

**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 9**

BETWEEN LM
 Applicant

AND THE QUEEN
 Respondent

Court: McGrath, William Young and Arnold JJ

Counsel: Applicant (in person)
 G H Vear for Respondent

Judgment: 20 February 2014

JUDGMENT OF THE COURT

- A Leave to appeal against conviction on the charge under s 144A of the Crimes Act 1961 is granted.**
- B The approved ground of appeal is whether s 144A criminalises offending as a party under s 66 of the Crimes Act.**
- C The application to appeal against conviction on the charge under ss 131A and 145A of the Films, Videos and Publications Classification Act 1993 is dismissed.**
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[1] The applicant was convicted of two offences. The first was of being a party to an indecent act on a child outside of New Zealand which, if done here, would be an offence under s 132(3) of the Crimes Act 1961 (sexual conduct with child under 12). This charge, brought under s 144A of the Crimes Act, arose because the applicant took a photograph of his victim while she was performing a sexual act on a

male. He was convicted following trial by a Judge alone in the District Court. The second charge, brought under ss 131A and 145A of the Films, Videos and Publications Classification Act 1993, was of knowingly possessing, in Russia and elsewhere overseas, objectionable publications. It resulted from the applicant's arrival in New Zealand with a laptop and Maxtor hard drive containing some 30 objectionable images and stories. The applicant pleaded guilty to this charge. He seeks leave to appeal against a Court of Appeal judgment upholding those convictions.¹

[2] The applicant wishes to raise three points before this Court, none of which was argued before the Court of Appeal or the trial Judge. This Court will rarely grant leave to appeal on grounds not raised in the Court of Appeal.² An appeal to this Court is concerned with clarification and development of the law. It is critical to this task that the Court has the assistance it derives from considering judgments of the Court of Appeal in the cases which are given leave to appeal. Accordingly, in cases where the point on which leave is sought was not addressed in the Court of Appeal, the Court will usually only grant leave where the applicant satisfies it that there is a real possibility that there has been a miscarriage of justice.³

[3] The first ground on which the applicant seeks leave to appeal is that taking a photograph could not amount to doing an offensive act. The point is, however, misconceived as the applicant was convicted of offending as a party to the indecent act that was the subject of the photo. The Judge found that the photograph was posed at the applicant's direction.

[4] The second proposed point is one that the Court of Appeal in obiter observations has previously left open.⁴ It is a contention that party offending under s 66 is not covered by s 144A, which only applies to offending as a principal. If this is correct, the appellant has been convicted of an offence that does not exist, which raises the possibility of a miscarriage of justice if the applicant cannot argue the

¹ *LM (CA217/2012 v R* [2013] NZCA 145.

² *Pavitt v R* [2005] NZSC 24; *Kanhai v R* [2005] NZSC 25; *Mankelow v R* [2007] NZSC 57; and *Bland v R* [2013] NZSC 93.

³ *Kanhai v R*, above n 2, at [6]; and *Pavitt v R*, above n 2, at [4].

⁴ *R v M* [2008] NZCA 193 at [38] and [56].

point in this Court. In these circumstances, leave to appeal should be given on this ground.

[5] The third proposed appeal point concerns an assertion that, as the possession of objectionable material is not an offence in Russia, a defence of “lawful authority or excuse” is available under s 131 of the Films, Videos and Publications Classification Act. The applicant pleaded guilty to this charge and nothing indicates that he did so other than on an informed basis. We see no proper basis for allowing him to change his plea. Nor do we see any tenable basis for the argument that “lawful authority and lawful excuse” is to be interpreted by reference to Russian law, having regard to the purpose of the legislation criminalising conduct overseas.

[6] The application for leave to appeal is accordingly granted on the second proposed ground of appeal.

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