IN THE DISTRICT COURT
AT LOWER HUTT

CRI 2016-096-4593
[2018] NZDC 2761

NEW ZEALAND POLICE
Prosecutor

V

TIMOTHY STUART CHARLESWORTH
Defendant

Hearing: 7 February 2017

Appearances: N Ford for the Prosecution
K Pedder for the Defendant

Judgment: 19 February 2018

RESERVED JUDGMENT OF JUDGE I G MILL

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[1] Two pre-trial admissibility issues have arisen in this case:

(a) Should the adult pornography and a "small bondage kit" discovered in Mr Charlesworth's possession be excluded as evidence in his trial for the charges of possession of objectionable publications, namely child exploitation images?

(b) Should the defendant's "no comment" answers, and the Police questions which the defendant responded to as such, be omitted from the DVD interview for the purposes of the trial?

Introduction

[2] Mr Timothy Charlesworth, faces 5 charges of unlawful possession of objectionable publications, namely child exploitation images, knowing or having reasonable cause to believe that such publications are objectionable.

[3] The alleged offending occurred between 27 May 2014 and 25 June 2015. The objectional publications were discovered in a folder titled 'my pictures' on Mr Charlesworth's ex-wife's computer.

[4] These were recovered by the Police during a forensic examination of the computer when hundreds of photo images of naked and clothed children in various poses were found. Five of the "worst" were selected and relate to the charges before the Court.

[5] Alongside the objectional publications, the Police also discovered multiple collections of pornography consisting of DVDs and magazines. A number of the DVD had titles related to "Teens" which the Police argue show a propensity to view pornography involving teenage girls, and are relevant given the nature of the charges Mr Charlesworth faces.

[6] On 14 December 2016, Mr Charlesworth was interviewed by the Police in relation to the alleged offending. After receiving the warning and advice, Mr Charlesworth advised the Police that "under advice of my attorney this morning I'm not to make any statement at this stage".

[7] Shortly after saying this, Mr Charlesworth was asked if he was asked questions if he would be providing answers at this time to which he responded "Depends....depends, depends on the nature of the question obviously but yeah".

[8] A perusal of the interview transcript shows Mr Charlesworth did indeed answer the majority of the questions he was asked. Not surprisingly, Mr Charlesworth made "no comment" responses, or statements to that effect, to the questions specifically put to him about the images on his ex-wife's computer.

ISSUE I: SHOULD THE ADULT PORNOGRAPHY BE EXCLUDED?

Relevant law

[9] Section 7 EA states:

> **7 Fundamental principle that relevant evidence admissible**
>
> (1) All relevant evidence is admissible in a proceeding except evidence that is—
>
> (a) inadmissible under this Act or any other Act; or
>
> (b) excluded under this Act or any other Act.
>
> (2) Evidence that is not relevant is not admissible in a proceeding.
>
> (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

[10] Section 8 EA states:

> **8 General exclusion**
>
> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
>
> (a) have an unfairly prejudicial effect on the proceeding; or
>
> (b) needlessly prolong the proceeding.
>
> (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

Cases and discussion

[11] Defence counsel object to the Police seeking the inclusion of the adult pornography as admissible evidence in Mr Charlesworth's Judge-Alone-Trial, citing several cases on point.

[12] The Police submit the "legal" pornography shows a propensity to view pornography of young females particularly given several DVDs have "teens" in their title and one is called "Barely Legal".

[13] In *R v Hurring* the Court of Appeal held the discovery of scrapbooks containing pictures of young girls, written obscenities on the pictures and adult pornography were inadmissible because these were not similar to the alleged offending (indecent assault on a young girl).[1]

[14] In the circumstances of that case, the Court of Appeal considered:[2]

> ... any relevance of the pornography is only at a general level of propensity for interest in sexual matters... We consider that, as Mr Watts submitted, there is distinct risk that the jury would find the pornography so distasteful as to allow rational judgment to be overcome by disgust.

[15] In *Snell-Scasbrook v R*, the Court of Appeal approved of Judge Tuohy's rulings to exclude sexually explicit evidence including DVDs and magazines found in the appellant's bedroom, noting:[3]

> These items featured young women but did not feature children. The Judge rightly considered they lacked any probative value in light of the trial issues but were potentially prejudicial.

[16] In the present charges the objectionable material depict girls estimated to be between 9 and 15 years of age in sexually explicit poses or being sexually violated by an adult male.

Conclusion

[17] Case law and ss 7 and 8 of the Evidence Act 2006 (EA) supports exclusion. The adult pornography is irrelevant to the present charges and has no probative value which, in any event, is outweighed by the risk of being unfairly prejudicial against Mr Charlesworth if offered as evidence during his trial.

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[1] *R v Hurring* [2008] NZCA 245.
[2] At [38].
[3] *Snell-Scasbrook v R* [2015] NZCA 195, at [9].

[18] To include the adult pornography as evidence in the trial objectional would result in unfairly prejudicing Mr Charlesworth for the possession of legally purchased adult pornography which records persons of legal age performing consensual sexual acts.

[19] Furthermore, there is a distinct difference between the possession of adult pornography and the alleged possession of child exploitive images depicting under-aged girls in compromising positions or sexual activity.

[20] Nor do I find it evidence of propensity that should be admitted. The propensity to have and watch adult pornography involving consensual sexual activity is not sufficiently similar in kind or tending showing a propensity to possess illegal underage non-consensual pornography involving children. There is a fundamental difference between an interest in the former and interest in the latter and any probative value is outweighed by its illegitimate prejudicial effect.

[21] I find no relevance in the evidence of a "small bondage kit" being found and so the evidence of the finding of the adult pornography and the kit is ruled inadmissible.

ISSUE II: SHOULD THE QUESTIONS ASKED PARIED WITH "NO COMMENT" ANSWERS BE EDITED OUT OF THE DVD INTERVIEW?

Relevant law

[22] Section 7 EA, as outlined above. In particular subs (3) which states:

> **7 Fundamental principle that relevant evidence admissible**
>
> ...
>
> (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

[23] Section 32 EA states:

> **32 Fact-finder not to be invited to infer guilt from defendant's silence before trial**

(1) This section applies to a criminal proceeding in which it appears that the defendant failed—

(a) to answer a question put, or respond to a statement made, to the defendant in the course of investigative questioning before the trial; or

(b) to disclose a defence before trial.

(2) If subsection (1) applies, —

(a) no person may invite the fact-finder to draw an inference that the defendant is guilty from a failure of the kind described in subsection (1); and

(b) if the proceeding is with a jury, the Judge must direct the jury that it may not draw that inference from a failure of that kind.

(3) This section does not apply if the fact that the defendant did not answer a question put, or respond to a statement made, before the trial is a fact required to be proved in the proceeding.

Cases and discussion

[24] Defence counsel have cited *R v Kingi* in support of the submission that any questions put to the defendant to which he responded "no comment", or a statement to that effect, should be excluded by virtue of s 7 of the EA.[4]

[25] In *R v Kingi* Justice Brewer, relying on appellate decisions, held:[5]

> It is clear that the Police may not manipulate or coerce a suspect into agreeing to be interviewed after they have asserted their right to silence. Nor do I think it is appropriate for the Police to press on with a barrage of questions (in the guise of putting the case to the suspect) when it is clear that the suspect's response to each question is that they do not want to comment.
>
> I accept that the accused did not waive his right to silence at any point during the discussion... On the contrary, he repeatedly confirmed that he did not wish to make a statement. It would be an inappropriate undermining of the accused's right to silence if the questions and the accused's responses to them were characterised as properly obtained.
>
> ...

[4] *R v Kingi* HC Whangarei CRI-2010-088-2617, 29 July.

[5] *R v Kingi,* above n 11, at [36]-[37] and [40]. See *R v Wallace* [2007] NZCA 265; *R v Ormsby* CA493/04, 8 April 2005; *R v Toka* (1994) 11 CRNZ 607 9CA); *R v Korkiri* (2003) 20 CRNZ 1016 (CA).

> Quite apart from whether the evidence was improperly obtained, the questions which elicited no answer or a "no comment" answer are inadmissible by operation of s 7 of the *Evidence Act 2006* (no tendency to prove or disprove anything).

[26] Justice Brewer made this observation about the admissibility of the evidence based on s 7 of the EA of his own motion and that is not the focus of the appeal.

[27] This decision came after the Court of Appeal decision in *Hitchinson v R* where it was observed that "the fact of silence and the question or statement to which the silence relates are admissible pursuant to the general admissibility section, s 7".

[28] In *Osman v R,*[6] the right to silence arose on appeal, where the appellant argued that the evidence of not answering questions where he said "unless it was to his lawyer or to the Judge" was inadmissible and the "mere fact" it was led at trial was a breach of s 32.[7]

[29] The Court of Appeal held there was no breach because nobody at the trial invited the jury to infer guilt from the appellant's statement, or lack thereof. The Court helpfully observed:[8]

> In the current case, the comment made by the appellant, in reply to the question from the police officer, that he would not answer any questions unless it was to his lawyer or to the Judge was essentially part of the narrative. No other basis was advanced for its inadmissibility. No point was taken at the trial that the evidence was not relevant. It was merely referred to as contextual material dealing with what the appellant said when he interrupted the constable during the administration of his rights. In that sense, it merely framed his interaction with the police.

[30] Given there are only a few instances of "no comment" statements made by Mr Charlesworth during the police interview, these replies, and the questions to which they relate, are merely part of the narrative and must be viewed in that overall context.

Conclusion

[31] Section 32 stipulates the fact-finder, trial judge or jury, is not to draw an inference of *guilt* from a defendant's silence before trial. Given there are few

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[6] *Osman v R* [2012] NZCA 32.
[7] At [22]-[23].
[8] At [30].

occasions during a lengthy interview that Mr Charlesworth said he had no comment I see no reason to exclude them as s 32 applies.

[32] The comments are admissible.

I G Mill
District Court Judge