

Citation: *R. v. Gibb*, 2005 YKTC 34

Date: 20050527
Docket: 03-00517
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Faulkner

R e g i n a

v.

Robert Douglas Gibb

Appearances:
David McWhinnie
Keith Parkkari

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] Robert Douglas Gibb is charged that he:

On or between the 01st day of September, 2002, and the 26th day of November, 2003, at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that: he did have in his possession child pornography, to wit: pictures of prepubescent girls, contrary to s. 163.1(4) of the *Criminal Code*.

[2] The matter came to the attention of the police after Mr. Gibb's son, Duncan, was found in possession of a number of child pornographic images that appeared to have been printed on a computer printer. Duncan had apparently found the images amongst papers and other belongings of Mr. Gibb's that had been left by Mr. Gibb at the home of his ex-wife. Mr. Gibb was called to the police station where he gave a statement admitting that he had downloaded the images found in Duncan's possession. Mr. Gibb also turned over a computer hard drive to

the police suggesting that an examination of the drive would show that it contained no child pornography.

[3] In fact, forensic analysis of the hard drive revealed a large number of such images, although an attempt had been made to delete these files. As well, an additional computer hard drive and a number of computer floppy discs were seized from the accused's residence pursuant to a search warrant. It is noteworthy that the second computer hard drive had been entirely erased, probably on the same day that Mr. Gibb was first contacted by the police. An analysis of the floppy discs seized from Mr. Gibb revealed that a number of them also contained child pornographic images.

[4] It has, therefore, been proved that the accused had in his possession a number of printed child pornographic images (the ones that found their way into Duncan's hands). He also possessed a hard drive on which similar images had been stored and a number of computer disks containing readily accessible child pornography.

[5] The defence quite properly conceded that the images in question fall within the definition of child pornography contained in s. 163.1(1)(a) of the *Criminal Code*. The images are of nude or essentially undressed girls clearly under the age of eighteen years. In some cases, the girls are depicted involved in explicit sexual activity, primarily the use of dildos or other objects.

[6] However, the defence argues, correctly, that possession in law amounts to more than mere physical possession or handling of the object and a measure of control over it. It also must be shown that the accused had knowledge of what the object is, or, in this case, what it contained. *R. v. Beaver*, [1957] S.C.R. 531; 118 C.C.C. 129 (S.C.C.).

[7] In this case, the accused, although conceding that he had physical possession of the computer equipment and discs in question, claims that he did not know that there were child pornographic images stored on them.

[8] The accused's story of how he came to unknowingly be in possession of the images is somewhat complex. He testified that the computer hard drive he turned over to the police was a hard drive he had installed in a computer in Korea. Mr. Gibb was in Korea from August 2001 to August 2002 teaching at an English language college. Although the computer was located in Mr. Gibb's residence room at the college, Mr. Gibb says that two fellow teachers also had access to the computer. He surmises that one of these persons, one Phillip Jones, must have downloaded the child pornographic images found on the hard drive.

[9] It will be recalled that there are also similar images on a number of floppy disks seized from the accused. In fact, child pornographic images were found on 12 different discs in Mr. Gibb's possession.

[10] As to these, Mr. Gibb's explanation is that, shortly before leaving Korea, and in a somewhat drunken state, he was packing up some of his effects to ship to Canada and, inadvertently, must have packed up a number of discs belonging to Mr. Jones. These were then shipped to Canada together with Mr. Gibb's belongings.

[11] On his arrival back on Canada, Mr. Gibb went to Winnipeg. He describes himself as being in a very bad mental state and taking Zanax, which he described as a very powerful anti-anxiety drug. In this state, he awoke one morning to find himself surrounded by images of young girls that he had apparently downloaded from the Internet and printed or saved to floppy disc. Horrified, Mr. Gibb burned the pictures and threw the computer discs in a lake.

[12] Shortly thereafter, the accused moved to Whitehorse. Initially, he stayed at his ex-wife's residence. While unpacking, he discovered six or eight printouts of young girls that he obviously had not destroyed. He thought he should get rid of these items but did not do so. When he moved out of his ex-wife's residence, the images were inadvertently left behind and ultimately discovered by Mr. Gibb's son.

[13] Mr. Gibb denies downloading or saving any images after his arrival in Whitehorse. However, the evidence as to when certain of the computer files in question were created might suggest that some of the images were downloaded here. Mr. Gibb has an explanation for that, too. He says that his son had access to the computer at various times and must have downloaded the images.

[14] As to the erasure of the hard drive seized by the police, Mr. Gibb also has an answer. He testified that he was having trouble with his computer and erased the operating system, intending to reinstall it. By an unfortunate coincidence the deletion took place on, or within a day or two, of the time he was contacted by the police.

[15] A forensic analysis of the computer hard drives and floppy discs suggests that the "Korean" hard drive was in use from 1999 to early 2003. The "Canadian" hard drive was used from 1999 until late November 2003 when its operating system was erased. The computer files containing the images recovered from the Korean hard drive and from the floppy discs all have dates attached to them indicating when the files were created or accessed. However, these dates may not be accurate since they depend on whether or not the computer's internal clock is correctly set.

[16] Mr. Gibb contends that some of the dates attached to the computer files may be off by as much as a year. The importance of the dates is that, in Mr. Gibb's version of events, the downloading of child pornography would have

occurred in Korea or in Manitoba and at times before the period encompassed by the Information before the court.

[17] In my view, it is most likely that the dates shown on the computer files are at least reasonably accurate. It was shown in cross-examination of Mr. Gibb that, in the few instances where the dates attached to files stored on the drive or discs can be verified by reference to the material contained in the file, the dates appear to be essentially correct. Moreover, analysis of the Korean hard drive shows that, as of the date of installation of the operating system, the clock was set to Korean Standard time and shows the installation as having occurred in late December – which is when Mr. Gibb says he installed it. It is, therefore, unlikely that, although the time and date were correct, the year was wrong.

[18] However, I do not find it necessary to decide whether or not the dates attached to the computer files are accurate or not. Even if the images were first downloaded in Korea and / or Manitoba, the bottom line is that Mr. Gibb had physical possession in the Yukon of a computer hard drive and a number of computer discs containing child pornography and he had these items in his possession during the time period covered by the Information. There is also evidence in Exhibit 6 (the computer analyst's report) that Internet browser favourites (bookmarks) on the computer drive contained links to sites that, by name, appeared to be child pornographic in content. He also admittedly had possession of the images that ended up in the hands of his son, albeit, he claims, in effect, that he had forgotten about them.

[19] Absent some evidence that Mr. Gibb did not know what the computer drive and disks contained, it may be presumed that he did have such knowledge.

[20] One has only to recite Mr. Gibb's various explanations for how he came to have physical possession of these materials to see that his claim that he lacked knowledge defies belief:

1. It must have been Phillip Jones who accessed all the child pornography while the accused was in Korea.
2. While still in Korea, and by accident, the accused also ended up in possession of some computer discs belonging to Phillip Jones and he still had them when arrested in the Yukon.
3. Unfortunately, it turned out that twelve of these discs contained one or more child pornographic images.
4. Although the accused, himself, downloaded child pornography, he only did so in Manitoba, never in the Yukon.
5. It must have been Duncan Gibb who accessed all the child pornography while the accused was in the Yukon.
6. He destroyed all the child pornography obtained in Manitoba by burning it or throwing it in the lake.
7. He later discovered that he still had some child pornography brought from Manitoba. He intended to destroy it but forgot. It was this material that found its way into Duncan's hands.
8. The accused deleted the operating system on his hard drive. By coincidence, the date of the deletion, according to the forensic analysis of the computer, was November 25, 2003. This is the same day Mr. Gibb went to the police station in response to the inquiry about possession of child pornography. Even if the date is not entirely accurate, Mr. Gibb's own evidence was that he deleted the hard drive approximately two days before the police called – a coincidence almost as unfortunate.

[21] It may well be that any one of these things could have happened. For instance, there was some suggestion in the evidence that Duncan had, on occasion, attempted to access pornography on the Internet. However, the probability that all of these unfortunately incriminating things happened together is essentially zero.

[22] Moreover, apart from the suggestion about Duncan's proclivities, there is simply no independent evidence to support what Mr. Gibb says. For example, Mr. Gibb claims that the twelve floppy discs containing child pornography belonged to Phillip Jones. Yet there is no evidence that there was any data stored on any of these discs that indicated an association to Mr. Jones.

[23] The credibility of Mr. Gibb's assertions was further undermined by his shifting explanation of the events in Manitoba. He clearly left the impression, both in his direct evidence and in cross-examination, that he only downloaded child pornography on one occasion while in a drug-induced haze. These materials were quickly destroyed. When asked by the court how it was that he still had such images in his possession (the ones appropriated by the son) if all the material had been destroyed, Mr. Gibb was forced to admit that he had downloaded child pornography not once, but several times.

[24] In the final analysis, I place no weight whatever on the evidence of the accused denying knowledge of the nature of the materials stored on the various computer media in his possession.

[25] In the result, and on the whole of the credible evidence, I find that the charge has been proved.

Faulkner T.C.J.