

Walker and Beard

Transcript

Mowday v The State of Western Australia

The appellant was convicted in the District Court after a trial before a Judge and jury on an indictment which read that on 2 March 2004 at Merredin he had in his possession child pornography in the form of computer images contrary to s 60(4) of the Censorship Act 1996 (WA) (repealed). (Currently the Classification (Publications, Films and Computer Games) Enforcement Act 1996).

The prosecution case was that there were 27 images of naked female children stored on three floppy disks. The three disks were in the appellant's possession on 2 March 2004. As will appear from the evidence referred to below, these images were not downloaded and viewed by the Merredin police at the Merredin Police Station until 10 months later in January 2005. At the beginning of the trial counsel for the appellant made a concession in the following terms:



APPELLANT

We do not contest that the images downloaded by Officer Beard, I think you will hear at the Merredin police station, from the floppy disks that she received - that they did indeed contain images which contravene section 60(4) of the Censorship Act, which of course constitutes this charge. So just so you're in no doubt at all, we are not contesting that part of the prosecution case.

The images "downloaded by Officer Beard" were downloaded in January 2005. The precise terms of that concession are important for reasons that will be apparent later.

The uncontradicted prosecution evidence was as follows. A Mr Hawser was the part-owner of an internet café in Merredin. He knew the appellant because the appellant would come into the café three or four times a week and would stay in the café for long periods of time ranging between two to eight hours at each visit. There were three computer terminals available for public use.

On 2 March 2004 Mr Hawser turned the computers on. Mr Hawser's evidence, at ts 26, was as follows:



When you turned the computers on, what would be on the screen?

PROSECUTION

Nothing. Just bare Windows - just a normal computer start up.

WALKER





Would it be whatever was last used the night before?

PROSECUTION

No.

WALKER



Mr Hawser cleaned up any personal effects remaining on the desks on which the computer terminals were located. He then saw the appellant arrive. The appellant took up his position at a desk on which one of the computer terminals was located. The appellant left the premises for a short time but then returned and stayed for a considerable period of time. Mr Hawser observed the appellant to have a grey floppy disk container with him. Eventually Mr Hawser saw something on the screen which prompted him to call the police.

Two police officers arrived. They were Senior Constable Walker and Constable Christine Beard. They saw the appellant seated at the computer terminal. Senior Constable Walker asked the appellant to move away from the computer. Senior Constable Walker's evidence was as follows:



PROSECUTION

Did you observe anything on the computer screen?

I did observe some - like a child pornography site along with - a Virgin Airways flight site, I think it was.

WALKER





PROSECUTION

Now, can you describe for us as best as you can how those two sites were displayed on the screen?

The majority of it was the Virgin Airways flight, the majority of the screen.

WALKER





PROSECUTION

You are holding your hands up with your hands apart. You are indicating, what, across the width of the screen?

Yeah, across the width of the screen and then over - I believe it was the left-hand side, just down the side was a child pornography site.

WALKER





PROSECUTION

You are moving your hands up and down and holding your hands a few inches apart. You are indicating like a strip down the side of the screen. Is that what you mean?

That is correct, yes.

WALKER





PROSECUTION

When you say 'a child pornography site,' what exactly did you see?

I can't recall exactly what I saw, but I can recall the name of the site ... I can't remember what it was called now. I think it was roughly Lolita, which I know to be a child pornography site because I've dealt with it in the past.

WALKER





PROSECUTION

All right then. Just answer yes or no. Was there then a discussion between you and Mr Mowday?

There was.

WALKER





PROSECUTION

Did you notice anything near the vicinity of that computer that he had been using?

There was a grey computer disk case, and there was also a disk inside the hard drive of the computer.

WALKER





Were there any disks inside the grey container?

PROSECUTION

There was.

WALKER



Senior Constable Walker seized the grey container which was on the desk next to the computer. There were three floppy disks within the container. Constable Beard gave evidence that she observed "child pornography sites" on the computer screen.

The container, the three floppy disks in the container, and the hard drive of the computer were removed from the internet café by the two police and taken to the Merredin Police Station. Sergeant Ryan was at the police station and he recorded the receipt of these materials. The grey container containing the three floppy disks was taped up with red evidence tape and signed by Sergeant Ryan in Constable Beard's presence. Sergeant Ryan was also called as a witness. The container and the hard drive were put into a secure store in the Merredin Police Station by Constable Beard. Constable Beard's evidence was as follows (at ts 61):



PROSECUTION

I think - did you enter the property into the police computer?

Yes, I put an IR on the system and entered the property.

BEARD





PROSECUTION

IR is incident report?

Incident report, yeah.

BEARD





PROSECUTION

So you enter that into the police computer and then you are given an incident report number?

Yes.

BEARD





PROSECUTION

That comprises six digits of the date, four digits, being the time, and five digits, being your regimental number?

That's correct.

BEARD





PROSECUTION

Was the hard drive also taken?

Yes.

BEARD





PROSECUTION

Did you - were you then involved in placing that grey container and the floppy disks into the storeroom?

Yes, I was.

BEARD





PROSECUTION

What did you do?

I got the keys for the storeroom, went down, unlocked it, because it's always kept locked, and placed it on Constable Walker's shelf.

BEARD





PROSECUTION

Were there any other grey floppy disk containers on that shelf?

No.

BEARD



Constable Beard printed out a "property tag" and placed that document, the container containing the three floppy disks and the computer hard drive into a bag which she placed in the secure store room at the Merredin Police Station.

Later Senior Constable Walker transported this box, including the container with the three floppy disks inside, to Perth where he delivered them into the possession of a police officer in the Computer Crime Section of the police department who signed that he received them. Neither the Sergeant, the Senior Constable nor Constable Beard gave evidence that they put the disks into a computer and viewed the contents before they were sent to Perth. There was no evidence about when Senior Constable Walker effected delivery to Perth. There was no evidence about who took delivery at the Computer Crime Section. There was no evidence about the procedures at the Computer Crime Section for handling the container and disks. There was no evidence about who handled them or how they were dealt with at the Computer Crime Section. There was no evidence about what work was performed on the disks at the Computer Crime Section.

In December 2004 the container and the disks were returned by the Computer Crime Section to Merredin. At ts 61 to 63 Constable Beard said in her evidence-in-chief:



PROSECUTION

At some stage later, in December of 2004, do you recall receiving a case with floppy disks in it from computer crime?

Yes, I do.

BEARD





PROSECUTION

If you take those disks out, do they have stickers on them?

Yes, they do.

BEARD





PROSECUTION

What do those stickers say?

'Merredin police, disk 1,' my signature and regimental [number], 'Disk 2, Merredin police,' my signature and regimental [number], and, 'Disk 3.'

BEARD





PROSECUTION

In January of - when you received that back in December of 2004, where did you place - what did you do with that container and those disks?

I placed them back into the property storage room, which is the same one that's always kept locked, but I put it on my shelf because at that time Constable Walker had left.

BEARD





PROSECUTION

Did you - were there any other grey plastic containers with floppy disks on your shelf?

No, there weren't.

BEARD





PROSECUTION

And then in January of 2005, did you inspect the floppy disks?

Yes.

BEARD





PROSECUTION

Is that all three of them?

Yes.

BEARD





PROSECUTION

That's the container and the disks that had been located next to the computer Mr Mowday had been seated at?

Yes, that's correct.

BEARD





PROSECUTION

Did you then download from those disks 27 images of child pornography?

Yes, I did.

BEARD





PROSECUTION

Now, there is also a document in that bag - a typed piece of paper. Can you open that?

This one?

BEARD





PROSECUTION

Yes. What is that?

It's a property tag. It's basically when we have property in an information report, it tags it, so it's internal for the police department to know that that property is at the station and that's the - so when I printed it out, it went straight onto that and straight into the storage room.

BEARD





PROSECUTION

So on 2 March 2004 you printed out that document you have in your hand?

Yep.

BEARD





PROSECUTION

And was that placed inside that container or in the bag with it? Do you recall?

**It was placed probably in the bag with it,
yep.**

BEARD





And was that when you - and that was in that bag when you put it into that storeroom?

PROSECUTION

Yes.

BEARD





PROSECUTION

In March 2004?

Yes.

BEARD





PROSECUTION

All right. When you received that grey container and disks back in December 2004, was that piece of paper still with the bag?

Yes.

BEARD





PROSECUTION

Yes, I would seek to tender that piece of paper. It's a property tracing document, your Honour.

There was no cross-examination about this evidence save to elicit from Constable Beard that the stickers placed on the three floppy disks were placed there in December 2004. At the hearing of this appeal counsel for the appellant conceded that that was evidence that the three floppy disks were the same disks which had been seized at the internet café on 2 March 2004.

The prosecution then closed its case and counsel for the appellant made a submission that there was no case to answer. He submitted that the fact that there was no evidence from the person who had possession of the disks between the time Constable Walker delivered them to the Computer Crime Section of the police department until they were returned to Merredin in December 2004 meant that there was no case to answer. The trial Judge ruled that there was a case to answer. The appellant then elected not to give evidence.

The jury returned a verdict of guilty and a conviction was recorded.