NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

SC 143/2013
[2014] NZSC 110

BETWEEN	LM Appellant
AND	The Queen Respondent

Hearing:	17 June 2014
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	C T Patterson for Appellant M D Downs and K A Courteney for Respondent
Judgment:	13 August 2014

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

	Para No
Elias CJ, McGrath and William Young JJ	[1]
Glazebrook and Arnold JJ	[31]

ELIAS CJ, McGRATH and WILLIAM YOUNG JJ

(Given by William Young J)

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A prosecution for offending which occurred in Russia

[1] The appellant stood trial before Judge Field in the Auckland District Court on a charge which alleged that he:

> … on or about the 11th day of March 2007 at Moscow, Russia, being a citizen of New Zealand … did an act to a child under the age of 12 years which would, if done in New Zealand, constitute an offence against Section 132(3) of the Crimes Act 1961.

The particulars were as follows:

> Taking a photograph of [the complainant], then 7 years old, whilst she is masturbating the penis of an adult male.

The indictment referred to ss 144A(1)(a) and (2)(c) and s 66 of the Crimes Act 1961.

[2] Section 144A provides for the prosecution of New Zealanders[1] for conduct which, if it had occurred in New Zealand, would be contrary to specified provisions of the Crimes Act involving sexual offending against children and young people. Amongst the provisions so specified is s 132(3), which deals with indecencies

[1] Meaning those who are citizens of, or usually resident in, New Zealand.

involving children under the age of 12. Although the way the count was laid was consistent with an allegation that the appellant was guilty as a principal,[2] the Crown case at trial was that the appellant was a party to the offending of the man depicted in the photograph (V). The appeal raises the issue whether s 144A permits prosecution where the defendant was a party to the alleged offending but not the principal offender.

[3] Both at trial[3] and on appeal to the Court of Appeal,[4] the appellant through his counsel accepted that if he could be shown to have taken the photograph in question, he was guilty as a party. On appeal to this Court, however, the appellant has put in issue the question whether s 144A provides for conviction of someone who was a party to the offending and not a principal offender. For the reasons which follow, we conclude that the basis upon which the Crown case was advanced was misconceived. But, because we are satisfied that the appellant in fact offended as a principal, we are of the view that his conviction can and should be upheld.

The core facts

[4] The critical facts lie within a narrow compass. The appellant is a New Zealander. At the time of the offending he was living in Russia. The complainant is his stepdaughter. V is a Russian with no apparent connection to New Zealand but was a friend of the appellant. The photograph was taken in the apartment in which the appellant and his stepdaughter were living along with other members of the family. On the findings of fact, the appellant not only took the photograph but also directed the posing of the scene which he photographed.

Section 132(3) of the Crimes Act

[5] The Crown case relied on s 132(3) of the Crimes Act. This provides:

> Every one who does an indecent act on a child is liable to imprisonment for a term not exceeding 10 years.

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2 The reference was just to "s 66" which encompasses the liabilities of both principals and parties. As well, it is not uncommon for s 66 to appear on the indictment in cases where the Crown is alleging liability as either a principal or a party.

3 *R v [LM]* DC Auckland CRI-2010-4-15660, 15 December 2011 (Judge CJ Field).

4 *LM (CA217/2012) v R* [2013] NZCA 145 (Harrison, Allan and Clifford JJ).

"Child" is defined to mean a person under the age of 12 years.[5] The scope of this offence is expanded by s 2(1B) which provides:

> For the purposes of this Act, one person does an indecent act on another person whether he or she—
>
> (a) does an indecent act with or on the other person; or
>
> (b) induces or permits the other person to do an indecent act with or on him or her.

If the incident between the appellant, the complainant and V had occurred in New Zealand, the appellant could have been found guilty as a principal if the Court was satisfied that he had induced or permitted the complainant to do "an indecent act with or on him".

[6] The Crown case was advanced on the basis that the appellant was a party and not a principal because it was thought that, in the absence of physical contact between the appellant and the complainant, the indecent act which the complainant performed was not "with or on" the appellant. It is, however, now established by the judgment of this Court in *Y (SC40/2013) v R* that physical contact is not fundamental to liability under s 132(3).[6] On the basis of that judgment,[7] it is clear that if the conduct had occurred in New Zealand, the appellant could have been found guilty as a principal offender.

Extraterritorial jurisdiction in respect of sexual offending against children

[7] Section 144A falls to be considered in the context provided by the United Nations Convention on the Rights of the Child[8] and the Optional Protocol to that Convention on the Sale of Children, Child Prostitution and Child Pornography.[9]

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5 See s 132(6)(a) of the Crimes Act 1961.

6 *Y (SC40/2013) v R* [2014] NZSC 34 at [20]–[22].

7 Particularly at [22].

8 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

9 Optional Protocol to the Convention of the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2171 UNTS 227 (opened for signature 25 May 2000, entered into force 18 January 2002).

[8] Article 34 of the Convention provides:

> States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
>
> (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
>
> (b) The exploitative use of children in prostitution or other unlawful sexual practices;
>
> (c) The exploitative use of children in pornographic performances and materials.

The conduct of the appellant is within art 34(a). That article, however, did not require New Zealand to enact legislation addressing (and criminalising) unlawful sexual activity in other jurisdictions, albeit that such legislation is consistent with the general obligation to take "all appropriate national, bilateral and multilateral measures".

[9] Section 144A of the Crimes Act was first enacted in 1995 in these terms:[10]

> **144A Sexual conduct with children outside New Zealand**
>
> (1) Every one commits an offence who, being a New Zealand citizen or a person ordinarily resident in New Zealand, does, outside New Zealand, any act to or in relation to any child under the age of 16 years if that act would, if done in New Zealand, constitute an offence against any of the following provisions of this Act:
>
> (a) Section 132(1) (sexual intercourse with girl under 12):
>
> (b) Section 132(2) (attempted sexual intercourse with girl under 12):
>
> (c) Section 133 (indecency with girl under 12):
>
> (d) Section 134(1) (sexual intercourse with girl between 12 and 16):
>
> (e) Section 134(2) (indecency with girl between 12 and 16):
>
> (f) Section 139 (indecent act between girl and woman):
>
> (g) Section 140 (indecency with boy under 12):

[10] Section 144A was inserted on 1 September 1995 by s 2 of the Crimes Amendment Act 1995.

(h) Section 140A (indecency with boy between 12 and 16):

(i) Section 142 (anal intercourse).

(2) Every one who commits an offence against this section in respect of any provision specified in subsection (1) of this section is liable to the same penalty to which he or she would have been liable had he or she been convicted of an offence against that provision.

…

Some of the ground covered by art 34 of the Convention was also covered by s 144A as first enacted. The text of the section, however, was not substantially driven by art 34. Instead, as its legislative history shows, s 144A was primarily a response to concerns about sex tourism to third world countries, particularly in Asia.[11]

[10] Article 3 of the Optional Protocol to the Convention is in these terms:

Article 3

1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether these offences are committed domestically or transnationally or on an individual or organized basis:

(a) In the context of sale of children … :

(i) The offering, delivering or accepting, by whatever means, a child for the purpose of:

a. Sexual exploitation of the child;

b. Transfer of organs of the child for profit;

c. Engagement of the child in forced labour;

(ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;

(b) Offering, obtaining, procuring or providing a child for child prostitution …;

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[11] See (29 November 1994) 545 NZPD 5231–5233 and (30 March 1995) 547 NZPD 6564. Some, although limited, reference was made to the Convention. For example, the Hon Phil Goff MP, in addressing the proposed s 144A, made reference to arts 34 and 35 on the basis that "those articles create obligations for New Zealand to act to try to prevent this trade in child sex tourism. The challenge is to translate those good intentions into effective law": (29 November 1994) 545 NZPD 5235. As well, Mr Alec Neill MP referred to the "requirement under the United Nations Convention on the Rights of the Child to take positive and proper action to bring about laws of this nature": (1 June 1995) 547 NZPD 7031.

(c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography … .

2. Subject to the provisions of a State Party's national law, the same shall apply to an attempt to commit any of these acts and to complicity or participation in any of these acts.

3. Each State Party shall make these offences punishable by appropriate penalties that take into account their grave nature.

…

The Optional Protocol requires New Zealand to impose criminal liability for offences against children committed "transnationally". But, rather oddly, the list of offences in art 3 of the Optional Protocol did not include anything akin to art 34(a) of the Convention.[12] There is thus no general obligation to provide for "transnational" liability for the "inducement or coercion of a child to engage in any unlawful sexual activity". As it happens, the particular conduct of the appellant did involve the production of child pornography (which is addressed by art 3(c) of the Optional Protocol), but this is of no practical moment in terms of the statutory interpretation issue which we must address.

[11] Section 144A was repealed and replaced with effect from 14 June 2006[13] and now relevantly provides:[14]

144A Sexual conduct with children and young people outside New Zealand

(1) *Every one commits an offence who, being a New Zealand citizen or ordinarily resident in New Zealand,—*

(a) *does outside New Zealand, with or on a child under the age of 12 years, an act to which subsection (2) applies*; or

(b) does outside New Zealand, with or on a person under the age of 16 years, an act to which subsection (3) applies; or

(c) does outside New Zealand, with or on a person under the age of 18 years, an act to which subsection (4) applies.

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12 Article 3(1)(a)(i)(a) is not engaged because it operates only in the context of the sale of children, which is defined by art 2 to mean "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration".

13 By s 8 of the Crimes Amendment Act 2005.

14 (Emphasis added.)

(2) *This subsection applies to an act that, if done in New Zealand, would be an offence against—*

(a) section 132(1) (sexual connection with a child under 12); or

(b) section 132(2) (attempted sexual connection with a child under 12); or

(c) *section 132(3) (doing an indecent act on a child under 12).*

(3) This subsection applies to an act that, if done in New Zealand, would be an offence against—

(a) section 134(1) (sexual connection with a young person); or

(b) section 134(2) (attempted sexual connection with a young person); or

(c) section 134(3) (doing an indecent act on a young person).

(4) This subsection applies to an act that, if done in New Zealand, would be an offence against section 23(1) of the Prostitution Reform Act 2003 (breach of prohibitions on use in prostitution of persons under 18 years).

(5) *A person who commits an offence against this section in respect of a provision specified in any of subsections (2) to (4) is liable to the penalty to which he or she would be liable if convicted of an offence against the provision.*

…

[12] By way of preliminary comment about the current s 144A and its relationship to the Convention and Optional Protocol, we note that:

(a) The new s 144A was in part a response to the Optional Protocol, as illustrated by s 144A(4) which draws from art 3(1)(b) of the Optional Protocol. There was, however, no systematic alignment of the offences provided for in s 144A with the conduct addressed in either the Convention or the Optional Protocol.

(b) The words "does … any act to or in relation to any child" in the former s 144A were replaced with "does … with or on a child … an act". The expression "with or on" is plainly taken from s 2(1B) of the Crimes Act but, in this context, it is clumsy at best.

- The phrase is tautologous in respect of s 144A(2)(c) because the same phrase appears in the definition of the offence.

- The use of "with or on" in relation to the offences listed in ss 144A(2)(a) and (b) and s 144A(3) is unnecessary as the acts referred to will always be "with or on" the child or young person in question.

- The significance of the use of "with or on" in relation to s 144A(4) is uncertain, because it is not clear whether it adds an additional element to the offences provided for under s 23(1) of the Prostitution Reform Act 2003. We can illustrate this by reference to the offence of receiving a payment derived from commercial sexual services provided by someone under 18 years of age.[15] If such receipt occurred outside New Zealand, does the prosecution have to show that the receipt involved actions which were "with or on" the person who provided the commercial sexual service? This question may be of significance if the payment was received from an intermediary.

(c) Article 3(2) of the Optional Protocol requires state parties to provide for liability for "complicity" in offending of the kinds specified. So the Optional Protocol requires New Zealand to impose "transnational" liability for complicity – or, as we would say, party liability – in relation to child prostitution offences of the kind provided for in s 144A(1)(c) and (4).

[13] The offence of which the appellant was found guilty comes from the combined effect of ss 144A(1)(a) and (2)(c). Read together, they provide:

> Every one commits an offence who, being a New Zealand citizen or ordinarily resident in New Zealand, does outside New Zealand, with or on a child under the age of 12 years, an act that, if done in New Zealand, would

[15] Prostitution Reform Act 2003, s 21.

be an offence against section 132(3) (doing an indecent act on a child under 12).

As will be noticed, that is broadly the way in which the count was framed.

Section 144A and permutations of party liability

Overview

[14] In the present case, the specific issue is whether s 144A permits the prosecution of a New Zealander (being LM) on the basis of party liability for "offending" where the principal "offender" is not a New Zealander (being V). The distancing quotation marks reflect the reality that on this hypothesis, the conduct of a non-New Zealander is not an offence under New Zealand law. The question whether s 144A contemplates extraterritorial jurisdiction in respect of party liability can arise in other contexts as well, and we will address these contexts before addressing the specific issue just identified.

[15] Critical to the discussion which follows is s 66(1) of the Crimes Act which provides:

> **66 Parties to offences**
>
> (1) Every one is a party to and guilty of an offence who—
>
> (a) actually commits the offence; or
>
> (b) does or omits an act for the purpose of aiding any person to commit the offence; or
>
> (c) abets any person in the commission of the offence; or
>
> (d) incites, counsels, or procures any person to commit the offence.

Also relevant is s 6:

> **6 Persons not to be tried in respect of things done outside New Zealand**
>
> … [N]o act done or omitted outside New Zealand is an offence, unless it is an offence by virtue of any provision of this Act or of any other enactment.

Permutation one: the alleged principal and party are both New Zealanders

[16] The appellant's primary submission is that party liability under s 66 does not apply to offences committed under s 144A. This argument must be assessed in the general context in which the default position is that New Zealand criminal law does not apply extraterritorially.[16] In the ordinary course of events, there could be no question of a New Zealand prosecution in respect of conduct which occurs overseas as such conduct is, with rare exceptions, not a crime under New Zealand law. But where such conduct does amount to a crime, there is a strong argument for the view that ss 66(1)(b), (c) and (d) also apply.

[17] To put this in more concrete terms, if V had been a New Zealander, he would have been liable under s 66(1)(a) as the person who actually committed "the offence". It might be thought to follow that ss 66(1)(b), (c) and (d) would then apply to the appellant as a person who, by his conduct, was a party to "the offence", being the offence committed by V. This would be consistent with s 6 as the combination of ss 144A and 66(1)(b), (c) and (d) mean that the appellant's conduct, despite occurring overseas, would nonetheless amount to an offence. This was broadly the approach taken by the Court of Appeal in *R v M*.[17]

[18] This approach is consistent with the obligations of New Zealand under the Optional Protocol to provide for liability in respect of "complicity" in child prostitution. As well, as pointed out in *R v M*, such an approach is also consistent with the drafting of s 375A of the Crimes Act (now s 199 of the Criminal Procedure Act 2011) which, in dealing with the procedures to be followed in cases of a sexual nature, proceeds expressly on the basis that there may be a prosecution where the defendant is alleged to have been a party to an offence under s 144A.[18]

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16 There are exceptions; see, for instance, s 7 of the Crimes Act.

17 *R v M* [2008] NZCA 193.

18 See [55] and s 375A(1)(c) of the Crimes Act (now s 199(3)(d) of the Criminal Procedure Act). We note, however, that it would be possible even on the appellant's argument for there to be party liability in respect of a s 144A(1) offence where the acts of the defendant which gave rise to party liability occurred in New Zealand.

Permutation two: the alleged principal is a New Zealander but not the alleged party

[19] Let us assume that LM is the principal offender and V merely a party. Could V, despite not being a New Zealander, be prosecuted in New Zealand as a party to LM's offending?

[20] If the view proposed in [17] is correct, it is perhaps arguable that V could be prosecuted as a party. LM, as principal offender, would be guilty under s 66(1)(a) and V would arguably be liable accordingly under ss 66(b), (c) and (d). But although this outcome may seem logical, it is not quite as obvious as that proposed in [17]. If s 144A had explicitly addressed party liability it would almost certainly have done so by providing that a New Zealander commits an offence under the section by conduct which, if it occurred in New Zealand, would give rise to liability as either a principal or party in respect of the specified offences. Such a formulation of the offence would create no scope for prosecuting a non-New Zealander (on this hypothesis V) in New Zealand on the basis of party liability. For this reason, we are inclined to the view that the section is best read as restricting the scope of extraterritorial jurisdiction to New Zealanders.

Permutation three: the alleged principal is not a New Zealander and the alleged party is a New Zealander

[21] From the point of view of the Crown, the awkward feature of the case is that V is not a New Zealander. So his conduct in respect of the complainant did not amount to an offence under s 144A(1). Because the actions to which the appellant was a "party" did not amount to an offence under New Zealand law, there is no easy mechanism to apply ss 66(1)(b), (c) and (d) to the appellant in order to find him liable as a "party" to the "offending" (in fact non-offending) by V.[19]

[22] This is of limited practical moment where, as in both this case and in *R v M*, the allegation is of indecencies "with or on" a child. As noted, the words "with or on" appear in both s 144A and the definition of the substantive offence. This means

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[19] We note in passing that in *R v M*, above n 17, there was uncertainty as to whether the principal offender was the appellant who was a New Zealander or another man who was not. The case was addressed on the basis that it was at least arguable that the principal offender was the other man. The point now under discussion was not, however, adverted to.

that conduct of the kind which might usually involve party liability may also amount to the substantive offence.[20] The problem we have identified, however, will be more significant in the case of offending in respect of which the words "with or on" do not form part of the definition of the substantive offence.

[23] As we have noted,[21] the repeated use of the words "with or on" in s 144A is awkward and of uncertain purpose and effect. We have given consideration to the question whether those words should be construed as generally encompassing party liability. The difficulty is that this would require a far from natural application of those words. Conduct which triggers party liability does not necessarily have to be "with or on" the victim. So if the purpose of the legislature was to provide for party liability, it is practically certain that different language would have been chosen. There is also the problem that, in the case of indecencies with children, the phrase "with or on" forms part of the definition of the offence.

[24] An approach to the statute which excludes party liability where the principal "offender" is not a New Zealander (and there is thus no substantive offence under s 144A(1)(a)) may result in s 144A having less reach than is thought appropriate. But, recognising as we do that this is so, we are not able to construe ss 144A and 66(1) as imposing liability on someone as a party to a substantive "offence" which occurred overseas and is not an offence under New Zealand law.

Legislative reconsideration is warranted

[25] The statutory provisions in Australia[22] and the United Kingdom[23] which correspond to s 144A address party liability explicitly. As the preceding discussion shows, there are conceptual problems with the drafting of s 144A. The reality is that the various permutations which we have discussed have not been thought through and adequately provided for. In light of this, legislative reconsideration of s 144A is warranted.

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20 A point which was made in *R v M*, above n 17, at [47].
21 See [12](b) above.
22 Division 272 of the Criminal Code Act 1995 (Cth).
23 Section 72 and sch 2 of the Sexual Offences Act 2003 (UK).

Determination of the appeal

[26] For the reasons given already, it was not open to the Judge to hold that the appellant was liable as a party to the offending by V. On the other hand, given the findings of fact made by the Judge and which are no longer in issue, the appellant was nonetheless liable as a principal. For the reasons that follow, we are of the view that the appellant's conviction can and should be upheld.

[27] The appellant's appeal must be assessed under s 385(1) of the Crimes Act which provided:[24]

> (1) On any appeal … the Supreme Court must allow the appeal if it is of opinion—
>
> …
>
> (b) that the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
>
> (c) that on any ground there was a miscarriage of justice; or
>
> …
>
> and in any other case shall dismiss the appeal:
>
> Provided that the … Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

[28] Also relevant is s 386(2) which provided:

> (2) Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the … Supreme Court that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed as may be warranted in law for that other offence, not being a sentence of greater severity.

[29] If the count is to be regarded as alleging liability as a party only, this Court could, under s 386(2), substitute a conviction for the principal offence. As it turns

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[24] Part 13 of the Crimes Act, which included both ss 385 and 386, was repealed from 1 July 2013 by s 6 of the Crimes Amendment Act (No 4) 2011.

out, however, we see no need to resort to s 386(2). This is because we are of the view that the appeal should be dismissed on the basis that:

(a) the "wrong decision on a question of law" as to party liability does not warrant the allowing of the appeal; and

(b) there has not been a miscarriage of justice.

Disposition

[30] The appeal is accordingly dismissed.

GLAZEBROOK and ARNOLD JJ
(Given by Glazebrook J)

[31] We agree with the result reached by the majority in this case but for different reasons. We do not disagree with the analysis of the majority that Mr LM could have been convicted as a principal but we consider that he was properly convicted as a party.

[32] The appellant's conviction was on the basis that he was a party (while he was living in Russia) to offending by a Russian, V, on a child under the age of 12 years. The appellant had photographed his seven year old stepdaughter masturbating the penis of V, an adult male, and directed the posing of the scene.

[33] We consider that the appellant was properly convicted as a party to the offending under s 144A of the Crimes Act 1961. We explain our reasoning by first examining the wording of s 144A in the context of the Act. We then consider the purpose of the provision, its legislative history and New Zealand's international obligations relating to the protection of children.

Wording of s 144A

[34] Section 144A(1)(a) provides that, where a New Zealand citizen or a person ordinarily resident in New Zealand does an act with or on a child under 12 years to

which subs (2) applies, while outside New Zealand, then he or she commits an offence.[25]

[35] Section 144A(2) applies to an act that, if done in New Zealand, would be an offence against s 132(1). Section 66 provides that every one is a party to and guilty of an offence who actually commits the offence or who is a party to the offence in one of the ways set out in s 66(1)(b)–(d).

[36] The relevant acts in this case were the photography and the directing of the pose. These acts of the appellant cannot be considered in a vacuum but must be assessed in the context in which they took place. In other words, the act of photographing and the directing of the posing of the photograph cannot be considered in isolation from what the appellant was photographing and directing.

[37] If those acts had been done in New Zealand by the appellant then, by virtue of a combination of s 132(1) and s 66(1)(b)–(d), he would have committed an offence. The appellant is a New Zealand citizen. He did acts to which s 144A(2) applies. He was therefore properly convicted under s 144A(1) of the offending.

[38] On this analysis, it is of no moment that V is Russian or that his actions took place in Russia and that therefore V committed no offence in New Zealand by virtue of s 6 of the Crimes Act. It is the acts of the appellant that are at issue and these, by virtue of s 144A(2), are assessed as if they took place in New Zealand.

Statutory purpose

[39] As is clear from its wording, the policy behind s 144A is to criminalise specified offences by New Zealand citizens or those ordinarily resident in New Zealand, despite those offences being committed offshore.

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[25] We agree with the majority that the words "with or on" in s 144A(1) are clumsy for the reasons set out by the majority. We see them, however, as merely linking the offending with the child victim.

[40] There is no logical reason, in light of this policy, why party liability would be imposed in some circumstances and not others, as the majority suggest.[26] In particular, there is no logical reason why party liability would ensue where the principal is a New Zealander but not where the principal is a foreigner. The acts of the New Zealand person aiding or abetting or encouraging are the same in each case.

Legislative history

[41] As noted by the majority, s 144A was introduced in 1995 and was directed in particular at those engaged in child sex tours.[27] When introducing the Bill in November 1994, the Minister of Justice Hon D A M Graham said that the sexual exploitation of children by tourists travelling abroad was a significant problem in some Asian countries. Those jurisdictions had major difficulties in suppressing the practice, particularly when the offences were committed by visitors. The Minister said that a number of countries had already decided that they should prosecute their own nationals for committing sexual offences outside the jurisdiction. The Government had decided that it should follow suit. It would not be surprising if some New Zealand tourists were contributing to the problem but, whether or not that was the case, "we should take a clear stance on the matter."[28]

[42] The Hon Roger McClay, Minister of Youth Affairs, in the Bill's second reading, made it clear that the aim of s 144A was to criminalise all sexual exploitation of children by New Zealand citizens and New Zealand residents, wherever the offending occurred. He said that "[a]ll Parliamentarians would agree that if it is illegal here for New Zealanders to do it, it should be illegal for New Zealanders to do it overseas especially in respect of children."[29]

[43] The Bill was supported by the Opposition. The Hon Phil Goff said that "[i]t is no more acceptable for New Zealanders to exploit children sexually in other

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[26] We do not consider that if V (a non-national) had been party to the offence, he could have been prosecuted in New Zealand. Under s 144A(1) and s 6, V could not be prosecuted as he is not a New Zealand citizen. Nor is he a person ordinarily resident in New Zealand. Compare with paragraph [20] of the majority's judgment.

[27] By s 2 of the Crimes Amendment Act 1995.

[28] (29 November 1994) 545 NZPD 5232 (introduction).

[29] (1 June 1995) 547 NZPD 7034 (second reading).

countries than it is for them to exploit children sexually here."[30] A similar sentiment was expressed by another Labour party speaker, Martin Gallagher, who said that:[31]

> We, as a society, are making a statement to those citizens that when they return to these shores they will be subject to the laws of this land. No longer can a citizen or permanent resident get on a plane and ignore the laws and the values of this society.

[44] The Parliamentary debates, when s 144A was first introduced, also illustrate that Parliament was cognisant of New Zealand's obligations under the United Nations Convention on the Rights of the Child. As the Hon Phil Goff said, the United Nations Convention on the Rights of the Child, in particular arts 34 and 35, "create[s] obligations for New Zealand to act to try to prevent this trade in child sex tourism" with "the challenge [being] to translate those good intentions into effective law".[32] He also stated that New Zealand's international obligations mandated that it "do everything that [it] can to prevent a trade in child sexual exploitation."[33] A similar point was made by a National party speaker, Alec Neill, who said that "[t]here is a requirement under the United Nations Convention on the Rights of the Child to take positive and proper action to bring about laws of this nature."[34]

[45] A number of optional protocols have followed the Convention on the Rights of the Child. In 2002, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography ("the Optional Protocol") came into force.[35] New Zealand signed this protocol in 2000 and ratified it in 2011.

[46] Section 144A was amended in 2005 by the Crimes Amendment Act 2005.[36] The purpose of this amendment was in part to align our law with the Optional

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30 (27 July 1995) 549 NZPD 8250 (third reading).

31 (27 July 1995) 549 NZPD 8259 (third reading).

32 (29 November 1994) 545 NZPD 5235 (introduction).

33 (30 March 1995) 547 NZPD 6565 (presentation of select committee report). Jill White, another Labour party speaker, also said that "[t]his Bill is part of meeting our international obligations": at (1 June 1995) 547 NZPD 7032 (second reading).

34 (1 June 1995) 547 NZPD 7031 (second reading).

35 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2171 UNTS 227 (opened for signature 25 May 2000, entered into force 18 January 2002).

36 The provision amending s 144A did not come into force until 14 June 2006.

Protocol. As noted by the Hon David Cunliffe (Minister of State), who introduced the amendment on behalf of the Minister of Justice:[37]

> Passage of the bill will also make New Zealand compliant with the Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, by creating a new offence to prohibit the sale or exploitation of a child. The offence will be able to be enforced extraterritorially.

[47] The legislative history is clear. The aim of s 144A was to make sexual exploitation of children by New Zealand citizens or residents an offence, wherever it was committed, in harmony with New Zealand's international obligations. As a result, the legislative history of s 144A supports the view that individuals should be liable for offences committed overseas in the same way they would be if the offence were committed in New Zealand. This would therefore include party liability.

International obligations

[48] As noted by the majority, s 144A, both as originally enacted and as amended, is (at least) consistent with the obligations under art 34 of the Convention to take all appropriate national measures to protect children from unlawful and exploitative sexual activity. Further, the obligation in art 3 of the Optional Protocol is to ensure "as a minimum" that the acts set out are fully covered under criminal or penal law whether committed domestically or internationally.

[49] New Zealand has chosen to criminalise extraterritorially not only the offences covered in art 3(1) of the Optional Protocol but also some covered by art 34 of the Convention,[38] although in this case the offending did come within art 3(1)(c) of the Optional Protocol as it involved producing pornography. Under art 3(2) of the Optional Protocol, states are required to have party liability for the offences covered by the Optional Protocol and also to prosecute attempts.

[50] It was argued on behalf of the appellant that the phrase in art 3(2), "[s]ubject to the provision of a State Party's national law" means that it is up to each individual

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37 (2 March 2004) 615 NZPD 11474 (first reading).

38 We agree with the majority that there was, however, no systematic alignment of the offences provided for in s 144A with art 34 of the Convention or art 3(1) of the Optional Protocol: see [12](a) above.

state whether or not to impose party liability. We do not accept this submission. In our view the phrase merely means that, if a state's national laws do not impose attempt or party liability for offences generally, then they do not need to be imposed for the art 3(1) offences.

[51] New Zealand does impose party liability for offences committed in New Zealand. This means that it was obliged under art 3(2) of the Optional Protocol to extend party liability to art 3(1) offences committed offshore. Section 144A, however, makes no distinction between art 3(1) offences and the other offences covered by the section. The words of s 144A allow an interpretation that extends party liability to all offences covered by it and the legislation should be construed accordingly.

[52] It is assumed that New Zealand intends to comply with its international obligations and, insofar as the wording of a statute allows, statutes are construed accordingly.[39] This interpretive principle is even stronger in a case, such as the present, where the legislation was specifically directed (at least in part) towards compliance with those international obligations.[40]

Conclusion

[53] The wording of s 144A, the policy behind the section, its legislative history and New Zealand's international obligations all support our view that the appellant was properly convicted as a party.

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[39] See *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) at 57; *Attorney-General v Zaoui (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [90]; and *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 3 NZLR 596 at [84].

[40] See above at [44].