

*Bird v Peach* [2006] NTCA 7

PARTIES: BIRD, Thomas

v

PEACH, David

TITLE OF COURT: COURT OF APPEAL OF THE  
NORTHERN TERRITORY

JURISDICTION: CIVIL APPEAL FROM THE SUPREME  
COURT EXERCISING TERRITORY  
JURISDICTION

FILE NO: AP 4 of 2006 (20307355)

DELIVERED: 28 August 2006

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JUDGMENT OF: MARTIN (BR) CJ, ANGEL AND  
THOMAS JJ

APPEAL FROM: Peach v Bird [2006] NTSC 14

**CATCHWORDS:**

CRIMINAL LAW

Appeal – appeal against finding of Judge on appeal that Magistrate erred in dismissing charge – appeal dismissed – matter remitted for retrial.

Legislation: NT Criminal Code s 1, s 188

Authorities: *Semple v Williams* (1990) 156 LSJS 40; *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32; applied.

**REPRESENTATION:**

*Counsel:*

Appellant:	I Read
Respondent:	A Elliott

*Solicitors:*

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

Judgment category classification:	C
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IN THE COURT OF APPEAL  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Bird v Peach* [2006] NTCA 7  
No. AP 4 of 2006 (20307355)

BETWEEN:

**BIRD, Thomas**  
Appellant

AND:

**PEACH, David**  
Respondent

CORAM: MARTIN (BR) CJ, ANGEL AND THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 28 August 2006)

**Martin (BR) CJ:**

**Introduction**

- [1] The appellant was charged on complaint with possessing child pornography. After a trial in which the appellant gave evidence, the learned Magistrate dismissed the complaint. On a prosecution appeal against the dismissal, a Judge found that there was no evidence upon which the hypothesis of innocence relied upon by the Magistrate could be based and allowed the appeal. The appellant appeals to this Court essentially on the basis that the learned Judge erred in finding that there was no evidence capable of supporting the reasoning of the Magistrate.

## **Evidence - Facts**

[2] The Judge accurately summarised the evidence and issues before the

Magistrate in the following terms:

“[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 80870531lg0.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."



### **Magistrate's Reasoning**

- [3] The Magistrate found that the pornographic image which was the subject of the charge was downloaded to the appellant's computer on or about 17 March 2003. The appellant in his evidence excluded the possibility that some other person could have downloaded the image to his computer. Although the Magistrate expressed some concern about this issue, ultimately his Honour found that the prosecution had excluded the possibility that a person other than the appellant had downloaded the image.
- [4] In substance, the Magistrate found that the prosecution had not excluded the reasonable possibility that the appellant inadvertently downloaded the image. The essence of his Honour's reasoning is found in the following passages from his extemporary reasons:

“It may be that in his stumbling during the night time – sorry, in his ramblings, I withdraw that word, his ramblings as it came to be during night-time of surfing 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 – there's at least two or three photographs of the like that ended up, as I found it to be, on his computer.

...

I'm prepared to find ... that the defendant had inadvertently downloaded without paying particular attention to the picture and that with his children coming as apparently they'd been away, I don't know whether they'd been away for some access visit or not, he hurriedly erased everything to do with his night-time ramblings, surfing on the net.

It appears to me that middle aged men want to do this kind of thing. They risk accessing and possessing child sex scenes that may be intermeshed with general pornography scenes. I don't know whether he's having a beer at night or not when he was, as I say surfing the net, but in my view, if the likes of Mr Bird are going to do this kind of thing, they are going to put themselves at risk of possessing this kind of material and suffer at the very least embarrassment of their pathetic, unsavoury and sad efforts being disclosed, not of its behaviour.

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

- [5] There are a number of difficulties associated with the Magistrate's reasoning. First, his Honour accepted the prosecution evidence and, in particular, the evidence of Senior Constable Fausett. His Honour specifically stated that he accepted all of the evidence given by Constable Fausett which he described as "reliable and credible". As outlined in the reasons of the Judge on appeal, Constable Fausett excluded the possibility of outside interference with the computer. He gave evidence that the child pornographic image was a unique image and, in order for that image to be recorded in the directory file names of the relevant folder of the respondent's computer, the person operating the computer was required to click on the specific child pornographic image contained in the photo album on the website and then to have deliberately downloaded and saved the larger formatted image. As expressed by the Judge:

"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.”

- [6] In the face of that evidence which the Magistrate accepted, his Honour had the evidence of the appellant that he had no idea how the image or the name of the image could have been saved on the hard drive of his computer. The appellant said that although he created the untitled word document containing the link to the relevant website, he never opened any of the links and he never opened the child pornographic image. The appellant said he never saw the image. There was no evidence from the appellant or any other witness upon which a conclusion could be based that it was possible for the image to have been inadvertently downloaded and saved. The appellant did not suggest in his evidence that during his night time surfing of the net he had inadvertently accessed the website and image and inadvertently downloaded and saved it.
- [7] Counsel for the appellant was unable to identify any error in the approach of the Judge. Similarly, counsel was unable to identify any hypothesis consistent with innocence that was open on the evidence. Rather, counsel contended that notwithstanding acceptance of the prosecution evidence and the unavoidable inference that deliberate actions were required to access, download and save the image, the Magistrate was not precluded from holding a “nagging doubt” about guilt.

- [8] The Magistrate having accepted the prosecution evidence, there was no basis in the evidence for a finding by his Honour that it was reasonably possible that the accused not only accessed the image by mistake, but inadvertently downloaded and saved that image. Perhaps his Honour did not fully appreciate the nature and effect of the prosecution evidence. Whatever be the cause of the error, the impermissible process of reasoning led to his Honour experiencing what he described as the “nagging doubt”.

### **Principles**

- [9] The principles applicable to prosecution appeals against acquittals by a Magistrate were discussed in a particularly helpful judgment of Olsson J in *Semple v Williams* (1990) 156 LSJS 40. The principles were correctly applied by the Judge and may be summarised as follows:

- The appeal is an appeal in the nature of a rehearing and is limited to matters or questions of law alone or matters or questions of both law and fact.
- The power to allow an appeal against acquittal is an exceptional discretionary power vested in the court.
- “There is a world of difference between an appeal against an acquittal based upon a question of law on the one hand and one which essentially arises from an exercise by a Magistrate of [the Magistrate’s] jury function of assessing the impact of the factual witnesses on the other”:  
*Semple* at 41 and 42.

- The Appellate Court is in a position of disadvantage as against the Magistrate at first instance and “unless it can be shown that [the Magistrate] has failed to use or has palpably misused [the Magistrate’s] advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of its own comparisons and criticisms of the witnesses and its own view of the probabilities of the case based upon a consideration of the printed transcript”: *Semple* at 42.
- Questions of double jeopardy are involved. For this reason alone, “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 when it appears that the order of dismissal sought to be impugned was plainly wrong or on any reasonable interpretation of the recorded evidence and (where relevant) the inferences which patently arise from it”: *Semple* at 43.
- The question whether there is any evidence to support a conclusion reached by the fact finder, including a finding as to a hypothesis consistent with innocence, is a question of law: *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32.
- When extemporary reasons of Magistrates are under consideration, it is inappropriate to dismember such reasons or subject them to hyper-critical analysis. Magistrates work under considerable pressure which frequently

requires the giving of brief oral extemporaneous reasons without significant opportunity for reflection or preparation. “It is necessary to take a broad view of [extemporaneous reasons] and ascertain the essential thrust of the reasoning processes applied, without being unduly critical of the precise modes of expression used or according them a degree of definitiveness which was never intended”: *Semple* at 40.

[10] On the basis of the acceptance by the Magistrate of the expert prosecution evidence, I agree with the conclusion of the Judge as expressed in the following passages from his Honour’s reasons:

“[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.

- [11] The Magistrate made inconsistent findings. He accepted the prosecution evidence. The only reasonable inference from that evidence was that the accessing, downloading and saving of the image required deliberate actions by the appellant. On the other hand, without any foundation in the evidence other than the appellant's denial that he accessed, saw or downloaded the image, his Honour found it was a reasonable possibility that the accessing, downloading and saving occurred inadvertently. The trial miscarried.
- [12] The appeal should be dismissed. As ordered by the Judge the matter should be remitted to the Court of Summary Jurisdiction for a retrial before a different Magistrate.

**Angel J:**

- [13] I agree that the appeal should be dismissed.
- [14] The magistrate accepted the prosecution expert evidence that the child pornographic image could only have been recorded and erased knowingly by deliberate operation of the appellant's computer. He found that the appellant was the only person who used the computer during the relevant period. He found outside interference with the computer was not possible. He also said:

“I'm prepared to find --- that the [appellant] had inadvertently downloaded without paying particular attention to the picture --- .”

[15] The magistrate's findings are inconsistent. The trial miscarried. The judge on appeal ordered a retrial. Save for directing that the retrial be before a different magistrate I would dismiss the appeal.

**Thomas J:**

[16] I agree that for the reasons stated by the Chief Justice the appeal should be dismissed. I agree with the proposed orders.

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