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## **In the Crown Court for the Division of Antrim**

### **R v Michael Morton**

#### **His Honour Judge Smyth QC**

#### **Ruling**

#### **Application to Adduce Hearsay Evidence**

**Articles 18 and 21 of the Criminal Justice (Evidence) (NI) Order 2004.**

**Incitement to distribute indecent images of a child, Protection of Children (NI) Order 1978, proof of contents of web site.**

#### **The Charges.**

[1] The accused is charged with two counts of inciting Landslide Incorporated, a Company based in the United States, to distribute or show indecent photographs of a child contrary to Article 3(1)(b) of the Protection of Children (NI) Order 1978. The relevant periods specified in the particulars of the charges are between 8<sup>th</sup> June 1999 and 11<sup>th</sup> July 1999 and between 9<sup>th</sup> July and 10<sup>th</sup> August 1999.

#### **The Issues involved in the Trial**

[2] For the prosecution to bring home the charge against the accused it has to satisfy a jury that he knowingly made payments to the Defendant and that he was aware that these payments were made for the purpose of obtaining access to an indecent image of a child. It therefore is essential for the Prosecution to be able to prove two separate matters. First they have to prove that the accused made the payments. Second they have to prove both that the site contained indecent images of children at the relevant time and that the accused was aware of this when he made the payments. The relevant time is that specified in the particulars of offence.

[3] Incitement of others to commit a criminal offence is an offence at Common Law. By subscribing to an organisation with the knowledge that that subscription obtains access to an indecent image of a child is to encourage distribution, even if the communication is with an automated computer system. *R v O'Shea* (2004) Crim L R 948.

### **Factual Background.**

[4] On 9<sup>th</sup> June 2003 the police carried out a search of Unit 6, of the Rathenraw Industrial Estate, Antrim and seized various computer items. The accused was present and there is a limited number of other staff with computer access.

[5] For the purpose of this application what was found on the hard drives and who had access to them is of little relevance. No relevant images of child abuse were found on the computers to which the accused had access. A keyword search revealed that a "keyword hit" high-lighted an HTML page that contained links to various sites suggestive by description of child pornography. It was not possible to say what these sites contained at the time and date they were visited.

[6] The search arose out of credit card details that had been found by investigators in the United States as a result of an extensive investigation into the Company, Landslide Incorporated, and its directors made subsequent to the summer of 1999.

[7] On 15<sup>th</sup> October 2003 the accused was arrested and interviewed later that day. The accused conceded he, by mistake, may have come across an indecent image of a child when he was using the internet but he denied he had ever made any payments to Landslide Incorporated or that he had made any payments for the purpose of gaining access to indecent images of children. The principal thrust of his defence is that payments recorded on his Visa account to Landslide were fraudulently made by a third party. He still however requires the Prosecution to prove its case against him.

[8] Evidence that the prosecution can call includes: the police officer in the United Kingdom charged with investigating Landslide Inc, and other forensic witnesses who, between them, can give direct evidence as to the nature of Landslide Inc's business and what was found on various computers. The records in relation to Mr Morton's Visa account are held in Scotland but no issue arises here in relation to their proof.

[9] The business of Landslide Inc. was to run an Internet Portal for various webmaster sites that specialised in pornography. These webmasters are located worldwide and it is the Prosecution case that those websites registered with Landslide Inc under a specified code word predominantly

contained images of children being subjected to various forms of sexual abuse.

[10] United Kingdom investigators had access to the databases containing details of customers who made payments by credit card to Landslide Inc to gain access to its hosted sites. They have extrapolated the UK transactions and have identified two relevant e-mail addresses associated with successful purchases to permit access to KEYZ registered sites. Dates purchased (end of period of access) were: Monday 7<sup>th</sup> December 1998, Saturday 10<sup>th</sup> July 1999, Tuesday 3<sup>rd</sup> August 1999 and Monday 9<sup>th</sup> August 1999.

[11] The person who made these purchases selected various websites. A total of \$109.80 was spent by whoever submitted these details on the credit card. Purchases for access to sites were made on : Sunday 7<sup>th</sup> November 1998, , Saturday 10<sup>th</sup> July 1999 and Tuesday 3<sup>rd</sup> August 1999. Automatically generated e-mails would have been sent to the e-mail address provided by the person who made this subscription.

[12] The details submitted were: a visa card number x x x 8721, expiry dates 01/99 and 01/02. A sign up document were submitted that matched the billing details. These had Train Street, Belfast in common but there were variations. The subscriber gave his name as that of the accused, Michael Morton. Ms Girling has prepared a chart of the purchases by this subscriber.

[13] Direct evidence can be given as to what a subscriber was required to do to gain access though Landslide Inc to coded registered sites including payments by credit card, what details had to be supplied online and how such a purchase would give web site access for a specific time. The business run by Landslide Inc, how it was organised, the way it received payments, the system for return of challenged payments and the means whereby it facilitated access to particular web pages whose web sites it hosted through its coded registration system, including the use of hyperlinks which possessed what are called "banners" will be explained by direct evidence to the jury. This will include what was found on Landslide Inc's computer databases that related to personal and account details of the accused.

[14] There also is one "banner" that I understand relates to one of the sites accessed by the subscriber who used Mr Morton's credit card details and which will be viewed by a jury. This banner contains a number of images which, despite their size, would allow a jury to assess the ages of the children depicted and also to assess the issue of indecency. Apart from this there is a lack of other evidence that can be used to establish what was depicted on the accessed sites at the time of access. It is this lack of evidence that the Prosecution seeks to address by the evidence of Ms Jennifer Lee and four reports to which I refer later in this Ruling.

## **History of the Application.**

[15] Jennifer Lee was, at the relevant time, a staff analyst at the National Centre for Missing and Exploited Children (NCMEC) at Washington. It was understood that she was to give evidence by Live-link. She has subsequently left NCMEC and has moved a considerable distance inside the United States. It is said that it is not practicable for her to travel to Northern Ireland and my understanding is that she is no longer willing to give evidence by live-link. Whether this is as a result of policy by her past employer, or personal or practical considerations is not clear. This application has therefore been made out of the time specified. It is also opposed and notice of opposition has similarly been served outside the specified periods. In respect of both these matters extensions of time are sought and, given the overall circumstances, I grant them.

### **Jennifer Lee**

[16] The importance of Ms Lee's evidence is two fold. She gives evidence as to the function of NCMEC for whom she worked as a staff analyst, its system for compiling and collating reports from those who contact it. She also proves the relevant reports and records. These total four: 8712, 10367, 1171 and 9966.

[17] She describes her role as follows: "I have access to all the NCMEC records, both manual and computerised, relating to I.P. addresses and web site details of those persons suspected of proliferating child images upon the internet. The documents...are derived from and form part of the records relating to the business of NCMEC and were compiled in the ordinary course of business from information recorded by persons who had, or may reasonably be supposed to have had, personal knowledge of the matter dealt with in the information they supplied. The person or persons who supplied the information recorded in the records cannot reasonably be expected to have any recollection of the matter dealt with in the information they supplied".

[18] I have reservations about whether it can be said that the persons supplying the information NCMEC records could not reasonably be expected to have any recollection of what they reported but the lapse of time in this case has this effect. Ms Lee's also refers to the terminology used in these reports. The expressions "child pornography" and "child erotica" are used as generic terms with the former being used to describe images containing a child engaged in "sexually explicit and/or lewd and lascivious behaviour" and the latter describing images of children "acting or posing in an inappropriate manner yet not depicting sexual activity or lewd and lascivious behaviour".

[19] In assessing this it has to be borne in mind that these descriptions can cover a broad range of situations most of which would render the situations unlawful under our law. There might, perhaps, be a "margin" where the images, particularly those of children "acting in an inappropriate manner", might not transgress the law in Northern Ireland. Regard also has to be had to the difference between the definition of a child between Northern Ireland and the United States.

[20] NCMEC has a national remit in America. Its role, recognised by Congress, is to collate information about missing and exploited children for use by enforcement agencies. It is not permitted to download or store prohibited indecent images. It does not investigate the authenticity of reports it receives but acts as a clearing house for onward referral. Although it seems from the reports that I have examined its officers do comment on reports they, understandably given the organisation's function, do not stand over the authenticity of reports made to it. An informant is not required to give an address or name and no check is made to verify names and addresses that are given.

[21] These reports, described as "Cyber Tipline Reports" can be made by post, by telephone or, perhaps most frequently, by the internet itself. They can also be made anonymously. NCMEC's staff do not give evidence in court. I am unaware of any examples of evidence being admitted in a similar case as this either in the United Kingdom or America.

[22] Since NCMEC does not make or store image copies of what can be seen online and its staff cannot access these sites beyond what is publicly displayed the most that staff can do is record and collate the report and pass it on. My understanding is that an informant, even if that person has given a valid name and can be traced, has never been asked to give direct evidence in court as to what he or she viewed. It is NCMEC's policy that it would not be reasonable to expect that person to recollect the matters complained of. Here there has been a lapse of almost nine years and it is clear that it would be unlikely that informants could be traced who could recollect such matters sufficiently to be able to give admissible and cogent evidence.

[23] Before I come to apply the provisions of the Criminal Justice (Evidence) (NI) Order 2004 I briefly describe the reports that are exhibited in Ms Lee's statement of evidence and which would be admitted in evidence, without scope for those upon whose information the reports have been derived being subject to cross-examination.

[24] The layout of these pro-forma reports will become clearer as I, briefly, mention each of the four. It is sufficient here to point out that the report essentially starts with the date and time for report of the incident and a date and time of the viewing. I do not propose to go into any greater detail than I

feel necessary, either about these forms generally or the four that are relevant to this Ruling. I briefly examine the four reports.

[25] Number 8712 gives the time of entry of report as 19<sup>th</sup> May 1999 and time of "incident" as 5<sup>th</sup> February 1999. The dates appear to be outside those contained in the particulars of the charges in the indictment. An e-mail address is recorded for the complainant. The report appears to concern a number of sites with additional comments by NCMEC analysts but all the entries appear to have a date prior to the period in the particulars. The report does not specify the nature of images seen.

[26] Number 11171 has no name recorded and is anonymous. The incident is reported as 01/01/1900 which I assume is a typographical error. Under "date of report" is recorded 08/09/1999 (a similar error may be in 8577). A note is made on the report which describes two different site names. In relation to the first, the "site description" gives the analyst's estimate of the child's age as 11-12 years old and description of the image as "lewdly exhibiting" the genitalia. A link gave access to another site and a description is recorded of accessible images being "child erotica". The comment that the analyst further made was that he could not further access the site as membership was required and it was protected.

[27] In report numbers 10367 and 9966 the complainant is the same person and gives both her name and her address. She is therefore presumably still traceable although, given the lapse of time, she could not reasonably be expected to remember what she saw with sufficient cogency to be able to give relevant evidence. Her call was by telephone and she gave a number of sites. The date of report was 29/07/1999 and the incident is recorded as being slightly earlier on the same day. It is not made clear whether all sites were accessed at this time and there is a lack of detail recorded which, given the nature of the report, is understandable. One of these sites was accessed by the analyst. The analyst describes it as a linking site to many different sites which contain graphic child pornography. But they were membership sites and password protected.

[28] Report 9966 recorded this complainant as making a report on 13/07/1999 concerning an incident on 13/06/1999. She complained of a number of sites and there is a dated additional entry by the NCMEC analyst describing a site with perhaps the most explicit description out of the four reports of what is to be seen, of the number of images and their nature including depiction of sexual acts between children and children and adults and children.

[29] I note here the importance of this evidence to the case as a whole. It is this evidence on which the Prosecution relies to show what the websites contained at the relevant times and dates stipulated in the particulars. The

importance of the date of the incident entry is therefore obvious. While the date and time of the report depends on the accuracy of the system and of its operator at NCMEC the accuracy of the time of the incident depends on the accuracy of both the information given **and of** the way that is recorded.

[30] The prosecution seek to introduce four Reports, which they say were created during the period in question, and which represent evidence of what was on the website during that time. Miss Lee's evidence may well be simply to confirm that these records were kept and she cannot personally give any evidence as to either the reliability or identity of a complainant. The real purpose of the evidence that she will adduce lies in the contents of the four reports. These reports contain both "double" hearsay as to what was said to the receiving analyst at NCCMEC and recorded by him and also direct hearsay in relation to any further analysis recorded by the analyst.

[31] For this reason it is my view that the first question the Court has to address is whether these reports should be received in evidence as proof of the truth of their contents. There is no doubt as to how important this is to the issues in the trial and to what the jury will have to decide. There is also no doubt whatsoever about the extent to which this deprives the accused from seeking to challenge or question such evidence. Until such time as a Superior Court gives authoritative guidance on this particular area I take the approach that the tests in Article 18 and Article 21 of the 2004 Order have to be applied to the individual facts of each case and I am satisfied this involves looking at the nature of the reports, assessing their importance to the case and, particularly in applying Article 21(7), gauging the reliability of the report. I have to assess this having regard to the contents of the report, the source of the report's information, the circumstances in which the report was received and the way in which the document was created.

[32] This assessment is made difficult by the fact that there will be no-one to give any evidence in person to the court about the system for recording complaints at NCMEC and the times and dates and classification. Since this is a criminal matter the additional provisions of Article 18(1) and of Article 21(5) apply. The list of factors Article 18(2) requires to be considered is not exhaustive but they give considerable guidance as to whether I am satisfied that it is in the interests of justice for the hearsay to be admitted.

[33] The evidence would have considerable probative value. There is a lack of other evidence, save for the one matter referred to above. The reports are made, either by phone, mail or e-mail, by a person who may be encouraged by the fact that he can be anonymous and also perhaps is assured he will never be required to give evidence. It is difficult to assess reliability of any complainant as there is a lack of information on which that assessment can be made. In some cases informants are anonymous but in some cases names and addresses are given but no verification process is undertaken. Oral evidence

arguably could have been given but clearly can not now because of the lapse of time and also the approach of the Organisation. Finally the Defence can not challenge the statement. Whether that difficulty is likely to prejudice the defence is something that I consider later.

[34] I also take into account the following provisions: Article 25 on multiple hearsay and the effect of that provision which essentially requires the prosecution to bring this application within Article 21 or else meet the higher test set by Article 25 (1)(c) and Article 28 which makes provisions allowing for the testing of credibility in criminal proceedings involving admission of hearsay. These latter provisions can obviously not be applied to any significant extent especially considering the anonymity of some of the informants.

### **Conclusions:**

[35] In relation to Article 21 I am satisfied that both Ms Lee and the complainants could give admissible oral evidence, that they could be expected to have personal knowledge of what they saw and that the reports were created in the course of a relevant business or office and that, since they were prepared for the purpose of a criminal investigation, the provisions of Article 21(5) apply.

[36] I am prepared to accept that Article 20(2)(c) applies namely that the relevant person (whether Ms Lee or the informants whose reports we are concerned with) are outside the UK and it would not be practicable (or even possible) to secure their attendance. Likewise under Article 20(5)(b), again given the lapse of time, neither the person who complained to MCMC nor the analyst who received the complaint and compiled the report could not reasonably be expected to have sufficient memory of the events as to be able to give cogent evidence. The provisions of Article 21(5) are therefore met.

[37] There are four questions I have to answer:

- Am I satisfied, having regard to the factors in Article 18(2), as well as any other relevant matters, that it is in the interests of justice for this evidence to be admitted?
- Am I doubtful as to the statement's reliability as evidence for the purpose for which it is tendered so as to give a direction under Article 21(7)?
- Does Article 30(1) apply? If it does I have discretion to refuse to admit.
- Finally do the provisions of Article 76 apply namely the provisions requiring the exclusion of unfair evidence?



[38] I have regard to the central importance of this to the issues in the trial but also to the degree to which the Defence would be restricted from asking questions and testing the evidence on this central issue. This does not just apply to asking questions from the staff at NCMEC but also of the persons who made the original complaints. I appreciate some of these are identified and traceable while others are anonymous. Some reports are more explicit than others.

[39] In answering the first question it is not for the court to look at what individual weaknesses each report contains but to take an overall view on the issue as to whether it is satisfied that it is in the interests of justice this evidence be admitted. This situation approaches, although it is not identical to, one where intelligence from informants is received by the police. Here the complainants are well meaning and no doubt outraged by what they see and by what they believe these sites give access to.

[40] It however is my strong view that if this evidence is to be received it has to be directly given in court and subject to cross-examination.

[41] I find the answer to the second question more difficult. If, having regard to the four factors to which Article 21(7) directs me to, I am doubtful about the reliability of a statement then I must make a direction under this Article. This does involve a study of the reports and of the system for recording these. I have made some comments on the overall nature of these reports and some minor points about individual entries.

[42] I also have had the benefit of reading a Ruling in a very similar case R V Flynn by the Recorder of Belfast, Judge Burgess. He refers to similar reports from NCMEC.

“I have expressed concerns that in three of the ten Reports a date, crucial in that it seeks to determine the “Incident date”, was plainly wrong. The court can make no comment as to the reliability of the informant, and therefore the reliability of the statement accredited to that person. Indeed in some of the cases the informant is unknown, and it is accepted by NCMEC that their system of recording could involve someone giving false information about themselves. The organisation makes no check on the informant or that person’s reliability in terms of making reports. As to the NCMEC staff the court would have greater confidence as to the reliability of what they record as to what they saw.”

[43] Given the provisions of Article 21(7) such concerns clearly would affect the reliability of the circumstances in which information was received and the document created. I also found some potential errors but not such that I would make a direction on these alone.

[44] I however feel there are three points of substance. Firstly, where a source is anonymous it is impossible to check its reliability. Secondly, there never has been a check on the reliability of identified sources. Finally, the giving of a direction under Article 21(7) should not depend on errors being demonstrated but on the capacity for such errors to occur. This involves consideration of the overall system as well as the contents of individual reports. Having regard to these matters I make a direction under Article 21(7).

[45] It is in the circumstances otiose to proceed to Article 30. The first part of which I feel does not apply and the second has been made redundant by my conclusions.

**Ruling:**

**[46] I am not satisfied that it is in the interests of justice for the Reports to be admitted for the purposes of Article 18(1)(d) and I also make a direction under Article 21(7) that the statement's reliability as evidence for the purpose for which it is tendered is doubtful and therefore should not be admissible under Article 21.**