37/09; [2009] VSC 562

SUPREME COURT OF VICTORIA

DPP v WANG YI CHAO

Lasry J

30 November, 8 December 2009

CRIMINAL LAW – POSSESSION OF CHILD PORNOGRAPHY – VIDEO IMAGES ALLEGEDLY CONTAINED ON COMPUTER HARD DRIVE – ADMISSIBILITY OF COMPUTER RECORDS – ADMISSIBILITY OF RECORDS PRODUCED BY SCIENTIFIC INSTRUMENTS AT COMMON LAW – APPEAL REFUSED: *EVIDENCE ACT* 1958, S55B.

Wang Yi Chao was charged with possessing child pornography contrary to s70 of the *Crimes Act* 1958. Wang had left his computer hard drive with another person for repair and child pornography was found to be on that hard drive. At the hearing of the charge, the issue identified for the hearing of the matter was whether the prosecution could prove to the required standard that Mr Wang had knowledge of that pornography. The only witness called by the prosecution stated that when reviewing the registry hardware files of the operating system he was able to determine what devices had been previously connected to the computer. It was argued that any information derived by the witness was inadmissible unless the preconditions in s55B of the *Evidence Act* 1958 ('Act') were first satisfied. The Magistrate concluded that the provisions of s55B of the Act applied and as the pre-conditions specified in the section were not met then the witness's evidence was inadmissible. The prosecutor announced that in those circumstances no further evidence would be led and the Magistrate dismissed the charge. Upon appeal—

HELD: Appeal dismissed.

1. What was sought to be led from the witness was evidence from the registry hardware files from which a determination could be made about what devices had previously been connected to the computer. The purpose of leading that evidence was to establish usage by Wang in order to infer that the downloaded material in respect of which he was charged was downloaded by him. Section 3 of the *Evidence Act* defines "statement" as to include "any representation of fact whether made in words or otherwise".

2. S55B of the Act applied to the material sought to be presented to the Magistrate. It was a statement contained in a document produced by computer. Accordingly, the Magistrate ruled correctly that s55B of the Act applied to the evidence sought to be led and that the requirements of s55B had not been complied with. Reliable and accurate information produced by a computer about access to is and the use of its hard drive is admissible if the provisions of s55B(2) of the Act are satisfied.

LASRY J:

1. This is an appeal pursuant to s92 of the *Magistrates' Court Act* 1989. The appellant is the Director of Public Prosecutions on behalf of Brian Francis Nolan, a Detective Sergeant of the Victoria Police and the informant against the respondent Wang Yi Chao. The respondent had been charged with the offence of possession of child pornography contrary to s70 of the *Crimes Act* 1958. The original charge and summons alleged the offence had been committed by the respondent at Glen Waverley on 27 November 2006.

2. An affidavit of Adrian Mark Castle of 1 April 2009 is filed in support of the appeal. The affidavit sets out in detail the various assertions contained in the police brief brought against the respondent. However, much of that material was not before the Magistrate on the hearing of the matter and, obviously, I should only deal with what was before him rather than what could have been put before him.

3. The matter proceeded in the Dandenong Magistrates' Court on 23 February 2009.

4. After the Magistrates' Court proceedings commenced, an application was made by the Prosecutor to amend the charge to allege that the offence was committed by the respondent between 11 March 2004 and 27 October 2006. Though opposed by senior counsel for the respondent, the Magistrate permitted the amendment.

5. Before any evidence was called senior counsel on behalf of the respondent informed the

Magistrate that it was agreed that the respondent, Mr Wang, left a "C-Gate" hard drive, serial number 4 MF02Z24 with Vladimir Markov of Image Data Recovery for repair and that located on that drive was child pornography. The issue identified for the hearing of the matter was whether the prosecution could prove to the required standard that the respondent had knowledge of that pornography.

6. The only witness to give evidence for the prosecution was Jason Michael Knott. He said he was the Manager of Forensic Technology with Price Waterhouse Coopers and that at the time of these events he was a member of the police force having become involved in the matter after being contacted by the informant. He said that on 15 January 2008 he went to the property office where he collected the hard drive and removed it to a laboratory area of the Computer Crime Squad. What he received from the property office was two hard disk drives. They were contained in the computer tower or console. Mr Knott said that he conducted a search of the hardware registry files. He then gave the following evidence:

> I then reviewed the registry hardware files of the operating system.

And then further:

> Your Honour, whenever a new piece of hardware is connected to a computer system, the registry of the computer system creates registry entries as an installed drive files for the actual hardware devices when they're connected.

He went on to explain that that information enabled him to determine what devices had been previously connected to the computer.

7. At this stage of the proceedings senior counsel for the respondent indicated that he objected to any further evidence being given in that context "…because any information that Mr Knott has derived has been derived from the computer and, unless certain prerequisites are satisfied, what he reads from the computer and information he derives from the computer is inadmissible." He then referred the Magistrate to s55B of the *Evidence Act* 1958 identifying the requirements and submitting that what is read from a computer is not admissible unless the pre-conditions are satisfied or by the prosecution being able to "satisfy various common law requirements".

8. The prosecutor submitted that the evidence he was seeking to lead was "direct evidence" although he accepted he was "confined" by the provisions of the *Evidence Act*.

9. At the conclusion of the submissions, the Magistrate said:

> Well, Mr Priest has made a submission with respect to Mr Knott's evidence, and he refers to s55B of the *Evidence Act* and states that any evidence Mr Knott is going to give with respect to the material that he has gained from the particular computer in question must satisfy s55B; and, in order to do that, he has submitted that there are four conditions that must be met and that is in s55B(2). He states that none of those conditions have been met nor can they be met; and in order for Mr Knott's evidence to be admitted they must be met. I don't disagree with Mr Priest. It seems to me that 55B – apply to this situation, and it also seems to me that 55B(2), the conditions there have not been met and are unable to be met. So, therefore, Mr Priest's submission is upheld.

10. After a brief adjournment the prosecutor announced that in view of the Magistrate's ruling no further evidence would be led and with the inevitable result that the charge should be dismissed.

11. The resultant Notice of Appeal in this matter identifies a question of law in the following terms:

> Is reliable and accurate information mechanically produced by a computer about access to it and the use of its hard drive admissible in evidence?

12. The ground of appeal identified in the Notice of Appeal was in the following terms:

> The Magistrate erred in law by finding that reliable information mechanically produced by a computer about access to it and the use of its hard drive was not admissible in evidence.

13. The ground of appeal, which was not sought to be amended during the course of the hearing before me, does not accurately state what the Magistrate decided. The Magistrate did not determine that reliable and accurate information mechanically produced by a computer about access to it and the use of its hard drive was not admissible. What the Magistrate determined was that in accordance with the submission made on behalf of the respondent s55B of the *Evidence Act* applied and that the conditions set out in s55B had not been met. Section 55B is in the following terms:

> (1) In any legal proceeding where direct oral evidence of a fact would be admissible, any statement contained in a document produced by a computer and tending to establish that fact shall be admissible as evidence of that fact, if it is shown that the conditions mentioned in sub-s (2) are satisfied in relation to the statement and computer in question.
>
> (2) The said conditions are—
> (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any person;
> (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
> (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
> (d) that the information contained in the statement reproduces or is derived from the information supplied to the computer in the ordinary course of those activities.

14. As was submitted on behalf of the respondent, the record maintained on a computer which might be relied upon to prove usage of the computer as it was in this case is hearsay and so s55B of the *Evidence Act* makes such records admissible where certain pre-conditions are satisfied.

15. The transcript reveals that what was sought to be led from the witness Knott in this case was evidence from the registry hardware files from which a determination could be made about what devices had previously been connected to the computer. The purpose of leading that evidence was to establish usage by the respondent in order to infer that the downloaded material in respect of which he was charged was downloaded by him. Section 3 of the *Evidence Act* defines "statement" as to include "any representation of fact whether made in words or otherwise".

16. Before the Magistrate, the Prosecutor did not contend that s55B of the *Evidence Act* did not apply nor did he indicate a desire to lead evidence to enable compliance with the conditions.

17. I am unable to see why s55B of the *Evidence Act* does not apply to the material sought to be presented to the Magistrate in this case. On any view the material sought to be put before the Magistrate was a statement contained in a document produced by computer. The definition of "a document" in the *Evidence Act* includes:

> (d) Any disk tape sound track or other device on which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced there from;
> or
>
> (f) anything whatsoever on which is marked any words figures letters or symbols which are capable of carrying a definite meaning to persons conversant with them.

18. In my view, the Magistrate ruled correctly that s55B of the *Evidence Act* applied to the evidence sought to be led.

19. An alternative basis was submitted to be available to the informant for the admission of this evidence. In certain circumstances, such evidence may be admissible pursuant to the common law. That was the original basis for the written submissions filed on behalf of the appellant in this case and based on the judgment of Wright J of the Tasmanian Supreme Court in *Rook v Maynard*[1].

20. Like this case, that case was an appeal from a Magistrate who had ruled certain computer-related information inadmissible. The respondent was employed by the Department of Social Security and was charged with 38 offences of obtaining access to data stored in a computer owned by the Department. A "trace" had been placed on the respondent's log-in identification number with a view to recording each use by the respondent of his computer terminal. Print-outs of the program which operated the "trace" purporting to show the times and dates upon which the respondent accessed information was sought to be tendered in evidence. The prosecution then sought to infer that since the respondent's log-in identification number was unique, the respondent must have had access to the data revealed in the trace.

21. The Magistrate ruled that the evidence was inadmissible because he was of the view that what he was shown in the print-outs did not accurately reflect what the respondent would have had on his screen when the data was accessed. Wright J disagreed holding that, unlike this case, the reliability of the trace program as a scientific device had been established on the evidence before the Magistrate and also concluding that the print-out was not inadmissible as hearsay because it was "totally devoid of any such human hearsay element."

22. In argument before me it was further put on behalf of the Director that it would have been open to the informant to lead evidence to enable the information to be put before the Magistrate pursuant to the common law on the basis that there was a presumption of accuracy in relation to the computer. Reliance was placed on two cases on behalf of the appellant for that proposition. First was *Thompson v Kovacs*[2] in which Sholl J held that a speedometer was able to be regarded by a court as a known type of technical if not scientific instrument the accuracy of which might be presumed in the absence of evidence to the contrary even though the instrument had not been tested. For that conclusion, Sholl J relied on what was said by Lowe J in *Crawley v Laidlaw*[3]. In that case the respondent had been charged with carrying a greater weight than that allowed on a public road. The vehicle inspector sought to measure the load on the vehicle using 'loadometers'. Lowe J noted:[4]

> Apparently the learned magistrate did not know, and I myself do not know, what a loadometer is. I may guess from the derivation of the name what the instrument is, but my guess is not evidence.

His Honour had observed that there were presumptions about the working accuracy of scientific instruments but it must appear from evidence before the Court or something which stands in its place such as judicial notice that an instrument is a scientific instrument before the presumption applies. His Honour concluded that there was no evidence that the loadometers were scientific instruments and thus no foundation for a presumption that they were working accurately. As a result, his Honour held that the Magistrate had correctly dismissed the information about the loadometers.

23. Counsel on behalf of the appellant also referred to the judgment of Mullighan J in the Supreme Court of South Australia in a case of *R v Jarrett*.[5] That case concerned the admission of evidence of DNA analysis and the statistical interpretation of the analysis. His Honour delivered a separate judgment in relation to the issue concerning the admissibility of evidence kept on a computer database by the State Forensic Science Centre. In that case his Honour concluded that evidence was admissible because s59(b) of the *Evidence Act* 1929 (SA) which laid out the prerequisites for admission of "computer outputs" had been complied with. Another category of evidence was that produced by scientific instruments scientifically accepted as accurate, which his Honour held, did not have to meet the admissibility standards prescribed for computer-generated evidence. His Honour concluded that if compliance with s59(b)(2) was required, none of the evidence sought to be tendered could be admitted. His Honour concluded:[6]

> Results obtained from scientific instruments which are scientifically accepted as accurate are admissible at common law. I do not think any of the instruments fall within the category of notorious scientific instruments in which the Court will take judicial notice of their capacity for accuracy but they are within the class of instruments which are generally accepted by experts as accurate for their particular purpose. It must be shown that if they are used properly they produce accurate results. (See White J in *Mehesz v Redman (No. 2)* (1980) 26 SASR 244.

24. Thus, as I follow the argument, it was submitted that the evidence sought to be put before the Magistrate in this case was admissible independently of s55B of the *Evidence Act* pursuant to

the common law on the basis that the computer was a scientific instrument scientifically accepted as accurate. I have recited the argument on behalf of the appellant because it was made but the reality was that no such submission was made to the Magistrate and even if it had been on the evidence as it stood, there was no evidentiary basis for such a conclusion to be reached by the Magistrate.

25. In this case, confronted with the submission made on behalf of the respondent in the Magistrates' Court, the informant made no attempt either to obtain an adjournment, produce evidence to demonstrate compliance with s55B(2) of the *Evidence Act* or endeavour to establish that the computer data on which reliance was sought to be placed was independently admissible pursuant to the common law criteria.

26. I will deal with this appeal on the basis of the case that was conducted and the evidence and submissions that were put before the Magistrate. For the reasons put forward by senior counsel for the respondent, the Magistrate ruled that s55B of the *Evidence Act* 1958 applied and that the requirements of s55B(2) had not been complied with. In my opinion that ruling was correct. The Magistrate did not conclude that reliable and accurate information mechanically produced by a computer about access to it and the use of its hard drive was inadmissible. He was in no position to conclude that the information was accurate and reliable because there was no evidence about that. The Magistrate concluded that there was a statutory basis for the admission of this evidence and the prerequisites for admission on that basis had not been fulfilled.

27. The answer to the question of law raised in the Notice of Appeal is that reliable and accurate information produced by a computer about access to it and the use of its hard drive is admissible if the provisions of s 55B(2) of the *Evidence Act* 1958 are satisfied.

28. The appeal is dismissed. I will hear the parties on the appropriate orders and as to costs.

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[1] [1993] TASSC 137; (1993) 2 Tas R 97; (1993) 116 FLR 234; (1993) 126 ALR 150;
[2] [1959] VicRp 40; (1959) VR 229; [1959] ALR 636.
[3] [1930] VicLawRp 56; (1930) VLR 370; 36 ALR 311.
[4] Ibid at 374.
[5] [1994] SASC 4596; (1994) 62 SASR 443; (1994) 73 A Crim R 160.
[6] Ibid at 188.

APPEARANCES: For the appellant DPP: Ms A Hassan, counsel. Office of Public Prosecutions. For the respondent Wang Yi Chao: Mr PG Priest QC with Mr CB Boyce, counsel. Galbally & O'Bryan, solicitors.
