

*Peach v Bird* [2006] NTSC 14

PARTIES: PEACH, David

v

BIRD, Thomas

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING APPELLATE  
JURISDICTION

FILE NO: No JA 30/2004 (20307355)

DELIVERED: 21 February 2006

HEARING DATE: 14 September 2005

JUDGMENT OF: SOUTHWOOD J

**CATCHWORDS:**

MAGISTRATES – appeal against dismissal of complaint – errors of law and fact – no evidence - whether decision inconsistent with the evidence - child pornography – pornographic image downloaded onto computer

Criminal Code s 125B(1)(a)  
Justices Act s 163(3), s 163(5)

*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; *Berlyn v Brouskas* (2002) 134 A Crim R 111; *Gover v R* (2000) 118 A Crim R 8; *Semple v Williams* (1990) 156 LSJS 40; *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473; *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32; *The King v Wilkes* (1948) 77 CLR 511

**REPRESENTATION:**

*Counsel:*

Appellant: A Elliott  
Respondent: M Johnson

*Solicitors:*

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

Judgment category classification: B  
Judgment ID Number: Sou0622  
Number of pages: 23

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

*Peach v Bird* [2006] NTSC 14  
No. JA 30/2004 (20307355)

BETWEEN:

**DAVID PEACH**  
Appellant

AND:

**THOMAS BIRD**  
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 21 February 2006)

**Introduction**

- [1] This is an appeal against the dismissal of a complaint by the Court of Summary Jurisdiction on 9 March 2004. The complaint charged that contrary to s 125B(1)(a) of the Criminal Code, on 17 March 2003 at Darwin, the respondent possessed child pornography being one picture image that had been downloaded onto the hard drive of his personal computer. The presiding magistrate acquitted the respondent. He found that although the child pornographic image had been downloaded onto the hard drive of the respondent's computer, the downloading was inadvertent and the respondent

had no knowledge of the content of the downloaded image before it was erased.

- [2] The appeal is brought under s 163(3) of the Justices Act. The appellant argues that the presiding magistrate erred in law in finding that the respondent had inadvertently downloaded the child pornographic image onto his personal computer. The appellant says that there was no evidence of an inadvertent downloading of the child pornographic image; the prosecution's evidence was that the child pornographic image could not have been inadvertently downloaded; the respondent's evidence was that he did not visit the relevant websites; and, the presiding magistrate's finding that the respondent inadvertently downloaded the child pornographic image while surfing the net was inconsistent with the evidence in the case and the presiding magistrate's acceptance of the evidence tendered by the prosecution.

**The issue**

- [3] The primary question in the appeal is whether the evidence before the Court of Summary Jurisdiction was such as to exclude the respondent's inadvertent surfing of the net as a reasonable hypothesis as to how the child pornographic image was downloaded and saved onto the hard drive of the respondent's computer?
- [4] In my opinion the appeal should be allowed. The possibility that the respondent had inadvertently downloaded the child pornographic image onto

the hard drive of his personal computer while surfing the net could not reasonably be supposed by the presiding magistrate. The presiding magistrate's supposition was fanciful and constituted an error of law: *Gover v R* (2000) 118 A Crim R 8 at 19. There was no evidence upon which such a supposition could be based and the supposition was inconsistent with the prosecution evidence which the presiding magistrate accepted. The hypothesis that the respondent had inadvertently downloaded and saved the child pornographic image onto the hard drive of his personal computer while surfing the net amounted to speculation inconsistent with the evidence in the case: *Gover v R* (supra).

### **The charge**

[5] The proceeding in the Court of Summary Jurisdiction arose from a complaint filed on 10 September 2003. The respondent was charged with a simple offence, not a crime or a minor indictable offence. As at 9 March 2004, s 125B(1)(a) of the Criminal Code provided as follows:

(1) A person who has in his or her possession –

(a) child pornography; or

(b) ...

is guilty of an offence and is liable –

(c) in the case of an individual to imprisonment for 2 years;

[6] Where an Act provides for a penalty of imprisonment for a period of more than two years for an offence by an individual against a provision of or

under the Act, the offence is a crime unless expressed to be otherwise: s 38E Interpretation Act. A minor indictable offence is a crime which is capable of being, and is, in the opinion of the magistrate before whom the case comes, fit to be heard and determined in a summary way in the Court of Summary Jurisdiction: s 4 Justices Act. A simple offence is one that is not a crime. That is, it is an offence that is not punishable by a term of imprisonment exceeding two years and is not a regulatory offence.

### **The nature of the appeal**

- [7] The appeal is under s 163(3) and s 163(5) of the Justices Act which provide as follows:

(3) A party to proceedings before the Court arising from a complaint or information in relation to a minor indictable offence that the Court summarily disposes of may appeal to the Supreme Court from an order or adjudication of the Court dismissing the complaint or information.

(5) An appeal under subsection (3) may be on a ground that involves an error or mistake on the part of the Justices whose decision is appealed against on a matter or question of law alone or a matter or question of both fact and law.

- [8] Subsections 163(3) and 163(5) of the Justices Act grant a right of appeal to the prosecution against the dismissal of a complaint or information by the Court of Summary Jurisdiction. The appeal is an appeal in the nature of a rehearing. The scope of the appeal is limited to matters or questions of law alone or matters or questions of both law and fact.

[9] At first glance there appears to be an inconsistency between s 163(1) and s 163(3) of the Justices Act. Subsection 163(1) of the Justices Act provides as follows:

(1) A party to proceedings before the Court may appeal to the Supreme Court from a conviction, order, or adjudication of the Court (including a conviction of a minor indictable offence **but not including an order dismissing a complaint of an offence**) (*emphasis added*), on a ground which involves –

(a) sentence; or

(b) an error or mistake, on the part of the Justices whose decision is appealed against, on a matter or question of fact alone, or a matter or question of law alone, or a matter or question of both fact and law,

as hereinafter provided, in every case, unless some Special Act expressly declares that such a conviction, order, or adjudication shall be final or otherwise expressly prohibits an appeal against it.

[10] However, on further consideration, it is apparent that there is no inconsistency. Subsection 163(1) of the Justices Act does not purport to preclude the right of appeal granted by s 163(3) of the Justices Act. The wording of s 163(1) of the Justices Act is simply in conformity with the limited scope of the right of appeal granted by s 163(3) and s 163(5) of the Justices Act. The right of appeal granted pursuant to s 163(1) includes a right of appeal in relation to a matter or question of fact alone. There is no right of appeal under subsections 163(3) and 163(5) in relation to matters or questions of fact alone. If the words, “but not including an order dismissing a complaint of an offence”, were not included in s 163(1) of the Justices Act

then arguably s 163(1) would expand the scope of the prosecution's right of appeal against a dismissal of a complaint or information beyond that specified by s 163(5) of the Justices Act.

[11] The question of whether there is any evidence of the facts and the question of whether a particular inference can be drawn from the facts are both questions of law: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355 to 356; *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32. To make a finding of fact or to draw an inference in the absence of evidence is equally an error of law: *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 at 481; *Tracy Village Sports and Social Club v Walker* (supra). There is, however, no error of law in making a wrong finding of fact or drawing an illogical inference, if the finding is reasonably open. "Reasonably" in this context means no more than a rational tribunal of fact acting according to law as opposed to an irrational tribunal acting arbitrarily: *Tracy Village Sports and Social Club v Walker* (supra); *Berlyn v Brouskas* (2002) 134 A Crim R 111 at par [30].

[12] Strict principles apply to a prosecution appeal against the dismissal of a complaint. The allowance of an appeal against a dismissal of a complaint has always been regarded as the exercise of an exceptional discretionary power. This is because, as in the case of prosecution appeals against sentence, what is involved is the undesirable placing of an alleged offender in a situation of double jeopardy: *The King v Wilkes* (1948) 77 CLR 511 at 516. An appeal should only be allowed in the clearest and most compelling



circumstances, for the purpose of correcting manifest error. An appellate court will be prepared to set aside an order of dismissal based upon the impact of the evidence upon the fact finder and remit a matter for retrial only where it appears that the order of dismissal sought to be impugned was plainly wrong on any reasonable interpretation of the recorded evidence and the inferences that patently arise from it: *Semple v Williams* (1990) 156 LSJS 40.

- [13] In considering any appeal, it is both unrealistic and inappropriate to attempt to dismember *ex tempore* reasons and subject them to a vigorous analysis. It is necessary to take a broad view of them and ascertain the essential thrust of the reasoning process applied, without being unduly critical of the precise modes of expression used or according them a degree of definitiveness which was never intended: *Semple v Williams* (supra).

### **The Evidence of the Prosecution**

- [14] At the trial in the Court of Summary Jurisdiction the prosecution case was that the respondent had downloaded and saved one child pornographic image onto the hard drive of his personal computer, an image that he subsequently erased. The prosecution case was a strong circumstantial case. It was not a case where the child pornographic image, the subject of the charge, was actually found on the hard drive of the respondent's computer. Instead the name only of a computer file of the downloaded and saved child pornographic image was found in the C:\My Documents\My Pictures folder

on the hard drive of the respondent's computer. The file name for the child pornographic image was created in the respondent's computer on 17 March 2003. The only way the name of the computer file of the child pornographic image would appear in the C:\My Documents\My Pictures folder of the computer was if the respondent had deliberately downloaded and saved the child pornographic image in his C:\My Documents\My Pictures folder. It was said that the respondent had obtained the address or link of a Yahoo website known as the pishanito website that contained a photo album of picture images of adult and child pornography, that he had visited the pishanito website with the use of his personal computer and the link he had obtained and there located the child pornographic image which he selected and saved in the C:\My Documents\My Pictures folder on the hard drive of his personal computer. The address or link of the pishanito website was contained in an untitled word document that the respondent had created and saved in the C:\My Documents folder of his computer. It was contended by the appellant that the reason the child pornographic image itself could not be located in the respondent's computer was that the image had been overwritten or erased by the respondent on 18 March 2003 with the use of an eraser program that had been installed in the respondent's computer.

[15] At the trial in the Court of Summary Jurisdiction the appellant led oral evidence from Detective Senior Constable Nicholas Warren Fausett, a computer expert, and Christina O'Connor, a plainclothes constable. The appellant tendered a s 87 Classification (Publications, Films and Computer

Games) Act 1995 certificate, a print out of the C:\My Documents\My Pictures file name directory that had been obtained from a copy of the hard drive of the respondent's computer, a list of erasure programs installed on the respondent's computer and log entries of the operation of the programs, an untitled word document obtained from the hard drive of the respondent's computer containing addresses or links to various websites, a print out of pornographic images found by Detective Senior Constable Fausett at the pishanito website, the address or link for which was listed in the untitled word document found in the C:\My Documents folder on the hard drive of the respondent's computer, a print out of a child pornographic image from a photo album found by Senior Constable Fausett at the pishanito website address listed in the untitled word document found on the hard drive of the respondent's computer, a transcript of a record of interview between police and the respondent and a print out of the internet favourites found on the respondent's computer.

[16] The prosecution evidence was to the following effect. The respondent owned a computer. The computer was kept at the respondent's home at 9 Bittern Street Wulagi. The computer was connected to the internet. The police received information that the respondent may be in possession of child pornography. On 26 March 2003 the police executed a search warrant at the respondent's home and they seized his computer. The computer contained a hard drive that was examined by Detective Senior Constable Fausett with the use a software program called EnCase. The program

enabled police to make a complete and exact copy of the hard drive of the respondent's computer and to then work on the copy of the hard drive of the respondent's computer without interfering with its integrity. Examination of the copy of the hard drive of the respondent's computer revealed no images of child pornography. However, the examination did reveal that the computer was equipped for internet connection and the computer was configured in such a way as to indicate that the computer had been connected to the internet. The hard drive of the computer contained a word document named "untitled document.wps" ("the untitled word document"). The document was found in the computer folder, C:\My Documents. The word document contained a number of links to or addresses of websites, including the link, "<http://mx.photos.yahoo.com/pishanito2002>" (the pishanito website). The hard drive of the computer also contained a directory of 70 images and one temporary storage file of a word document that had been stored in the C:\My Documents\My Pictures folder of the computer. The 70 images and the one word document contained in the directory had been overwritten or erased with the use of eraser programs on the computer. This meant that the 71 files could no longer be recovered. All that could be seen was the name of each file that had been saved to the C:\My Documents\My Pictures folder of the hard drive; the date that each file was created and the date that each file was overwritten or erased. Unlike a file which has been merely deleted, a file which has been overwritten or erased cannot be recovered. The erasing programs on the

computer had been run on the files/images rather than the whole of the folder including the directory of file names of the 70 images and one word document. One of the files of the 70 erased images in the directory was named 80870531g0.jpg. A jpg file is an image or picture file as opposed to a text file. The file named 80870531g0.jpg was created on 17 March 2003 and overwritten or erased on 18 March 2003.

[17] Detective Senior Constable Fausett visited each of the websites listed in the untitled word document that had been saved in the C:\My Document folder on the hard drive of the respondent's computer. He found that two of the websites, one of which was the pishanito website, still existed. The pishanito website was not a commercial website. It was created by someone using Yahoo who made their own photo album for the web. Once you get to the photo album you know what you are going to get from the thumbnail image in the photo album found at the pishanito website. It was not the sort of website that runs in the background. It was a website that is right in front where you can view and see the images. You have to make a conscious decision to click on the thumbnail image. It was not a commercial pop up site. When Detective Senior Constable Fausett visited the pishanito website he found a photo album of 93 pornographic images. He printed a copy of the photo album. He noted that one of the 93 images had the file name 808705311g0.jpg being the same name as one of the file names in the C:\My Documents\My Pictures directory on the hard drive of the respondent's computer. The image with the file name 808705311g0.jpg was a child

pornographic image of one young girl inserting an object in the vagina of another young girl. Detective Senior Constable Fausett clicked on the image named 808705311g0.jpg located in the photo album at the pishanito website. When he did so the image opened up another web page which only displayed the photograph of the two young girls in a larger format. The image was sent for classification. The image was classified RC which means refused classification because the image depicted in a way that is likely to cause offence to a reasonable adult, a person who is or who looks like a child under 16 years.

[18] Detective Senior Constable Fausett said that the child pornographic image was a unique image and that in order for the name of the image to be recorded in the directory file names in the C:\My Documents\My Pictures folder of the respondent's computer, it was necessary for the person who operated the computer at the material time to have clicked on the specific child pornographic image contained in the photo album found at the pishanito website and then to have deliberately downloaded and saved the larger formatted image that is thereby produced to the C:\My Documents\My Pictures folder of the computer. The child pornographic image could not be downloaded remotely. That is, it could not be downloaded and saved to the respondent's computer from the website that was being accessed by the user of the respondent's computer. It was necessary for some one operating the respondent's computer to download the image to the relevant folder of the computer. The user of the respondent's computer saved the image to that

specific location being the C:\My Documents\My Pictures folder. When the child pornographic image is clicked on it is enlarged and is clearly visible to anyone looking at the computer display screen. The images named and listed in directory of file names in the C:\My Documents\My Pictures folder of the respondent's computer including the child pornographic image had been erased or overwritten with the use of the eraser programs downloaded by the respondent onto his personal computer.

[19] In his electronically recorded interview with police the respondent admitted that the computer was his and that he was the main user of the computer, he accessed pornographic sites on the internet, at the material time he was the only user of the computer and he had saved the list of website addresses or links contained in the untitled word document in his C:\My Documents folder of his personal computer. The respondent said that the website addresses or links contained in the untitled word document saved on the computer were obtained from briefcases that he got from internet chat rooms and that he had saved them because he could not open them up while accessing a chat room on the internet. However, he strongly denied that he had accessed the websites after he had created the untitled word document that was saved in his C:\My Documents folder on his personal computer.

[20] The evidence of the police witnesses, the tendered documents and the admissions made by the respondent in his electronically recorded interview with police leads to a very strong inference that the respondent accessed the pishanito website with the use of the address or link contained in the

untitled word document that he created and saved in his personal computer and that the respondent deliberately downloaded and saved the child pornographic image being the image named 808705311g0.jpg as a file in his C:\My Documents\My Pictures folder on his computer. It is extremely difficult to see how the name of the child pornographic image would otherwise appear in the C:\My Documents\My Pictures folder of the respondent's personal computer. However, it was not possible to verify this inference from either the temporary internet folder or the recycle bin of the respondent's computer because all of the files in these folders had been overwritten or erased by the respondent.

### **The respondent's evidence in the Court of Summary Jurisdiction**

[21] The respondent gave oral evidence in the Court of Summary Jurisdiction. His evidence was to the following effect. On occasion he used his personal computer to look at adult pornographic sites. He did not look at child pornographic sites. Child pornography repulsed him. He had absolutely no idea how a child pornographic image or the name of the child pornographic image could have been saved on the hard drive of his computer. He created the untitled word document containing the link to the pishanito website by cutting and pasting briefcases from internet chat rooms. However, he never opened any of the links to websites contained in the untitled word document that he had created and saved in the C:\My Documents folder of his personal computer. He had forgotten all about the untitled word document. He created the untitled word document containing the link to the pishanito



website because it was his practice, if people in an internet chat room “spoke” about child pornography, to email the information to Cyber Angels which is a website created for the purpose of reporting child pornography on the web. However, no such emails were found on his computer. He used a number of programs that erase and shrink files on his computer because he wanted to create room for computer games and because he was also thinking about selling his computer to a university student. He never opened the child pornographic image which was the subject of the charge against him and he did not know that any such image or the name of any such image was on the hard drive of his personal computer. He had difficulty with his computer. He had got stuck on different pornographic sites that caused pop up images to come up all of the time.

[22] However, no evidence was led from the respondent or anyone else on his behalf that when pornographic pop up problems occurred pornographic images could be or were sent to the respondent’s computer and saved in the C:\My Documents\My Pictures folder by the transmitting site (the website where the pornography was located). The respondent did not give evidence for example that he had checked his C:\My Documents\My Pictures folder after a pornographic pop up event and noticed that pornographic images had been saved to the C:\My Documents\My Pictures folder of his computer. Nor was there any evidence that a pornographic pop up event had occurred on 17 March 2003. As I have said, the prosecution’s evidence was that the child pornographic image could not have been downloaded remotely and

saved in the C:\My Documents\My Pictures folder of the respondent's computer because of the nature of the pishanito website.

[23] During cross examination the respondent gave evidence to the following effect. Other than the respondent no one else had access to his personal computer on 17 March 2003. He used his computer on 15, 16, 17, 18 and 19 March 2003. There was no one else using his computer on those days. He normally deleted emails that he had sent to other people. He used the name "Koori Tom" when he participated in internet chat rooms with the use of his personal computer. He never went to the pishanito website, all he did was copy and paste the links to the pornographic websites including the pishanito website to the untitled word document that he created and saved in the C:\My Documents folder of his computer. He did not overwrite or erase the 71 files listed in the directory in his C:\My Documents\My Pictures folder of his computer. He did not know that such files had been saved on his computer and he had no idea how they came to be erased. However, he deleted or erased his temporary internet files, his recycle bin, his internet history and his internet cookies so that his children could not access any adult pornography sites that he may of accessed.

[24] No evidence was led from the respondent to the effect that he had accessed the pishanito website and inadvertently clicked on the wrong image in the photo album which is found at that site. Not all images to be found at that website were images of child pornography.

## **The reasons of the presiding magistrate**

[25] The learned magistrate gave an *ex tempore* decision. He gave the following reasons that are of significance for his decision dismissing the complaint:

“I have listened carefully to the evidence of Detective Senior Constable Fausett. I accept that he is an expert at computer technology and forensic investigations involved with computers. He gave in my view reliable and credible evidence and I accept all that he had to tell me. He was frank with me, not given to exaggeration and in my view an impressive witness. Following from his evidence I do accept that the image P6 (*the child pornographic image*) was downloaded to the computer owned and possessed by Thomas Bird on or about 17 March 2003.

It may be that ... during ... his ramblings ... during night time surfing of the net looking at pornography sites and accessing adult chat rooms, that he inadvertently downloaded this particular picture.

I note in that regard that this picture came from a site that had a majority of adult sexually explicit photographs through to teenagers, through to ... two or three photographs of the like that ended up ... on his computer.

I am prepared to find that ... the defendant had inadvertently downloaded without paying particular attention to the picture and that with his children coming ... he hurriedly erased everything to do with his night time ramblings, surfing on the net.

At the end of the day he swore on oath that he did not know and yes it would be easy to call him a liar, but I would have a nagging doubt if I did. He is either a liar or just a fool, because of that nagging doubt I do not find the Crown case proven beyond reasonable doubt and he is acquitted.

[26] While it is not necessary that there be any direct evidence of the alternative hypothesis or explanation, the trier of fact cannot have regard to hypotheses or explanations which are inconsistent with such evidence as they accept.

Nor can they guess or speculate on matters inconsistent with the evidence in the case: *Grove v R* (supra); *Semple v Williams* (supra).

[27] The respondent gave the following evidence of relevance during his oral testimony in the Court of Summary Jurisdiction:

Did you at any time use that computer to look at child pornographic sites? - - - No.

What can you tell us about how that image came to be on your computer? - - - I have no idea.

You've heard about the site from which that file came? - - - Yes.

How did that come to be on your computer? - - - The actual URL?

Yes, the Pishanito? - - - The address, yeah – I was in a chat room and I copied and pasted it to save it to the – to 'My Documents' but I never opened it, and I'd forgotten all about it.

Did you at any time open the image the subject of this charge? - - - No, never.

And at anytime know that that image was on your computer? - - - Not the image, no.

You knew the site the URLs? - - - The URLs on there yes, yes.

You've never been to any of these sites yourself? - - - No

Not even once? - - - No

Not even for a little look? - - - No

You never would have gone to the Pishanito site and downloaded a picture from there is that what you say? - - - I never downloaded any picture, all I did was copy and paste the link.

But you never went to that site the one - - -? - - - No.

The one that says HTTP – I'll just do the main bit –  
'mxphotosyahoo.com/Pishanito 2000' – you never went there? - - -  
No.

And you never downloaded any pictures from that site? - - - That's  
correct.

Can you have a look at Exhibit P2 (*the directory of the 71 file names  
in the C/My Documents/My Pictures folder of the respondent's  
computer*) – now I appreciate that although you've seen this before  
you might have only seen it very quickly before. Do you understand  
that Detective Fausett says these are files that used to be on your  
computer in 'C/My Documents/My Pictures'? - - - Yep.

But have been overridden or erased – shredded I think is the word  
we've used a lot of times in court – you understand that? - - - Yep.

And there's about 70 pictures there you see that? - - - Yeah, about  
70, yep.

Do you have a digital camera? - - - No

Did you make any of these pictures? - - - No

Did you download any of these pictures? - - - No, the only thing I  
downloaded was the link.

So these 70 pictures that have been on your hard drive at some stage  
did you know how those 70 pictures came to be there? - - - I've got  
no idea.

You didn't download them? - - - Not the pictures, no, just the link.

There isn't anyone else you know who used your computer who  
might have downloaded these files? - - - In that time no.

All 70 of them? - - - No

And you say you didn't do it? - - - That's correct.

Did you delete them? - - - Well I - - -

I'm sorry I withdraw that question. Did you shred them, Mr Bird? - -  
- I shredded this document.

Yes? - - - That's the only one I shredded.

You couldn't have shredded that document because the detective found it on your computer? - - - Well, I admitted I copied and pasted this.

Did you shred this directory with files in it – 'My Documents/My Pictures'? - - - Where's that one?

That's the one near your left hand on the left side exhibit P2, did you shred all of those files, Mr Bird? - - - I didn't know those files were on there.

So you didn't shred those either? - - - No.

All right? - - - The only thing I shredded as I said was the Word document.

You sure it's not the case that you shredded all of the pictures because you knew that they were bad, you knew they were illegal? - -  
- No, I didn't know I had pictures on there.

Did you deliberately erase the other files that are on exhibit P2, Mr Bird? - - - No, the only thing I deliberately erased is that Word document.

All right within that same time frame you didn't delete possible child pornography that was already stored on your computer? - - - How do you mean?

Well, all the things in 'My Pictures/My Docs' – 'My Docs/My Pictures' I should say? - - - On these ones?

Yes? - - - I didn't even know they were there.

You didn't even know they were there okay but you knew in the immediately superior directory – the parent directory – that 'untitled document.wps' was there didn't you? - - - That's this one is it?

Okay but you didn't know about these very bad images the prosecution says were in 'My Documents/My Pictures'? - - - No, not these ones.

You never even looked in there? - - - No, I hadn't even opened up any of those.

Well My Pictures – 'My Documents/My Pictures/ - how did they come to be erased, that's my question? - - - I have no idea.

[28] The respondent's evidence was that he listed various links to websites that he had obtained from internet chat rooms in the untitled word document that he created and saved. The purpose of doing so was to send information about child pornography to Cyber Angels. However, he was most definite that he never accessed any of the websites with the use of the links contained in the untitled word document or at all; nor did he ever download any images from those sites including the pishanito website onto his computer. He forgot that he created the untitled word document.

[29] The evidence in the case was either that there had been a deliberate accessing of the pishanito website and a deliberate selecting and saving of the child pornographic image to the hard drive of the respondent's computer by the respondent or that there was no accessing of the pishanito website and related images at all by the respondent. There is simply no evidence upon which to base an alternative hypothesis of inadvertent downloading of the child pornographic image. The hypothesis that the child pornographic image had been inadvertently downloaded by the respondent while he was surfing the internet is inconsistent with all the evidence that was tendered in

the Court of Summary Jurisdiction. The hypothesis was excluded by the evidence.

[30] The presiding magistrate's hypothesis was plainly wrong on any reasonable interpretation of the recorded evidence and the inferences that patently arise from the whole of the evidence: *Semple v Williams* (supra). The possibility that the respondent had inadvertently downloaded the child pornographic image onto the hard drive of his personal computer while surfing the net could not reasonably be supposed by the presiding magistrate. The presiding magistrate's supposition was fanciful and constituted an error of law: *Gover v R* (supra) at 19; *Semple v Williams* (supra), *Berlyn v Brouskas* (supra). There was no evidence upon which such a supposition could be based and the supposition was inconsistent with the prosecution evidence which the presiding magistrate accepted. The hypothesis amounted to speculation inconsistent with the evidence in the case.

### **Orders**

[31] I make the following orders:

(1) The appeal is allowed.

(2) The adjudication and order of the Court of Summary Jurisdiction acquitting the respondent and dismissing the complaint is set aside.

(3) I direct that there be a retrial of the complaint filed on 4 September 2003 in the Court of Summary Jurisdiction



[32] I will hear the parties as to costs.

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