R v Dickens [2016] NTSC 7

PARTIES:	THE QUEEN
	v
	DICKENS, David Thomas
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING ORIGINAL JURISDICTION
FILE NO:	21446827
DELIVERED:	17 February 2016
HEARING DATES:	2, 3, 4 December 2015, 25 January 2016, 1 February 2016
JUDGMENT OF:	MILDREN AJ

CATCHWORDS:

EVIDENCE – *Evidence (National Uniform Legislation) Act 2011* s 97 – Tendency evidence – tendered to prove state of mind of accused and tendency to access CAM - possession of CAM not proved – possibility that others in residence accessed internet CAM – possession of some images of young children not CAM in itself – circular reasoning – neither tendency proved – evidence not admitted.

EVIDENCE – *Evidence (National Uniform Legislation) Act 2011* s 98 – coincidence evidence – possession of CAM – where CAM stored on accused's hard drives and DVDs – where CAM stored in accused's home – where internet CAM access dates and times unlikely to be generated by access by anyone other than the accused – where number of times and

periods of access considerable - sufficient similarities found – coincidence evidence allowed.

EVIDENCE – *Evidence (National Uniform Legislation) Act 2011* s 101, s 137 – where probative value of tendering evidence of the accused's pornography habits may be outweighed by unfair prejudice –some material the subject of uncharged acts – some other material potentially repellent to jurors –some chance of contamination by reason of internet CAM access by persons other than the accused – no other reasonable explanation of innocence – probative value not outweighed by prejudice – evidence admitted.

Evidence (National Uniform Legislation) Act 2011 s 97, s 98, s 101(1)-(2), s 137

Elomar & Ors v R [2014] NSWCCA 303; 316 ALR 206, distinguished, followed.

Velkoski v The Queen [2014] VSCA 121, not followed in part.

R v MR [2013] NSWCCA 236; *The Queen v Miller* [2014] NTSC 12; *CW v The Queen* [2010] VSCA 288; *CV v The DPP* [2014] VSCA 58; cited.

REPRESENTATION:

Counsel:

Appellant:	D Dalrymple & A Swindley
Respondent:	J Truman

Solicitors:

Appellant:	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

R v Dickens [2016] NTSC 7
No. 21446827

BETWEEN:

THE QUEEN
Appellant

AND:

DAVID THOMAS DICKENS
Respondent

CORAM: MILDREN AJ

REASONS FOR RULING

(Delivered 17 February 2016)

Mildren AJ:

[1] This is an application made pursuant to s 192A of the *Evidence (National Uniform Legislation) Act 2011 (NT)* (the Act) to determine the admissibility of certain evidence which the Crown seeks to lead at trial. The accused is charged with five counts of possession of child abuse material. Counts 1 and 2 relate to images downloaded onto and deleted from two separate hard drives found in a room in the defendant's home. Count 3 relates to multiple photos of children printed onto A4 size sheets of paper some of which the accused's former partner, Ms Shepherd, found in the accused's home and gave to the police. Count 4 relates to images found on a CD Rom disc located in the same room. Count 5 relates to human animation images/video

footage on a CD found in a black box located in a trailer outside the back of the defendant's home.

[2] During the course of the execution of a search warrant, the police located a large number of other computer storage devices such as CDs and external hard drives which contained other material not the subject of any charges.

[3] During the course of an electronically recorded interview with the police, (the EROI) the accused made a number of admissions but denied any knowledge of the child abuse material which he claimed must have been the work of others who had access to his computer. The possession charges in relation to counts 1 and 2 cover a period of seven years between 2007 and 2014. Count 3 covered a period between September 2012 and May 2014. Counts 4 and 5 relate to possession on 2 October 2014, the date when the search warrant was executed. In relation to certain human animation images, although the accused admitted to making similar images, he claimed in the EROI that the particular images the subject of count 5 were not his work, but he thought they could have been made by a friend called Guy Burton whom he had taught to use software to make animated images.

[4] The Crown seeks to lead evidence which shows that the accused accessed various websites, including pornographic websites which the Crown submits shows that the accused had a particular state of mind, namely an interest in young girls. The Crown seeks to introduce this evidence as tendency evidence pursuant to s 97(1)(b) of the *Evidence (National Uniform*

Legislation) Act 2011 (the Act) (the tendency rule). The tendency evidence is said to be relevant to prove:

(a) Whether the accused possessed the alleged child abuse material between 23 April 2007 and 2 October 2014; and

(b) the tendency of the accused to engage in particular conduct, namely to search for, download and store sexualised images of female children, including torture/bondage type images and animated images.

[5] The Crown also seeks to lead evidence which the Crown submits shows that, having regard to the number of different storage devices located at the accused's premises containing either child abuse material (CAM) or material indicative of an interest in CAM, the amount of non-prurient material on the same discs or data storage devices which can be linked to the accused, the behaviour of the accused alleged by his former partner Ms Shepherd, and the extensive internet use history which the Crown says is the use history of the accused, it is improbable that the CAM the subject of the various counts in the indictment came to be in his premises in circumstances other than as a result of the accused having deliberately arranged or consented to be in possession of it. By a supplementary coincidence evidence notice, the Crown also seeks to rely upon the evidence relating to each count as tendency and coincidence evidence in relation to each other count. The Crown seeks to rely on the evidence for establishing by inference both conduct on the part of the accused and an accompanying and continuing state of mind on the part of the accused. The state of mind which the Crown

alleges is knowledge or awareness of the existence of the CAM, or of its likely presence, and also a state of mind equating to an intention to exercise control over the stored data or foresight of continuing to have control of the data. The Crown seeks leave to introduce this evidence pursuant to s 98(1)(b) of the Act (the coincidence rule).

[6] Both the tendency rule and the coincidence rule are exclusionary rules unless the court thinks that the evidence, either by itself or having regard to other evidence adduced or to be adduced in evidence have significant probative value. However, in criminal proceedings evidence of this kind cannot be used by the prosecution unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant: see s 101(1) and s 101(2) of the Act. Before evidence under either rule can be adduced, the Crown is required to give notice in writing to the accused of its intention to adduce the evidence: see s 97(1)(a), s 98(1)(a) and s 99 of the Act, and Regulation 6(2)(b) of the regulations. It is not in contention that the relevant notices have been properly given.

Background facts

[7] On 29 September 2014, Ms Kathleen Shepherd (Shepherd), the accused's former partner, had a meeting with Senior Constable Mattiuzzo (Mattiuzzo) in Katherine. She showed him four A4 sheets of paper of printed photos in a gallery style format. There were face shots and body shots of young girls in a variety of poses. All were clothed but some were allegedly provocative. Some of the children were clothed only in underwear. When interviewed,

Shepherd claimed that she had found the photos about a year earlier in a spare room of the accused's residence (the residence) where she had also been living with the accused at the time. Some of these images were later classified as child abuse material by the police (CAM). These photos are the subject of count 3 on the indictment. It is not admitted by the accused that any of these images are CAM. That is a question for the jury. For the purposes of this ruling I will assume that the images alleged to be CAM fall into that description.

[8] On 2 October 2014, police executed a search warrant on the residence. Relevantly, the following items were located and seized:

(a) A black box containing CDs and DVDs found in a trailer outside the back of the residence, which became Police Exhibit (PE) 424015/006.

(b) A 'Seagate' 320GB external hard drive located in a room allegedly mainly occupied by the accused (bedroom 1), which became PE 424015/009.

(c) An assortment of CDs and DVDs located in bedroom 1, which became PE 42401/013.

(d) A Western Digital 500GB hard drive in a 'Barracuda' box located in bedroom 1, which became PE 424015/015.

(e) Four DVDs located in bedroom 1, which became PE 424015/017.

[9] In order to simplify the PE numbers, I will hereafter refer only to the last three digits of each PE. It should be noted that although the room is

described as bedroom 1, the room appears to have been used principally as a computer room.

[10] One of the discs from 006 was later classified as containing CAM in the form of human animation images/video footage (count 5).

[11] Material previously stored on both the hard drives 009 and 015 was later found by police to have been deleted, but on further examination by police, CAM was allegedly able to be detected as having been stored on the hard drives previously (counts 1 and 2).

[12] One of the DVDs in 017 contained video footage subsequently classified as CAM. The video consisted of a sequence of photo stills with an accompanying music soundtrack (count 4).

[13] In summary, there were a total of 1,969 images of alleged CAM located which have been assessed according to the so-called Oliver scale as follows:

(a) Level 1 1,714 images

(b) Level 2 24 images

(c) Level 3 9 images

(d) Level 4 0 images

(e) Level 5 34 images

(f) Level 6 188 images (animated or virtual)

The kind of evidence sought to be adduced at the trial

[14] In addition to relying on the finding of the above exhibits, the Crown seeks to adduce the following evidence at trial as coincidence evidence:

(a) Past behaviour consistent with a sexual interest by the accused in young girls.

(b) The finding in the accused's premises, including the said exhibits, of stored images of young children indicative of a sexual interest in young girls or of an interest in possessing CAM.

(c) The finding on the hard drive 015 of a chronological record of internet use which includes accessing websites allegedly recognisable as pornography websites, including child pornography websites.

(d) Evidence recorded in the Internet Explorer Logs extracted from 015 (the hard drive referred to in count 1) of accessing URLs and local drives containing titles suggestive of content in the nature of:

(i) bondage/BDSM/torture type of pornography;

(ii) animated pornography;

(iii) child abuse material.

(e) Information contained in the statement of Anthony Lawrence dated 22 January 2016.

The evidence of past behaviour relied upon

[15] The Crown seeks to call Shepherd to give evidence that at a time when she was living with the accused before they separated in 2013, she saw the accused accessing a site which had Japanese girls dressed up as school children.

The evidence relating to stored images of young children indicative of an interest in young children

[16] The Crown seeks to call Shepherd to give evidence that at a time about 18 months before they separated, she went into bedroom 1 looking for a blank disc which she needed to make a copy of something. When she put it into her computer she found that the disc contained images of babies having penises inserted into them, and children, about two years old, having oral sex with men. She will further say that shortly before they separated she found about 30 sheets of pictures of girls. These pictures showed the girls' faces and in some cases the clothing being worn. None showed naked images. The accused told her that these photos had something to do with his work as a police auxiliary. During the course of cleaning up this room at a later time, she found the sheet of images, the subject of count 3, underneath a folder with a writing pad attached to or on it which she subsequently put in the boot of her car before handing it to the police.

[17] The Crown intends to rely upon photos of female children found on a disc located in bedroom 1 at the time of the search and marked PE 424015-013 (Ext P19) which contained four images of a young girl "K" allegedly in "indicative poses". On the same disc were a number of other photos of young females "N" and "T" as well as three of a female adult identified as "TW". In one of the photos of the young female K, the accused is seen sitting in the background. It is not alleged that any of these other images are "indicative". None of these images are CAM.

[18] The Crown intends to rely upon a disc located in bedroom 1 and marked PE 424015-017-001. PE 017 consisted of four discs and this disc was subsequently relabelled with the additional numbers 001. It was tendered as Ext P20. It contains a number of electronic files of images of:

(a) Various females both adult and juvenile whose faces had been superimposed on the bodies of other females. In nearly all of these images the females were clothed, although there were some of adults that were not. In one photo the face of a male has been superimposed on the body of another partly clothed male. In some cases, photos of "N" and "T' have been superimposed. Two of these photos it is alleged are "indicative".

(b) Other images of various subjects of no particular significance in themselves, except as to context.

[19] The Crown intends to rely upon another disc located in bedroom 1 and marked PE 424015-017-002 (Ext P21). It contains, inter alia, the following material:

(a) Files relating to digital modelling programs.

(b) A document entitled "EE lies and facts". This document purports to challenge the veracity of claims made by Robin Hood Software about a program they are advertising which is designed to protect people using their computers to watch or download child pornography on the internet from detection or prosecution.

(c) A file containing 17 images allegedly of the accused's property at Katherine.

(d) A file containing 31 images of bushfires.

(e) A folder entitled "games" containing two applications entitled "Pgfv" and "Pursuit".

(f) Two text documents relating to the purchase of sex games entitled "Sexy Pursuits" and "Sexy Party" with purchase receipts attached in the name of the accused.

(g) A folder entitled "Kodak DC 25" images containing a variety of sub files with photographic images of various sorts. Included in the folder is a subfolder which contains images of a small child in her underpants standing in front of a blue towel draped over the door of a cupboard. There is also a subfolder showing the child in a swimming pool area. Some of the photos display the child's underpants with her legs apart.

(h) There is another subfolder of the same child posing in her underpants in front of a blue curtain.

(i) There is also a subfolder entitled "Temp" containing:

(i) three photos of a man, a woman and the same child handcuffed to a pole;

(ii) two digitally altered images of the same child in her underwear, crouching, one in a pool;

(iii) six images of the same child in the bush with a tiger toy.

(j) There is a folder entitled "miscell" which contains, inter alia, material relating to encryption software, including "Stealth Files" which can be used to compress, encrypt and hide files.

The evidence relating to the internet use of access to child pornography sites

[20] The Crown intends to call Senior Constable Hoffman (Hoffman) to give evidence to the effect that, using certain software, she viewed URLs (universal source locators or web browser addresses) obtained from the two hard drives seized.

[21] In the course of her examination she found that there were links to seven sites which had been accessed at various times and dates between 16/11/2013 and 8/6/2014, six of which contained written stories concerning sexual relations between a female child and an adult male. In some of the stories the male was the child's father. One of the sites contained an autobiography of the author's process in creating sexualised children's stories. All of these stories are allegedly CAM. Also, screen shots were taken of web pages that do not contain CAM but indicate the contents of the stories linked to the page, which are strongly suggestive of CAM.

[22] In addition, it is proposed that Hoffman will give evidence that other URLs accessed at various times have titles which are indicative that the sites contained CAM.

[23] I will return to the evidence in more detail later.

Admissibility as a contemporaneous representation of a state of mind under s66A of the Act

[24] At a late stage of the hearing of the voire dire the Crown submitted that, as a threshold question, certain evidence was admissible pursuant to s 66A of the Act, irrespective of whether or not the evidence was admissible as tendency evidence. Section 66A provides:

> The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

[25] This submission focused on the Internet Explorer History obtained from the internal hard drive on PE 015. The Crown relies on certain data which it says reveals that search terms and phrases researched prove that sites were accessed which fall into three broad categories:

(a) URLs containing titles suggestive of content in the nature of bondage/BDSM/torture type pornography; (BDSM stands for "bondage, domination and sado-masochism");

(b) URLs containing titles suggestive of content in the nature of simulated or digitally produced pornography;

(c) URLs and local drive access addresses containing titles suggestive of content in the nature of pornography involving children.

[26] The Crown submits that these records form a pattern. It is the frequency and range of such entries which are capable of:

(a) excluding other parties as the operator of the computer at the material times;

(b) establishing a modus operandi on the part of the operator in terms of behaviour and habits; and

(c) establishing an ongoing and consistent 'state-of-mind', namely an interest in each of the three categories outlined in paragraph [24] above on the part of the operator; or

(d) establishing a tendency to have a particular state of mind, namely an interest in each of the three categories outlined in paragraph [24] above on the part of the operator.

[27] The fact in issue is whether the Crown can establish that this material is capable of proving that the accused had knowledge of the contents of his

hard drive. This is relevant to prove the mental element of knowledge in relation to the possession charges, or some of them.

[28] The Crown referred to *Elomar & Ors v R*[1]. In that case, evidence was led that one of the accused, Cheikho, had attended a camp in Pakistan in late 2001, which was a military style training camp with a clear Islamic focus. The principal purpose of the camp was to train militant Islamists to fight in the conflict with India over Kashmir. Participants were given firearms training and "commando training". The accused were charged with that between July 2004 and November 2005 they conspired with each other and with others to do acts in preparation for a terrorist act or acts. The trial Judge admitted the evidence as evidence of the accused's state of mind, but not as tendency evidence. On appeal it was argued that the evidence was inadmissible, because the only way the evidence could bear upon the accused's state of mind in 2004-2005 was by tendency or propensity reasoning. The Court of Criminal Appeal of NSW[2] upheld the trial judge's decision. In their Honours' joint judgment they said:[3]

> 361 The evidence of Moustafa Cheiko's attendance at the LeT camp was not, in our opinion, evidence of conduct such that any conclusions or inferences could be drawn that he had a tendency to act in any identifiable (particular) way. It was, however, evidence that could provide the foundation for a conclusion or inference that, in 2001-2002, he had in fact had a particular state of mind. That state of mind was support for violent Islamic Jihad. Looked at in that way, the evidence was capable of being seen as tendency evidence. It was evidence

[1] [2014] NSWCCA 303; 316 ALR 206.
[2] Bathurst CJ, Hoeben CJ at CL and Simpson J.
[3] At paragraphs [361]-[369].

which could be seen as evidence that, because he had that state of mind in 2001-2002, he had a tendency to have that state of mind, and commencing in 2004, he again had that state of mind.

362 That is one way of looking at the evidence. There is an alternative way of looking at it.

363 As mentioned above, s 97 of the *Evidence Act* restricts only the admissibility of evidence to prove that a person had a relevant tendency. It does not restrict evidence that proves that a person in fact acted in a particular way, or in fact had a particular state of mind, if evidence is available to prove that fact without recourse to the syllogistic process of tendency reasoning.

364 It is one thing to say that a series of acts of a person can establish a tendency to act in a particular way. That makes perfect sense. Common examples are to be found in cases of alleged sexual abuse of children. That an accused person is shown to have abused one child (or a number of children) may be held to establish a tendency to act in a particular way. (From that, it may then be inferred that, on an occasion relevant to the proceedings, that person acted inconformity with that tendency).

365 It may also be said, in appropriate circumstances, that a series of incidents is capable of giving rise to an inference that a person had a tendency to have a particular state of mind. Common examples again are to be found in cases of alleged abuse of children. It may readily be said that the accused person has a tendency to be attracted to children. (From that, it may then be inferred that, on an occasion in question in the proceedings that the person acted in a way alleged, or did so with the relevant state of mind).

366 A state of mind, unlike conduct, is not necessarily a series of intermittent events, feelings or ideas. Commonly, a state of mind is continuous. Belief in a deity, opposition to capital punishment, support for a political philosophy are all states of mind. It would not be in accord with ordinary human experience or language to describe a person who held such beliefs as having a "tendency" to have the relevant state of mind. Rather, the person is said to have that state of mind.

Proof of a state of mind may be direct, not indirect. In appropriate circumstances, it does not depend upon tendency reasoning.

367 Evidence that a person has a particular state of mind is relevant to a vast number of criminal offences. Proof of a particular state of mind is not tendency evidence. It is evidence of the fact of the state of mind of the person (even where, as is often the case, it is proved by inference). It is therefore necessary to ask whether the evidence of Moustafa Cheikho's attendance at the LeT camp was evidence of **a tendency** on his part to support violent Islamic Jihad, from which the Crown would seek to have drawn an inference either (i) that he entered into the agreement alleged intentionally; or (ii) that he intended that a terrorist act would be committed in Australia. If that were the basis on which the Crown tendered the evidence, it would come within s 97 of the *Evidence Act* and the tests imposed by s 97 and s 101 would have to be applied. Alternatively, did the Crown seek to prove that Moustafa Cheikho **in fact** supported violent Islamic Jihad, from which, similarly, the Crown would seek to have drawn an inference that he entered the agreement alleged intentionally, or intended that a terrorist act would be committed in Australia? The former involves tendency reasoning; the latter does not.

368 The most powerful argument in support of the former proposition is the gap in time between Moustafa Cheikho's attendance at the camp, and the commencement of the alleged conspiracy. But that does not conclude the issue. Proof that a person held a particular belief on one occasion does not prove that he had a tendency to have that belief. It proves that, on that occasion, he did have that belief. There is no reason to think that, if Moustafa Cheikho had a state of mind that supported violent Islamic Jihad in 2001-2002, he did not continue to have that state of mind up to and including the time of the alleged conspiracy.

369 If it could reasonably be inferred from the evidence of his attendance at the camp, and the nature of the camp, that he had a state of mind that favoured militant Islamic Jihad, it may equally be reasonably inferred that he continued to have that state of mind up to and beyond 2004. That is not tendency evidence and does not give rise to tendency reasoning.

[29] The kinds of states of mind to which their Honours referred might all be described as beliefs in the righteousness of a particular cause, or philosophy, or religion, but I do not understand the examples given as being exclusive from other states of mind where it might be said that the person had a particular state of mind which was likely to be continuous such that it might be inferred that, because he had a state of mind at an earlier time or times, it may reasonably be inferred that he continued to have the same state of mind at some later relevant time. When evidence of this kind is relied upon, *Elomar* suggests that there must be direct evidence of the existence of the state of mind relied upon from which it can be inferred that the state of mind is a continuous one, but I am unable to see why the evidence cannot be circumstantial, so long as the kind of circumstantial evidence relied upon is not tendency evidence nor coincidence evidence. The state of mind relied upon is an interest in pornography including BDSM/torture related pornography; digitally produced/simulated pornography and child pornography which the Crown submits is continuous and on-going over a number of years. That does not, by itself, prove knowledge of the contents of the discs, photographs and hard drives which are the subject of the charges, but if admissible at all, it is circumstantial evidence from which knowledge might be inferred.

[30] The other thing to note is that their Honours at no time referred to s 66A of the *Evidence Act*. That provision operates, according to its terms, as an exception to the hearsay rule. It makes it clear that any admissions made by

the accused to the police in the record of interview about his knowledge or state of mind are admissible. But the evidence relied upon does not depend exclusively on admissions made by the accused but upon allegedly direct evidence of sites, consistent with the admissions made, which the accused is alleged to have visited. This latter evidence is in itself circumstantial evidence which it is alleged does not depend upon tendency reasoning, nor presumably coincidence reasoning. The reason why the evidence in *Elomar* was admissible was because the Act is not a code. Section 9(1) of the Act specifically provides that:

> This Act does not affect the operation or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.

[31] The starting point is that there is evidence that the hard drives were the accused's property. In the record of interview (EROI) made on 14 October 2014, the accused admits that all of the items seized by the police at the time the search warrant was executed belonged to him, except "the stuff out of that black briefcase". He also admitted that the "stuff in the trailer - no, I'll say it all belonged to me because I - it's my property. Everything on the property was mine". The reference to the black briefcase is later explained as being the property of Guy Burton, which the accused had placed in the lounge room. All of the items which are the subject of the relevant evidence in these proceedings were located in bedroom 1, although the search warrant booklet, Ext P1, shows that items were also seized from bedroom 3 and the

living room. Later, when shown a disc which was found in the trailer, he denied that it was his. He also denied any knowledge of any of the alleged CAM.

[32] For much of the relevant period of time, which extends over several years, the accused was not the only person who had access to the hard drives. It could not be said that the accused had exclusive control over them. Apart from Ms Shepherd who accessed the hard drives on a regular basis, several other persons are known to have had access to them from time to time.

[33] Later in the EROI, the accused is shown PE 009, a hard drive located in bedroom 1. The accused stated that it was a hard drive taken out of an external hard drive because Ms Shepherd had used it and damaged the USB connection on it. He admitted to using it to store photos on it, specifically referring to photos of a bush fire, and a flight simulator. He told the police that he obtained the hard drive from the Post Office “a while ago”. He was also shown another hard drive, PE 015 which was also located in a wardrobe in the bedroom. He said that this hard drive was possibly a hard drive he had taken out of the Tower (a computer tower PE 012) when it started to play up and he replaced it with a new one in about May 2014, either shortly before or shortly after Ms Shepherd left living on the premises. There is therefore evidence that the hard drives and disks were his property.

[34] There is evidence in the EROI that persons other than the accused had access to his computer from time to time. I leave aside the lap-top computer

PE 004 which does not feature in the evidence. However, there is no evidence that after Ms Shepherd left, anyone else had access.

[35] In the EROI the accused is asked about his normal habits when using Google to search the internet. He said that there were, amongst other things, "a couple of porn sites that I normally sort of go and have a look at just out of curiosity". He referred to viewing xhampster, Pornorama and Heavy R. Heavy R, he said was different with a whole lot of reality motor bike and car accidents and there were funny skits on it as well. Pornorama was "just the normal porn stuff" and xhampster was "same again. They're just videos". He was asked what he meant by normal porn and he replied:

> "Normal porn you see on - um - any porn site, normal sex act things and all that sort of stuff - um- all the kinky crap - um - whatever - um - all the various things that you normally - yeah, whatever you see on porn sites".

[36] He said he visited these sites maybe once a week, or once a fortnight, but not every day. He also admitted to visiting Pandora Sim or Sim Pandora which is "to do with sim 3", which I take to mean a reference to three dimensional simulations of pornographic acts. When asked if he had downloaded anything from those sites, he said that he thought that he may have downloaded a couple of videos off of xhampster on the hard drive that came out of the Tower, not the external hard drive. He was also asked if, when he visited these sites, he was directed to other sites. He replied that this happened only rarely, and if it happened, he immediately either turned the computer off or hit Control, Alt and Delete, brought up the task manager

and cancelled it out. He was asked whether he had ever viewed any CAM sites whilst viewing the porn sites. He said:

> None of those, nothing. None of those sites would've taken me anywhere near that sort of stuff… xhampster is - um - it's secure in regards to that sort of stuff so you can't go to that sort of stuff or you can't even search for it or anything else like that, same as Pornorama and same as Heavy R. Heavy R - um - the problem with Heavy R it's got some really graphic stuff on it but not pornographic.

[37] This evidence is sufficient to show that the accused had an interest in pornography, which he accessed on a regular basis.

[38] As to three dimensional simulated pornography, there is a reference to a site called Pandora Sim or Sim Pandora 3. The accused also admitted to having skills in 3D imagery. He said that he used to do 3D art work, using a program called Daz 3D, and that he taught Guy Burton to use the program to photo shop things, where "he'd paste in faces on various people and figures and - and - and things like that. …we used to make postcards up… and I made up various ones of different people as well - um - just out of a sort of a bit of a laugh". He also referred to doing some backgrounds for advertising purposes for a person doing some modelling, but that never progressed because the person concerned decided to do something else. He went on to explain that he used 3D modelling on occasions using other programs as well, but many of the images were done by Burton. He was eventually shown some modelling that was CAM which he denied was his work and he stated that it was shoddy. He said that his work was tasteful - the sort of work which could have and was put on a site called Renderosity.

There were no admissions that he used 3D imagery to create pornography. I note also that his employment as a police auxiliary involved the use of COMFIT software.

[39] The other evidence relied upon to prove the state of mind relied upon relates to the evidence referred to in paragraph [24] above. This evidence is voluminous and complicated. I will not attempt to summarize it, but rather deal with it in general terms as to what it is said to reveal. The officer in charge of the investigation is Senior Constable Anya Hoffman (Hoffman). Her evidence is contained in Exts P4, P5, P7, P8, P11 and P28. She was called to give evidence and was cross-examined by counsel for the accused, Ms Truman. Hoffman used certain special software to review URLs referenced in Explorer logs located on PE 015, (the hard drive). In para 8 of her statutory declaration Ext P11, she reviewed a number of URLs with names such as:

http://gelbooru.com/index.php?page=post&s=list&tags=loli+bondage

The evidence is that the "?" in the above URL name indicates that a search has been made for a site. The evidence of Hoffman is that she is familiar with the tag "loli" as a reference to indicate the material is associated with young girls portrayed in a sexual context, and that in this instance the references contain anime or manga style cartoons depicting mostly female children naked and bound or handcuffed. All are in her opinion CAM.

[40] These URLs are recorded in what is called the “unallocated space” in a hard drive. Hoffman explained what this means:

> Basically on a computer hard drive you’ve got information stored in your primary space so that’s the information that you’re able to access by opening it up, perhaps Windows Explorer, double clicking on a file and it will open for you. Unallocated space indicates that either that file has been deleted or perhaps the hard drive has been formatted which basically means that that file is no longer accessible through your usual means such as using Windows Explorer. When you delete a file that file still technically exists on the hard drive it’s just that- it’s a little more convoluted than that, but I’d have to go into further detail which might take a little while to explain, that’s all.

[41] Hoffman reviewed the IEF Report Viewer which related to both Exts PE 009 and PE 015 (the two hard drives) and burned certain excel documents to a disc which is referred to as Exhibit AH5-07 which contained the Internet Explorer History on the hard drives. This consisted of 13 separate files of which the following are relevant:

(a) Internet Explorer 10-11 Daily-Weekly History;

(b) Internet Explorer 10-11 Main History;

(c) Internet Explorer Main History.

The “Daily-Weekly History” represents the recovered browsing history for internet sites accessed by the user of the computer and local files that have been opened using a registered application for that type of file - eg a word document opened by Microsoft Word may appear in the report.

The “10-11 Main History” provides the same browsing history but over a longer period of time.

The “Main History” is the browsing history prior to Internet Explorer version 10.

In each of these histories there are references to an account user in the name of “Dave”.

[42] The list of terms which appear in the URLs and webpage titles are set out in Hoffman’s statement of 28 January 2016 (P27) in paragraph 4. There are 48 different titles listed which include titles which indicate pornography sites including sites which are indicative of CAM according to their titles.

[43] The 10-11 Main History is summarized in P27 annexure AH6-01. Of significance is the following:

(a) Panorama had 813 “results” which included sites with names such as would suggest male sexual activity of various kinds with a teenager female.

(b) xhampster had 1834 “results” which included some sites with names suggestive of sexual activity involving teenage girls.

(c) There were a number of other sites recorded with dates ranging from April 2014 to June 2014 of a similar nature. The type of pornography which the sites suggest include bondage, BDSM, torture and the like. One of the sites recorded is “Loli/ta” which had 24 results on 24 June 2014 suggestive of CAM/bondage.

(d) Some of the sites had names suggestive of incest and inappropriate sexual relations between a stepfather and stepdaughter.

[44] The “Main History” covers an earlier period from 2009-2013. There are fewer results overall, but the names of the sites suggest similar contents to that referred to in paragraph [39]. Loli/ta is also recorded as having been accessed on 21 occasions between the 2nd November 2009 and 10th of July 2010. There is also a site recorded as Preteen, suggestive of CAM.

[45] The 10 -11 Daily Weekly History is similar in content to the 10-11 Main History referred to in para [29] and covers the period 12 April 2014 to 8 July 2014. Included in this history is a record of 111 “results” for “Sims” between 6 June 2014 and 8 July 2014.

[46] The histories do not strike me as showing a continuous interest in CAM. Although there are some sites visited from time to time which are suggestive of CAM, the dates do not indicate to my satisfaction that CAM represented continuous interest. Further, the vast majority of the sites visited and the times accessed are not even arguably CAM sites at all.

[47] There is also the added difficulty that apart from the site names, it is not possible to know what the sites were actually all about in most cases. Hoffman acknowledged that the internet Explorer logs do not identify with any degree of certainty what was actually seen at the time the URL was accessed. Hoffman’s evidence was:

> [HIS HONOUR: When you say a record of URLs do you mean that you could physically look at what was originally downloaded?] No. What’s been retrieved is internet explorer logs. Within those logs it shows the URL that was visited, the date and time it was recorded

> plus some other information but it doesn't actually contain the web page or any images associated with that web page.

[48] In some cases, Hoffman visited the web addresses and was able to ascertain the contents of the relevant web pages. The results of these searches are contained in Ext. P 8. This shows that there were six URLs with links to webpages which, when accessed, were able to be seen in each case as written stories which were CAM. A brief description of each story is given in Ext. P8. Each of those links were said to have been accessed at dates ranging from 2013-2015. The last occasion one of these links was accessed is stated to be on 8 June 2014. However, Hoffman conceded that the sites could have changed between the time the site had been accessed by the user and the time Hoffman had examined the site.

[49] The circumstantial evidence that the accused accessed pornographic sites relating to children is inherently weak. Even if the evidence permits a finding that the accused had an interest in pornography generally or bondage, BDSM/torture pornography, or simulated pornography it does not follow from this that he had an interest in CAM let alone a continuous state of mind displaying an interest in CAM.

[50] Even if this evidence is technically admissible for the purpose of proving what the Crown seeks to prove, in my opinion the evidence should be excluded in the exercise of my discretion pursuant to s 135 of the Act in that its probative value is substantially outweighed by the danger that the evidence might be misleading or confusing. I would further exclude the

evidence under s 137 of the Act because its probative value is outweighed by the danger of unfair prejudice to the defendant. The evidence that the accused had a continuous state of mind of the kind asserted is inherently weak. The inference that as a result, he had the requisite knowledge of the CAM which is the subject of the charges in counts 1 and 2 is also tenuous. Evidence that the accused may have accessed pornographic sites, particularly sites such as BDSM/torture and sites concerning incest is by its nature likely to be viewed with abhorrence and may lead jurors to conclude that if the accused is continuously interested in this type of pornography he would be similarly continuously interested in child pornography as well.

Admissibility as tendency evidence

[51] Section 97 of the Act provides:

> (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:
>
> (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
>
> (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

[52] The tendencies relied upon in this case are both a tendency to act in a particular way, namely a tendency to locate, view, download and store CAM

and a tendency to have a particular state of mind, namely, a sexual interest in children.

The tendency to act in a particular way

[53] There is a difference of approach between the Court of Appeal Victoria and the Court of Criminal Appeal of New South Wales on an important consideration of an aspect of the tendency rule. In *Velkoski v The Queen*[4] the Court of Appeal said in a joint judgment (Redlich, Weinberg and Coghlan JJA):

> 163 Where there is an absence of remarkable or distinctive features in the manner in which the offences are committed, the difference in the law as stated by this Court and the New South Wales Court of Criminal Appeal has left the law in a state of uncertainty as to the degree of similarity in the commission of the offences or the circumstances which surround the commission of the offences that is necessary to support tendency reasoning. One line of authority has held that some degree of similarity in the acts or surrounding circumstances is necessary before it will be sufficient to support tendency reasoning. Another line of New South Wales authority, that has not been followed in Victoria, has emphasised that tendency reasoning is not 'based upon similarities', and evidence of such a character need not be present. These lines of authority within each Court are not readily reconcilable.
>
> 164 Section 97 (1) (b) is intended to address the risk of an unfair trial through the use of tendency reasoning by ensuring a sufficiently high threshold of admissibility. We consider the approach currently taken by the New South Wales Court of Criminal Appeal to tendency and coincidence goes too far in lowering the threshold to admissibility. To remove any requirement of similarity or commonality of features does not in our respectful opinion give effect to what is inherent in the notion of 'significant probative value'. If the evidence does no

[4] [2014] VSCA 121 at [163]-[164].

> more than prove a disposition to commit crimes of the kind in question, it will not have sufficient probative force to make it admissible. This view, we think, clearly represents the present position of our Court reflected in the long line of authority to which we have referred.

[54] The Crown in their written submissions, after referring to both lines of authority, state that "whichever test the Court applies, the Crown submits that in the instant case, the evidence sought to be led as tendency evidence involves access to, and electronic storage of non-CAM images which is conduct which possesses 'sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct'. Further, though it is not required to demonstrate repetition of particular acts or types of behaviour, there is sufficient evidence present in the instant application to suggest, persistent repeat conduct across different websites, and repeat acts of storage on several different storage devices".

[55] Counsel for the accused in her submissions says that she takes no issue with the Crown's outline of the law relating to the admissibility of tendency evidence. That comment is to be read subject to some other points raised by Ms Truman which I will deal with later. For the moment, it is sufficient to note the argument pressed by Ms Truman that the methodology allegedly used by the accused to locate, view, download and store images of any kind is no different from the methodology which would be used by anybody else. I agree with that submission.

[56] I do not accept the Crown's submission that there is evidence of a tendency by the accused to act relevantly in a particular way. I do not think that evidence that the accused downloaded and stored non-CAM images, even if that were proved, is probative of a fact in issue except by coincidence reasoning. Similarly, there is no evidence that the accused downloaded and stored anything remotely suggestive of being CAM, except perhaps evidence by coincidence reasoning. The evidence relied upon in this case is, in my opinion, bootstraps reasoning. The fact that he viewed, copied, downloaded and stored non-CAM images, if that were proved, goes nowhere. In my opinion the evidence, such as it is, has no probative value whatsoever under this limb of s 97(1).

The tendency to have a particular state of mind

[57] In *Velkoski* the Court of Appeal of Victoria said:[5]

> The offender's state of mind is frequently relied upon in the Crown's notice of tendency evidence to cover the offender's interest in particular victims and his willingness to act upon that interest. That the offender has such a state of mind discloses only rank propensity which is not admissible as tendency evidence. It shows only that he is the kind of person who is disposed to and commits crimes of the type charged. Resort to that particular state of mind to support tendency reasoning is impermissible, highly prejudicial and unnecessary. Once the jury is satisfied that the acts relied upon as tendency have been committed, the offender's state of mind adds nothing. Reference to it is calculated to divert the jury from focussing upon the extent to which the similar features of the previous acts render the occurrence of the offence charged more likely.

[5] [2014] VSCA 121 at [173 (f)].

[58] This statement of the law was relied upon by Ms Truman in answer to the Crown's submissions. There are three reasons why I consider that this should not be determinative of the outcome in this case. First, the statement refers to the offender's interest in particular victims, which is not the case here. Secondly, the words of the section plainly contemplate that tendency evidence may become admissible to show that the defendant by his conduct had a particular state of mind. Thirdly, the passage quoted above was rejected by the Court of Criminal Appeal (NSW) in *Elomar*[6] where the Court said:

> If, by this paragraph, the Victorian Court of Appeal is asserting that s 97 of the *Evidence Act* does not permit evidence of the offender's state of mind to be used as or establishing a particular tendency then, with respect, we consider it to be incorrect, and should not be followed in this State. There is no such limitation in the statute, the limitations on tendency evidence being those contained in s 97 itself and s 101. Further, at the point when admissibility of evidence is under consideration, it cannot be known whether "the jury is satisfied that the acts relied upon as tendency have been committed". Indeed, at that time, a jury may not have been empanelled, and, even if it has, will not have reached any conclusions about the commission of the tendency evidence acts. Evidence of the state of mind of the accused may be very relevant to their reaching that satisfaction. In the second place, the very point of s 97 is that evidence of a state of mind is, once the pre-conditions have been met, permissible to provide the foundation for, or part of the reasoning process towards, an inference that the person committed the offence charged. Paragraph [173](f) of *Velkoski* does not state the law as it is understood in NSW.

[59] In my opinion the reasoning of the Court of Criminal Appeal of NSW is to be preferred.

[6] [2014] NSWCCA 303 at [371]; 316 ALR 206 at [371].

[60] The state of mind which the Crown submits that the evidence reveals is a sexual interest in young girls.

[61] The problem with the evidence is that, although there is evidence that the accused had an interest in pornography, even what I might call “hard core” pornography (eg torture, sado-masichism, bondage and the like) it does not follow that therefore he had a sexual interest in young girls, which I take to mean girls who are under-age. Proof of the latter depends in this case upon proof that he was the person who visited CAM sites, or downloaded the CAM material and saved it, there being no admissions of such an interest. The only direct evidence of an interest in young girls is the evidence of Ms Shepherd who claims to have seen the accused watching a site showing Japanese girls dressed up as school children, but there is nothing in her statement to show that whatever he was looking at was of a sexual nature. The evidence relating to the finding of the photos which are the subject of count 3 also has its problems. First, it is not admitted that any of the photos in count 3 are CAM. Those particular photos are not before me. Secondly, the evidence does not support a conclusion that merely because they were found where Ms Shepherd located them, that they were in the accused’s possession. As to the other sheets of photos referred to by Ms Shepherd in her statement, if her evidence is accepted, these photos would certainly be categorized as CAM, but the accused made no admissions concerning them either to her or to the police, these photos have not been located, and even if they existed as claimed by Ms Shepherd, they do not prove he had

possession of them merely because of where they were found. Without proof connecting the accused to the photos, the visiting of sites with titles suggestive that they were CAM, the downloading etc of CAM, the argument, in so far as it relies on a tendency of a state of mind to prove knowledge, depends on reasoning which is circular. It is therefore necessary to consider the contention that the evidence is admissible as coincidence evidence.

Coincidence evidence

[62] Section 98 (1) of the Act provides:

> (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:
>
> (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
>
> (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

[63] What must be shown is a similarity in the events and/or the circumstances in which they occurred to prove that the accused was the person who saved the CAM material found on the hard drives the subject of counts 1 and 2 and on

the discs the subject of counts 4 and 5 and the photos the subject of count 3.

As Odgers notes[7]:

> The specified purpose caught by this provision in relation to "evidence that 2 or more events occurred" is:
>
> (a) to rely on any contended similarities in the events or circumstances in which they occurred, or any contended similarities in both the events and the circumstances in which they occurred;
>
> (b) to prove that a person did a particular act or had a particular state of mind;
>
> (c) by reasoning that "it is improbable that the events occurred coincidentally".

[64] But, mere reliance on improbability or coincidence, which is one basis for making circumstantial evidence relevant, will not make such evidence "coincidence evidence" to which the coincidence rule applies unless the process of reasoning relies upon the contended similarities in the events or the circumstances in which they occurred[8]. The Crown also relies on circumstantial evidence which does not fit into the category of "coincidence evidence" in support of its case that there is evidence to which the rule does apply and also in support of its case that such evidence has significant probative value.

[65] Evidence sought to be admitted under the coincidence rule is a kind of circumstantial evidence where, although each piece of the evidence when

[7] Stephen Odgers *Uniform Evidence Law,* 11th edition at para [1.3.6880] p493.
[8] Odgers, see fn 7; *R v MR* [2013] NSWCCA 236 at [64].

considered individually could not lead to any conclusion, the evidence considered as a whole when considered in the light of all of the evidence to be relied upon, enables the trier of fact to conclude that a fact in issue has been proven.

[66] The contended similarities do not have to be 'strikingly similar', although the more similar they are, the more likely it is that the similarities will have probative weight.[9] In *CV v The DPP*[10] the Court said:

> There may be such a relationship between the events in purpose, circumstances and mode of conduct that coincidence reasoning will be open. The necessary relationship is not confined to events, each of which possesses unusual characteristics in its execution. The evidence of each may provide strong support for the others, making it just to admit them all notwithstanding the prejudicial effect of admitting the evidence.

The similarities in the events and the circumstances in which they occurred

[67] The Crown relies upon the following evidence:

(a) The hard drives and discs the subject of the charges were all found in bedroom 1.

(b) The accused's admitted ownership of these hard drives and discs.

(c) Both hard drives had CAM material stored on it.

(d) In relation to the DVD the subject of count 4, (PE 017/002) this contained a video classified as CAM and was located in the wardrobe in the same bedroom 1 where the two computer hard drives were found and which contained category 5 CAM in the unallocated cluster part of the drives.

[9] *The Queen v Miller* [2014] NTSC 12 at [15]; *CW v The Queen* [2010] VSCA 288 at [22].
[10] [2014] VSCA 58 at [10]

(e) Data on the DVD the subject of count 4 was burned within the time frame 11 June 1999 to 5 July 2002. This disc also stored two emails sent on 11 June 2002 to thefirefly@austarnet.com.au. Each email contained a receipt for the purchase of an on-line computer game with titles suggestive of being some kind of sex game. The receipt was made out in the name of "david t dickens". Two addresses are given for the purchaser: PO Box 1042 Katherine NT 8015 and 39 Morey Road Katherine with a telephone number 89722081. The accused's actual address is 134 Morey Road Katherine. There is evidence that PO Box 1042 Katherine is the accused's PO Box number. There is evidence that the telephone number is that of the accused. Also located on this DVD were images of a white station wagon registration number 441362 which belongs to the accused, photos of the accused's residence, files which appear to be related to SIMS games, edited photos of a young girl, files relating to naked women which are bondage-type adult pornography, and the CAM video footage which is the subject of count 4. It is submitted that there is a high degree of probability that the accused was the person who saved all of the material on this DVD because of the circumstances under which the various folders in the DVD occur, particularly having regard to its content, subject matter and the evidence relating to the storage of the emails only three days before the last of the material was saved on the DVD. I consider that this evidence has significant probative value.

(f) In relation to the CDR-80 MagMedia disc the subject of count 5, it was found in a trailer outside the house on the accused's premises. It contained the category 6 images.

(g) In the EROI the accused admitted to having an interest in the production of 3D digital animation of the human form.

(h) In the EROI the accused admitted to having an interest in pornography, including accessing the xhampster and Panorama websites on regular occasions.

(i) The record of web browsing located on PE 015 on various websites indicating access to websites with titles suggestive of CAM;

(j) The record of web browsing located on PE 15 on various websites indicating access to pornographic torture, rape or bondage websites or with titles suggestive of CAM.

(k) The presence of non-CAM images depicting female children posing in underwear, with underwear visible or with the child in suggestive poses or suggestive props, such as ropes, located on the storage devices that contained CAM.

(l) In relation to the disc PE 006 located in the accused's trailer, there are a number of files in 3D imagery which are pornographic, including some allegedly 3D images in a folder "cell01.jpg" to "cell026a.jpg" which when viewed in succession progress with a storyline. Included in this category are children sitting with objects including a plunger, a purple mask with a large nose and a milk carton which depicts the face of Guy Burton with the words "Missing- Guy D'Drunk." The content of some of these images are allegedly CAM. There are a number of other folders which contain 3D adult pornography. There is nothing to directly link this material to the accused other than inferences which can be drawn from its location, the skills in 3 D imagery and COMFIT admitted by the accused in the EROI, the unlikelihood that Mr Burton would have included in the images a picture of himself on a milk carton with the caption referred to above, and it is not suggested that anyone else with access to the accused's property had the ability to create this kind of imagery. There is also the coincidence that the DVD located in bedroom 1 which is PE 017-002 (Ext P21) had 3D modelling software located on it: see paragraph [18] and the discussion of the data found on it discussed under the bullet point relating to count 4 above.

(m) Of particular significance is the record of sites apparently accessed in the unallocated clusters which I have briefly described previously. What emerges, for example in relation to the hard drives, is a record of access to apparent CAM sites found on PE 015 by Senior Constable Lawrence. This device contained the Microsoft Windows 7 Home Premium operating system registered to "Dave" which had been installed on 9 July 2014 which showed an internet viewing history from 2 May 2009 to 9 July 2014. There were two sites visited on 7 May 2009 and one on 2 June 2009.

(n) Further, there were the sites recorded as having been visited in the statement of Ms Hoffman Ext. P8 which indicated accessing of certain sites suggestive of CAM on the accused's rostered days off. Although all but two of these sites was accessed after normal working hours, one site was recorded as having been accessed at 2.47 pm and another at 12.31 pm. Also of significance is that the dates of access of these sites included accessing on 7 June 2014, 8 June 2014 and 15 June 2014, well after Ms Shepherd had left the premises, as well as accessing similar sites in 2013. One of these

> web sites “Dancing in the Dark” which was accessed on 8 June 2014 was recorded as having been viewed between 2.47.51 pm and 2.57.07pm which is inconsistent with it having been deleted immediately (Ext P22). There are no records of accessing sites which the accused admits to having accessed on that date, but Ext P22 shows that on 10 June 2014 the site xhampster was visited and again on the 14th of June 2014, as well as on other dates.

[68] In my opinion there are sufficient similarities in the events, (the accessing and storage of CAM) and the circumstances in which they occurred, including their location in time and space linked to the accused and in circumstances where they were linked to the limited admissions made by the accused to which I have earlier referred, to draw the inference that it is improbable that these events and circumstances are mere coincidence and that the inference can be drawn that it was the accused who was the person who was responsible for viewing, download, and storing the CAM images the subject of each of the counts. It follows that this is evidence from which it may be inferred that the accused had the requisite knowledge to prove the possession charge.

[69] The next question is whether the evidence has significant probative value. I have taken into account the criticisms made of each of the factors referred to above by Ms Truman in her written submissions. In general I accept the proposition that none of the items referred to above looked at individually, have any significant probative value except the data on the DVD the subject of count 4. But when these items are all looked at together, in my opinion they do have significant probative value because the probability of mere coincidence is extremely unlikely in all of the circumstances, particularly

having regard to the similarities in subject matter, the number of times and the period of times over which these events occurred, the location of the items found and the fact that the evidence as to the existence of the facts upon which the conclusions depend appear to be able to be proved.

[70] The final question is whether the evidence should be admitted because the probative value of the evidence outweighs any prejudicial effect it has on the accused.[11] Having regard to the nature of the material being relied on, there are two potential problems. The first is that technically speaking, some of the material relied upon amounts to uncharged acts. The second problem is that a great deal of the material consists of pornography of a type, which although not CAM, and not illegal, some jurors might find to be repulsive. The third problem relates to the possibility of contamination because someone else other than the accused was responsible for downloading the CAM material. For these reason I think that I should adopt a more stringent test than might, in other circumstances, be required. In my opinion the test in the circumstances of this case should be whether the probative value of the evidence is of such cogency that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offences charged. In my opinion, the material meets that test, and the evidence should be admitted. An appropriate direction should be given to the jury to ensure that the material is not misused.

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[11] The Act, s 101(1) and (2).