Guerin v HB [2017] NTSC 14

PARTIES:	GUERIN, Malcolm v HB
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 24 of 2015 (21500360)
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JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	THE LOCAL COURT

CATCHWORDS:

Criminal law – Local Court Appeal – Appeal against dismissal of charge – Error in law – Possession of child abuse material – Meaning of sexual, offensive or demeaning context – Broader context of image irrelevant – Context limited to the image – Ground of appeal upheld.

Criminal law – Local Court Appeal – Appeal against dismissal of charge – Possession of child abuse material – Foreseeability of possible consequence and proceeding with conduct – No substantial miscarriage of justice – Appeal dismissed.

Classification (Publications, Films and Computer Games) Act 1995 (Cth).

Classification (Publications, Films and Computer Games) Act (NT).

Criminal Code (Cth) s 473.

Criminal Code (NT) s 31(2), s 125A(1), s 125B(1)(a), s 125E.

Criminal Code Amendment (Child Abuse Material) Act 2004 (NT), Act No 55, 2004.

Guidelines for the Classification of Publications 2005 (Cth).

Local Court Act (NT) s 83, s 87.

Local Court (Criminal Procedure) Act (NT) s 163(3), s 177(f).

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41; *Attorney-General (NT) v Wurrabadlumba* (1990) 101 FLR 414; *Crowe v Graham* (1968) 121 CLR 373; *DPP (NT) v WJI* (2004) 219 CLR 43; *Phillips v Police* (1994) 75 A Crim R 480; *Pregelj v Manison* (1987) 31 A Crim R 383; *R v Morcom* (2015) 122 SASR 154; [2015] SASCFC 30; *Worcester v Smith* [1951] VLR 316, referred to.

REPRESENTATION:

Counsel:

Appellant:	S.Robson
Respondent:	R.Goldflam

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Northern Territory Legal Aid Commission

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Guerin v HB [2017] NTSC 14
No. 21500360

BETWEEN:

MALCOLM GUERIN
Appellant

AND:

HB
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 28 February 2017)

Introduction

[1] The appellant was the informant in an unsuccessful prosecution against the respondent. The Local Court heard and dismissed a single count of possession of child abuse material contrary to s 125B(1)(a) of the *Criminal Code*. The appellant appeals from the Local Court's adjudication dismissing the information pursuant to s 163(3) of the *Local Court (Criminal Procedure) Act*. An appeal of this kind may be on a ground that involves an

error or mistake on a question of law alone, or a question of both fact and law.[1]

[2] The single ground of appeal is:

> "The Local Court erred in law by regarding the definition of "child abuse material" pursuant to s 125A(1) of the Criminal Code, namely material that 'depicts… in a manner that is likely to cause offence to a reasonable adult…a child (b) in a sexual, offensive or demeaning context' to include the context in which the alleged child abuse material was originally created and possessed".

Evidence before the Local Court

[3] The material comprising the single count of possession of child abuse material contrary to s 125B(1)(a) of the *Criminal Code* was a series of 50 photographs depicting a young girl, the respondent's daughter, in various poses and stages of undress. The material came to police attention through a series of events which were summarised by the Local Court Judge. There is no dispute of significance in respect of the background and circumstances relied on by his Honour describing the history of how the subject material came to light.[2]

[4] In June 2014, the respondent reported an unlawful entry at his home and the theft of some property to police. During the course of investigating the unlawful entry and theft, police officers observed photographs of a child apparently aged between five years and 12 years. A number of the

[1] The order dismissing the charge was originally made in the Court of Summary Jurisdiction, now the Local Court: s 84 *Local Court Act*. Judgments and orders made by the Court of Summary Jurisdiction have ongoing effect and become judgments and orders of the Local Court: s 87 *Local Court Act*. Appeals of this kind are governed by Part VI Division 2 of the *Local Court (Criminal Procedure) Act*.
[2] T, 2 December 2015, p3.

photographs were on walls in the house. One photograph that hung in the hallway particularly attracted the attention of the investigating officers who thought it was provocative and that it seemed to be child abuse material. The photographs were images of the respondent's daughter when she was a child. At the time of giving evidence in the respondent's case below, his daughter (MB) was 35 years old.[3] MB identified her age in a sample of the photos as "perhaps" seven years old.[4]

[5] An officer who attended the respondent's home made a complaint to the officer in charge of the Child Abuse Task Force. The officer in charge then attended the respondent's home, ostensibly to assist in the investigation of the unlawful entry, but the real purpose was to look at the photographs displayed in the home.[5]

[6] As a result of those observations, a search warrant was obtained and executed. Thousands of photographs were in the house but ultimately 31 exhibits were seized, some with multiple photographs. The photographs were located in a variety of areas in the home, including the respondent's office, within wardrobes and in the garage. A number were hung in frames on walls. Ultimately from the items seized, 20 exhibits had no material of any relevance. Police examined hundreds of photographs. Fifty became the subject of the proceedings in the Local Court and ultimately this Appeal.

[3] T, 30 July 2015, p72.
[4] T, 30 July 2015, p72.
[5] T, 2 December 2015, p3.

[7] It is agreed between the parties the relevant photographs included the following:[6]

- An enlarged and mounted photo of the child with buttocks exposed wearing a swimsuit fashioned into a "G-string" (P3), (P10);
- Photos of the child reclining on a motorcycle, shirt parted to expose her chest/breasts (P5), (P7), (P11);
- Photos showing the child naked, some with her mother also naked, apparently at Uluru. In some of the photos the child is posed as if to be sucking the mother's breast (P8), or touching the mother's breast (P8);
- Photos of the child set in the outdoors, the child naked, save for wearing red socks, and some with the mother also naked, in various front, rear and side poses, including bending over exposing her buttocks (P12);
- A photograph of the child, apparently very young, bending over with her pants down exposing her buttocks or genitalia (P9);
- Photos of the child naked, playing violin and piano (P9 and P13).

[8] The circumstances surrounding the alleged offending disclosed during the hearing of the charges were highly unusual for cases of this kind. Possession of the material was not disputed, nor was the fact that the respondent was the photographer who created the images and had them in his control since their creation. He was not charged with using a child for the production of child abuse material pursuant to s 125E of the *Criminal*

[6] Appellant's submissions at [4]; Respondent's submissions at [1].

Code, however it may be surmised that given the age of the images, their production well pre-dated the creation of those offences in the Northern Territory.[7]

[9] The respondent gave evidence at the hearing. The parties to the appeal agree the salient parts of the evidence for the purposes of the appeal are summarised in the appellant's submissions.[8]

[10] In evidence in chief the respondent said that he had lived in Alice Springs for 48 years and was a retired photographer. He had formerly operated a photographic business.[9] He had taken thousands of photographs of his daughter "MB" since she was born. Asked whether he remembered taking photographs of his daughter and her mother without any clothes on, somewhere out bush, he said: "Yeah, very clearly. It's a long time ago".[10] He said Exhibit P3 had been hung on the wall in the passage to a bedroom of their house for 15 years,[11] but visitors to the house would not have gone to that part of the house.[12] When visitors came to the house they would usually go to the dining room or breakfast room (one and the same) and would see pictures hanging on the wall of that room.[13] Neither his wife, nor son, had ever asked him to take any pictures of MB down from the walls. Nobody

[7] *Criminal Code Amendment (Child Abuse Material) Act 2004* (NT), Act No 55, 2004.
[8] Submissions on behalf of the appellant at [5]-[7]; outline of respondent's submissions at [1].
[9] T, 30 July 2015, p34.
[10] T, 30 July 2015, p38.
[11] T, 30 July 2015, p39.
[12] T, 30 July 2015, p40.
[13] T, 30 July 2015, p35.

had suggested to him that there was anything wrong with any of the pictures hanging in parts of the house – "…they thought they was beautiful".

[11] Aside from the photos that had been hung on the walls, the photos seized by police had been kept "locked away in a cupboard…I mean some of the pictures I haven't seen for 25 years…They've been locked away…I was quite surprised to see some of them".[14] The respondent considered the material to be "private family photos".[15]

[12] The respondent was cross examined about his interest in taking naked photos of his daughter, as opposed to his son:[16]

> "Did you ever take photos of your son naked?---No.
>
> And why was that? Why didn't you take naked photos of your son?---I wasn't interested.
>
> …
>
> Is that correct, you're not interested in the male form?---My daughter, [what's the difference?][17] She's a beautiful girl.
>
> I'm asking you then why you didn't take naked photos of your son? ---I wasn't interested.
>
> So, you're not interested in the male body; is that correct? You don't find the male body is beautiful?---Never thought about it.

[14] T, 30 July 2015, p50.
[15] T, 30 July 2015, p63.
[16] T, 30 July 2015, p51-53.
[17] It is agreed by counsel in this Court that this question was asked by counsel for the prosecution and wrongly transcribed, attributing that comment to the respondent, when the transcript should have been attributed it to counsel.

> Never thought. Tell us now, do you think the male body is beautiful?---No, I'm not interested, no.
>
> Alright. So, you took photos of your daughter because she's a female, correct?---She was my firstborn child, you know, she was…
>
> Agree or disagree? You took photos of your daughter because she's a girl. She was a girl, a female?---Yeah.
>
> And you found that - saw her body to be beautiful; is that right?---Yes".

[13] Counsel for the appellant fairly pointed out that a few photographs of the respondent's son had been located, including situational naked 'snapshots', however the respondent said that he had not taken any photos of his son.

[14] The respondent was also cross-examined on whether the photographs of his naked daughter might convey a sexual impression to someone outside his family.[18]

> "…And you'd agree, wouldn't you, that it wouldn't have been okay for somebody other than you or your wife to take photos of your daughter naked; do you agree with that?---Yes.
>
> Somebody outside the family, they – it wouldn't be right for them to take a photo of your daughter naked?---No
>
> And it wouldn't be right for people outside your family to have photos of your daughter showing her naked; is that correct to say?---Yes.
>
> Right. And it wouldn't be right for people outside your family to look at those photos, or to possess those photos, I should say?---No, of course not.

[18] T, 30 July 2015 p53-54.

Or to show them around?---I didn't show anyone, no. Of course not.

No, because they might get the wrong idea about those photos; is that right? ---Yes.

They might think they're sexual?---It's a matter of opinion.

Well, do you agree that you wouldn't have shown those naked photos of your daughter to people outside your family? Do you agree?---Yeah.

And I'm putting to you, you wouldn't have done that because they might think they're of a sexual nature; is that right?---Maybe.

They may misunderstand why they were taken, correct?---Yes.

And they may not understand by whom they were taken, you as the father; is that right?---Mm.

So, they would get in your view a wrong impression of what those photos mean, correct?---Yeah.

And they might think those photos are sexual photos, yes or no?---Yes.

And so you never would've shown those photos to anybody outside the family; is that right?---Yes.

And I speak in particular of the smaller photos that you said were not on display?---That's right.

Right. You would never have shown them to anybody?---Even me, I haven't seen them for 25 years".

[15] The respondent's daughter gave evidence at the hearing. At the time of giving her evidence she was a mature adult in sound employment with children of her own. She described the respondent as loving, caring and

supportive.[19] Her evidence was that she was a willing participant in the creation of the photographs. Exhibit P3 had been taken when she was "seven, perhaps". She spoke of how she loved the bows on the back of her bathers, pulling them down, and placing them around her bottom saying "Daddy, look, take a photo of this. Aren't they pretty?"[20] In relation to some of the photographs in P8, she said "the photos were just family photos and no one in the family had ever suggested that the photos were inappropriate or distasteful".

The reasons for the dismissal of the charge

[16] The learned Judge found the photographs did not constitute child abuse material. Part of the reason was that the context of the possession of the images was within a family who enjoyed being naked. Additionally, his Honour found other factors relating to specific photos meant particular photos did not constitute child abuse material.[21] His Honour found that factors relevant to the broader context were persuasive in reaching this conclusion. Additionally, his Honour was not satisfied the respondent foresaw the photos could represent child abuse material, because he never intended them to be seen by people outside his family and they were nothing more than mementos of his family history.[22] Unlike most of the images however, his Honour found Exhibits 5 and 11 (MB standing next to a motorcycle exposing her right nipple in a staged photo) had a "sexual

[19] T, 30 July 2015, p72-73.
[20] T, 30 July 2015, p73.
[21] T, 2 December 2015, p3-7.
[22] T, 2 December 2015, p8.

element". Once the family circumstances were taken into account, along with the age of the photos and how the child came to participate, it was held those two exhibits did not constitute child abuse material. Part of the reasoning towards the conclusions below was as follows:[23]

> [In relation to Exhibit 13]:
>
> "These two photographs come from a bundle of a large number of photographs depicting all members of the family, except the mother, naked. Again it demonstrates this family's permissive attitude to nudity.
>
> It is clear from viewing all the photographs in all the exhibits that this family had a very relaxed attitude to nudity. Family photographs of family holidays in various locations in the Territory, for example the Kakadu National Park, showed the defendant's wife either topless or naked.
>
> The attitude of the family as seen through the photographs seized by Detective Sergeant Butcher and the responses given by the defendant in cross-examination, specifically demonstrated that the defendant and his family held a very permissive attitude to nudity and did not find it offensive.
>
> Twenty years approximately after he took these photographs he conceded that someone might derive some sexual gratification from them, but that he didn't and he never intended that anyone would. I accept his answers in this regard as being honest answers.
>
> While it is argued that he didn't take photographs of his son, naked, he did. Albeit that there aren't very many. I accept that he saw his young daughter as a model and had her pose for him, often in staged poses which he arranged. However, the photos were for his family; private mementos of their history. He took similar photos of his wife.

[23] T, 2 December 2015, p7-8.

> I have found therefore that I am not satisfied that a reasonable adult could find any of the photographs, except those in exhibits 5 and 11 constitute child abuse material. This is because the context of these photographs is that the family enjoyed being naked.
>
> MB's mother, as I have said, is often seen topless in many photographs. I infer therefore that MB believed that her mother's behaviour in this regard was acceptable. I accept MB was a young girl wanting to be seen like a model and was happy to be posed as a model.
>
> Exhibits 5 and 11 exemplify this. The photographs were posed and show the exposed nipple of a young girl. The girl is posing like a model and exposing herself in exactly the same way as her mother has in a large number of photographs.
>
> Some reasonable adults may take offence, but if the context of the family's permissive attitude is taken into account, it may not be viewed as offensive.
>
> In addition, these photographs were taken twenty years ago. They've been retained within the family's house during that time. That goes to the context in which they must be considered".

[17] As is evident from the ground of appeal, the appellant's principal argument is that the above reasoning discloses error, as "context" was construed too broadly and beyond the limits permitted by s 125A(1) of the *Criminal Code*. On the appellant's argument, this is illustrated particularly by the reliance his Honour placed on the circumstances in which the images were created and the family circumstances. The respondent argued his Honour's approach reflected long held principles of the common law when dealing with similar subjects and the guidance that may be sought from s 473 of the

Criminal Code (Cth) on factors to be taken into account to determine whether reasonable persons would regard particular material as offensive.

The construction of section 125A(1) "Child Abuse Material"

[18] On appeal the construction arguments have largely mirrored those made before the Local Court. His Honour accepted the submissions put on behalf of the respondent, supportive of an approach to have regard to the wider context, which in turn informs on the question of the genuine character of the material.

[19] Section 125A(1) of the *Criminal Code* defines child abuse material as follows:

> **Child Abuse Material** means material that depicts, describes or represents, in a manner that is likely to cause offence to a reasonable adult, a person who is a child or who appears to be a child:
>
> (a) engaging in sexual activity;
>
> (b) in a sexual, offensive or demeaning context; or
>
> (c) being subject to torture, cruelty or abuse,
>
> but does not include:
>
> (d) a film, publication or computer game that is classified (other than as RC) under the *Commonwealth Act*; or
>
> (e) a film, publication or computer game that is the subject of an exemption under Part X of the *Classification of Publications, Films and Computer Games Act*.

[20] His Honour commented that the absence of rationale given in the Attorney General's second reading speech in 2004 when the provision was introduced, as to what test should be applied in the Northern Territory, was unhelpful. To constitute child abuse material, his Honour held the material must depict a child in a "sexual, offensive or demeaning context".[24] His Honour acknowledged that phrase was clearly "open to a very wide interpretation, particularly over time". For this reason, inclusion of the word "context" was important.[25]

[21] In terms of context, it was noted the child in the photographs was a member of a family that had permissive views about nudity. Her mother was often photographed in different locations, topless. The photographs were often taken in the presence of the respondent's daughter and over time she participated in the same photography. His Honour accepted the respondent was a professional photographer and accepted that he would chronicle the family's history. In essence those were the matters that informed the relevant context. Accordingly, his Honour was not satisfied that a reasonable adult, understanding that context, would be offended, because a reasonable adult would not consider that MB appears to have been depicted in those photographs in a sexual, offensive or demeaning manner. I will deal with the issue of foreseeability and s 31 of the *Criminal Code* later in these reasons, as his Honour considered lack of foresight a further reason to dismiss the charge.

[24] T, 2 December 2015, p8.
[25] T, 2 December 2015, p8.

[22] Notwithstanding many sound and authoritative statements that have stood the test of time and are relevant to determining the content of such concepts as "offensive", "highly offensive" or "indecent", particularly with reference to potentially pornographic material, the clear ordinary meaning conveyed by the text of the *Criminal Code* must prevail. That is not to suggest the common law has no role. There is a long history of the common law informing terms and concepts in the *Criminal Code* (NT).[26] The *Criminal Code* does not define "cause offence" or "offensive". There is significant scope to draw on the common law to give content to the phrase "cause offence" or the word "offensive", however whatever meaning is ascribed, the construction must still comply in the first instance with the text of s 125A(1) of the *Criminal Code*.

[23] For the definition to make sense, paragraphs (a) (b) (c) (d) and (e) of the definition must be read to refer back to the preliminary paragraph "material that depicts, describes or represents… a child", and then, in this instance, (b) "in a sexual, offensive or demeaning context". "Sexual, offensive or demeaning context" clearly relates back to what is "depicted", "described" or "represented" by the material. This is the natural construction when the section is read as a whole. It might be anticipated that the definition would govern a range of means of communication, not solely photographs. However with respect to photographs it is difficult to apply the section in any alternative way, other than to consider whether the photograph "depicts"

[26] Eg. *Pregelj v Manison* (1987) 31 A Crim R 383, *Attorney-General (NT) v Wurrabadlumba* (1990) 101 FLR 414; *DPP (NT) v WJI* (2004) 219 CLR 43.

in a manner likely to cause offence to a reasonable adult, a child (b) “in a sexual, offensive or demeaning context”.

[24] The use of the word “context” in paragraph (b) relates to each of the identified indicators of child abuse material: “sexual, offensive or demeaning”. In my view it is the context evident, or “depicted”, in the photo that is the relevant context. I would also add any relevant indicators of context apparent on or accompanying the photo, for example, additional script, names, dates or the fact the photo is part of a series. There may be an indication ‘depicted’ that shows the photo is a ‘selfie’; that may also inform the context. In my view, the context is drawn from the image and what is depicted.

[25] As pointed out on behalf of the appellant, the interpretation adopted here is consistent with the observation that paragraphs (a) and (c) of the definition omit the word “context” when referring to materials which depict a child engaging in sexual activity or being subject to torture, cruelty or abuse. “Context”, beyond what is depicted in the image, would seem to be irrelevant with respect to paragraphs (a) and (c), as what is envisaged by those paragraphs requires no further context to establish child abuse material. The depiction of those activities well suffices.

[26] In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*,[27] French CJ referred to the current approach to statutory construction as:

> "The established common law approach, which begins with the ordinary grammatical meaning of the text having regard to context and purpose".[28]

[27] The plurality in *Alcan* said:[29] [Footnotes omitted]

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy".

[28] Save for the lack of definition of "cause offence" or "offensive context", the meaning of the text is, in my view, clear that the assessment of the material is confined to the image. It is the context drawn from the image that is to be assessed. In this particular instance it is clear from the evidence given in the Local Court, no harm was done to the child, however the primary purpose of the section is to reduce or eliminate child abuse material and to protect children generally from being exploited. Although in this particular case the broader context of the respondent's family and their lifestyle meant the risk of exploitation of the child was low or eliminated, the section itself is clearly directed to the quality and character of the image. As indicated, in

[27] (2009) 239 CLR 27; [2009] HCA 41.
[28] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 at [5].
[29] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 at [47] per Hayne, Heydon, Crennan and Kiefel JJ.

my view that would include closely associated features that bear on the context of the image such as any associated script, dates and times or whether the photo is part of a series. Although there is an element of circularity in the definition, I am satisfied it is the image to be scrutinized, not its creation or broader circumstances such as arising in a family.

[29] Leaving aside the facts here, in cases of this kind it cannot be assumed that the fact that the impugned images were produced in a family setting will of itself negate exploitation and abuse. Regrettably the family setting is often the context for offending of various kinds against children. For similar reasons, the fact of consent by a child is of little or no consequence, however an image depicting a child not consenting to a photograph or a particular pose is more likely to be found to be child abuse material.

[30] It is appreciated that many earlier cases concerning the definition of either pornography or child abuse material had regard to the broader context. However, this is an area that is highly statute specific. My reading of the authorities referred to by counsel for the respondent tends to indicate cases where the statute allowed more latitude compared with the section being considered here.

[31] The respondent relied on *Crowe v Graham*[30] to emphasise the importance of context when assessing offensiveness in relation to obscenity and indecency in the context of pornography offences. In *Crowe v Graham*, Barwick CJ

[30] (1968) 121 CLR 375.

discussed "indecency" as it appeared in the *Obscene and Indecent Publications Act* (NSW), emphasising that the circumstances in which a picture or written matter is presented was relevant to the question of whether such material would offend the modesty of the average man or woman in sexual matters. His Honour said the:

> "Manner and occasion of placing the matter before others as well as the significance of the matter itself must be considered and might in some circumstances be critical in resolving the question. Here, for example, sexual matters were referred to in the issues of the magazines in a way which might pass muster in a tap room or smoke concert but which, displayed in print to the reader of the magazine, could, in my opinion, be held to offend the modesty of the ordinary man".[31]

Similarly, Windeyer J said:[32]

> "It is an act in its setting and circumstances which constitutes the offence. To publish or exhibit a particular picture or print might amount to a publication of indecent matter in one set of circumstances although in other circumstances this would not be so. When it is said that a print or picture is indecent because it is "an affront to modesty" what is meant is that it is of such a character that its publication in the way alleged is an affront to modesty".
>
> "The publication is to be considered as a whole, it several parts in the context of the whole… It is the whole that is on trial in the whole circumstances of its publication".

[32] Although as demonstrated on behalf of the respondent before this Court, *Crowe v Graham* is sound authority on the point of contextualising a publication to assist in the determination of whether it is indecent or offensive, the determination of whether material amounts to child abuse

[31] *Crowe v Graham* (1968) 121 CLR 375 at 379.
[32] *Crowe v Graham* (1968) 121 CLR 375 at 396-398.

material under the *Criminal Code* (NT) does not permit a full importation of the principles in *Crowe v Graham*, given the wording and grammatical structure of the section.

[33] Counsel for the respondent also drew attention to *Phillips v Police*.[33] The South Australian Court of Criminal Appeal held, albeit with some criticism of the approach it was obliged to take, that because of s 33(4) of the *Summary Offences Act* (SA), context could not be regarded in determining whether material was indecent or obscene. Section 33(4) of the *Summary Offences Act* (SA) at that time provided:

> "In proceedings for an offence against this section, the circumstances of the production, sale, exhibition, delivery or possession of material to which the charge relates will be regarded as irrelevant to the question of whether or not the material is indecent or offensive material".

[34] In *Phillips v Police* the Court of Appeal relied on *Crowe v Graham* and other authorities to the same effect. The Court reaffirmed that at common law, consideration of indecency or obscenity took account of all of the circumstances that by virtue of s 33(4) of the *Summary Offences Act* (SA) were required to be put aside. A provision such as s 33(4) that excludes the general circumstances behind the material means the prosecution is unable to rely on any known context in proof of a charge. The construction adopted here leads to the same result. Counsel for the respondent informed the Court that because of the criticism from the Court of Appeal in *Phillips v*

[33] (1994) 75 A Crim R 480.

Police, the South Australian Parliament enacted s 63C(1) of the *Criminal Law Consolidation Act 1935* (SA) which provides:

> "In determining whether material to which a charge of an offence relates is of a pornographic nature, the circumstances of its production and its use or intended use may be taken into account but no such circumstance can deprive material that is inherently pornographic of that character".

[35] Further attention was drawn to the analysis of this provision in *R v Morcom*.[34] Summarising previous decisions, it was held that the aim of child pornography legislation is to reduce, and as far as possible eliminate, possession, production, supply and sale of child pornography.[35] The structure of the South Australian provisions differ significantly from what is being considered here. Some offences require the proof of further elements such as proof of an intention to excite or gratify sexual interest. There are multiple differences. In the discussion of three of the images under consideration in *R v Morcom*, Stanley J observed:

> "The purpose of this aspect of the criminal law is to protect children from exploitation, degradation and humiliation through child pornography. It is not to criminalise innocent photography of family or friends".[36]

[36] In their analysis of s 63C of the *Criminal Law Consolidation Act 1935* (SA) and setting out the relevant considerations, Peek and Blue JJ confirmed that the objective circumstances of the production and intended use of the material can be taken into account in determining whether it has the

[34] (2015) 122 SASR 154; [2015] SASCFC 30.
[35] *R v Morcom* [2015] SASCFC 30 at [116].
[36] *R v Morcom* [2015] SASCFC 30 at [122].

requisite pornographic nature. Their Honours gave the example that material originally created for non-pornographic purposes might be appropriated by a producer and acquire a pornographic nature by a change in the context and circumstances which objectively demonstrate dissemination for the purposes of sexual excitement or gratification.[37]

[37] Although the relevant authorities under different regimes illuminate in part the approaches taken to questions of indecency, offensive and similar terms seen in legislation of this kind, the primary issue here must be resolved through the text, supplemented within that limitation by the common law.

[38] One of the difficulties with the current definition of child abuse material is that "cause offence" or "offensive" are not defined. "Offensive" has however been defined many times in different statutory contexts. In *Pregelj v Manison*,[38] Nader J observed the dictionary meaning of the word "offensive" is of little assistance in the context of "offensive behaviour" within the meaning of the *Summary Offences Act (NT)*. Offensive behaviour was said to have a more restricted meaning. His Honour noted a wide variety of actions which many people regard as offensive in the broad sense of the word would not come within the scope of the *Summary Offences Act*. In *Pregelj v Manison* the definition given in *Worcester v Smith*[39] was applied:

[37] *R v Morcom* [2015] SASCFC 30 at [67] per Peek and Blue JJ.
[38] (1987) 31 A Crim R 383.
[39] [1951] VLR 316 at 318; *Pregelj v Manison* (1987) 31 A Crim R 383 at 387.

> "Such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person".

[39] The issue in *Pregelj v Manison* however, was ultimately resolved by resort to s 31 of the *Criminal Code* and whether the appellants had intended or foreseen their conduct in the circumstances would offend. Kearney J said the question was one of whether, according to community standards of decorum, the act in question in the circumstances in which it occurred constituted offensive behaviour.[40] Rice J agreed that adoption of the definition given in *Worcester v Smith* was appropriate to "offensive behaviour".

[40] Although elements of the definition of offensive behaviour derived from *Worcester v Smith* may be appropriate to determine "cause offence" or "offensive" in respect of child abuse material, a useful contemporary description of what is meant by "offensive" may be gleaned from the child pornography provisions of the *Criminal Code* (Cth). His Honour referred to those provisions. This is not to import impermissibly the terms of one statute into another, but rather to utilise an example of a contemporary definition. As can be seen from the *Criminal Code* (NT) definition of child abuse material, certain materials that have received classifications under the *Classification (Publications, Films and Computer Games) Act* are exempt from the definition. The respective Commonwealth and Territory *Classification (Publications, Films and Computer Games) Acts* are part of a

[40] *Pregelj v Manison* (1987) 31 A Crim R 383 at 400.

Federal Scheme. Both the *Criminal Code* (Cth) and the *Guidelines for the Classification of Publications 2005* (Cth) are of some assistance in assessing the true character of the impugned material.

[41] In my opinion, the Northern Territory definition, contrary to the common law, does not allow the broader context to be regarded. To that extent I will uphold the ground of appeal, however that does not finally determine the issues between the parties.

[42] In determining whether the material depicts the child in a manner that is likely to cause offence to a reasonable adult, and whether the child is depicted in a sexual, offensive or demeaning context, it is appropriate to consider relevant common law approaches, the *Criminal Code* (Cth), and the *Classification Guidelines* that are not inconsistent with the *Criminal Code* (NT). Relevant factors might therefore include:

- Whether the image is likely to arouse anger, resentment, disgust or outrage in the mind of a reasonable person;
- In deciding whether a reasonable person would be so offended, the standards of morality, decency and propriety generally accepted by reasonable adults;
- The literary, artistic or educational merit (if any) of the material;
- The general character of the material (including whether it is of a medical, legal or scientific character – noting the defences in s 125B(2)-(5) of the *Criminal Code* (NT), including the relevance of the Classification Board).

[43] The mode of the creation of the material or that the material was generated in a family are not relevant factors. In assessing the material, it is not relevant to consider that few or no photos were taken of the respondent's son. That would be to assess context.

Without considering the broader context, are the photographs child abuse material?

[44] Applying the principles and relevant factors discussed, it is necessary to make an independent assessment of the material, excluding the broader context. Each item will not be described here. In terms of what is depicted in the exhibits, having viewed the exhibits, I agree with the description of each image given by his Honour,[41] although the assessment of whether the image amounts to child abuse material differs here with respect to some of the exhibits.

[45] A reasonable person would regard Exhibit P3 to be in poor taste, perhaps a misguided attempt at a depiction of cuteness, but not clearly of a child in an offensive, sexual or demeaning context. The same may be said for Exhibits P4, P6, P7 and the photos comprising P9, P10 and P13. Exhibits P5 and P11 depict the child in a clearly sexual context. Those images are likely to cause offence to a reasonable person. The images fall well below the standards of decency and propriety generally accepted. In my view the photos in Exhibit P8, despite the young age of the child depicted, amount to images of the

[41] T, 2 December 2015, 4-8.

child in a variety of sexual contexts, principally sexual posing. The images fall below the accepted standards of decency and propriety and are likely to cause offence to a reasonable person. Similarly, I regard the series of photos comprising Exhibit P12 to depict the child in a sexual context. They too are likely to cause offence to a reasonable person.

Section 31 *Criminal Code* considerations

[46] If I am in error with respect to finding Exhibits P5, P8, P11 and P12 constitute child abuse material, or if I am in error in finding the remainder of the exhibits do not constitute child abuse material, in either case the broader contextual issues that have been excluded from consideration with respect to the definition of child abuse material are relevant to determining whether the respondent intended or foresaw that the items he possessed were likely to cause offence to a reasonable person. It seems unlikely that the respondent intended to possess child abuse material or that he did foresee such a consequence as a possibility. However even if he did foresee such offence there is a wealth of material to satisfy s 31(2) of the *Criminal Code*. Section 31(2) would excuse him from criminal responsibility if, in all of the circumstances, including the chance of causing offence in the manner anticipated, an ordinary person similarly circumstanced and having such foresight would have proceeded with possession of the photos.

[47] It is important to recognise his Honour believed the respondent and accepted his evidence with respect to the background and the context in which the

images were made and retained. There is no reason to disturb those findings. The ordinary person similarly circumstanced in this case is a long term male resident of Alice Springs in his seventies who had a career in photography. While it is not possible to have regard to the intertemporal aspects of the case in the determination of what images may or may not meet the definition of child abuse material, that is a factor that has some bearing on foresight and whether an ordinary person similarly circumstanced may have the same.

[48] The possession of the photos had taken place for a number of decades. A number of exhibits were displayed in the house without adverse comment from anyone. He had invited police into the house for the initial investigation into the unlawful entry in the knowledge that some of the impugned images were openly displayed. The respondent's evidence indicates he would not have allowed other persons to see some of the images but that appears to be motivated by an intention to guard the privacy of his daughter rather than foresight of causing offence because of what is depicted in the images. The photos the subject of the charge are part of a much greater collection of family photos, probably thousands. He had forgotten he had many of them.

[49] Although the respondent intended, at some stage in the past to possess and continue to possess the photos, in the circumstances it could not be proven he intended or foresaw the images would cause offence to a reasonable person. If at some stage he did foresee this consequence as a possibility, it

could not be proven that an ordinary person similarly circumstanced would not have possessed the same photographs in the same circumstances.

Conclusion and Orders

[50] The single ground of appeal is upheld. It was an error to have regard to the broader family context and the circumstances of the original creation and possession of the images, however given the considerations relevant to s 31 of the *Criminal Code*, the appeal is dismissed pursuant to s 177(f) of the *Local Court (Criminal Procedure) Act* as no substantial miscarriage of justice has actually occurred.

[51] The Local Court finding that the respondent is not guilty and the dismissal of the charge is confirmed.

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