*Chenhall v Mosel* [2013] NTSC 19

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| PARTIES: | **CHENHALL, Craig Anthony** |
| | v |
| | **MOSEL, Jeffrey David** |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | JA 35 of 2012 (21135192) |
| DELIVERED: | 17 April 2013 |
| HEARING DATE: | 29 August 2012 |
| JUDGMENT OF: | SOUTHWOOD J |
| APPEAL FROM: | LOWNDES M |

**CATCHWORDS:**

JUSTICES APPEAL – Appeal against conviction – appellant's evidence differing from questions put in cross-examination – whether discrepancy may be regarded in evaluating the evidence – lies – recent invention – fresh evidence – whether conviction was supported by the evidence – appeal against conviction dismissed – appeal against sentence – minimum maximum penalty – manifestly excessive – appeal against sentence allowed

*Criminal Code* s 125B
*Justices Act* s 176A
*Sentencing Act* s 78BB

*Bahar v R* (2011) 255 FLR 80
*R v Birks* (1990) 19 NSWLR 677
*Browne v Dunn* (1829) 3 Sim 23; (1829) 57 ER 907
*Edwards v The Queen* (1993) 178 CLR 193
*R v Fenlon* (1980) 71 Cr App R 307
*R v Grant* [1975] 2 NZLR 165
*The Queen v Hancock* [2011] NTCCA 14
*R v Karabi* [2012] QCA 47
*M v The Queen* (1994) 181 CLR 487
*R v MAP* [2006] QCA 220
*R v Morrow* (2009) 26 VR 527
*Nominal Defendant v Clements* (1960) 104 CLR 476
*R v Oliver & Ors* [2003] 2 Cr App R(S) 15
*R v Robinson* [1977] Qd R 387

**REPRESENTATION:**

*Counsel:*

| | |
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| Appellant: | P Elliott |
| Respondent: | D Morters |

*Solicitors:*

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| Respondent: | Office of Director of Public Prosecutions |

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|---|---|
| Judgment category classification: | B |
| Judgment ID Number: | Sou1301 |
| Number of pages: | 50 |

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

*Chenhall v Mosel* [2013] NTSC 19
No. JA 35 of 2012 (211335192)

BETWEEN:

**CRAIG ANTHONY CHENHALL**
Appellant

AND:

**JEFFREY DAVID MOSEL**
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 17 April 2013)

**Introduction**

[1] On 20 April 2012 the appellant was found guilty by the Court of Summary Jurisdiction of possess child abuse material contrary to s 125B(1)(a) of the *Criminal Code* (NT). He was convicted and sentenced to imprisonment for two months, to be suspended after he had served seven days in prison.

[2] The appellant has appealed against both his conviction and his sentence. There were six grounds of appeal pleaded against conviction.

1. The finding of guilt was against the weight of evidence.

2. The trial magistrate erred in his application of the test for, and categorisation of, lies capable of establishing evidence of guilt.

3. The trial magistrate erred in finding beyond reasonable doubt that the evidence of the witness Setter could be used to establish the lies told by the accused.

4. The trial magistrate erred in finding that the versions of the witness Setter and the accused as to the contents of their telephone conversation were irreconcilable.

5. The trial magistrate erred in law in treating the cross-examination of the witness Setter as being capable of drawing inferences adverse to the appellant.

6. The hearing miscarried in that the prosecutor submitted to the trial magistrate that the evidence of the appellant about his use of the floppy disk was a recent invention, when the prosecution had in its possession, or access to, evidence that the appellant had stated, more than six months before the hearing, that he used a floppy disk.

[3] The appellant acknowledged that grounds 2 and 3 were in effect the same ground of appeal and ground 4 was abandoned.

[4] During the appeal, the appellant also applied to tender, as fresh evidence, the transcript of a directed interview of the appellant that was conducted by the police for disciplinary reasons on 25 October 2011. During the directed interview, the appellant said that many years ago he had downloaded child pornography onto a floppy disk for the purpose of reporting the child pornography to Elio Valente who was a police officer working in the computer crime section. He maintained that this was the only involvement he had ever had with child pornography. The purpose of applying to tender this evidence was to support ground six of the appeal and demonstrate that the trial in the Court of Summary Jurisdiction had miscarried.

[5] There are two grounds of appeal against the sentence. First, the trial magistrate erred in his application of the principles set out in *The Queen v Hancock*.[1] Second, the sentence imposed by the trial magistrate was manifestly excessive.

**Section 125B(1)(a) of the Criminal Code**

[6] So far as is relevant to this appeal, s 125B(1)(a) of the *Criminal Code* (NT) states that a person who possesses child abuse material is guilty of a crime and is liable, in the case of an individual, to 10 years imprisonment. Child abuse material means material that depicts, describes or represents in a manner that is likely to cause offence to a reasonable adult, a person who is a child or who appears to be a child: engaging in sexual activity; in a sexual, offensive or demeaning context; or being subject to torture, cruelty or abuse.

[7] The elements of the offence are:

1. The person has under his (or her) custody or control in any place child abuse material.

2. The person is aware or has knowledge that he (or she) has custody or control of child abuse material. That is, the person knows that the material in his (or her) custody or control is material of a particular kind, namely, child abuse material.

[1] [2011] NTCCA 14.

[8] To possess something is neither an act nor omission. It represents the passive consequence of a prior act, namely, the act of acquisition of possession.[2]

**The prosecution case at trial**

[9] The prosecution case at trial was that the appellant was a member of the Northern Territory Police Force who had been seconded to the Australian Federal Police. On 8 October 2011 he brought to work a USB drive which contained 11 images of child abuse material. It was discovered and interrogated by another police officer who found the 11 images of child abuse material.

[10] In order to prove the appellant was aware the USB drive contained child abuse material, the prosecution relied on lies that it alleged the appellant told his superior officer, Superintendent Mark Setter, during a telephone conversation they had on 11 or 12 October 2011. The prosecution maintained that the appellant lied when he told Superintendent Setter that he downloaded the child abuse material many years ago so that he could report the website that contained the child abuse material to Officer Elio Valente who was working in the computer crime section of the Northern Territory Police Force. The prosecution case was that by so doing the appellant was initially trying to avail himself of the defence provided by s 125B(2)(a) of

[2] *R v Grant* [1975] 2 NZLR 165 at 169.

the *Criminal Code* (NT).[3] However, the appellant abandoned this defence when he realised that Officer Valente left the Northern Territory Police Force in 2002 and the USB drive came into use in 2008.

[11] The lies alleged to have been told by the appellant, and the use to be made of those lies by the prosecution were particularised during Counsel for the respondent's opening address in the Court of Summary Jurisdiction. He made it clear that the evidence about the appellant's lies showed a consciousness of guilt and constituted implied admissions.

[12] Counsel for the respondent opened the prosecution case as follows.

> The [appellant] was working as an Australian Federal Police Officer on secondment from the Northern Territory Police on a shift which spanned 8 and 9 October 2011. He finished his shift on the morning of 9 October 2011.
>
> He brought with him at the beginning of the shift a USB drive and he left that drive on the desk that he was working at. The USB drive was found by another officer. It was examined and found to contain 11 images which are child abuse material. The prosecution says that the [appellant] was aware of the presence of the material on the USB drive. He was therefore in the possession of that material when he brought it to the Darwin office of the Australian Federal Police on 8 October 2011.
>
> On 9 October 2011 the USB drive was found by Roland Kubank, a fellow officer. Officer Kubank saw that it was a non-issue USB drive so he interrogated it and found 11 images of child abuse material. As a consequence he immediately reported his find to his supervisors. Also on the USB drive was some material which

[3] s 125B(2)(a) of the Criminal Code states that: "Nothing in this section makes it an offence: (a) for a member or officer of a law enforcement agency to have any child abuse material in his or her possession in the exercise or performance of a power, function or duty conferred or imposed on a member or officer by or under an Act or law."

identified the accused as the person who had been in possession of the USB drive.

The accused's next shift was on 11 October 2011. At the start of the shift, he was told of the discovery of the USB drive and the child abuse material. He was told about these matters by Detective Foley from the Northern Territory Police Force in the presence of Superintendent Mark Setter, who is the Australian Federal Police officer in charge of airport policing.

The accused's locker was searched and nothing was found. The accused was then escorted from the premises by Superintendent Setter.

During the evening of 11 October 2011 the accused telephoned Superintendent Setter. Superintendent Setter missed the call, but he saw that he had missed the call and he telephoned the accused. There was a discussion between them during which the accused said that, while he was searching the net, he had inadvertently stumbled across some material which he was concerned was child abuse material. The accused saved the material for the purpose of bringing it to the attention of a fellow member who he said was working in the area of investigation of child abuse. The member he nominated was Elio Valente.

The accused will make certain formal admissions. The admissions are as follows.

1. The accused brought the USB drive to the Australian Federal Police office at the Darwin Airport. The accused left the USB drive on a desk.

2. The USB drive is the same one that was subsequently analysed by Sergeant Windebank.

3. There are 11 images on the USB drive that are child abuse material.

4. Elio Valente's last day of active duty in the Northern Territory Police Force was 23 June 2002.

5. The USB drive was not in operation until the third or fourth week of March 2008

So given admissions 4 and 5, the accused was lying when he provided an explanation to Superintendent Setter about how these images came to be on the USB drive, or the reason for them being on the USB drive. **These lies demonstrate both knowledge of the material on the USB drive and a consciousness of guilt on the accused's part about his possession of those images**.

Because of the admissions made by the accused, the prosecution will only call two witnesses. The first is Sergeant Roland Frederick Kubank. He is the officer that discovered the USB drive. The second is Superintendent Mark Setter from the Australian Federal Police.

[13] During his examination-in-chief, Superintendent Setter gave the following evidence about the telephone conversation he had with the appellant on 11 or 12 October 2012.

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| Prosecutor: | You are aware that [the appellant] had worked on [the evening of 8 October 2011 and] the morning of 9 October 2011? |
| Defence: | That is not in dispute your Honour. It is an admitted fact that he was there. |
| Prosecutor: | After you received the USB from Sergeant Kubank, when did you next have contact with the [appellant]? |
| Setter: | On the Monday [10 October 2011] I believe. |
| Prosecutor: | That would have been 11 October (sic)? |
| Setter: | Yeah, 11 (sic). At that stage I believe Mr Chenhall was working as the Crime Prevention Liaison Officer in the administration area and I |

had contact with him on weekdays during business hours.

Prosecutor: Was it on the morning of the 11th that you had contact with him?

Setter: Yes. I spoke to him on the 11th, but I did not speak to him in relation to this matter.

Prosecutor: At some point in time were you present when Detective Foley from the Northern Territory Police Force spoke with Mr Chenhall?

Setter: Yes, that is correct. That occurred in my office and that was on the 12th just after lunch.

Prosecutor: At that point you heard Mr Foley inform Mr Chenhall about the allegations of being in possession of child abuse material?

Setter: That is correct.

….

Prosecutor: Now on that day you received a telephone call from the [appellant], is that correct?

Setter: Yes, later that evening prior to leaving my house. I had [asked] Detective Foley and Mr Chenhall to contact me and brief me on what was going on, Detective Foley, particularly in relation to the investigation. Mr Chenhall obviously was dependant on what had occurred …. The AFP had intended on suspending him from duty and to inform him of his status.

Prosecutor: It was about 7.30pm that call was received?

Setter: About 7.30 I received a telephone call from Detective Foley. It was about 12 minutes past

7 that conversation occurred. From there I spoke with Superintendent (inaudible) from the AFP professional responsibility section. After the conversation with him, I then went and had a shower. While I had a shower [the appellant] rang and I had a message on my telephone.

Prosecutor: Now, can you do your best to relate to his Honour the conversation that occurred between you and Mr Chenhall at that point in time. Who commenced the conversation?

Setter: Yes. I commenced the conversation. So I rang Mr Chenhall.

Prosecutor: What did you say?

Setter: I asked him how he was going. He said he was alright.

Prosecutor: Did he provide you with any information about the material that had been discovered?

Setter: During the course of the conversation he told me that he remembered the USB. He **also** told me that **many years ago** he had been observing porn sites and one site had led to another and he ended up on what he believed to be a Japanese porn site where there were pictures of children. He told me that he downloaded a number of images from that site and wrote down the address of the site. His intent was to report that to the Northern Territory Police Computer Crimes Section.

Prosecutor: Did he mention the names of any people that he intended to report the matter to?

Setter: Yes, Elio Valente.

Prosecutor: Did you know who Elio Valente was?

Setter: Yes. Elio Valente used to be a Detective Senior Constable with the Northern Territory Police and at one stage he worked in the computer crimes section.

Prosecutor: Did he say anything about why he had brought the USB drive into the AFP office?

Setter: Yes. He said that he had brought it into the AFP office to print up some personal documents.

[14] During his cross-examination Superintendent Setter gave the following evidence about the telephone conversation he had with the appellant.

Counsel: During the conversation that you detailed having had with the appellant, I understand your evidence to be that he called you as a result of your request that he do so?

Setter: That is correct.

Counsel: The conversation proceeded along the lines of what is contained in your statement which is, 'He intended to cooperate with the investigators. He intended to tell them what had happened', do you agree with all of that?

Setter: Yes.

Counsel: He said that he remembered the USB drive, and would you agree **that he sought to give you some sort of information relating to anything that he had to do with child pornography?**

Setter: What it appeared to me was an attempt to give an explanation of how that material was on that USB drive.

[*Having obtained this answer, counsel for the appellant did not put to Superintendent Setter that the appellant told the superintendent that he downloaded the child abuse material onto a floppy disk not the USB drive. Nor was the superintendent asked if the appellant told him that there were a number of people who had access to his computer and that any one of these people could have downloaded the child abuse material. Both of these matters were key aspects of the appellant's defence.*]

Counsel: But what he actually said to you was many years ago he had downloaded some pornography, did he tell you that?

Setter: What he said to me was that he had been searching for porn. The sites had led him into a, what he believed to be Japanese porn site where there were images of children. He downloaded those and wrote down the USB, wrote down the website address with the intent of reporting that to the Northern Territory Police.

Counsel: But he told you to whom he intended to report it?

Setter: Yes.

Counsel: He named Elio Valente?

Setter: He named Elio Valente.

Counsel: Who was in computer crime, correct?

Setter: I do not know that he was in computer crime or not.

Counsel: He was in computer crime at an earlier period?

Setter: I know Elio Valente served in the computer crime section, whether that time correlates with the time that this occurred, I do not know.

**The defence case at trial**

[15] In the written Outline of the Appellant's Submissions, counsel for the appellant stated that the appellant's defence at the trial was that the appellant admitted that he had the USB drive in his possession but he did not download or know that the 11 images of child abuse material were stored on it. He took the USB drive to work for a lawful purpose, namely he was going to store material on it connected to his wife's business so that he could print the material at work.

[16] During his evidence-in-chief the appellant gave the following evidence.

[17] He denied that he knew that the USB drive contained child abuse material and he denied that he downloaded child abuse material onto the USB drive. The USB drive was kept in a plastic drawer in a computer desk in the lounge room of his house at Howard Springs. It was a family item. He probably bought and paid for the USB drive but it was a shared USB drive which was used to save and store everyone's emails. The appellant could not say and did not know if his wife used the USB drive. However, from time to time the USB drive disappeared from the drawer in the computer desk and it turned up elsewhere in the house.

[18] In early October 2011 his wife's mother and brother, who live in Thailand, were visiting them and were staying in the appellant's house. Between 29 October 2009 and 8 October 2011 the appellant, […] lived in the appellant's house. […].

[19] Just before October 2011 he was changing the sheets and cleaning […]. […].

[20] The appellant told the trial magistrate, "When I pulled the sheet off […] a slip of paper fell out from […] pillow, underneath the pillow, and I looked at the piece of paper. It was just like an A4 piece of paper with the bottom bit torn off. It had handwritten words on it like, 'sex', 'schoolgirl' and other words. I can't recall the words." The appellant was in a hurry so he did not pay much attention to the piece of paper. He screwed it up and threw it in the bag that he had on the floor. A couple of days later, he was thinking about the words written on the piece of paper and he thought they sounded like words that people might use if they were searching the internet for pornography sites.

[21] About a week later he and his wife were both in […] changing the bed sheets and he said to his wife, "I meant to tell you that I found this piece of paper with 'sex' and 'schoolgirl' on it and think they might be words that …" and she immediately jumped on the computer […] and opened up the history and when they clicked on some of the history links there were some pornography webpages that opened up on the computer. The appellant and his wife discussed what they had discovered and they thought that it may have been […] that was doing the searches. The appellant and his wife then arranged for […] to further interrogate […] computer and he put the history that he searched in a folder on the computer. After this the appellant restricted […]

to the computer. The appellant's evidence was that none of the images discovered on the computer were images of child pornography.

[22] The appellant said that during the telephone conversation he had with Superintendent Setter he told him that he remembered the USB drive. He was asked why he did and he answered, "In that, that is the USB that I took to work, that's, yes, I know, I remember the USB."

[23] During the telephone conversation, he told Superintendent Setter that many years ago he was searching the internet. He did not tell him that he was searching pornographic websites. He said that he was looking up something that was in South East Asia because he was doing a university degree in South East Asian Studies. He told Superintendent Setter that he was doing some research for a university paper and as a result of those searches a lot of pages started popping up. They were popup pages for pornography sites. He just started clicking on them and the next thing that occurred was some child pornography sites popped up.

[24] He told Superintendent Setter that one of the pornography sites was a Japanese pornography site with images on it of children, which did not look right, so he copied some of the images on a floppy disk. He told Superintendent Setter that the incident was so long ago he did not have a USB drive. He told Superintendent Setter that he wrote the web address down and his intention was to take the images and show them to Elio Valente who was working in Computer Crime at the time.

[25] The appellant told Superintendent Setter about this incident just to say that was the only time he had anything to do with downloading anything like that. He certainly never downloaded anything like that on the USB.

[26] The appellant put the floppy disk in an envelope and put it in his backpack and took it to work with him. The incident occurred about 10 years ago. He tried to telephone officer Valente but there was a recorded message and he was not available for some reason. He left the floppy disk in his bag and just forgot about it. Sometime later he was cleaning out the backpack and he found the floppy disk. He went back to see if the websites were still there but when he went onto the internet they seemed to have closed down. As they had closed down, he did not think that there was any real point in pursuing any investigation so he destroyed the disk.

[27] During his cross-examination, the appellant gave the following evidence.

[28] On 8 October 2011 he was rostered off duty. He was at home, and he had been working on taxation matters for the fruit orchard owned by his wife, when he received a telephone call from Superintendent Setter who asked him if he could go to work that evening. He told Superintendent Setter that he would prefer not to go to work because he had a "roll on the tax matters" and he would like to continue with that work. Superintendent Setter stated that he was really desperate. He was down to one man. He said to the appellant that he would ring and around and see if he could get someone else. The appellant said that he would come into work if Superintendent

Setter was really desperate. Superintendent Setter then hung up. He called back later and again asked the appellant if he was able to go to work. The appellant said that he would do the nightshift.

[29] The appellant could not get the taxation figures to balance so he told his wife that he would take the taxation calculations into work and he would try to complete the calculations during one of his breaks at work. When he left for work, he was running a bit late so he threw his laptop computer into the bag and on the way out he stopped at the computer desk in the lounge room and got one of the USB drives out of a drawer. He needed the USB drive so he could print the taxation calculations at work. He could not print from his laptop computer at work. However, he could save the documents onto the USB drive and then print the documents with the use of the USB drive. He had purchased a USB drive earlier to store the taxation calculations on but he could not find it when he placed the laptop computer into the bag. So on the way out he took a USB drive from the computer desk drawer.

[30] As matters transpired, the appellant did not save any taxation calculations onto the USB drive he had taken out of the computer desk drawer. When he unpacked his laptop computer at work he found the USB drive that he had purchased "to do that" and he used that USB drive. The USB drive that contained the child abuse material may have come out of his computer bag when he unpacked his computer. He was unable to recall if he printed out any documents at work that were saved onto the USB drive that he had purchased.

[31] The appellant was asked if he was aware that there was an image of him, that he had taken using a camera with his arm outstretched, on the USB drive that contained the child abuse material. He answered that he knew of the existence of such an image which was on his computer but he would not accept that it was on the USB drive unless he had actually seen it on the USB drive. The appellant was then asked if he transferred the image of him which was on his computer to the USB drive. He answered that he did not recall doing so. He did not know if he did. However, he conceded that from time to time he downloaded material onto the USB drive. The appellant admitted that from time to time he probably downloaded videos that he had filmed onto the USB drive but he did not remember downloading the image of him which he had taken with his arm outstretched.

[32] He denied that he had downloaded 11 images of child abuse material onto the USB drive.

[33] […]. The appellant found a slip of paper under her pillow with the words 'sex' and 'schoolgirl' and another word written on it. The appellant found the piece of paper with the words written on it in the first week of September 2011. He told his wife about it and she discovered pornographic images on the computer […]. The pornographic images on […] were not images of child abuse material.

[34] The appellant was asked if, after he found the piece of paper with the words written on it under […], he came to the conclusion that […], had been

downloading pornographic material onto […] computer. The appellant answered, "Well, I do not know that […] had been downloading it but I said there were four people staying in that bedroom at the time. […]. They were all sleeping in that bedroom at the time. I had no idea […] was even using the computer in that room. I had no idea […] was using it. What I said to my wife and – when I was discussing it with my wife is, I said, 'I am sure it is not […].' The appellant had his suspicions that it was […].

[35] The appellant was then cross-examined about why he did not tell Superintendent Setter that it was not his material on the USB drive and about why these matters were not raised with the superintendent during his cross-examination. He gave the following evidence.

> Prosecutor: You don't tell Setter when you talk to him, 'Oh that is not my stuff; that is stuff that […] probably put on the computer' – you don't say anything like that do you?
>
> Appellant: I think I may have said to Setter that there are up to – over time there would have been up to possibly six or seven adults staying at my house, and there were people staying at my house who have access to my computers and I don't know what gets done on my computer. ….
>
> Prosecutor: Alright, let's talk about what you said to Setter. You have had the opportunity to review the police brief of evidence for quite some time now, haven't you?
>
> Appellant: Yes. Yes.

Prosecutor: You have had the opportunity to read what it was that Superintendent Setter said was the conversation that occurred between him and you when you called him on the evening of 12 October 2011?

Appellant: Yes.

Prosecutor: And you have sat here while my learned friend has cross-examined him about that conversation?

Appellant: Yes.

Prosecutor: And at no point in time did you hear your legal representative put to Mr Setter that there were conversations between you and him about how lots of people had access to this USB and that anyone of those people could have downloaded that material onto your USB, you never heard any of those propositions put to Mr Setter, did you?

Appellant: No.

Prosecutor: And you did not grab hold of your lawyer's arm and say, 'Tell him to confirm that we had these conversations as well' – you didn't hear any of that cross-examination?

Appellant: No.

Prosecutor: You are making this up now, aren't you?

Appellant: No.

[36] The appellant was then cross-examined further about the telephone conversation that he had with Superintendent Setter on 11 October 2011. He gave the following evidence.

Prosecutor: You heard Superintendent Setter say in pretty clear terms, what it was that transpired or what the conversation was between you and him when he returned your call on the evening of 12 October?

Appellant: Yes. I did.

Prosecutor: You heard him say that you remembered the USB drive?

Appellant: Yes.

Prosecutor: It is absolutely clear that you were talking about the USB drive that was found on your desk when you said that to him isn't it?

Appellant: Yes. Yes well …

Prosecutor: 'Yes, I remember the USB drive.' – Immediately after that he said you talked about how you had been surfing the internet, looking at pornography sites?

Appellant: No.

Prosecutor: All right, well …

Appellant: Sorry, I heard Superintendent say that, yes.

Prosecutor: You heard Setter say that, you did not hear any challenge to his account?

Appellant: No.

Prosecutor: You did not hear it put to him that the true nature of the conversation was that you had been doing some South East Asian Studies? You never heard it put to Setter that is what you said to him, that as a consequence of doing those studies there were

heaps of pages popping up which included pornography?

Appellant: Mm

Prosecutor: Because that is not what you said to Setter is it?

Appellant: It is what was said to Setter. Well, Superintendent Setter also said to me, which he never put in his statement, or that there was – that, 'You have never struck me as a paedophile.'

Prosecutor: You say that Setter's evidence is not accurate in this respect, that you said to him that you had been surfing the internet, looking at pornography sites and been led to what you thought was a Japanese porn site that contained images of children?

Appellant: Mmm

Prosecutor: You say that is not accurate?

Appellant: It is roughly accurate, yes.

Prosecutor: You agree though that you told him that you wrote down website addresses at that point in time?

Appellant: Yes.

Prosecutor: There was no reason whatsoever for you to download the material, was there?

Appellant: Yes, to show Valente.

Prosecutor: Well you could have just given him the piece of paper with the website addresses on it, couldn't you?

Appellant: Yes but then the website might have been closed or – I don't know. I don't know that that's what – I am not familiar with that area of investigation.

Prosecutor: So you are saying that you downloaded the child pornography onto a removable storage device, a floppy disk?

Appellant: Floppy disk, yes.

Prosecutor: Because you were concerned that the opportunity to see that child pornography would be lost because the website addresses you had written down no longer existed when you showed it to Valente?

Appellant: Yes, well …

Prosecutor: So this discovery of child pornography on the computer caused you significant concern?

Appellant: Which discovery?

….

Prosecutor: You told Setter, tell me if I am wrong about this, you told Setter that during your surfing of the internet, whether it be because you were looking for South East Asian Studies addresses or for Japanese pornography sites, you came across child pornography. That is right, isn't it?

Appellant: Yes.

Prosecutor: You downloaded that child pornography onto a floppy disk?

Appellant: Yes.

Prosecutor: Now, you say that you told Setter that you downloaded it onto a floppy disk, do you?

Appellant: Yes.

Prosecutor: You never heard it once said to him that was the term you used when he was cross-examined about the conversation he had with you?

Appellant: I never heard Mr Setter say, or the Superintendent say, that I had downloaded it onto anything. He just said, 'downloaded'.

Prosecutor: You want to say now that what you said to him at that point in time specifically referred to floppy disk?

Appellant: Well …

Prosecutor: You don't? You can't be certain?

Appellant: What I'm … What I'm saying now referred to a floppy disk. Can I … I'm starting to get a bit confused here because I have … Excuse me, I am sorry, your Honour, I have already been for an internal interview about this stuff too so …

Prosecutor: Alright, you tell me, alright? If I ask a question that you don't understand, just tell me and I will ask it in a different way or I will try to break it down a bit. I don't want you to answer anything that you don't understand, alright?

Appellant: Yes.

Prosecutor: Are you saying that you said to Setter that you stored this material on a floppy disk?

Appellant: Yes, and I have maintained that before in the past.

Prosecutor: Alright?

Appellant: So to say that I have only made it up since I have heard Mr Setter give evidence here is incorrect.

Prosecutor: You have never heard it suggested to Mr Setter?

*[Counsel for the appellant then objected to the line of questioning being adopted by the prosecutor, namely recent invention. He did so on the basis that evidence was available to the prosecutor which demonstrated that the appellant's statements were not a recent invention. However, the trial magistrate ruled that it was a legitimate area of cross-examination. Regardless of whether or not the apparent inconsistency was due to recent invention, the Court of Summary Jurisdiction was entitled to compare Mr Elliot's cross-examination of Superintendent Setter with the appellant's evidence. The Court of Summary Jurisdiction then took the luncheon adjournment.]*

[37] Immediately after the lunch, the appellant was cross-examined about the fact that the accused had apparently downloaded a photograph that he had taken of himself onto the USB drive that contained the images of child pornography. The prosecutor then asked the accused the following questions.

Prosecutor: Mr Chenhall you did not know at the time that you spoke with Superintendent Setter that it could be shown that the USB drive had been manufactured in 2008?

Appellant: No.

Prosecutor: It was only something you learned as a consequence of information that has been served on you in the police brief?

Appellant: Mmm

Prosecutor: So what you told Setter was an explanation for the presence of that child abuse material on the USB, wasn't it?

Appellant: No. No.

Prosecutor: Because what I am suggesting to you is that what you clearly intended to communicate to Setter was that the child abuse material had come onto that USB drive by you engaging in a lawful purpose. That is what you wanted to communicate to Setter?

Appellant: No, not at all sir. I was neither raising that as a defence to law or an excuse. I was merely raising that to say that is the only time I have done anything like that and it was done at a time before USBs were, as far as I know, on the market. So there is no way known that I was trying to say that the stuff I downloaded was the stuff on the USB, not at all.

[38] He also denied that he had invented the story about storing material on the floppy disk since he had heard Superintendent Setter give evidence. The appellant said that he had maintained that version of the conversation in the past. He had already been for an internal interview about these matters.

**Fresh evidence**

[39] At the beginning of the appeal the appellant made an application to tender, as fresh evidence in the appeal, the recording and transcript of a directed interview of the appellant which was conducted by Detective Senior Sergeant Sachin Sharma on 25 October 2011.

[40] During the interview the appellant was asked if he ever downloaded child abuse images for any reason. He answered:

> Probably years and years ago, I was at home and I was doing some searches. Can't even remember what I was searching for and um somehow I got taken to some um pornographic … I don't even think … The original search was not of a pornographic nature but these were the days when, like before you had um firewalls and things like that. Shit used to just bombard you, and pop up and pop up and that sought of thing and I was only fairly new to the internet, fairly new to computers and that sort of thing. Didn't know much about them and somewhere in the course of these things, I'd come across some sites that looked a bit suspicious. Like they looked like they might have underage girls or something on it. And I remember it was that long ago, it was even in the days of floppy disks and I save 'em, I saved some of the images that I thought looked suspicious to a floppy disk um 'cause I thought it was my obligation, my duty as a police officer. And back in those days, I didn't, I didn't sort of have any idea how really to import those images. I don't think, it certainly wasn't as big as it is today. Um and I, I took the floppy disk and I was, I took it to work with me. I was gonna get in touch, I think it was Elio Valenti was working in computer crime back in those days and I was gonna basically take it to him and show him and ask him if it was right or what he thought of it. Um but I just recall for some reason he was not available or he was away or something like that. And then yeah basically I put it aside and um forgot about it and I was, sometime later, um I think I come across it again. Um I can't, I mean this is a long time ago, I think I checked the internet site and it had been closed down or something like that and basically um I destroyed the disk. I just thought, well it's you know, it's certainly um, yeah if I'd, if I'd downloaded it, it woulda only been for that reason. Because I thought as a police officer, and I think I mighta been working with CIB at the time um yeah and I thought it was my obligation to, to, to, to download it and report it.

[41] During the directed interview the appellant then stated that he originally took the floppy disk to work with him but he could not recall whether he found it in his bag or somewhere else later on. He came across the child pornography before firewalls had been installed in computers. He said that it would have to be 10 years ago. However, the appellant could not remember when he found the floppy disk again. He was not looking for pornography sites when he found the child pornography. He could not

remember what he was searching for. He has never deliberately accessed pornography. However, when the pornographic sites came up on his computer he did click through them and while doing that he came across girls who looked under age.

[42] Detective Sharma then asked the following questions of the appellant and the appellant gave the following answers.

| | |
|---|---|
| Sharma: | Do you still have that computer? |
| Appellant: | No. |
| Sharma: | No? |
| Appellant: | No. I've probably, since then I've had probably three computers, three main computers and three laptops. |
| Sharma: | Okay. |
| Sharma: | Then you said um 'sometime later you came across it' and when this detective asked you what 'it' means you said 'floppy disk'. |
| Appellant: | Must be the disk, yeah, yeah. |
| Sharma: | But then you also said the first time in, you answer that 'you checked the internet site and it's closed down'. |
| Appellant: | Yep. |
| Sharma: | What did you mean by that? |
| Appellant: | Well … |

Sharma: Because you answered that you come across …

Appellant: Yep.

Sharma: … floppy disk.

Appellant: Okay, I come across the floppy disk …

Sharma: Yep.

Appellant: … when, when I, when I downloaded those images just to save, I, I wrote the name of the website on a piece of paper …

Sharma: Yep.

Appellant: … I never, those, back in those days I don't think I had a printer or anything like that …

Sharma: Yep.

Appellant: So I wrote and I, that piece of paper was, was there too. So when I found the floppy disk, I think I have jumped, I think I have gone back and I thought, I wondered if this still was of any use. So I have gone to look at the website and it was closed down. So that's what I mean.

Sharma: So that is sometime later, you don't know how long?

Appellant: Naah.

Sharma: But you said that you found the floppy disk, there was a hand note of a web address, you then went and done the search again?

Appellant: And checked that website and I'm pretty sure, yeah it was closed down. So I just thought what is the point? No point now, so …

[43] During the directed interview Superintendent Setter's statement about the telephone conversation with the appellant at 7.30pm on 11 October was put to the appellant. The appellant responded as follows.

> No. No. Floppy disk, I have always maintained it was a floppy disk. I have never downloaded images like that onto a USB. I'm sorry but that is totally incorrect. I think … I'm pretty sure I even said to Mark that night, look that was a long time ago; it was … it was a floppy disk. It was before USBs were even invented. So these people ought to make sure they get their words right before they, you know, commit words to a statement as far as I'm concerned. I have never ever said to any of them that I have down loaded images onto a USB.

[44] The purpose of the application was to try to tender evidence which buttressed the appellant's credit by contradicting the assertion made by counsel for the respondent, during his cross-examination of the appellant, that the appellant's evidence about the conversation he had with Superintendent Setter was a recent or late invention. Counsel for the appellant contended that this evidence was relevant to ground 6 of the appeal.

[45] The admissibility of fresh evidence is governed by s 176A(1) of the *Justices Act* (NT) which states:

> (1) Where evidence is tendered to the Supreme Court, that Court shall, unless it is satisfied that the evidence, if received, would not afford a ground for allowing the appeal, **admit that** evidence if:

(a) it appears to it that that evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(b) it is satisfied that that evidence was not adduced in those proceedings and there is a reasonable explanation for the failure to adduce it; and

(c) it is satisfied that the appellant has complied with the requirements of subsections (2) and (3) in respect of that evidence.

[46] While the evidence about what the appellant **said** during his directed interview by the police is likely to be credible and it was not adduced in the Court of Summary Jurisdiction, in my opinion, the evidence set out par [40] to par [44] above should not be admitted in evidence as there is no reasonable explanation for the appellant's or his counsel's failure to adduce the evidence in the Court of Summary Jurisdiction.

[47] The substance of counsel for the appellant's principal submission, in this regard, was that he elected to conduct the appellant's case in the Court of Summary Jurisdiction on the basis that the appellant's and Superintendent Setter's versions of their telephone conversation on 11 October 2011 were reconcilable. The telephone conversation was consistent with the innocence of the appellant and there was a reasonable possibility that someone else had downloaded the child abuse material onto the USB drive. He told counsel for the respondent about the existence of the transcript and recording of the directed interview of the appellant which was conducted by the police. That recording provided evidence which incontrovertibly established that the

appellant's evidence about the telephone conversation he had with Superintendent Setter was not a recent invention. The prosecution elected not to obtain that evidence and, as a consequence, counsel for the respondent unfairly raised an issue which had no substance. In the circumstances, there was no obligation on the defence to introduce the contents of the transcript or the recording of the directed interview into evidence in re-examination.

[48] Counsel for the respondent's response to the above argument was that all of the relevant materials were in the possession of the appellant. The appellant participated in the directed interview on 25 October 2011. At 1.20 pm on 7 March 2012 Detective Senior Sergeant Sachin Sharma served a copy of the brief relating to the internal disciplinary charges, which had been brought against the appellant, on Mr Robert Perry who was at the Northern Territory Police Association office on Folsche Street. At that time Mr Perry was the appellant's representative for all disciplinary matters. At the time of the trial the transcript of the directed interview had been in the appellant's control for 41 days. A practice had developed between the Office of the Director of Public Prosecutions and the Northern Territory Police integrity section whereby the Director of Public Prosecutions was not provided with such materials when prosecuting a police officer who had undergone a directed interview. Consequently, counsel for the respondent was not briefed with the material to which counsel for the appellant referred. At no stage did he indicate that he would obtain and consider that material.

Neither the appellant, nor his counsel, were misled, in any way, about how the prosecution case was being presented. At the end of the appellant's cross-examination it was clear that counsel for the respondent was not going to change his position and the appellant could have been re-examined by counsel for the appellant if his version of the telephone conversation with Superintendent Setter was not a recent invention and the materials could have been tendered in evidence. As a result, there had been no unfairness and the summary trial had not miscarried.

[49] I accept counsel for the respondent's submission. Counsel for the appellant is a very experienced barrister who made deliberate forensic decisions to strictly confine his cross-examination of Superintendent Setter about this topic and not to re-examine the appellant about what he said during the directed record of interview. This material was not immediately available to counsel for the respondent. The material was available to the appellant and his counsel throughout the trial and both the appellant and his counsel were aware of the existence of the evidence. It is a well established principle that evidence may be led of a prior consistent statement in order to rebut an allegation of recent intervention.[4]

[50] When asked why he had not re-examined the appellant about these matters, counsel for the appellant's initial response was to submit that he was preserving an appeal point and he wished he had re-examined the appellant about that topic. He then changed his submission and said that he could not

[4] *Nominal Defendant v Clements* (1960) 104 CLR 476.

remember what he thought at the time and he had no explanation as to why he did not re-examine the respondent about these matters.

[51] In the circumstances, I am not satisfied that there is a reasonable explanation for the appellant's failure to adduce the evidence about what the appellant said during the directed interview in the Court of Summary Jurisdiction. Consequently, I rule that the evidence is inadmissible.

**Ground 1 – The finding of guilt was against the weight of the evidence**

[52] As to the first ground of appeal, counsel for the appellant submitted that there was no basis upon which the magistrate could have found the case against the appellant had been proven beyond reasonable doubt. The available evidence did not exclude the reasonable possibility that the appellant did not know that there was child abuse material on the USB drive.

[53] Counsel for the appellant stated that the only evidence which was used by the trial magistrate to make a finding that the appellant had the requisite mental state, at the time he possessed the child abuse material, was the admissions of fact, the inferences which the magistrate drew from the conversation that the appellant had with Superintendent Setter and what the magistrate categorised as an *Edwards v The Queen*[5] lie. The evidence of Superintendent Setter about his telephone conversation with the appellant was unreliable evidence. The conversation was not conducted in a formal setting, Superintendent Setter had just got out of the shower when he spoke

[5] *Edwards v The Queen* (1993) 178 CLR 193.

to the appellant and there was no evidence that he made any notes about the conversation. Taken at its highest, Superintendent Setter's evidence about what the appellant said during the telephone conversation did not exclude the possibility that the appellant was talking about two different things during the telephone conversation: (1) he remembered the USB drive which had been discovered at work; and (2) the only occasion when he had detected child abuse material, which had been an occasion many years ago and had nothing to do with the USB drive. Superintendent Setter did not give evidence that he had a complete memory of the telephone conversation he had with the appellant. At no stage did he give evidence that the appellant expressly told him that he had downloaded child abuse material onto the USB drive.

[54] He further submitted that the prosecution did not tender any evidence to the effect that the appellant was the sole or main user of the USB drive. There was evidence tendered by the defence, which was not contradicted, that the USB drive was used by […]. There was no evidence that any other computers in the appellants' home were interrogated or that […] were interviewed by the police. This left open the possibility that some other person could have placed the child abuse material on the USB drive without the appellant knowing about it.

[55] In my opinion, this ground of appeal is not made out. Upon the whole of the evidence it was open to the trial magistrate to be satisfied beyond reasonable

doubt that the appellant was guilty.[6] The evidence establishes and there was no dispute that: (1) the USB drive had been in the appellant's possession at work and he left it at work; (2) the appellant had used the USB drive and he had downloaded material on to the USB drive including a photograph he had taken of himself; and (3) there was no dispute that the appellant had knowledge of some of the contents of the USB drive.

[56] Superintendent Setter's evidence was that he understood the appellant to have said that he downloaded the child abuse material onto the USB drive so that his find could be reported to Police Officer Valente who was in Computer Crime. The defence that the appellant offered to Superintendent Setter was essentially one of confess and avoid. Superintendent Setter's evidence about the telephone conversation he had with the appellant contains an admission made by the appellant that he put images of child abuse material on the USB drive after he found them on the internet. If the appellant put the child abuse material on the USB drive it may be inferred that he knew that he had the child abuse material in his possession. That evidence was capable of proving element two of the offence.

[57] Further, the admitted facts demonstrate that the appellant could not have downloaded the child abuse material for a lawful purpose because Police Officer Valente had left the Police Force in 2002 and the USB drive was not in use until 2008. The evidence establishes that the appellant told a lie about why the child abuse material came to be on the USB. The lie reveals

[6] *M v The Queen* (1994) 181 CLR 487 at 493.

knowledge of the child abuse material by establishing consciousness of guilt as to the possession of the child abuse material. It was told because the accused knew the truth would implicate him. It is an implied admission against interest.

[58] In any event, the appellant's evidence was capable of being rejected on the basis that he changed his story after he spoke to Superintendent Setter. He has given no explanation for why he changed his story after he spoke to Superintendent Setter. Further, the story that the appellant has maintained since he spoke to Superintendent Setter does not make sense. The early incident of downloading child pornography, which is now recounted by the appellant, was utterly irrelevant to the current circumstances; particularly, as all evidence of what is said to have occurred on the earlier occasion had apparently been destroyed. There is absolutely no reason why anybody would raise such an incident when the subject of the investigation was the contents of a USB drive which first came into use in 2008. The story now relied on by the appellant lacks the ring of truth and reality. It would have been a different matter if many years ago the appellant had reported such an incident to Police Officer Valente.

[59] Both the appellant's admission that he placed the child abuse material on the USB drive, and the lie as to how the material came to be placed on the USB drive, logically exclude the possibility that the appellant did not know that there was child abuse material on the USB drive. In my opinion, the trial magistrate's analysis of the evidence was correct. It is apparent from

the trial magistrate's reasons for decision, that his Honour rejected the evidence of the appellant about the telephone conversation that he had with Superintendent Setter and accepted Superintendent Setter's evidence about that conversation. His Honour was entitled to do so.

**Grounds 2 and 3 – The learned magistrate erred in his application of his test for, and categorisation of lies capable of establishing evidence of guilt**

[60] In support of these grounds of appeal, counsel for the appellant submitted that the trial magistrate failed to sufficiently identify the lie which is said to have constituted the admission against interest. It was submitted that it was impossible to know what the lie was that was found to have been told by the appellant. Further, before a lie can be relied on as admission against interest the lie must be proven beyond reasonable doubt by evidence which is independent of the appellant.

[61] This ground of appeal is not made out. The lie said to have been told by the appellant was particularised by counsel for the respondent during his opening for the prosecution in the Court of Summary Jurisdiction. It was said that the appellant lied about how the child abuse material came to be on the USB drive. The lie said to have been told by the appellant was his statement to Superintendent Setter that, "he [the appellant] downloaded a number of images from that site and wrote down the address of the site. His intent was to report that to the Northern Territory Police Computer Crimes Section … to Elio Valente." The lie is proven by the admissions of fact that; (1) Elio Valente's last day of active duty in the Northern Territory

Police Force was 23 June 2002; and (2) the USB drive was not in operation until the third or fourth week of March 2008.

[62] Before finding that the appellant had lied to Superintendent Setter the trial magistrate gave himself a direction in accordance with *Edwards v The Queen*. He stated:

> I have to, in this particular case, give myself an *Edwards'*[7] direction. As I said before, the prosecution rely upon an *Edwards'* lie as a consciousness of guilt in this case. An *Edwards* type direction, should be given if the prosecution contends that a lie is evidence of guilt in the sense that it was told because the accused knew that the truth would implicate him or her in the commission of the offence and if, in fact, the lie in question was capable of bearing that character.
>
> It is important, in cases where an *Edwards'* lie is sought to be relied on by the prosecution, that the court should direct itself that there may be many reasons for post-offence conduct apart from consciousness of guilt. For example, it may be the result of panic or fear or a wish to escape an unjust accusation or because of guilt of some other lesser criminal offence or moral wrongdoing falling short of criminal behaviour, or to protect some other person or to avoid a consequence extraneous to the offence.
>
> In my view, in this particular case, I am satisfied beyond reasonable doubt that the defendant lied to Superintendent Setter. I am satisfied that the lie discloses a consciousness of guilt. In my view, all or any explanation consistent with innocence has been eliminated on the evidence. It is because of that lie I am satisfied beyond reasonable doubt that the defendant had knowledge of the presence of the child abuse material on the USB.

[7] *Edwards v The Queen* (1993) 178 CLR 193.

**Ground 5 – The trial magistrate erred in law in treating the cross-examination of the witness Setter as being capable of drawing inferences adverse to the appellant**

[63] As to this ground of appeal, counsel for the appellant submitted that the trial magistrate misapplied the principles in *R v Robinson*,[8] or alternatively, placed too much weight on the difference between counsel for the appellant's cross-examination of Superintendent Setter and the evidence of the appellant at the trial. The trial magistrate's application of *R v Robinson* caused him to wrongly reject the appellant's evidence on the basis that the appellant's account was a fluctuating account which should be disbelieved. The conclusion reached by the trial magistrate was an inference which could not be made beyond reasonable doubt.

[64] In support of this submission counsel for the appellant relied on the following propositions:

1. The cross-examination of Superintendent Setter took place in circumstances where (a) Superintendent Setter's evidence-in-chief did not establish that he had a complete recollection of the telephone conversation; (b) during his evidence-in-chief Superintendent Setter did not state that the appellant expressly stated to him that he downloaded the child abuse material onto the USB drive, the Superintendent merely stated that "he told me that [many years ago] he downloaded a number of images from the site and wrote down the address of the site"; and

[8] [1977] Qd R 387.

(c) taken verbatim, Superintendent Setter's recollection of the telephone conversation was reconcilable with the defence case.

2. The line of cross-examination taken by counsel for the appellant was as follows: (a) the appellant was shocked when he was told about the discovery of the child abuse images on the USB drive; (b) the telephone conversation proceeded along the lines that the appellant intended to co-operate with the investigators and tell them what had happened, he said that he remembered the USB drive and he sought to give Superintendent Setter some sort of information relating to anything that the appellant had to do with child pornography; and (c) while the superintendent may have surmised that the appellant was attempting to give an explanation of how the material got onto the USB drive, what the appellant actually said to him was that many years ago he had downloaded some pornography with the intent of reporting that to Elio Valente who had been in computer crime at an earlier period.

[65] Counsel for the appellant further submitted that the principles in *Browne v Dunn*[9] did not require him to put the detail of the appellant's recollection of the telephone conversation to Superintendent Setter during his cross-examination as the details of the conversation simply contained the particulars of the only occasion on which the appellant had any dealings

[9] (1829) 3 Sim 23; (1829) 57 ER 907.

with child abuse material. The cross-examination of the appellant was consistent with the defence case. The matters which were not put were merely peripheral and did not give rise to an inference that the appellant had given a fluctuating account of the telephone conversation.

[66] The difficulty with this submission is that it ignores a fundamental difference between Superintendent Setter's account of the telephone conversation and the appellant's account of the telephone conversation. The substance of Superintendent Setter's account of the telephone conversation was that the appellant had told him that he had deliberately downloaded the child abuse material for a lawful purpose. The substance of the appellant's account of the telephone conversation was that (1) the appellant had told Superintendent Setter about the only occasion when he had anything to do with child pornography, the floppy disk incident, and (2) there were other adults who had access to the appellant's computers and ancillary equipment and anyone of them could have downloaded the material. Significantly, while counsel for the appellant's cross-examination of Superintendent Setter dealt with the first aspect of the appellant's account of the telephone conversation it did not deal at all with the second aspect.

[67] Although any application of the principles enunciated in *R v Robinson* must be subject to careful consideration, it remains the law that a tribunal of fact is entitled to take into account a failure to put a conflicting set of circumstances to a witness when determining what weight to attribute to the account of a witness and the evidence of a subsequent witness who provides

conflicting testimony.[10] Further, the requirement to cross-examine a witness is expressed as a need to make it plain to a witness that his evidence is not accepted and in what respects it is not accepted.[11]

[68] There was no error in the trial magistrate's application of *R v Robinson* and he was entitled to draw the conclusion that the appellant's account of the telephone conversation was a fluctuating account. Further, the trial magistrate's application of the principles of *R v Robinson* was not the only basis on which his Honour accepted Superintendent Setter's evidence about the telephone conversation on 11 October 2011and rejected the evidence of the appellant. The trial magistrate found beyond reasonable doubt that Superintendent Setter's account of the telephone conversation was a true account because, among other things: (1) He considered that the appellant's account of what he claimed was his previous involvement with child pornography beggared belief. The trial magistrate stated that, "He would have the court believe that he would go to all the trouble of downloading the child abuse material and recording websites with the intention of passing that information onto Valente, but does not get around to doing so; and, subsequently, when he discovers the websites have been closed down he decided to take the matter no further. Then he destroys the floppy disk that he says was the medium for downloading the material in the first place." (2) He considered the defendant's version of the telephone conversation

[10] *R v MAP* [2006] QCA 220 per Keene JA at (57).
[11] *R v Fenlon* (1980) 71 Cr App R 307 at 313; *R v Birks* (1990) 19 NSWLR 677 at 689; *R v Morrow* (2009) 26 VR 527.

with Superintendent Setter did not make much sense at all. The trial magistrate stated, "He agrees that he did say to Setter, 'I remember the USB'; and then almost as a non-sequitur, he would have the court believe that he would then make some gratuitous admissions about some prior involvement with child abuse material. In my view that version of the conversation is a non-sequitur. It just does not make any sense at all."

[69] This ground of appeal is not sustained.

**Ground 6 – The hearing miscarried in that the prosecutor submitted to the trial magistrate that the evidence of the appellant about downloading child abuse material onto the floppy disk was a recent invention when the prosecution had in its possession, or access to, evidence that the appellant had stated, more than six months before the hearing, that he used a floppy disk.**

[70] As to this ground of appeal, counsel for the appellant submitted that at the trial he told counsel for the respondent that, during the appellant's directed interview by the police, the appellant had made similar statements to his evidence at the trial about copying child abuse material onto a floppy disk. He objected to counsel for the respondent cross-examining the appellant on the basis of recent invention and requested that counsel for the respondent make inquiries about what the appellant had said during the directed interview. Counsel for the respondent did not make any inquiries about the directed interview and he continued to cross-examine the appellant on the basis of recent invention. This ultimately resulted in the trial magistrate finding that, "it is a reasonable inference to draw that the [appellant's] account is a fluctuating one and should be disregarded or disbelieved", and

that in his opinion, "the [appellant's] evidence in the witness box had the characteristics of a person who discovered that the previous account could not stack up because the USB in question was not operational until 2008 and Valente had ceased employment in 2002 and he was stuck with an explanation that just could not be sustained". Consequently, there had been a miscarriage of justice.

[71] At the trial, counsel for the respondent responded to the objection taken by counsel for the appellant by saying that he did not know what was said at any internal investigation and he could not acquaint himself with that from the materials he had at the bar table. He was entitled to cross-examine the appellant about the difference between counsel for the appellant's cross-examination of Superintendent Setter and the evidence of the appellant. The trial magistrate ruled that he could do so on the basis of *R v Robinson*.[12]

[72] Despite the ruling of the trial magistrate, and despite the fact that counsel for the respondent did not make any inquiries about the answers the appellant had given to police at the directed interview during the luncheon adjournment, counsel for the respondent did not re-examine the appellant in full about what he said during the directed interview. Had he done so, counsel for the respondent would have been able to lead evidence from the appellant which was capable of rebutting any suggestion of recent invention as the directed interview took place within two weeks of his telephone discussion with Superintendent Setter. Counsel for the respondent was

[12] (1977) Qd R 387.

unable to give any explanation to the Court about why he did not re-examine the appellant about these matters.

[73] In the circumstances, no miscarriage of justice was caused by the conduct of counsel for the respondent. There was no unfairness in the way that the trial proceeded; and, regardless of whether the appellant's evidence about what he said was his only dealing with child pornography was a recent invention or not, the evidence which was accepted by the trial magistrate was that the appellant had made an admission to Superintendent Setter that he had downloaded the child abuse images onto the USB drive and lied about how this had come about. The appellant admitted during his cross-examination that, when he spoke to Superintendent Setter on the telephone, he did not know that the USB only became operational in 2008. As I have stated above at par [68] there were also other bases for accepting the evidence of Superintendent Setter and rejecting the evidence of the appellant.

[74] This ground of appeal is not sustained.

**Grounds 7 and 8 - The appeal against sentence**

[75] As to the grounds of appeal against sentence, counsel for the appellant submitted that the trial magistrate misapplied the sentencing principles enunciated by the Court of a Criminal Appeal in *The Queen v Hancock*[13] and that the sentence of two months imprisonment to be suspended after seven days in prison was manifestly excessive. The trial magistrate erred when he

[13] [2011] NTCCA 14.

stated that, "A lot has happened since *R v Oliver & Ors,*[14] Oliver is now about 10 years ago and the climate is changing all the time. And this type of offending is considered to be very very serious". The appellant was only found to be in possession of only 11 images of child abuse material. Seven of the images were category one images and four of the images were category two images.

[76] Counsel for the appellant submitted in the *The Queen v Hancock* Mildren J had referred to the following passage from the headnote of *R v Oliver & Ors*[15] which provided a useful guide to sentencing judges in cases such as this:

> The court agreed that the custody threshold would usually be passed where any of the material has been shown or distributed to others, or in a case of possession, where there was a large amount of material at level 2, or a small amount at level three or above. A custodial sentence of up to six months would generally be appropriate in a case where (a) the offender was in possession of a large amount of material at level 2 or a small amount at level 3; or (b) the offender had shown, distributed or exchanged indecent material at level 1 or 2 on a limited scale, without financial gain. A custodial sentence of between six and 12 months would generally be appropriate for (a) showing or distributing a large number of images at level 2 or 3; or (b) possessing a small number of images at level 4 or 5.
>
> A custodial sentence between 12 months and three years would generally be appropriate for (a) possessing a large quantity of material at levels 4 or 5, even if there was no showing or distribution of it to others; (b) showing or distributing a large number of images at level 3; or (c) producing or trading in material at levels 1, 2 or 3. Sentences longer than three years should be reserved for cases where (a) images at level 4 or 5 had been shown or distributed; or (b) the offender was actively involved in the production of the images at

[14] [2003] 2 Cr App R(S) 15.
[15] At pp 66-67.

> levels 4 and 5, especially where that involvement included a breach of trust, and whether or not there was an element of commercial gain; or (c) the offender had commissioned or encouraged the production of such images. An offender whose conduct merited more than three years would merit a higher sentence if his conduct was within more than one of the categories (a), (b) and (c) than one where the conduct was within the only one such category. Sentences approaching the 10 year maximum would be appropriate in a very serious cases where the defendant had a previous conviction either for dealing in child pornography of for abusing children sexually or with violence. Previous such convictions in less serious cases might result in the custody threshold being passed and would be likely to give rise to a higher sentence where the custody threshold had been passed.

[77] It was submitted that, if the above guide was applied, the sentence of imprisonment imposed on the appellant should have been suspended upon the rising of the court because the custody threshold had not been reached.

[78] At the outset, it is to be noted that a matter complicating the sentencing in this case is that the offence with which the appellant was charged is subject to s 78BB of the *Sentencing Act* which states:

> Where a court finds an offender guilty of a sexual offence, the court must record a conviction and must order that the offender serve:
>
> (a) a term of actual imprisonment; or
>
> (b) a term of imprisonment that is suspended by it partly but not wholly.

[79] The effect of the provisions of s 78BB of the *Sentencing Act* is that, regardless of anything stated by the Court of Appeal in *R v Oliver & Ors*, Parliament has required that a sentence of actual imprisonment must be imposed for all such offences. Where a statutory minimum sentence is set,

the seriousness of the offence is to be determined by taking into account both the statutory maximum penalty and the statutory minimum penalty. The general sentencing principles apply but between the maximum and minimum sentences as the ceiling and the floor of punishment.[16]

[80] Having had regard to s 78BB of the *Sentencing Act,* I am of the opinion that both the term of the head sentence and the time that the appellant was ordered to serve in actual imprisonment were manifestly excessive. The offending was very much towards the lower end of the scale of such offending. Only 11 images of child abuse material were possessed by the appellant for his own personal use. Seven of the images are category one images and four of the images are category two images. There were 10 or 11 different Japanese children involved in the production of the images. The most explicit images in category two were significantly towards the lower end of the spectrum of such images which come before the courts. It seems that the images were freely available on the internet and no money was paid by the appellant to anybody in order to obtain the images. The images were not acquired so they could be shown or distributed to anybody else. The appellant's demand for the material was not such as to create a financial incentive for others to exploit child victims.

[81] There was no evidence to suggest that any child or other person was aware of the existence of these images. However, the offending is aggravated to a limited degree by the fact that the USB drive was kept in such a manner as

[16] *Bahar v R* (2011) 255 FLR 80; *R v Karabi* [2012] QCA 47.

to be freely accessible by children and other adults who were living in the appellant's home.

[82] While the appellant's prospects of rehabilitation have to be considered in the light of his intransigence and lack of remorse, there is not a lot of evidence to suggest that significant weight must be given to the objects of punishment and specific deterrence over the object of structuring a sentence that will help the offender to be rehabilitated. The offender was a first offender. There appears to have been only one incident of downloading the child abuse material. He has been in meaningful employment as a police officer and he has worked to support his family. He is not to be punished more because he is a police officer. There is a significant risk that he will also lose his employment as a result of having committed this offence.

[83] The appeal against sentence should be allowed and the appellant should be resentenced.

**Orders**

[84] The appeal against conviction is dismissed. The appeal against sentence is allowed and I will hear the parties further before re-sentencing the appellant.

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