POLICE v PETER MELBOURNE KENNEDY No. SCGRG-98-23 Judgment No. 6638 Number of pages - 20 Criminal law (1998) 71 SASR 175 [1998] SASC 7122 (28 April 1998)

SUPREME COURT OF SOUTH AUSTRALIA

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COURT

IN THE SUPREME COURT OF SOUTH AUSTRALIA

BLEBY, J

CATCHWORDS

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Criminal law - general matters - criminal liability and capacity - mens rea - defence matters - ignorance and mistake of fact - appeal against order dismissing complaint - respondent charged with being in possession of child pornography - whether presumption that mens rea is a necessary element of the offence applicable - whether the respondent was in possession of the impugned material - whether the mental element of possession negated by forgetfulness - whether it was necessary to establish knowledge on the respondent's part that the impugned material constituted child pornography.

Criminal law - evidence - criminal law - criminal liability - evidence - whether the people depicted in the impugned material came within the definition of child - whether exclusive reliance by the magistrate upon expert testimony in determining the age of the subjects constituted an error of law -

role of expert witnesses considered - must not usurp function of fact finder - whether expert evidence capable of assisting the fact finder in this case - failure to consider the question of apparent age - failure to appreciate the true effect of the expert evidence - weaknesses in the evidence relied on. Summary Offences Act 1953 s33(1),(3); Police Offences Act 1953 s33; Statutes Amendment (Criminal Law Consolidation and Police Offences) Act 1983 ; Customs Act 1901 (Cth) s233B(1)(b) and (c); Acts Interpretation Act 1915 s22; Protection of Children Act 1978 (UK) s9(1)(c); Road Traffic Act 1961 s47, referred to. He Kaw Teh v The Queen (1985) 157 CLR 523; R v Martindale [1986] 3 All ER 25; McCalla v R (1988) Cr App R 372; R v Buswell [1972] 1 WLR 64; R v Land (1997) 162 JPR 29; Ramsay v Watson (1961) 108 CLR 642; Samuels v Flavel [1970] SASR 256; R v Penney (Unreported CCA (SA), 21 March 1997, Judgment No S6071), applied. R v Russell (1984) 81 Cr App R 315, not followed. Marshall v Benson [1970] 1 NSWR 458; Bahri Kural v The Queen (1987) 162 CLR 502; Police v Pfeifer (1996) 68 SASR 285; Hill v Donohoe (1911) 13 CLR 224, discussed. Yeates v Hoare [1981] VR 1034; CIC Insurance Ltd v Bankstown Football Club (1997) 187 CLR 384; Newcastle City Council v GIO General Ltd (1997) 149 ALR 623; Burch v State of South Australia (Unreported, Full Court, 25 February 1998, Judgment No S6517); Warren v Coombes (1979) 142 CLR 531, considered.

HEARING

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ADELAIDE, 5, 18 March 1998 (hearing) 28 April 1998 (decision)

28:4:1998

Appearances:

Appellant:

Counsel: Mr M A Nicholas

Solicitors: Crown Solicitor (SA)

Respondent:

Counsel: Mr G F Barrett QC

Solicitors: Camatta Lempens Pty Ltd

ORDER

ORDER: appeal allowed.

DECISION

Bleby J

Introduction

The respondent was charged on complaint that on 21 July 1996 at Sefton Park, he was in possession of child pornography contrary to s33(3) of the *Summary Offences Act* 1953 ("the Act"). He pleaded not guilty in the Magistrates' Court of South Australia, and after a trial was found not guilty by the Magistrate, who dismissed the complaint. The complainant was ordered to pay to the defendant the

sum of $4,500 costs, being an amount agreed between the parties.

This appeal is against the order dismissing the complaint and the consequential order for costs.

Section 33(3) of the Act provides:

"(3) A person who is in possession of child pornography is guilty of an offence.

Penalty: Division 6 fine or imprisonment."

A Division 6 fine is a fine not exceeding $4,000, and Division 6 imprisonment means a term of imprisonment not exceeding one year.

"Child pornography" is defined in s33(1) of the Act as follows:

"'child pornography' means indecent or offensive material in which a child (whether engaged in sexual activity or not) is depicted or described in a way that is likely to cause serious and general offence amongst reasonable adult members of the community"

The material concerned in this case comprised two magazines (Exhibits P1 and P2), each containing photographic material, with accompanying text, of males engaged in a variety of sexual activities with each other. On the appeal it was not in question that the material was indecent or offensive, and that the persons as shown in the magazines were depicted or described in a way that was likely to cause serious and general offence amongst reasonable adult members of the community. There were two questions canvassed on the appeal. I deal with them not necessarily in the order in which they were argued. The first was whether, for the purposes of s33(3) of the Act the respondent was in possession of the material. The second was whether the material depicted or described a "child".

For the purposes of the Act, "child" is defined as meaning "a person under, or apparently under, the age of 16 years".

Possession - Background and general considerations

The respondent gave evidence that he had acquired the magazines some time during the early to mid-1970's. He maintained that he had bought them legally. Of Exhibit P1 he said:

"I can remember seeing it in the mid-1970's. I can't remember seeing it for a long time."

He could not remember buying it. In relation to Exhibit P2 he said that he had acquired that at about the same time and had last seen it at about the same time as he had last seen Exhibit P1. The answer I have quoted above as to when he last saw the magazines was somewhat equivocal. He was not asked what he meant by the "long time" during which he could not remember seeing them. He expressed his own view that none of the actors in either publication was under 16. He was asked:

"Q. If you had thought that these magazines were unlawful to possess, would you have kept possession of them.

A. No.

Q. When was the last time that you would have realised that you had these 2 particular magazines in your possession.

A. I think the late 70's."

There was some difference between the evidence of the police who searched the respondent's house and that of the respondent as to where the two magazines were in fact found. Their precise location probably does not matter greatly. On the evidence of both the police and the respondent, the respondent was aware that the police inquiries were directed to any child pornography that he had in his possession. He directed the police to a number of videotapes and to the container in which the two magazines were found. According to the respondent, the magazines were two of about seventy in one box. None of the other material was seized by the police as being possibly child pornography, but from the evidence of the various titles referred to and of the conversation which took place whilst the search was going on, it is perhaps reasonable to infer that the respondent had directed police to parts of the house containing pornographic material, in one of which the magazines in question were found.

In the early to mid-1970's, being the period within which the plaintiff said that he had acquired the material, s33 of the (then) *Police Offences Act* 1953 made it an offence for any person (inter alia) to print, publish, sell, offer for sale or have in his possession for sale any indecent matter. "Indecent matter" was defined in sufficiently wide terms to include what is defined in the present Act as "child pornography". It was therefore not an offence merely to have such material in one's possession unless it was for the purpose of sale.

Section 33 was repealed and re-enacted in different form by the *Statutes Amendment (Criminal Law Consolidation and Police Offences) Act* 1983, with effect from 22 December 1983. The new section then made it an offence for a person to produce, to sell, to exhibit in a public place or to certain types of people and to do certain other acts with respect to what was then defined as "indecent material" or "offensive material". Possession of such material for sale was no longer an offence. However, subs(3) provided for heavier penalties where "a child (similarly defined) was physically involved as the subject or one of the subjects of the indecent or offensive aspects of the material". Possession of such material without more was not an offence.

The section was enacted in its present form with effect from 21 May 1992. It maintained a similar regime in respect of "indecent material" and "offensive material", and with heavier penalties where the indecent or offensive material was "child pornography". For the first time it also became an offence merely to be in possession of child pornography.

The argument of Mr Barrett QC for the respondent was that when Parliament created this new offence in 1992, it was prima facie to be governed by the established principles of criminal responsibility. There was therefore a presumption that *mens rea* was a necessary element of the offence. Alternatively, there would at least have to be shown to be a conscious awareness on the part of the respondent of his possession of the impugned material and of its nature, and that he intended to exercise some control over it.

The elements necessary to establish a charge of possession will vary greatly according to the legislative context in which the offence appears and the object of the legislation in question. In *Marshall v Benson* [1970] 1 NSWR 458 the allegation was that a police officer had in his possession an unlicensed pistol, being one which he had removed from the police station to his own home. At p461 Wallace P said:

"The word 'possession' can have various meanings and is sometimes an ambiguous word, and, as Lord Parker C.J., said in *Towers & Co. Ltd. v. Gray*, [1961] 2 All E.R. 68, at p.71: 'it is always giving rise to trouble'. We were referred to many authorities which have dealt with the subject of possession. But I would respectfully adopt the words of Lord Pearce in *Warner v. Metropolitan Police Commissioner*, [1968] 2 All E.R. 356, at p.387 where his Lordship said that in each case its meaning must depend on

the context in which it was used, and his Lordship added: 'One must, therefore, attempt from the apparent intention of the Act itself to reach a construction of the word "possession" which is not so narrow as to stultify the practical efficacy of the Act or so broad that it creates absurdity or injustice.'

In that case although a main concern was the nature and extent of the mental element involved in 'possession' as that word is used in the United Kingdom Drugs (Prevention of Misuse) Act 1964 (c.64) (an issue which does not arise here) it is clear that their Lordships considered that 'possession' of an article may be satisfied by knowledge of its existence in the control of the possessor."

A similar view was expressed by Kaye J in *Yeates v Hoare* [1981] VR 1034 at 1037. We are not here concerned, however, with the physical elements of possession or control but rather with the necessary state of mind of the defendant.

In *He Kaw Teh v The Queen* (1985) 157 CLR 523 the High Court had to consider the provisions of s233B(1)(b) and (c) of the *Customs Act* 1901. That subsection relevantly read:

"(1) Any person who -

...

(b) imports, or attempts to import, into Australia any prohibited imports to which this section applies or exports, or attempts to export, from Australia any prohibited exports to which this section applies; or

(c) without reasonable excuse (proof whereof shall lie upon him) has in his possession, or attempts to obtain possession of, any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act;

...

shall be guilty of an offence."

Subsection (1A) of the section provided as follows:

"(1A) On the prosecution of a person for an offence against the last preceding sub-section, being an offence to which paragraph (c) of that sub-section applies, it is not necessary for the prosecution to prove that the person knew that the goods in his possession or of which he attempted to obtain possession had been imported into Australia in contravention of this Act, but it is a defence if the person proves that he did not know that the goods in his possession or of which he attempted to obtain possession had been imported into Australia in contravention of this Act."

Much of the reasons for judgment in that case related to the mental element necessary for a breach of paragraph (b), but the requirements of paragraph (c), which perhaps have a greater similarity to this case, were also discussed. I will return to what the Court said about paragraph (c) later. In general terms, however, the Court considered that unless there was something in the Act to rebut the presumption, mere reference to the external elements of an offence raises a presumption that a mental element or *mens rea* is also a necessary (see, for example, Brennan J at 565). Whether the presumption is rebutted will depend on the terms of the statute in question. The Court was not unanimous on the extent of the knowledge or intention required for paragraph (b) or (c) of s233B(1) of the *Customs Act*. The difficulty of stating any universal test was recognised by the majority in the later case of *Bahri Kural v The Queen* (1987) 162 CLR 502. That case involved a prosecution for breach of s233B(1)(b) of the *Customs Act* 1901. At p504 the majority (Mason CJ, Deane and

Dawson JJ) said:

"Because the mental elements in different crimes vary widely it is impossible to make a statement which is universally valid for all purposes about the essential elements of a guilty mind. Depending upon the nature of the particular offence the requirement of a guilty mind may involve intention, foresight, knowledge or awareness with respect to some act, circumstance or consequence."

Similar observations were made by the Full Court in *Police v Pfeifer* (1996) 68 SASR 285 at 286. However, Doyle CJ, speaking on behalf of the Full Court, also went on to say:

"In Australia the mental element required for an offence can also be described as an absence of an honest and reasonable belief in the existence of facts which would have made the relevant act innocent. Unless the offence is one of absolute liability, if the issue is raised on the facts, the prosecution must establish the absence of what I will, for convenience, call an honest and reasonable belief. If the conclusion is that the absence of such belief is an element of the offence, it is for the prosecution to establish that absence before a conviction can be secured."

There are three aspects of the mental element which may need to be considered in this case. The first is the respondent's state of knowledge of his possession of the two magazines - whether at the relevant time he knew of their presence in his possession. The second element relates to his state of knowledge and belief as to whether the magazines were properly described as "child pornography" or more particularly in this case, his state of knowledge or belief as to whether the material depicted a person under or apparently under the age of 16 years. The third element to be considered is, if his state of belief or knowledge as to the age of the persons depicted is relevant, whether he is excused by a failure to direct his mind to the question after the enactment of s33(3) of the Act with effect from 21 May 1992, it being acknowledged that prior to that time his possession of the magazines was lawful.

Knowledge of actual possession

In relation to the first question, it is now clear in the light of the decision in *He Kaw Teh v The Queen* (supra) and subsequent cases that he must be shown to have had at least some knowledge of the fact that the offending material was in his possession and of the contents of that material. Something more than mere physical possession or dominion is necessary. As to that, the respondent knew, when he acquired the magazines, that he had them in his physical custody and possession. He obviously intended to keep them. There was no evidence that that intention ever changed, even though he may have forgotten for a period that he had them. Having made a conscious decision to acquire them in the 1970's, it can be inferred that he knew the nature of the contents of the magazines at least at that time or when he last looked at them.

There is now abundant authority in the United Kingdom that mere forgetfulness of the fact that a defendant has certain material objects in his custody or control, once that fact was previously known, will not be sufficient to defeat proof of his relevant state of knowledge that he possessed them. In *R v Martindale* [1986] 3 All ER 25 the defendant was searched and found to have in his wallet a small quantity of cannabis resin. He was charged with possession of a controlled drug. His case was that the drug had been given to him two years before in Canada and that he had forgotten about its presence in his wallet. It was argued that he did not have the necessary mental element to constitute a breach of the Act. The Court of Appeal held that he had been rightly convicted. Speaking on behalf of the Court, Lane LCJ said at p26:

"In our judgment, subject to the authorities, to which reference will have to be made in a moment, he remained in possession, even though his memory of the presence of the drug had faded or disappeared altogether. Possession does not depend on the alleged possessor's powers of memory. Nor does

possession come and go as memory revives or fails. If it were to do so, a man with a poor memory would be acquitted, he with the good memory would be convicted."

The Court followed an earlier decision of *R v Buswell* [1972] 1 WLR 64, and in doing so considered that a more recent decision of *R v Russell* (1984) 81 Cr App R 315 had been wrongly decided.

That position was affirmed by the Court of Appeal in *McCalla v R* (1988) 87 Cr App R 372. The appellant was charged with having an offensive weapon in a public place, namely a cosh in the glovebox of his car. He maintained that he had picked up the cosh on a building site a month before the incident which gave rise to his apprehension, and had put it in his car and had forgotten about it. The Court held that he was nevertheless rightly convicted. After reviewing all the relevant cases, May LJ, in delivering the judgment of the Court of Appeal said, at p379:

"We think that the basic principle underlying those cases is that once one has or possesses something, be it an offensive weapon or a drug, one continues to have or possess it until one does something to rid oneself of having or possessing it; that merely to have forgotten that one has possession of it is not sufficient to exclude continuing to have or possess it. As Phillimore LJ said in *Buswell* [1972] 1 All ER 75, 78, [1972] 1 WLR 64, 67, there is no limbo into which the article can go if recollection dims."

There can therefore be no doubt on the evidence that, even though the respondent may have forgotten that he had the magazines in his possession, he is taken to have had the required state of knowledge that he had the magazines in his possession. That imputed state of knowledge continued with the change in the law effected in 1992, when, assuming the material to be child pornography, it became an offence to possess it.

Belief as to nature and quality of the article

The second aspect is more difficult - whether it is necessary to establish knowledge on the respondent's part, or an absence of a contrary honest and reasonable belief, that the material constituted child pornography, or more particularly, in this case, that the persons depicted were persons under or apparently under the age of 16 years. So far as his own belief is concerned, the respondent gave evidence that of the three actors portrayed in Exhibit P1, two of them appeared to him to be 16 and one in his mid-20's. Of the twelve to fifteen actors in Exhibit P2, he expressed the view that none of them were under 16. He was cross-examined by reference to text accompanying some of the pictures, but maintained his view that none of the actors in either publication appeared to be under 16. There appears to be nothing in the evidence to suggest that that belief was not honestly held. I am prepared to assume, for present purposes, that it was.

Given that *He Kaw Teh* (supra) also dealt in part with an offence of possession, it is instructive to examine what the members of the majority of the High Court said about the mental element necessary in that particular case. It must be borne in mind, however, that the issue in that case was not so much the extent of the defendant's knowledge of the nature and quality of the material found to be in his possession but whether he knew it was in his possession at all. Gibbs CJ made the point (at p538) that the Court was not concerned in that case with the situation in which the accused knows that he has the thing in his custody but says that he does not know its nature or quality. He said:

"In Canada it has been held that the prosecution must prove that the accused knew that the substance was a drug (*Beaver v The Queen* [1957] SCR 531) but not that it was a drug of the kind mentioned in the charge: *Reg v Blondin* (1970) 2 CCC (2d) 118; affd. (1971) 4 CCC (2d) 566. There was no unanimity of opinion on this question in *Reg v Warner* [1969] 2 AC, at pp282, 307-308, 310-311. I need not discuss these questions further..."

Mason J agreed with the reasons for judgment of the Chief Justice.

After an extensive review of the cases, Brennan J (at p582) summarised the general principles as follows:

"1. There is a presumption that in every statutory offence, it is implied as an element of the offence that the person who commits the actus reus does the physical act defined in the offence voluntarily and with the intention of doing an act of the defined kind.

2. There is a further presumption in relation to the external elements of a statutory offence that are circumstances attendant on the doing of the physical act involved. It is implied as an element of the offence that, at the time when the person who commits the actus reus does the physical act involved, he either - (a) knows the circumstances which make the doing of that act an offence; or (b) does not believe honestly and on reasonable grounds that the circumstances which are attendant on the doing of that act are such as to make the doing of that act innocent.

3. The state of mind to be implied under (2) is the state of mind which is more consonant with the fulfilment of the purpose of the statute. Prima facie, knowledge is that state of mind.

4. The prosecution bears the onus of proving the elements referred to in (1) and (2) beyond reasonable doubt except in the case of insanity and except where statute otherwise provides."

In relation specifically to possession and paragraph (c) of the subsection, he held (at p586) that paragraph (c) "does not define the offence as possession of a substance - a formulation which arguably restricts the mental element of knowledge to the existence of a thing possessed. It is not possible to construe par. (c) as containing two elements - the existence of an object and its nature - and to require knowledge of only one of those elements... the offence is committed only if the supposed offender knows that the object possessed is, or is likely to be, narcotic goods."

His Honour said (at p587):

"To require knowledge of the existence and nature of narcotic goods that a person has in his possession gives to par. (c) an operation that is, in practical respects, in harmony with the operation of par. (b). Paragraph (b) would be largely unnecessary if proof of knowledge under par. (c) were not essential. Possession, not importation, would be the charge more easily pressed against an importer."

He relied also on the earlier decision of *Hill v Donohoe* (1911) 13 CLR 224. That concerned an alleged breach of paragraph (c) shortly after it was enacted. Of the paragraph, Griffith CJ (with whom Barton and O'Connor JJ agreed) said at 227:

"It is contended that the language of this section applies to the case of any person who has in his possession prohibited goods which have in fact been imported, although he may be quite ignorant of the fact. For reasons which I gave in the case of *Lyons v Smart* 6 CLR, 143 I do not think that that is the meaning of the section. I think that the case of the *Queen v Sleep* 30 LJMC, 170 which I there quoted, is applicable. In that case it was held that under a similar provision knowledge of the character of the goods is an element of the offence...

The section, as I am at present advised, means that any person who, without reasonable excuse, has in his possession any prohibited import which *to his knowledge* has been imported into Australia in contravention of the Act shall be liable, &c. And, so construed, it seems to me merely ancillary to the provision prohibiting the importation of certain goods." (Emphasis added)

Brennan J pointed out that the onus of proving that element had been altered by the insertion of subsection (1A) in 1967, but otherwise, as Brennan J observed, nothing has cast doubt on what the then High Court considered were the necessary elements of possession for the purposes of paragraph (c), including knowledge that the goods possessed had been imported legally. It is to be noted that that conclusion was reached without reference to the phrase "without reasonable excuse" appearing in paragraph (c). On the other hand, both Brennan J and Griffith CJ, in *Hill v Donohoe*, did construe the requirement of knowledge by reference to other relevant provisions of the subsection.

Dawson J expressed the view (at p599) that the question comes down to one of statutory interpretation, and will depend upon the nature and form of the legislation. He took a rather different view from that of Brennan J (at p601):

"[I]t may, I think, safely be concluded that, having provided the defence of reasonable excuse, the legislature intended that the knowledge required by the paragraph should be no more than is minimally necessary to establish possession, leaving it to the defence to bring forward matters of an exculpatory nature...

Put quite plainly, I think that the proper construction of par. (c) is one which attributes to the concept of possession as it is used there, the bare minimum of knowledge. To construe the paragraph in that way is to recognize that in law knowledge is intrinsic to possession, but that the degree of knowledge required may vary according to context. The context of par. (c) is one in which the legislature has expressly dealt with intent other than by spelling out what is meant by possession and has done so in a way which indicates that it did not intend an extension of that concept beyond the requirements of basic legal principle."

He concluded (at p602):

"In my view, it comes to this. A person cannot, within the meaning of par. (c), possess something when he is unaware of its existence or presence. But he will, since possession is used in its barest sense, possess something if he has custody or control of the thing itself or of the receptacle or place in which it is to be found provided that he knows of its presence. He need not know what it is (other than to the extent necessary to know of its presence) nor its qualities. Thus a person will possess narcotic goods if he has, to his knowledge, custody or control of something which is in fact a narcotic substance, even if its packaging prevents him from knowing what it is and even if he does not know its quality as a narcotic substance. If, of course, he does not know what it is or does not know that it is a narcotic substance, he may have a defence of reasonable excuse under par. (c), but to point this out is only to emphasize that the use of the concept of possession in that paragraph was not intended to cover ground which would otherwise be covered by the defence expressly provided."

Once again, Dawson J's view was coloured by the context in which the word "possession" appeared, but with a rather different result from that reached by Brennan J.

I remind myself too that it is not only the context in which the expression appears, but that the extent of knowledge, intent, belief or foresight of a given consequence etc will also depend on the nature of the offence itself, or even of the element of the offence in question: *Police v Pfeifer* (supra) at 286.

What is there then in the context of s33 of the *Summary Offences Act* 1953, or in the nature of the offence or its elements, which might indicate whether proof of knowledge of the nature and quality of the article possessed, is necessary in order to obtain a conviction? I have already pointed out that in 1992 Parliament, for the first time, made it an offence merely to be in possession of child pornography. Prior to the 1983 amendments to the Act, possession of "indecent matter" was an offence, but only when it was for the purpose of sale. That required proof of an element of necessary

intention to sell the material and therefore the imputation of some knowledge as to the nature and quality of what was intended to be sold. Otherwise, there would have been no ability to place a value on the thing for the purpose of sale. In that respect, the 1992 amendment can be seen as contrasting with the position before 1983, in that it became less relevant to know the nature and quality of the material possessed.

It is also instructive to look at the 1992 amendment in the light of the apparent purpose of Parliament in enacting it. It cannot now be doubted that reference may be made to parliamentary debates to establish the purpose of the legislation and the mischief it was designed to overcome, regardless of whether there is manifest ambiguity in the provision concerned: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; *Newcastle City Council v GIO General Ltd* (1997) 149 ALR 623; 72 ALJR 97; *Burch v State of South Australia* (Unreported, Full Court, 25 February 1998, Judgment No S6517). By reference to Hansard, 27 February 1992, page 3101, the then Attorney-General introducing the Bill observed that it was based on recommendations of the Australian Law Reform Commission (ALRC) in its report No 55 entitled "Censorship Procedure". He said:

"The ALRC considered Australia's obligations as a result of ratification of the United Nations convention on the rights of the child, particularly article 34, which undertakes to protect all children from all forms of sexual exploitation and sexual abuse. The production of child pornography is likely to involve child sex abuse and is often associated with child sex offenders...

The Government believes that children, who are amongst the most vulnerable in our society, must be protected from adults who seek to abuse and exploit them. This amendment will work to eliminate the sexual exploitation of children in our society."

The object and purpose of the legislation was therefore the prevention of sexual abuse and exploitation of children. That abuse and exploitation could be either as persons involved in offensive acts being depicted or described in the material, or by making such material available to readers who might be encouraged or incited to exploit children. That object seems to have been pursued in this case by denying a market to those who would exploit children in the production of the material and by preventing access to other would-be exploiters to material which might have the effect of promoting such exploitation by readers. Section 22 of the *Acts Interpretation Act* 1915 requires that a construction that would promote the purpose or object of the Act must be preferred to a construction that would not promote that purpose or object. Assuming that it is otherwise established that the material depicts or describes a child, if a successful prosecution required proof of the possessor's state of knowledge or belief as to the age or apparent age of the persons depicted, it would be very difficult to prove an offence other than, perhaps, in the case of pre-pubescent children of such an age that no-one could possibly hold a belief that the subject was not under 16. Proof of knowledge of the age or apparent age of the person depicted would therefore militate against fulfilment of the object of the legislation.

This appears to be the reasoning underlying the decision of the Court of Appeal in *R v Land* (1997) 162 JPR 29. The appellant there was convicted of two counts of possessing indecent photographs of a child contrary to s1(1)(c) of the *Protection of Children Act* 1978 (UK). "Child" was defined as meaning "a person under the age of 16", and the Act further required that 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". On appeal it was alleged that the trial judge had failed to direct the jury that the defendant had to know that the indecent photograph was the photograph of a child. The Court of Appeal rejected the argument, observing that the object of the Act in question was "to protect children from exploitation and degradation". The Court said (at pp33-34):

"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... 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...

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...

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 s.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."

I respectfully agree with those comments, and it is my opinion that they apply equally to s33(3) of the Act.

There are also limited statutory defences provided for in subs(4) and (5) of s33, and Parliament has not chosen to include lack of knowledge or belief as to the nature and quality of the material as one of them. Parliament has not qualified the phrase "in possession of" in s33(3) with the word "knowingly" or "without reasonable excuse", such as would more readily give rise to the inference that a state of relevant knowledge or belief is necessary.

There is one further reason why in the circumstances of this section I would not consider it necessary to prove knowledge on the part of the appellant of the nature and quality of the material by proving knowledge that a person depicted in the material is apparently under the age of 16. It will be apparent from what I have said below in relation to the other ground of appeal that whether a person is apparently under the age of 16 is a question of fact to be determined by the magistrate. In that regard, the magistrate may or may not be assisted by the leading of expert evidence. However, ultimately the magistrate must exercise his or her fact-finding role. Where that involves, as it does here, a qualitative assessment of a person's apparent age, that will be a matter of judgment, based on all the evidence, and on which the magistrate will bring to bear his or her own experience, commonsense and judgment, in the same way as a member of a jury would be required to do if this were an indictable offence. If, according to the experience and commonsense of ordinary and reasonable people, a person is apparently under the age of 16, it follows that, although the respondent may have genuinely held the opposite belief, it was not a belief that could have been reasonably held by the respondent. In other words, once the conclusion is reached that the subjects depicted in the material are apparently under the age of 16, there can be no room for any honest and reasonable belief that they were not.

Thus far, I have looked at the history, the apparent object and purpose of the section and its actual terms. These all seem to suggest a lack of necessity to prove knowledge or absence of reasonable belief of the age of the persons depicted or described. Would such an interpretation lead to unfortunate or harsh results? Would it allow punishment of completely innocent victims? I think not, provided that the requirement for proof of knowledge that the material is possessed and of its generally indecent or offensive nature is adhered to. The possessor of such material, even if he or she may have a genuine belief that the subjects are under 16, runs a risk that if the possession continues, and he or she is apprehended, a court may find that the subjects depicted or described are apparently under the age of 16. It is not as though that is a concealed risk or something that may take the

possessor by surprise. It would not therefore lead to a harsh result. Indeed, only those whose genuine but mistaken belief was unreasonable would be convicted. If it were a reasonable belief that the subject was apparently under 16, it is a belief or conclusion that one should expect to be shared by a court or a jury. Thus, the nature of the offence itself and its respective elements also suggest that proof of relevant knowledge or belief is not necessary.

For these reasons, in my opinion it was not necessary for the prosecution to prove either knowledge that the subjects depicted were or were apparently under the age of 16 or absence of a reasonable belief that the subjects were apparently over the age of 16. It also follows that it is not necessary to consider the third aspect of the mental element to which I earlier referred, namely whether the respondent is excused by a failure to direct his mind to the question of the age of the participants after the enactment of s33(3) of the Act in 1992. However, as with the first aspect - the respondent's state of knowledge of his possession of the two magazines - mere forgetfulness or failure to address one's mind to the question after the change in legislation would not in itself be sufficient excuse.

Whether the material depicted or described a "child" - The evidence

The prosecution did not attempt to prove that any of the persons depicted in the material were in fact under the age of 16 years. The source of the material and the identity of the persons in the photographs were quite unknown. Therefore it would have been impossible to have proved the actual age of the persons by any acceptable evidence. The prosecution relied on the photographs themselves together with some parts of the written text as depicting or describing a person or persons apparently under the age of 16 years. I disagree with the primary thrust of the submission of Mr Barrett QC for the respondent that the prosecution case was directed primarily at establishing the actual age of the subjects, by the leading of expert evidence, and that when confronted with a defence "expert" who disagreed, the prosecution then sought to rely on apparent age by discounting the experts. Mr Barrett may be correct in saying that the prosecution cannot rely on apparent age if the evidence shows that the actual age of the person in question is 16 or over. That question need not be resolved in these proceedings. But if experts were to be led, their opinions could only ever have been based on how the subjects appeared in the material - their apparent features, and hence their apparent age.

Expert Witnesses

The prosecution called Dr N R McCleave, a Fellow of the Royal Australian College of General Practitioners, who had a number of post-graduate diplomas in obstetrics and gynaecology and medical jurisprudence, and a masters degree in medical jurisprudence and in social science criminology. He was a Fellow of the Australian College of Legal Medicine. He had done no post-graduate study in paediatrics. His practice was said to relate largely to medico-legal matters.

He expressed the opinion that a number of pictures in the two publications depicted people who appeared to be under the age of 16. The factors which he took into account in arriving at that opinion included "their general presentation, their facial features, the shape of their body, their body configuration and slimness. I looked to see their beard pattern, also their face development and also the development of their head." Later in his evidence he was asked:

"Q. So in all of your comments, as I understand it, you look at the amount of facial hair, the softness of the features, and the development of the chest -

A. The development which includes the bone, which includes the muscles, which includes the width of the shoulders, which includes the anterior, posterior diametre(sic) of the shoulders, the jaw line is also present in there, the apparent softness of the skin from the photographs as present there, the level of boney(sic) development is also relevant. And without all of those things together, not necessarily

all of them, it becomes hard to actually predict things. It is the concept of I suppose you know, one swallow a spring doesn't make, you need a lot of swallows to make a spring. The more you have the more you know it is spring."

In expressing the opinion that certain identified males appeared to be under the age of 16 he referred in particular to some of the features of that person on which he relied. In relation to one of the subjects he relied on "his hair cropping, his general narrowness of his face, his narrowness of his shoulders and also his lack of chest development, flesh on that plus his face looks generally young". In another case he referred to "the cropping of the hair, the narrowness of the face, the narrowness of the shoulders and the narrowness of the chest plus the overall impression".

In some cases Dr McCleave expressed the view that the subject was either probably less than 16 or gave an estimate of what he considered the likely age or age range to be. He considered that it was not possible to tell from observations of the genitalia alone as to whether an individual was under or over 16. His opinion was based largely on factors of general appearance in the light of his own "personal experience and general living plus in medical practice". His evidence was based solely on the appearance of the subjects in the photographs. From that he was able to express an opinion as to their apparent ages. It was not, and could never have been, an opinion as to their actual ages.

The defence called Dr T G Donald who had been employed as a senior lecturer in community child health at the University of Tasmania, but who since 1988 had worked as a general community paediatrician, and at the time of giving evidence was head of the Department of Child Protection Services at the Women's and Children's Hospital in Adelaide. In expressing his opinions he was influenced largely by some United Kingdom research by a person called Tanner, which described and classified the various stages of adolescent development and the ages at which particular percentages of the population had reached each of those stages of development. Those stages related particularly to the development of male genitalia and of male pubic hair. That study showed that 95% of males over the age of 16 will have what he described as adult or stage 4 pubic hair. Based on that research he expressed the opinion that if a particular male subject displayed stage 4 pubic hair development there was a 95% chance that the subject was over the age of 16. I shall have more to say about this opinion in due course. He was shown the photographs in Exhibit P1 which showed persons whom Dr McCleave had considered to be under the age of 16. He was unable to express any opinion as to any of those subjects because there was insufficient genital or pubic hair exposure in the photographs on which he could base any concluded view. In relation to Exhibit P2, he considered that those who had been identified by Dr McCleave as being apparently below the age of 16 all appeared to fulfil his criteria, namely that testicle size and distribution of pubic hair indicated a 95% chance that they were over 16.

Dr Donald rejected Dr McCleave's assessment criteria as being subjective, whereas he claimed that his assessment was based on scientific observations over a period of years. Notwithstanding that, he was asked the following question:

"Q. But on a fully qualified basis as in a qualified opinion as to the appearance, the general appearance, of any of the actors in the books, are there any who present with an appearance or the impression that they are under the age of 16."

After some discussion with counsel the magistrate reinterpreted the question and received the answer as follows:

"Q. Can you tell me what you subjectively feel about the photographs in P1 and P2 - the prosecutor is interested.

A. I think that subjectively, those - not all of them, but some of those actors look young. I have no problem with that at all. I wouldn't want to kind of stab at an age, but if you said 'Do they look younger than 16 to you?', I'd say 'Yes'. That's a subjective position."

Placed in their context, where those passages refer to what he "subjectively" felt or thought or to a "subjective position" they obviously referred to an assessment of the sort of criteria adopted by Dr McCleave.

"Child" - The Magistrate's Findings

The learned magistrate rejected the prosecution's submissions that she should determine the age of the persons depicted in the magazines as if she were a member of a jury. She said:

"It has been suggested by prosecution I look at these magazines and that if they appear to me to depict children in situations that could be described as child pornography, that is sufficient for proof beyond reasonable doubt. I reject that view and I consider the evidence of Dr Donald gives good reason for me rejecting such a view. His evidence shows that an approach relying on impression could lead to injustice."

The learned magistrate went on to stress the need to prove either element (actual age or apparent age) beyond reasonable doubt. She continued:

"On the medical evidence (presumably that of Dr Donald) I accept that if the actors in P1 and P2 were pubescent and their pubic hair and genital characteristics were displayed, an assessment of age could be made. However, these characteristics cannot be observed in those actors alleged to come within the definition of 'child'."

Her Honour preferred the expertise of Dr Donald and accepted his evidence. Where he was unable to view the spread of pubic hair and various other characteristics, Dr Donald was unable to express an opinion, and in the learned magistrate's view the prosecution had failed to discharge its onus of proof. She refused to rely on "impressions or opinions", referring to the more subjective opinions of Dr McCleave, and preferred those based on Dr Donald's scientific criteria.

Role of the Experts

In my opinion the learned magistrate erred in a number of respects. In the first place she seems to have relied entirely on the opinion of the expert she accepted as deciding what she perceived to be the ultimate issue in the case, namely the age of the subjects. She accepted in its entirety the opinion of Dr Donald that in respect of those subjects where pubic hair and testicle size was evident, none of the subjects were under the age of 16, and in respect of those where those features were not revealed, there was no acceptable evidence, and the Crown had failed to prove its case. It is not apparent from the learned magistrate's reasons that at any stage she brought her own judgment to bear on the issue. Indeed she rejected the prosecution submission that she should.

In a case such as this, it is not for the magistrate to abdicate that responsibility in favour of an expert. In the course of their joint judgment in *Ramsay v Watson* (1961) 108 CLR 642 the members of the High Court said, at p645:

"A qualified medical practitioner may, as an expert, express his opinion as to the nature and cause, or probable cause, of an ailment. But it is for the jury to weigh and determine the probabilities. In doing so they may be assisted by the medical evidence. But they are not simply to transfer their task to the witnesses. They must ask themselves 'Are we on the whole of the evidence satisfied on a balance of

probabilities of the fact?'. In this case his Honour in his summing-up instructed the jury that this was their task; and no ground is shown for impugning their conclusion."

That passage has obvious application to this case with the necessary modification, of course, that the jury, or in this case the magistrate, must be satisfied beyond reasonable doubt of the relevant fact. The important thing is that it is for the Court, not for the expert, to determine.

In *Samuels v Flavel* [1970] SASR 256 the respondent had been charged with driving a motor car while he was so much under the influence of intoxicating liquor or a drug as to be incapable of exercising effective control over the vehicle, contrary to s47 of the *Road Traffic Act* 1961. There was nothing about the respondent's manner of driving, apart from the fact that he drove into a one-way street, which called for any comment. He was steady on his feet and neat in his appearance and answered questions rationally and politely. He submitted to a breathalyser test, and the two tests showed readings of .18 and .19 grams of alcohol per thousand millilitres of blood. The prosecution attempted to rely on the evidence of a forensic pathologist who had not seen the accused, and his evidence was that a person with a blood alcohol concentration of .19 percent would necessarily have a substantial impairment of his faculties, and that his ability to drive a motor vehicle would be impaired. In the course of dismissing the complainant's appeal, Bray CJ, with whom Walters and Zelling JJ agreed, said, at p258:

"But no court should abdicate its own judgment in favour of an expert or refuse to give proper weight to other evidence in the case, even non-expert evidence, which is contrary to the expert's opinion."

At pp261-262 the learned Chief Justice explained in more detail why there were grave dangers in relying on the expert's opinion on the ultimate issue in the case, unless it was absolutely unavoidable. I also respectfully adopt what Duggan J said on behalf of the Full Court in *R v Penney* (Unreported, 21 March 1997, Judgment No S6071) at pp8-9:

"The role of an expert witness is to express opinions on matters which are not, or are not wholly, within the knowledge and experience of ordinary persons. (*Clark v Ryan* (1960) 103 CLR 486; *R v Bonython* (1984) 38 SASR 45 at 46). Opinion evidence in a case such as the present is based on a restricted collection of facts relevant to the expression of the opinion. However the jury's function when considering the issue to which the opinion evidence is relevant may well involve, as it did in the present case, consideration of a large number of proved circumstances which, for obvious reasons, were not put to the experts. The opinions of the experts are relevant in the ultimate assessment, but they cannot pre-empt the duty of the jury to consider the combined effect of all the circumstances which they find proved."

That this is not a question to be decided by experts is well illustrated by the decision in *R v Land* (supra). It will be remembered that the relevant Act in that case provided that a person was to be taken as having been a child "if it appears, from the evidence as a whole, that he was then under the age of 16". That is not a dissimilar provision in effect from the definition of "child" in s33(1) which includes a person *apparently* under the age of 16 years. Speaking of the UK provision the Court of Appeal said (supra at p34):

"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 1978 Act 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."

Those remarks are equally applicable to this case and I respectfully adopt them. The learned magistrate was required to act as the jury. Based on her own experience and commonsense, she was in as good a position as any expert to make an assessment as to whether the persons depicted were apparently under the age of 16.

The question of the apparent age of a person will always be a jury question. It will be for the finder of fact, if there is no evidence of actual age, to say whether a person is apparently under the age of 16. Expert evidence will seldom help. It may perhaps assist in reaching the factual finding as to whether a particular person is apparently under the age of 16 by reference to usual facial, bodily, genital and other features of children of various ages. In some cases that evidence may be enhanced by personal and family history and the interpretation by an expert of an x-ray examination of bony development. The expert may be asked whether certain features described by or in the material are consistent or not consistent with the person under the age of 16. However, at the end of the day it is the court and not the expert which must make the finding as to whether or not the prosecution has proved beyond reasonable doubt that the subject is apparently under the age of 16.

Failure to consider apparent age

The second unsatisfactory feature of the learned magistrate's reasons is related to her acceptance of Dr Donald's evidence.

The learned magistrate appears to have eschewed any process which relied on an opinion or impressions based on observations of the photographs, in favour of what was perceived by her to be scientifically a more accurate test. Reliance on impressions or subjective opinions could, she considered, lead to injustices. Failure to meet Dr Donald's scientific test exposed the case to reasonable doubt. But Dr Donald's evidence was expressed in the form of an opinion as to the subject's actual age. His evidence that the relevant subjects looked younger than 16 was not accepted by the learned magistrate. The inevitable conclusion is that the learned magistrate decided the case by reference to what she considered to be proof beyond reasonable doubt of actual age and did not consider whether the prosecution had proved the apparent age beyond reasonable doubt. The use of the word "apparently" in the definition of "child" at once lowers the standard of necessary proof from something that is of the specified quality, beyond reasonable doubt, to something that appears to be of that quality, beyond reasonable doubt, notwithstanding that it may not in fact be of that quality. That means that the fact-finder, in this case the learned magistrate, must at least consider whether a person is apparently under the age of 16 if she is unable to be satisfied by acceptable evidence that the person is in fact under the age of 16. This the learned magistrate failed to do.

Failure to appreciate the true effect of the expert evidence

The third point to be made about the learned magistrate's reasons is that both she and Dr Donald seem to have assumed that Dr Donald's evidence was directed to an opinion as to the actual age of the subjects. I have already noted that Dr Donald said as much in his evidence. However, neither expert was in a position to depose to the actual age of the subjects. Both experts could only rely on pictures, and could give evidence only as a result of what was evident or apparent from the magazines. Neither was in a position to give evidence other than as to the apparent age of the subjects; that is, from how they appeared or were described in the two magazines. In that respect the learned magistrate seems to have misconceived what could only have been the effect of the evidence of both experts, namely evidence of the age of the subjects apparent from the publication itself, they having no other source to rely on.

Weaknesses in the evidence relied on

There are also two quite unsatisfactory features of Dr Donald's evidence which, in my opinion, resulted in error on the part of the magistrate in her reliance on the evidence.

In the first place, Dr Donald's opinion could only be expressed where there was sufficient exposure of the genitalia for him to express an opinion. He expressed no opinion on any of the subjects where there was no or insufficient exposure of genitalia or pubic hair. The definition of "child pornography" in s33(1) of the Act includes any material in which a child *whether engaged in sexual activity or not* is depicted or described. There can conceivably be many situations depicted which will constitute child pornography where there is no exposure of the child's genitalia at all, and the Court will need to assess, from other features of the person depicted in the material whether that person is apparently under the age of 16. Merely because the genitalia are not exposed does not absolve the Court from any further inquiry as to whether the person depicted is a child. The learned magistrate seems to have implied from Dr Donald's evidence that no conclusion could be reached as to the age or apparent age of a person unless the features on which Dr Donald relied were exposed. Not only does it expose the weakness of Dr Donald's evidence in its application to all situations arising under the definition, but it also meant that in relying on it, the learned magistrate failed properly to consider any evidence in relation to those other persons.

The second feature of Dr Donald's evidence, reliance on which led the learned magistrate into error was that it was just not logically probative of the conclusion which he attempted to reach. I have already summarised Dr Donald's evidence and his reliance on a study which showed that 95% of males over the age of 16 have what he described as Stage 4 pubic hair. He used that study to express the opinion that if the subject depicted in the magazine had Stage 4 pubic hair, there was a 95% chance that that person was over 16. However, one cannot reason from the results of the study in that way. Just because the study shows that 95% of boys will have reached Stage 4 development by the age of 16 does not mean that there is a 95% chance that a boy with Stage 4 development is over 16. It can only mean that if he has not reached Stage 4 development, there is a 95% chance that he has not reached the age of 16 or conversely that there is a 5% chance that he is over the age of 16. The tables relied on also show that 90% of boys will have reached Stage 4 by the age of 15-3/4. If Dr Donald's reasoning were correct he would be forced to conclude that there was a 90% chance that a boy with Stage 4 pubic hair was over 15-3/4, ie under 16. Therefore, whilst the tables relied on might not be open to doubt for what they show, Dr Donald's reliance on them to prove his conclusion was flawed.

This flaw seems to have escaped both the magistrate and the prosecutor, but in my opinion it rendered Dr Donald's evidence worthless. For that reason, also, the learned magistrate erred in relying on it.

Other criticisms

Criticism was also made of the learned magistrate's reasons in that she failed to make any reference to other features of the publications, namely the written description accompanying the photographs. In both publications there were references to the fact that the subjects were "boys", "young" and other references suggestive of youth. These are not conclusive in themselves, but it is necessary to read the publication as a whole. The definition of "child pornography" includes offensive material in which a child may not only be depicted but may also be described in a way that is likely to cause serious and general offence. Therefore there seems to be a failure on the part of the learned magistrate to have considered all the relevant material. Whilst the descriptions cannot be conclusive in themselves, that omission emphasises the need for the fact-finder to consider all the circumstances. It also illustrates the danger of relying exclusively, as the learned magistrate did, on the opinion of the expert.

Conclusion

It follows that the proceedings before the learned magistrate miscarried, that the appeal must be allowed and that the orders dismissing the complaint and for the payment of costs must be set aside. It remains to determine whether the matter should be remitted to the magistrate in order to make the necessary factual findings or whether it is open to this Court to do so. In most cases the appropriate course would be to remit the matter to the trial Court where findings of fact remain to be made. However, this case possesses a number of unusual features.

The conclusion of fact that needs to be made is whether the subjects depicted or some of them are apparently under the age of 16. The only primary material on which that assessment can be made consists of the publications themselves - the photographs and text. The ability to reach the necessary factual conclusion does not depend upon a court having heard or assessed witnesses. An appellate court, in this case, is in just as good a position as the learned magistrate to make its own assessment of the primary factual material. It is in no different a position from that of an appellate court which is obliged to reach its own conclusion as to the inferences to be drawn from primary facts found or from undisputed evidence led in the court below: *Warren v Coombes* (1979) 142 CLR 531. It is also in the interests of the parties and of the administration of justice that there be as speedy a termination of the litigation as possible. It is therefore expedient that I should reach my own conclusion as to whether the subjects or some of them were apparently under the age of 16.

I have looked at the material myself and have formed my own view that some of the subjects in both publications are apparently under the age of 16. In reaching that conclusion I have had regard to the various physical features to which Dr McCleave referred, and have brought to bear on the question my own experience and commonsense. I am comforted in the conclusion I have reached that it is apparently one shared by all the witnesses who gave evidence, other than the respondent, who were asked to express a view on the matter. Both the experts agreed that some of the subjects were apparently under the age of 16. On the authority of *R v Land* (supra) that evidence was inadmissible. It was nevertheless admitted. Dr McCleave's evidence went further and was helpful in indicating the particular features of development which were relevant to take into account in making one's assessment of a person's age. It is perhaps not insignificant that, the evidence having been received, the judgment of both of them, applying their ordinary experience and commonsense, indicated that some subjects were apparently under 16. The evidence upon which they reached that conclusion was exactly the same as that before the magistrate and before me, namely the pictures and text themselves.

I therefore find the charge proved and the respondent guilty of the offence as charged. I will need to hear counsel further as to whether a conviction should be recorded and as to the appropriate penalty to be imposed.