23/10

HIGH PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 147/90

BETWEEN B

Appellant

AND

(New Zealand Police)

Respondent

HC judgt being reported as (Police v B) – name suppressed in HC

2110

Coram: Cooke P.
Richardson J.
Somers J.
Casey J.
Jeffries J.

Hearing: 19 October 1990

Counsel: M.G. Ring and G.F. Orchard for Appellant
J.C. Pike and R. Earwaker for Respondent

Judgment: 19 October 1990

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

Section 29(2)(a) of the Wanganui Computer Centre Act 1976 provides as amended:

> 29. Offences - (2) Every person commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding two years who -
> (a) knowing that he is not authorised to do so by or under any lawful instruction given by the permanent head of a department with access to the computer system gains or attempts to gain access to the computer system whether by means of any device or apparatus legally part of the computer system or by any other means;

The definition of 'Access' in s.2 is:

> 'Access' in relation to the computer system means the placing of information on that system and the retrieval of information from that system.

In the Auckland District Court the defendant in this case faced ten charges under s.29(2)(a). We quote the first as a sample:

> (i) On 26 November 1987 at Auckland did commit an offence against Section 29(2)(a) of the Wanganui Computer Centre Act 1976 in that the defendant, knowing that he was not authorised to do so by or under any lawful instruction given by the Permanent Head of a Department with access to the computer system, gained access to the computer system when he sought details of the criminal history of Dan Te Awa Heke.

The defendant was formerly a police officer and as such had authorised access to the Wanganui computer system. He had a personal QID, which is the access code required to be put by the terminal operator into a terminal in order to obtain information from the system. His QID had been expunged from the system on his retirement from the service. The prosecution allegations against him are that on the occasions specified in the charges he telephoned the operator of the remote terminal located at the watchhouse of the Auckland Central Police Station, falsely identified himself as a certain police sergeant stationed in Palmerston North, gave the latter's QID and requested the operator to obtain for him from the computer system certain information about named persons or vehicles. She obtained the particulars requested by keying the QID and the query into the system and receiving the information on her screen. She then conveyed this to the caller, who was waiting on the telephone line.

The defendant denies that he was the caller. We are not concerned with that question but with a question of law as to the true interpretation of the Act. The District Court Judge dismissed the charges on the ground that, in his view, s.29(2)(a) refers to mechanical access only and the principle of innocent agency enunciated in R. v. Paterson [1976] 2 N.Z.L.R. 394 cannot apply to this offence. The District Court Judge's decision was challenged by the informant by appeal on questions of law under s.107 of the Summary Proceedings Act 1957. In a judgment delivered on 5 April 1990 Tompkins J. allowed the appeal, differing from the interpretation of the Act adopted in the District Court, and remitted the case to the District Court for further hearing. The defendant now appeals to this Court by leave granted in the High Court.

The point is a short one the answer to which is to be found, in our view, in the natural and ordinary meaning of the words of the Act in their context and in the light of the purposes of the Act. In the courts below and in the argument for the defendant, now the appellant, much was thought to turn on the words 'or by any other means'. The argument for the defendant has been that these refer to physical (including electronic) means and that the person who is the operator cannot be described as a means. It seems to us that this does not bring out the true question. The last part of the statutory paragraph contemplates two classes of means of gaining access, namely a device or

apparatus legally part of the computer system and any other means. No doubt the references are indeed to physical means and 'any other means' covers what has come to be known as hacking. The question, however, is whether a person who uses mechanical means through the instrumentality of an innocent operator, as the defendant is alleged to have done here, is to be described as thereby gaining access to the computer system.

In our opinion the answer to the question is clearly Yes. That accords with the actual language of the Act in its natural and ordinary meaning, with such technical language as is used (e.g. 'access') and with the recited purpose of the Act 'to ensure that the system makes no unwarranted intrusion upon the privacy of individuals'. Counsel for the defendant were unable, as we understood their argument, to suggest any reason why Parliament should have wished to exclude the kind of conduct by the defendant alleged here from the ambit of the offences created by the Act. The suggestion was rather that it had been overlooked. We regard the words used as well capable of covering it.

The primary submissions for the defendant on the meaning of the paragraph were presented by Mr Ring, but Mr Orchard argued the points pertaining to the innocent agency doctrine. Mr Orchard accepted, and inevitably so, that there are a considerable number of crimes capable of being committed through an innocent agent, and that in such

cases the principal is the person who 'actually commits the offence' within the scope of s.66(1) of the Crimes Act 1961. Undoubtedly a statute creating a new offence may put the offence into that category.

By virtue of the statutory language, gaining access includes gaining the retrieval of information; and the defendant (if he was the caller) did this by deceiving the operator just as if he had been standing by her shoulder and persuading or frightening her into keying in the QID and the request or, indeed, just as if he had physically guided her hand on the keyboard.

There is much in the Act to support this approach to its interpretation. For example, certain departments and organisations have the right to use the system for the purposes of, inter alia, retrieval of information: see now s.4C and compare the former provisions of s.4. It is those departments and organisations which have access to the system and may retrieve information from it. 'Retrieval' and 'access' do not refer only to the operator: the scheme of the Act is that the operator may be the medium or agent through whom the processes are carried out. Qui facit per alium, facit per se. We find nothing in the Act contrary to the application of the ancient maxim.

The point is hardly capable of further elaboration. For these reasons we hold that the High Court Judge reached

the right result and dismiss the appeal. Further procedure and determinations evidently remain necessary in the District Court, so the order for remission remains.

The Crown is entitled to costs. If the parties are unable to agree on the amount, memoranda may be submitted.

RB Cooke P.

Solicitors:
McElroy Milne, Auckland, for Appellant
Crown Solicitor, Auckland, for Respondent