene video tapes depicting homosexual activity from two premises in Brighton. The business used a variety of addresses including accommodation addresses and post office boxes in the south of England.

In September 1993, at a time when the defendant was out of the country, the police raided the addresses in Brighton. At one set of premises they found a large quantity of pornographic material, together with video machines, cassette recorders, cassettes and tapes and a very large number of papers and documents as well as computers, discs and leads all of which formed part of the business enterprise.

The defendant gave evidence in his own defence. Among other things he asserted that he had no knowledge that his partner had been in the business of selling sexually explicit homosexual videos, that he had been deceived and misled and very badly let down. He said that had he known the nature of the business he would have asked his partner to leave his house. Despite his evidence he was convicted by the jury.

The present appeal is concerned with his conviction of possession of indecent photographs of a child in two video cassettes called "Golden Boy Special" and "Heisses Bankok." As the jury found that these two videos were indecent no description is needed beyond recording that in the first of them, count 8, two young adolescent males, and in the second, count 9, a young Thai male and a western youth, are depicted in varied and indecent forms of sexual activity. Hardly surprisingly, there was no direct evidence about the identity of any of the participants in these activities, or of their ages.

The first ground of appeal arises from the judge's failure to direct the jury that before an offence contrary to section 1(1)(*c*) of the Protection of Children Act 1978 could be established the defendant had to know that the indecent photograph was a photograph of a child. In other words it was not enough for him to know that he possessed a photograph that was indecent: he had to know that the photograph depicted a person under 16. Mr. James Wood further argued that in the absence of any direct evidence of age, expert paediatric evidence about these matters should have been called before the jury to enable them to be informed of the variations of onset of puberty in different adolescent males, particularly with persons of different racial origins and backgrounds. He reinforced this argument by the fact that the judge withdrew count 10 from the consideration of the jury on the basis that there was not enough evidence for them to conclude that the participants in the video there under consideration were children.

The long title to the Act of 1978 explains its purpose. It is "An Act to prevent the exploitation of children by making indecent photographs of them; and to penalise the distribution, showing and advertisement of such indecent photographs." Section 1(1), as amended by section 84(2) of the Criminal Justice and Public Order Act 1994, provides:

> "It is an offence for a person—(*a*) to take, or permit to be taken ... any indecent photograph ... of a child; or ... (*c*) to have in his possession such indecent photographs ... with a view to their being distributed or shown by himself or others ..."

By the interpretation section (section 7, as amended by section 84(3) of the Act of 1994), a "child" means "a person under the age of 16" and photographs "shall, if they show children and are indecent, be treated for all purposes of this Act as indecent photographs of children ..."

There is a statutory defence (section 1(4), as amended by section 84(2) of the Act of 1994) to charges under section 1(1)(*b*) or (*c*) but not under subsection (1)(*a*) or (*d*). The defences are limited to proof:

> "(*a*) that he had a legitimate reason for distributing or showing the photographs ... or (as the case may be) having them in his possession; or (*b*) that he had not himself seen the photographs ... and did not know, nor had any cause to suspect them, to be indecent."

Express provision is made in the Act for matters of evidence in section 2(3) which, with the relevant insertion made by section 168(2) of and paragraph 37(2) of Schedule 10 to the Criminal Justice and Public Order Act 1994, provides:

> "In proceedings under this Act relating to indecent photographs of children a person is to be taken as having been a child at any material time if it appears from the evidence as a whole that he was then under the age of 16."

Mr. Wood drew attention to the provisions of section 160 of the Criminal Justice Act 1988 which creates the offence of simple possession of an indecent photograph of a child, but also repeats the provisions for defence provided by section 1(4) of the Act of 1978 adding, no doubt deliberately, the further defence that "the photograph was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time." He also drew attention to the effect of the Sex Offenders Act 1997 which includes offences committed both under section 1 of the Act of 1978 and section 160 of the Criminal Justice Act 1988 among those to which Part I of the Act of 1997 applies, subjecting such offenders to notification requirements.

Mr. Wood suggested that unless his first submission were upheld these penal provisions could have some alarming results. He pointed out that a man might buy and keep an indecent magazine believing that the photographs contained in it depicted adults, and subsequently find himself convicted of possession of an indecent photograph of a child if, without his knowledge, it emerged that the person he believed was an adult was only 15 years old. In the absence of unequivocal language in the statute such an individual should not be subject to the rigours of the criminal law. He drew attention to *Reg. v. Warner* [1969] 2 A.C. 256. In that case the House of Lords was considering the effect of section 1(1) of the Drugs (Prevention of Misuse) Act 1964 and, in the absence of any statutory defence such as that later enacted by section 28 of the Misuse of Drugs Act 1971, the majority disagreed with the conclusion of the Court of Appeal that the Crown was not required to prove any mental element when seeking to establish unlawful possession of the specified substance. We cannot improve on the analysis of the reasoning to be found in *Smith & Hogan, Criminal Law*, 8th ed. (1996), p. 112:

> "Though D's possession of the box gave rise to a strong inference that he was in possession of the contents, that inference might be rebutted ... it seems that the inference certainly would be rebutted if (i) D believed the box contained scent, (ii) scent was something of a 'wholly different nature' from the drugs, (iii) D had no opportunity to ascertain its true nature, and (iv) he did not suspect there was 'anything wrong' with the contents. These issues (or at least some of them ...) ought to have been left to the jury ..."

The effect of Mr. Wood's argument was that applying these principles to the Act of 1978 (and section 160 of the Act of 1988) the jury should have been directed that before they could convict the defendant it had to be established that he knew that the photographs which were found to be

indecent were photographs of a child or children. No such direction was given.

We disagree. The provisions of the Act of 1978 (and section 160 of the Act of 1988) are unambiguous. The principle in *Pepper v. Hart* [1993] A.C. 593 has no application. An offence under section 1(1) of the Act of 1978 may be committed in a variety of ways which include possession of an indecent photograph of a child with a view to distribution. The object is to protect children from exploitation and degradation. Potential damage to the child occurs when he or she is posed or pictured indecently, and whenever such an event occurs the child is being exploited. It is the demand for such material which leads to the exploitation of children and the purposes of the Act (and section 160) is to reduce, indeed as far as possible to eliminate, trade in or possession of it. At the same time statutory defences provide a framework protecting from conviction those whose possession of such material is not prurient.

Accordingly, and without attempting to rewrite the statutory provisions, no statutory defence is available for the individual who creates the material or advertises its availability. The defence is limited to persons who distribute or are in possession of such material either for legitimate reason (for example, a police officer in the course of his duty showing such material to the Crown Prosecution Service with a view to possible prosecution) or for an individual who was ignorant of and had no reason to believe that he was in possession of or distributing indecent material or in the case of simple possession, those who receive it unsolicited and get rid of it with reasonable promptness. Once it is or should be appreciated that the material is indecent then its continued retention or distribution is subject to the risk of prosecution if the source of the material proves to be a child or children. The anxiety expressed by Mr. Wood 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.

We are reinforced in our conclusion by noting that if it had been the intention of Parliament to provide a defence for an individual who because of the apparent maturity of the person depicted in the photographs failed to appreciate that a child was involved, it would have been very simple to make appropriate provision in section 1(4) and extend the statutory defences to the person who did not know nor had any cause to suspect them to be photographs of a child or, alternatively, reasonably believed that they depicted persons who were 16 years or older.

We can now consider Mr. Wood's second ground of appeal, the requirement for paediatric evidence.

Section 2(3) of the Act is plainly concerned with the obvious difficulty of making any positive identification of an unknown person depicted in a photograph, hence his or her age, and therefore underlines that the question whether such a person was a child for the purposes of the Act of

1978 is one of fact based on inference without any need for formal proof. We can see no basis for concluding that in the absence of paediatric or other expert evidence the jury is prevented from concluding that the indecent photograph depicts a boy or a girl under the age of 16.

The judge directed the jury that, in deciding whether it was proved that the photographs were of a child, "You can do no more than use your own experience, your judgment and your critical faculties in deciding this issue. It is simply an issue of fact for you, the jury, to decide what you have seen with your own eyes ..."

In our judgment this direction is not open to question. In any event such expert evidence tendered by either side would be inadmissible. The purpose of expert evidence is to assist the court with information which is outside the normal experience and knowledge of the judge or jury. Perhaps the only certainty which applies to the problem in this case is that each individual reaches puberty in his or her own time. For each the process is unique and the jury is as well placed as an expert to assess any argument addressed to the question whether the prosecution has established, as it must before there can be a conviction, that the person depicted in the photograph is under 16 years.

The connected ground arising from the judge's ruling in relation to count 10 is that the judge told the jury the reason for his conclusion that they should return a verdict of "not guilty" because he had ruled that it would be unsafe to leave the question to them in the context of the video then under consideration. However he went on to remind them that the "factual conclusions you must make in respect of counts 8 and 9 are entirely yours and should be made without any consideration of my ruling on count 10."

In these circumstances the jury could not have treated his direction that there must be an acquittal on count 10 as an indication of his view that the videos in counts 8 and 9 depicted children. In a case with several counts where one was being withdrawn from the jury, we can see no possible criticism of the judge. The decision in *Reg. v. Smith (William)* (1986) 85 Cr.App.R. 197 involved criticism of the judge for explaining to the jury why he had rejected a submission of no case to answer. The basis of criticism was the risk that the jury might convict because they might regard the judge's view as a sufficient indication "that the evidence is strong enough ..." That reasoning has no application in the present case, where the judge was at pains to emphasise that the jury had to make up their own minds about counts 8 and 9, irrespective of his conclusion on count 10. That is precisely what they did.

In these circumstances none of the grounds of appeal leads us to the conclusion that this conviction is unsafe. Accordingly the appeal is dismissed.

Appeal dismissed.

Solicitors: Crown Prosecution Service, Brighton.

[Reported by MRS. CLARE BARSBY, Barrister]