CITATION: *DP –v- CHG* [2005] NTMC 024

PARTIES:	DP Informant v CHG Defendant
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Darwin
FILE NO(s):	20309445
DELIVERED ON:	9 May 2005
DELIVERED AT:	DARWIN
HEARING DATE(s):	15 March 2004, 7, 8 & 9 September 2004, 17 & 18 January 2005, 4 April 2005
DECISION OF:	D LOADMAN, SM

CATCHWORDS:

Possession of child pornography (section 125B(1)(a) Criminal Code NT – "Knowledge" of the existence of child pornography a prerequisite to any finding of guilt – Knowledge found not proven – Defendant not guilty

REPRESENTATION:

Counsel:

Informant:	A Elliott
Defendant:	Rowbottam/Hunter/Self

Solicitors:

Plaintiff:	Department of Public Prosecutions
Defendant:	Withnall Maley/Self

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 024
Number of paragraphs:	84

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20309445

BETWEEN:

DP
Informant

AND:

CHG
Defendant

DECISION

(Delivered 9 May 2005)

Mr David LOADMAN SM:

EVIDENCE

1. The Defendant is charged with 3 separate counts of child pornography. The 3 charges are:

COMPLAINT

The Complaint of **DNP** Senior Constable of Police of DARWIN taken this 8th September 2003, before the undersigned, a Justice of the Peace for the Northern Territory of Australia, states that

CHG (Male, 27/02/1966) of .....ROAD, BERRIMAH, NT

On the 17th April 2003

at DARWIN in the Northern Territory of Australia.

3. you did possess child pornography:

Contrary to Section 125B(1)(a) of the Criminal Code.

AND FURTHER

On the 17th April 2003

at DARWIN in the Northern Territory of Australia.

4. you did possess child pornography:

Contrary to Section 125B(1)(a) of the Criminal Code.

AND FURTHER

ON the 17th April 2003

at DARWIN in the Northern Territory of Australia.

5. you did possess child pornography:

Contrary to Section 125B(1)(a) of the Criminal Code."

2. Each one of the charges relates to a specific "movie", which was played in court. The particulars of each are as follows:

(a)"Teen handjob and blowjob" which shows a picture of a girl apparently under the age of 16 performing fellatio on a prone male. The girl seems to be at the age of puberty, or about that age, being sexually underdeveloped in appearance with budding breasts. ("movie one")

(b) next is "Early Teen Sucks Little Dick". This movie is of a young girl, or maybe a young boy, certainly well under 16 years of age, performing fellatio on obviously a very young boy. ("movie two")

(c) The third is "r@ygold three russian pre-teens" which reveals, amongst other things, 3 girls under the age of 10 squatting with skirts hitched up to reveal their genitals. The camera zooms in, focusing on the genitals and captures the children urinating on the ground. ("movie three").

3. Child pornography is defined in section 125A of the *Criminal Code Act*. ("the Code"). Each one of the recited "movies" was duly classified, by the relevant body as required by the Code, namely the Classification Board, and although there is no dispute as to the fact, for the purposes of formality, the Court formally finds that each of the three specified movies constitutes child pornography within the meaning of the recited section.

4. The position at law in respect of the burden of proof on the prosecution, is recited in the judgement of Gibbs CJ in the decision of *He Kaw Teh* 3R 60 ALR 449 ("*He Kaw Teh*"), at page 453 which is in the following terms;

> "In deciding whether the presumption has been displaced by s 233B(1)(b), and whether the Parliament intended that the offence created by that provision should have no mental ingredient, there are a number of matters to be considered. First, of course, one must have regard to the words of the statute creating the offence. The words of para (b) of s 233B(1) themselves contain no clear indication of Parliament's intention. However, they stand in marked contrast to paras (a), (c) and (ca) of the sub-section, all of which deal with the possession of prohibited imports in certain circumstances and all of which contain the words "without reasonable excuse (proof whereof shall lie upon him)". The absence of those words from para (b) suggests that no reasonable excuse will avail a person who imports narcotics. That would lead to an absurdly Draconian result if it meant that a person who unwittingly brought into Australia narcotics which had been planted in his baggage might be liable to life imprisonment, notwithstanding that he was completely innocent of any connection with the narcotics and that he was unaware that he was carrying anything illicit. On the other hand, if guilty knowledge is an ingredient of the offence, it becomes understandable that no excuse should be allowed to a person who has knowingly imported narcotics. This provides an indication, although only a slight one, that by para (b) the Parliament did not intend to displace the presumption of the common law that a blameworthy state of mind is an ingredient of the offence.

The second matter to be considered is the subject matter with which the statute deals. Paragraph (b) of s 233B(1) and the other paragraphs of the sub-section deal with a grave social evil which the Parliament naturally intends should be rigorously suppressed. The importation of and trade in

narcotics creates a serious threat to the well-being of the Australian community. It has led to a great increase in crime, to corruption and to the ruin of innocent lives. The fact that the consequences of an offence against s 233B(1)(b) may be so serious suggests that the Parliament may have intended to make the offence an absolute one. On the other hand, the sub-section does not deal with acts which "are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty", to repeat the words used in *Sherras v De Rutzen* (at p 922) to describe the first of the three classes of exceptions to the general rule which that case laid down. On the contrary, offences of this kind, at least where heroin in commercial quantities is involved, are truly criminal; a convicted offender is exposed to obloquy and disgrace and becomes liable to the highest penalty that may be imposed under the law. It is unlikely that the Parliament intended that the consequences of committing an offence so serious should be visited on a person who had no intention to do anything wrong and no knowledge that he was doing so.

A third consideration is that which was mentioned in *Lim Chin Aik v R* (at p 174): "It is pertinent also to inquire whether putting the defendant under Strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly …. which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed Strict liability merely in order to find a luckless victim":

5. The offences, with which the defendant is charged, require the Crown to prove that the child pornography was in the possession of the defendant. The penalty prescribed in respect of a finding of guilt in relation to an individual is imprisonment for 2 years (on each charge).

6. Each one of the movies was located in the hard drive of a computer owned by the defendant. It is common cause that although possession is not

defined in the Code, it is incumbent on the Prosecution to prove the defendant had knowledge of the fact that the "movie", in each case, was known to the defendant to be located on the hard drive in his possession. The law in relation to the matter is the law as propounded in the decision of Gibbs CJ in *He Kaw Teh*. This is accepted as correct by the prosecution.

7. Evidence, of the existence of each of the "movies" was of Nicholas Warren F. In May 2003, when relevant material was seized by the Northern Territory police, he was employed in the Northern Territory Police Force. At the time he gave evidence on behalf of the Prosecution he was a private consultant carrying on business in Western Australia. The forensic computer evidence was both extensive and complex and the Court does not intend to even attempt to recite the totality of same.

8. By using a software program, styled "EnCase", invented for the very purpose, apparently by the FBI in the United States of America, the relevant hard drive possessed by the defendant in which the three "movies" were located was copied in its entirety.

9. Movie number one was located in C:\Mysharefolder\J.

10. Movie number two was located in -\PFiles\KaZaA lite.

11. The third movie was located in C:\DocumentsandSettings\Info.mode66\MyDocuments\MovieJack.

12. At (TR102), Mr F gave evidence that a browser on the Internet, who clicked on "movie" three would cause it be downloaded into "Temporary Internet Files" or by whatever other name was otherwise chosen by the user, but in the event in that particular location which was the "Internet cache". The same situation would apply if one downloaded a file not knowing of its contents when it was selected for example in downloading from a user group in a random selection. This is rejected by the defendant as an incorrect statement.

13. In order to move it from such Internet cache into, for example "My Documents\Movie Jack" there would have to be physical intervention, or as expressed by Mr F (TR102):

> "there has to be some interaction between the user and the operating system to make the file to be saved in this location, so it requires some distinct and deliberate steps"

14. At all material times, said Mr F, the operating system with which the Court was concerned was Windows XP. Each one of the subdirectories identified in paragraph 9, 10 and 11 was created by the defendant or someone else. TR102). He said subdirectory KaZaA lite is created "to peer sharing programs used on the Internet to share files between people." That program is used to download files from someone else's computer because the files are shared or available to be shared, but unlike downloading from the Internet, the actual file in such instances "movie two" would have to be selected and downloaded. (TR103/104).

15. He said further that if you browse a directory using ACDSee, that program will bring up a "thumb nail" of the image. Mr F produced such an image in Court in relation to "movie two" and "the thumb nail" is a photograph the court concluded, of the first frame of the "movie", but in any event the photograph or thumb nail showed fellatio as described in paragraph 2 of this decision.

16. In relation to the subdirectory for "movie one", it was Mr F's evidence it had to be specially created. Further, that the file was accessed on 16 April 2003 at 1343 hours (TR107). At (TR109) "movie three" had been viewed through Internet Explorer or Windows Media Player. He also identified a link file reference created by double clicking on a file and because of the existence of the link file, he was of the opinion that "movie three" had been opened and viewed by someone. In Exhibit P9a, the defendant advised the police that he was then living alone and that it was in all likelihood, he, who had accessed "movie three".

17. Mr F gave evidence (TR134) as to the simplicity of deleting an unwanted document which could be done immediately after identifying it and which act of deletion comprised a couple of mouse clicks. Of course deletion would demonstrate knowledge.

18. Another "movie" on a file, which was not child pornography, has some relevance in the proceeding and bears the description "Lolita 3 Russian Girls in the Woods", located under C:Program files/KaZaA lite, created 17 September 2002 at 0042 hours, accessed 8 February 2003 at 0943 hours (TR136).

19. In the course of his investigation, Mr F allegedly had ascertained certain groups (user groups) accessed by the defendant, one of which was Free Agent, and a list was made of those groups from which the defendant had downloaded, and Mr F compiled or recorded in exhibit P10 such information. Mr F opined that with names such as "Early Teens' one could expect the item to comprise child pornography and to the suggestion derived from contention by the defendant, that was not generally indicative of what one would get, Mr F disagreed. He said "it does include pornography that isn't child pornography, but it does include child pornography, which is the main type of image in those groups". This proposition was conceded by his prosecutor to be and found by the court to be, invalid.

20. Mr F's evidence was that each one of three "movies" had been downloaded from the Internet using the KaZaA lite program. Because of the fact that KaZaA lite was being used, it could not download en mass as it were. Each one of those three files had to be selected by clicking on the file name. (TR142 & 143) Further, that a file description would have been apparent in so using the KaZaA lite program. Further, for "movie three", the description that must have been seen in the pop up when selecting the file to download was, "Three Pre-Teens Peeing and showing Cunts in the Street" (TR143). For "movie one" the description is "A young girl giving a blow

job". There is no similar or ascertained "description" in relation to "movie two", but for that there was the thumb nail allegedly ascertained via ACDSee and at (TR144):

> "So based on all of those things, is it possible in your expert opinion for those files to have been downloaded to Mr G's "machine" without him having any indication of the content?- - - No."

21. The "evidence" set out in the paragraph above must be looked at on the basis he conceded it would also be possible for someone else, other than the defendant to have downloaded the "movies" using the KaZaA lite program. He also viewed the defendant's "user account" and further (TR145), having viewed them, concluded the three movies could have been immediately deleted, nevertheless as Mr Elliott said, it was not the mere downloading which is alleged by the prosecution to constitute the possession, it is the downloading followed by the continuing possession which constitutes the necessary element as far as the prosecution is concerned (TR145).

22. In cross examination it was put to Mr F that there is no documentary proof, other than that which had been ventilated or had been available, which would prove the proposition that "movies one and three" were downloaded by the use of KaZaA lite. But it remained his opinion, as a consequence of the basis of their location in the computer that was so (TR150).

23. At (TR155), he agreed with the proposition:

> "image can come to be on a computer hard drive because they are, for example, deliberately put there by a computer. In other words, they may be copying from one disc to another or downloading from the Internet or they can come to be on a disc without the intervention of a user, do you agree with what I've just said?---Yes, I do."

24. But at (TR156), Mr F said:

> "There would have to be some intervention of a user at some stage but the file could come to be there, Your Worship, without the user knowing that the file was part of a set of other files or contained in some type of compressed – compressed file, or was perhaps sent by

e-mail to the user's computer without their knowledge of what the file actually was."

And he acknowledged, in the same page, that which is obvious, that in such circumstances you would not know what the file is until it was opened, after which obviously the absence of knowledge would no longer be the case. And at (TR157) he conceded that similarly the file could "come onto a computer" by way of a virus, although he had never himself heard of such an event occurring, it being beyond the normal object of what a virus is used for, which essentially was to steal information such as a password to a bank account .

25. Mr Hunter then introduced, obviously on instructions, the issue of a Trojan Horse with which definition "a malicious security breaking program that is disguised as an innocent piece of software such as a screensaver, game or even a virus update", Mr F agreed.

26. As ultimately was submitted by Mr Elliott, the whole ventilation of this issue concerning a Trojan Horse, was of no utility to anyone and despite the time spent on it, was never the subject of any evidence led by or on behalf of the defendant or the prosecution.

27. At (TR169), Mr F, with whom Mr Hunter spent some time in relation to the aspect of accessing properties, concluded that the last access time and date coincided with the actual time and day of the act, because of accessing the properties of the file. A virus scanner, he said, could cause the same result. At (TR185) Mr Hunter actually suggested to Mr F, that the continued references to Trojan Horse issues (which Mr F said he had tested for and were absent) was being put strenuously to comply with "the rule in *Browne –v- Dunn*". In re-examination, Mr F refuted the suggestion that in his opinion, any of the "movies one", "two" and "three" had come in as a part of a compressed folder, by way of a virus, or by way of e-mail. In relation to e-mail, there had actually been an examination by him which excluded them

having been e-mailed in. There had been a check for viruses but none had been found on the relevant "15 gig hard drive", (TR199) having overnight installed KaZaA, the latest version off the Internet, thought to be 2.7 and used same to run the check.

28. At (TR200), an exercise by Mr F was described by him, relevantly resulting in the display of a "pop-up box" that popped up with details about a file, which significantly amongst other features, included "the description". The pop-up was revealed once you highlighted the file name and before pressing the download button. It is important also to observe that there were objections to the examination of this evidence and to its tender on the basis that KaZaA was different from KaZaA lite and for that reason, the document produced by Mr F was marked only for identification and otherwise designated P13. He confirmed running a virus scanner over the 15 gigabyte hard drive. He had not found any Viri (apparently the new plural of viruses) or Trojan's. He did identify elsewhere, than on the defendant's hard drive, a compressed file, an executable file (a virus), another compressed file and a fourth as the evidence is comprehended by the Court, a Trojan Horse quarantined by the defendant's anti-software "into a place where they can't affect the computer". On reflection the objection to the evidence being received should have been upheld.

29. At (TR216), having installed the version of KaZaA lite utilised by the defendant at relevant times, he was unable to connect to the peer-to-peer network, which he concluded was due to the fact that the defendant's software was old, by virtue of the fact that the latest version on his own machine "worked perfectly fine your Worship".

30. At (TR219) it emerged that the police had seized 29 hard drives and scanned 6, being those which were in computers in the defendant's possession, if not ownership.

31. On 9 September, the defendant commenced his evidence. As it transpired, the defendant's expert witness Mr A ultimately did not give evidence, although in the Court's perception no adverse inference to the defendant can be drawn from his failure to do so, it does seem strange to the Court. The defendant maintained that the KaZaA lite program, not only allowed you to connect to other users' computers on the Internet and share files with them, but that accessing pornography on the Internet could result in downloading material that you do not want, either because the image or film did not conform to the description, or by loading what transpired to be a Trojan Horse. Further, (TR224) another danger was a malicious Java Applet. The latter could just pop-up and without going into the methodology cause the computer to crash without the intention, or control, of the computer user.

32. Further, (TR224) ADSL, a high speed connection had been in use in his business, apparently, prior to general use in Australia occurring.

33. At (TR228) the Court was introduced to a worm, which is "similar to a virus except that a worm propagates itself across a network, whether it's a local area network or a wide area network like the Internet." Again, the Court remarks that ultimately "a worm" was not said to be the cause of the production or possession of the child pornography, the subject of the charges.

34. At (TR233), the defendant said:

> "…KaZaA. KaZaA and KaZaA lite are two completely independent programs. They operate to a small degree in a similar way but they're actually written by totally separate companies. They're not made by the same people. There's been a couple of law cases that the manufacturers of KaZaA have tried to bring against the people who make KaZaA lite. I'm familiar with them both. The interesting thing is that KaZaA itself, the commercial product KaZaA, actually installs Spyware out of the box when you install it on your computer, which I always thought was fairly humorous."

This of course is evidence which clearly is intended to endeavour to refute the validity of the results obtained by Mr F and is a significant matter for that reason. And he added as to the creation of (KaZaA lite):

> "…So they effectively re-engineered it and made it a very similar product, but without all the crap"

And

> "…KaZaA lite does not display any description without user intervention. The user must do extra tasks. When you do a search and the contents of your search are displayed, there is no description on the screen immediately. Their user intervention is required to achieve a description."

35. (TR243) the defendant said "movie one" was indeed located as set out earlier in this decision and he explained that the:

> "…---The c:/my shared folder is the default location for the version of KaZaA lite I was running. The j folder is an addition to that. Not made by the KaZaA lite program."

And

> "…---The j, fundamentally just stands for junk".

Mr Elliott pointed out that subsequently this evidence changed and the letter j was said perhaps to stand for JJJ, no doubt in aide of the proposition that his then de-facto JJJ, or her son, could have been the people who accessed the movies.

36. The defendant expressed surprise that Mr F had looked at 500 "movies" as the Court understood it, not comprising the entirety of the material on the defendant's computer in any event. He thought there may have been "far more image files" by contrast.

37. At (TR428) he denied any knowledge of the contents of the three "movie" files the subject of these charges and said if he had known of the content of those files "they would have been deleted". He then highlighted "the last

access date issue" maintaining that the contention appearing on page 19 of P9(b) "and the last access date on here also indicates that you've viewed these files" was wrong, because of Mr F's exercise in Court which had produced, by right clicking the last access time conforming, to the current time. This evidence the court accepts.

38. Further, (TR249) without clicking on an icon, "you can leave the mouse pointer hover over an icon and it will pop-up some system information about it. That also updates the time stamp" and "the Windows last update access time is an unreliable thing" and at (TR250) the Touch Pro program is "specifically designed to alter time stamps. That's its sole function." At (TR253) he also demonstrated, after some explanation, how clicking once on "silent.txt" the last access time stamp was altered, giving the same result that was demonstrated by hovering the mouse. Then it was demonstrated by "right click property". This evidence resulted in a concession by Mr Elliott that those were four methods capable of altering the last time and date, and further that only a double click on properties was the action which showed the contents of a file. The prosecution adduced no evidence which could establish the defendant had done so.

39. In relation to "movie one", (TR255) the last access date was 16 April 2003 at 1343 and 13 seconds, about 1.30 in the afternoon. In respect of that time, the defendant refers to a flexi sheet completed by him for the purposes of his employment at the Batchelor Institute reflecting the hours that he worked, which reflects working from 8.00 until midday, half an hour for lunch, the resumption of work at 12.30 and working through to 1621, obviously adduced for the purposes of refuting the ability of having access to "movie one" because he was an hour's drive away.

40. In relation to "movie two", the legend "Early teen sucks little dick.mpg" is referred to, the owner is identified and the entry concludes with number 1110 apparently a Microsoft reference to an SID. Further, that the user

display name is “CG” and then the users log name is “death” acknowledged by the defendant to be his log in name.

41. Insofar as residential issues are concerned, the defendant was living at RR Road, Berrimah for approximately two months before the police seized his computers and living there on his own. Prior to that date he was living in Stuart Park, where he had a relationship with one JJJ, who had a son LLL. He said that the defendant and JJJ discretely had their own unit. JJJ and her N year old son LLL, and sometimes her daughter DDD (whose residential arrangements are not certain to the Court) would sometimes “cruise the Internet on the Internet Café” (TR261) and apparently also members of the public would use the Internet Café service, which had been intense when the business was at Winnellie, but which had dwindled to almost nothing by late 2001, when the business moved from Winnellie to Stuart Park.

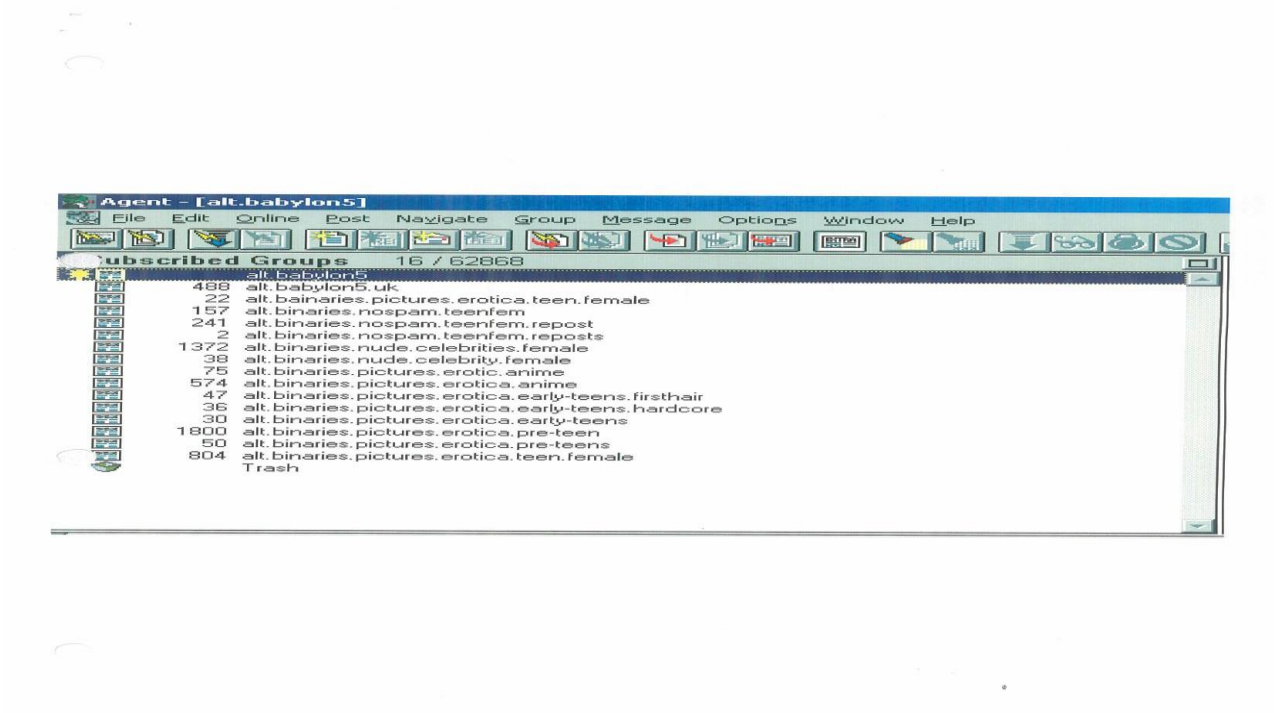
42. In cross examination, the relevant 15 gigabyte Seagate hard drive was discounted as a facility of the Internet Café. JJJ’s log in account was identified as “TTTT”. The defendant at TR264.5 conceded the “death” account, was in all likelihood his principal log in account. LLL’s account name was “LLLPPP”. The probative value of all this evidence is to the court obscure.

43. At (TR265), the defendant suggests that LLL or JJJ could have downloaded all or one of the “movies” the subject of the charge, although he was never aware that any child pornography at all had ever been downloaded. He conceded, as he obviously had to, that his first response when the police questioned him as to the person who had downloaded he answered, “well someone has – yes, more than likely myself”. Although, finally (TR267) he denied any suggestion that he was saying that JJJ or LLL had in fact opened the files and viewed them with Internet Explorer or Windows Media Player.

44. He conceded that he was in fact surprised that there were only five "nasty pictures" found allegedly because he had not had the opportunity to clean up "the library" (TR269) and he conceded (TR270):

> "that was an acknowledgement by yourself that you expected to have downloaded child pornography to your computer?---Yes.
>
> And you expected that you might have downloaded a lot more than just five?---I was surprised that I hadn't, yes."

45. He was then referred to exhibit P10. The exhibit being set out hereunder:



46. Mr Elliott, for the Prosecution, made the observation that the "bookmarks" (referred to under the heading Subscribed Groups 16/62868) in Exhibit P10 were by their title indicative of a predisposition for titles concerning erotic images, or pre-teens, or teenaged females.

47. The defendant said that despite the titles referred to above, the fact of the matter was that upon being accessed very few of them had or would have had anything to do with pre-teen females at all. He then asserted that if he discovered any "pre-teens" they are just deleted. In the event, (TR273) the

defendant accepted that there was a risk of obtaining child pornography, in downloading from titles such as many of those in P10 and then asserted that "3 Russian pre-teens" would not set an alarm bell ringing at all because allegedly, frequently, the suggestion conveyed by the title did not prove to be a representative of the image at all. He further conceded that he had never searched the hard drives for files with "pre-teen" in the title and deleted them:

> "Can I ask you Mr G, is it the case that you were reckless about whether or not you got child pornography or not?---Yes, I would agree. I was reckless.
>
> Mm mm. You knew it would be there …… I knew there was a chance that it would be there." (TR274)

48. That alone is not enough to discharge the onus resting on the prosecution. He also conceded that his response to Mr F was:

> "…I'm surprised there's only five to be honest"

suggests he had expected there to be more than five and

> "…Your expectation was to the actual presence of child pornography on your machine?---Yes."

49. Mr Elliott, for the Prosecution, then put the proposition (TR275) that the:

> "…index.dat file in the history ie 5 subdirectory, in the history subdirectory, in documents and settings username local settings path, relates to files that have been either been launched or visited using Internet Explorer or Windows Media Player, …"

which was not conceded by the defendant. The defendant denied that he ever used Internet Explorer, asserting use of others, viz Netscapé or Mozilla, but conceded occasional use of Windows Media Player (TR276).

50. An exercise was then embarked upon, which was acknowledged by the defendant, to comprise "we're browsing to the local hard drive" which resulted in the concession that browsing to a local "movie" using Internet Explorer automatically plays it (TR278) and then finally:

> "…And see, what I was suggesting to you is that the index.dat file entry on page 10 makes plain that there's a browsing to the three Russian pre-teens location, and anyone who's done that will have the movie popup Mr G?---Yes, I would agree with that".

51. After acknowledging that he did occasionally use Windows Media Player, the Defendant resisted the proposition advanced by Mr F that particular facility would have the same result as occurred with Internet Explorer.

52. When the matter resumed on 17 January 2005, the next germane exchange concerned a return to the stance that KaZaA lite and KaZaA only had a small similarity. The defendant was faced with the concession already made at TR233, to which the defendant responded:

> "If it's in the transcript, then I obviously said it, and it depends what context it was said in."

More pertinently he agreed that if there was a description it would be shown in the pop-up as portrayed on P13, whether KaZaA or KaZaA lite was the program being used. However, it must be borne in mind the title was always accepted as indicative, but not definitive of the content of anything. Perhaps that is obvious from the fact that F must by title have identified 500 or so images which he thought might be child pornography, but which transpired not to be so classified at all.

53. He refuted the proposition that in relation to "pre-teen files" by searching through Windows Explorer for images or "movies" involving the title or part of it as "pre-teen", many would be thrown up and that the logical exercise then to take place would be to examine each file. He did concede that if a "pre teen search" had been conducted "movie three" would be shown up. It would be easy to delete it in such event (TR290). It must be borne in mind though, he consistently denied he used that program.

54. In relation to exhibit D6, he conceded that it had been signed only on 1 May 2003 but asserted it was mainly filled out on the relevant day. The police seized the defendant's computers on 17 April 2003.

55. He said that in April 2003, or until then, he had not checked his system for the presence of Trojan Horses because his system was "possessed" of an effective "firewall". In any event, he ultimately conceded that he no longer held the view that a Trojan Horse could have been responsible for the presence of the three "movie" files in his computer hard drive.

56. At TR297, the defendant conceded that the "Russian Cake" movie was accessed on 17 September 2002 at 0044 hours. He conceded that at TR300 that movie three was stored in "my shared folder" and in a subdirectory below that folder.

57. At TR302 he conceded that KaZalite at 4.3 and 2.4.1 was substantially the same in particular in relation to the operation of the pop-up system which would show a description of the movie. This he conceded was accurately demonstrated by the screen dump shown on Exhibit P17. Again the Court reiterates the debunking of the link between a suggestive title and the actual contents.

58. In re-examination the defendant conceded that movie three, according to the contents of Exhibit P7 verified that this movie had been viewed, by Internet Explorer or by Media Player or similar, but denied he had been the person Viewing Sauce and there is no adequate or any evidence to the contrary.

59. At TR308 he conceded that Exhibit P10 showed he had accessed the described groups using a program "Agent". He suggested that, in essence, there was universal deception practised by the utilisation of such, all of which of course is suggestive of child pornography and would have it that those titles generally did not produce that which they described and indeed

he suggested that one could access such a title and find that you were involved in having to view older women. This was accepted by the Court.

FINDINGS:

60. Some findings have been made by the Court in the course of its dealing with the relevant evidence in the proceeding. For the assistance of those who might be burdened with reading this decision, they are as follows:

(1) Each of "movies one, two and three" constitutes child pornography as defined in section 125A of the Code.

(2) Mr F is qualified to give expert evidence in relation to some, but not all aspects of those matters to which he deposed.

(3) The Court finds that the defendant's Seagate 15 gigabyte hard drive was at all material times in his possession.

61. In relation to further findings, as a matter of law, the Court formally finds although there is no issue with the contention, that the Prosecution is obliged to demonstrate actual knowledge of possession and in light of the concession, knowledge of the existence and subsequent retention without destruction or deletion of the three "movies" the subject of these charges. Firstly this Court upholds the submission of Mr Elliott, for the prosecution, comparing link/index dat. One can see from Exhibit P7 at page 10 that the conclusion of F appearing at transcript 190 is valid. That conclusion being:

> "…The index.dat information would be written to it by the system every time the user goes to a different web page or uses a file or piece of – sorry, uses a Windows application which also uses the – the history, such as Windows Media Player…"

62. The Court accepts that the location of each one of the three "movies" entailed a deliberate movement and a deliberate use by the user, to extract

them from the browser or cache and locate them in the places where they were located, however there is no evidence that the defendant was in fact that user or at least no evidence to that effect beyond reasonable doubt.

63. Then there is the suggestion that the defendant knew that, even if he was to select pre-teens which would comprise in fact "adult woman dressing down", there was a 10% chance that there would be included in material downloaded the three "movies" in relation to the charges against him. At (TR272) he went so far as to say he actually expected that although he had not been searching for child pornography, he expected that it would be there. That is not enough to satisfy the proving of actual knowledge beyond reasonable doubt.

64. The Court accepts also the submission of Mr Elliott for the Prosecution, (TR325/6) that the three movie files and the Russian Cake movie, which the defendant admits he viewed, all have different last access dates to the creation date in each instance, that the Court accepts, is supported of the inference that each one of them had been viewed, but it begs the question, by whom?

65. The last access date (time stamp) is rejected as proof of the date upon which the files were viewed. This is a proposition of Mr F's and is to be observed as the first matter impugning his expertise. The defendant in this matter made submissions in relation to the outcome of the proceedings recorded in transcript ("Str"). At Str pages 5, 6 and 7 the defendant deals validly with the debunking of this proposition. Ultimately in any event the prosecution conceded the position in accordance with the court findings and reference to the concession is at TR317.9.

66. The prosecution contended that the time sheet (Exhibit D6) compiled by Mr G which would establish an alibi in relation to knowledge of a particular movie should be disregarded. The submission is that it is possible for this defendant and his supervisor to have conspired or colluded in falsifying

same so that the time sheet when produced did not accord with the facts. There is a presumption of regularity in relation to documents of this nature in law. (*omnia praesumuntur rite esse acta*) There is nothing overtly to support the proposition that the time sheet must have been falsified or could have been or more particularly that the court should find beyond reasonable doubt it was. At the very least, the time sheet therefore raises a reasonable doubt about the defendant being present in Darwin on the relevant date. The court also accepts the defendant's evidence that a "VPN" (virtual private network) could not have been used to access the pornographic images from the location of the defendants' employment in Batchelor.

67. The title at transcript 152.3 "pre-teen fucks hard.ntg" and transcript 153.8 "pre-teen fucks hard.mpe" transpired upon examination not to be images constituting child pornography. Exhibit P12 at page 8 refers to "pre-teen bondage whip incest 11.avi." As is submitted in Str 9 by the defendant it also transpired not to be child pornography. Page 10 Str correctly identifies the courts' acceptance of that proposition. Bluntly the court rejects the submission of the prosecution that a title is anything, but at best indicative that the image may be pornographic, but certainly is not definitive of that being the case.

68. Trojan Horses ("TJ") and viruses ("V") is the next topic. At Str 12 the defendant makes the submission which the court accepts. It is to the effect that F is wrong that if a Trojan horse had ever existed on the defendants' hard drive or any of them, he F would have been able to find it. As the court understands the position the same proposition applies to viruses. It is to be noted that this is the second aspect of F's evidence which is destructive of his expertise.

69. At page 13 Str the defendant deals with evidence by F. The court finds that it is correctly propounded that F said at TR 82.7 the "image.db.ddf file" was a list of files that was viewed by ACDSee. The court accepts that it was

wrong to receive as correct the proposition of the prosecutor at TR 180.2. The court further accepts the proposition at Str 15 that not only was F's statement wrong, but the file "image.dd.ddf" was not in fact a directory cache. Further it accepts that the proposition that ACDSee and information extracted from associated ACDSee files cannot say if the file was thumb-nailed or viewed. Support for the defendant's proposition in that respect is found in Exhibit P 12 at pages 10 and 10A. The court further notes this is the third of F's propositions to be refuted by the court's findings and the evidence.

70. The prosecution urge the suggestion by the defendant that anyone including JJJ his than de facto or her son LLL about 16 years of age at the time might have downloaded the three images the subject of the charges against the defendant must be indicative of guilt. Prosecution contrast that suggestion with the contents of the recorded response of the defendant at page 19 of the record of interview. Whilst much criticism is made by the prosecution of the conflict the court doesn't find it's a matter of significance at all. The fact that it was first raised as a possibility that one or other of those people may have viewed the file when being cross-examined is not a matter of pith and moment. The defendant's response in his record of interview as it being he who most likely viewed the relevant image or images' is not proof of the fact. More importantly it is not proof that knowledge of the image reposed in the defendant beyond reasonable doubt.

71. There was much evidence, cross-examination and discussion about the consequences of using Internet Explorer. What is wanting is the evidence that the defendant ever used that program. He always denied use of such program and did so in strident terms. His perception of the quality of the program was that it was "crap". The court accepts the proposition at Str 18 that he never recanted from the position that he had failed ever to use Internet Explorer. The prosecution has not proved that the defendant used Internet Explorer at all, let alone beyond reasonable doubt. The

consequence is that eradicates any possible conclusion that Internet Explorer was used by the defendant.

72. The next issue concerns Media PlayerTr 323.9 which deals with the prosecution submission that "the index dt" file could be modified using Windows Media Player". Str 19 the defendant's submission is accepted by the court that if Media Player was used and logged a record of files which are the subject of the charges against the defendant as having been viewed it is beyond comprehension that no log occurred for the other files on the hard-drive or any of the files the subject of charges against the defendant. It is further accepted this is further impugning of F's conclusions. Further lest it not be clear from what is set out above, as a consequence the court finds that movie two could therefore not have been thumb-nailed by ACDSee at all and consequently all of the propositions founded upon that being the case have no validity.

73. The defendant admits and always has admitted to sourcing pornographic images using a program called KaZaA Lite and in addition UNN program Agent by way of casting for these programs (Str 21) "Mr Elliott for the prosecution would have you believe your Worship that Mr G used these programs like an assassin uses a sniper-rifle, individually picking targets, clearly identifying them and then executing the target with skill and precision. "The really being" (sic) (obviously the transcript wrongly reflects the use of language) and should read "the reality being", "that Mr G used these programs like a deep sea fishing trawler casting these programs out onto the Internet like a huge trawling net, indiscriminately collecting all manner of things, mostly things he was after but inevitability catching some things he didn't want, namely the three files in question". The court accepts that was the methodology employed by the defendant in relation to his canvassing the sources available to him, which constituted the adult pornography in which he was then, on his own admission very interested. In the event it is correct that by such methodology the prosecution cannot

exclude beyond reasonable doubt that without his knowledge he acquired the three movies the subject of this charges against him.

74. A Str 23 the defendant raises the issue about F's expertise in relation to KaZaA or KaZaA Lite. It is correct that F at transcript 26.7 gave evidence that he was not familiar with the KaZaA program. The court finds that it is a valid assertion by the defendant that in such circumstances any testimony by him in relation to that program arguably ought to have rejected as being a matter in respect of which he had no valid expertise. If the evidence was admitted in error, which it clearly was, then that evidence carries no weight whatsoever. The court accepts the defendant's submission at Str23 that it was the courts misguided comment that then caused F, from recollection gained overnight, to endeavour to obtain the program. The court accepts that once F conceded as he did "no, I am not familiar with KaZaA", that should have been the end of his involvement in respect of any evidence concerning that program. For that reason the issues and the evidence concerning KaZaA and KaZaA Lite is a red herring spawned and nurtured by the court and all of the evidence and all of the submissions which relate to matters said to inculpate the defendant, but having its genesis in either of them, are not matters upon which the court relies or even focuses upon and all evidence whether by evidence in chief or cross-examination in relation to those topics will be treated on the basis that it's adduction should never have been allowed. Consequently the issue about "Popups" is of no consequence in respect of the courts findings. Self evidently this is the fifth instance of demonstrable lack of expertise reposing in Mr F.

75. Use Net Groups and the program AGENT. The court accepts that F was not qualified as an expert in either the field of Use Net Groups or the program AGENT and in that regard also the "evidence" if it can be called that will be treated as if it had not been admitted at first instance.

76. The downloading of the three movies. Str 28 points to the exchange between F and the court which culminated with Mr F agreeing that the totality of the evidence as expressed by the court was "Yes, so the real evidence is Mr Gs or some other human being must of downloaded them?.... yes, your Worship". Firstly as has already been found the downloading or acquisition of the images is insufficient to inculpate the defendant in any event. The distancing of the defendant from any inculpation is clearly magnified by the proposition as to the effect of that evidence. Such evidence is manifestly inadequate to discharge the burden of proof reposing on the prosecution to establish beyond reasonable doubt the requisite knowledge reposing in the defendant of the contents of the three movies and the possession of the three movies the subject of these charges.

77. On balance and given the identified shortcomings in the evidence of Mr F the Court must conclude and does find that he is not possessed of sufficient expertise in the fields relating to this particular defendant and these particular charges to be the basis of reliable evidence upon which to find the defendant guilty.

78. Most importantly the court finds having regard to all of the admissible evidence that there is no admissible, or any other evidence at all in fact, to prove beyond reasonable doubt as is required by the prosecution, that the defendant

    (a) viewed the three movies or any one of them;

    (b) knew otherwise that the three movies or any one of them was possessed by him to his knowledge.

79. In those circumstances the court does not address the submission by Mr Adams that the defendants' failure to call his nominated expert who was in court and heard F give evidence should result in the court embracing the principle enshrined in "*Jones and Dunkel*"

80. It follows in the circumstances the defendant is found not guilty in relation to all of the charges against him.

81. There is of course in this matter the issue of costs which has not been addressed. I will hear the parties in relation to the issue of costs at a time and date to be agreed upon.

82. Although as it happens in the light of the findings of the court, nothing turns on the issue it is a matter of some concern to the court that for instance in relation to child pornography charges to be pursued against the prominent person in the Northern Territory whose name has been suppressed, there is to the courts knowledge a single charge although there are involved some 52 images allegedly constituting child pornography. It may have been an appropriate enquiry to make of the prosecution as to whether or not the charges brought against the defendant for that reason are properly framed and brought. It must be borne in mind that upon the finding of guilt in relation to each charge against a defendant in relation to category of offending there is prospectively a separate penalty to be imposed by the court. Sauce as they say for the goose should be sauce for the gander.

Dated 9th day of May 2005

DAVID LOADMAN

STIPENDIARY MAGISTRATE