SCC File No.: 36435

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

- and -

OSWALD OLIVER VILLAROMAN

RESPONDENT
(Appellant)

- and -

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO) and ATTORNEY GENERAL OF BRITISH COLUMBIA

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(OSWALD OLIVER VILLAROMAN)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

PART I – OVERVIEW AND FACTS

1. Overview

[1] In this case, the trial judge committed clear and readily identifiable errors of law. He misdirected himself on how to draw inferences and failed to appreciate the circumstances under which a reasonable doubt can properly arise. The trial judge's analytical approach shifted the burden of proof to the accused and caused him to render an unreasonable verdict.

[2] The Alberta Court of Appeal (the "Appellate Court") identified the trial judge's errors and corrected them. The Appellate Court's approach is entirely consistent with the clear and relevant principles set out by this Honourable Court.[1]

[3] The Appellant now advances an argument based on the same errors committed by the trial judge. Contrary to the clear statements of law set out by this Court[2] the Appellant insists that an acquittal must be based on "actual evidence."[3] The Appellant fails to appreciate that an acquittal is not a finding of fact, but rather arises as a result of an insufficient evidentiary foundation.[4] The Appellant characterizes a doubt that arises in such circumstances as mere "speculation" or "conjecture."[5]

[4] The Appellant's error in relation to the inferences that may properly give rise to a reasonable doubt has caused them to misread the Appellate Court's judgment and advance questions that are not properly raised by the facts of this case. The Respondent submits that the Appellant has not established any errors in the Appellate Court's judgment; as such, the Respondent's acquittal ought not be disturbed.

2. Summary of the Facts

[5] The Respondent accepts the Appellant's statement of facts set out in paragraphs 1 – 9.

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[1] In cases such as *R v Walker*, 2008 SCC 34, [2008] SCJ No 34 [*R v Walker*] [Respondent's Book of Authorities, "RBA" TAB 9], *R v J.M.H.*, 2011 SCC 45, [2011] 3 SCR 197 [*R v J.M.H.*] [RBA, TAB 4], *R v Khela*, 2009 SCC 4 at para 58, [2009] 1 SCR 104 [*R v Khela*] [Appellant's Book of Authorities, "ABA" TAB 23], *R v Lifchus*, [1997] 3 SCR 320, [1997] SCJ No 77 [R v Lifchus] [ABA, TAB 25] and *R v Griffin*, [2009] 2 SCR 42, [2009] SCJ No 28 [*R v Griffin*] [ABA, TAB 17].

[2] *R v Lifchus*, *ibid*, [ABA, TAB 25] *R v J.M.H.*, *ibid*. [RBA, TAB 4]

[3] Factum of the Appellant Attorney General of Alberta [*Appellant's Factum*] at para 51.

[4] *R v Walker*, *supra* note 1 at para 26. [RBA, TAB 9]

[5] *Appellant's Factum* at para 43.

[6] With respect to paragraph 10, the Respondent accepts that the files in question were downloaded between September 16, 2009 and November 23, 2009 (with downloads occurring on both dates). However, the Respondent would add the following particulars:

- The files were created on four discrete occasions: September 16, November 12, November 18, November 22/23. Five of these occasions were at times prior to 11:45 pm.

[7] The Respondent agrees with the Appellant's statement of facts set out in paragraph 11.

[8] The Respondent takes issue with paragraph 12. At trial, the forensic examiner testified that any child pornography found on the Respondent's computer was listed in the 37 files identified in his report. He also testified that if a file was manually stopped, it would stay in the incomplete folder until it was manually deleted. He could not provide any evidence that the files in the incomplete folder would resume downloading when Limewire connected to the Internet again.[6] As such, the Appellant's statement that Limewire was "cued to download 67 files the next time it connected to the Internet. Again, the file names were consistent with child pornography" is not accurate.

i) Arguments at Trial

[9] At trial, the Respondent argued that the substantive offences had not been proven beyond a reasonable doubt. The Crown acknowledged that its case was entirely circumstantial but noted that the Respondent was the owner of the computer and that the computer had only one user account. In argument, Crown counsel reviewed the forensic evidence and then stressed that there was not "one iota" of evidence the computer had been used by anyone else. Despite the fact that there was no evidence the Respondent was the user, the Crown argued that to infer someone else used the computer would be pure speculation and would be in error.[7]

ii) The Trial Judge's Findings

[10] The trial judge acquitted the Respondent of accessing and distributing the child pornography but found him guilty of one count of possession. The trial judge expressly based this finding solely upon the evidence that the Respondent owned the computer. He wrote:

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[6] *Appellant's Record* Vol. 1, "AR1" Part 3, Tab A, pp 171-172, 190-191, 193-194. [AR1, TAB 3A]
[7] Final Submissions by Ms. Reese in the Court of Queen's Bench of Alberta, March 27, 2013, *Appellant's Record*, Vol. 2, "AR2", Part III, Tab E, p 105, lines 9-16. [AR2, TAB 3E]

> The child pornography was saved in the iTunes "Music" folder. These are the underlying data files. It was not just cached without the computer operator's knowledge. **Because the child pornography is located on the Computer, and the Computer, by his own admission belongs to the accused, this Court finds beyond a reasonable doubt that the accused was in possession of child pornography**. The accused knew the nature of the material, had the intention to possess it, and had the necessary control over it. Thus, according to *Daniels*, he had possession. [Emphasis added.]

[11] At the conclusion of his reasons, the trial judge identified some (but not all) of the Respondents arguments.[8] Specifically the trial judge noted:

- There was no evidence that the Respondent was the computer's user when the offending materials were downloaded or viewed;
- That anyone could have used the Respondent's computer in his absence, and
- The Crown did not (in the trial judge's words) "proffer adequate evidence" regarding who lived in the Respondent's house.[9]

[12] Despite the paucity of evidence before him, the trial judge dismissed the Respondent's arguments. The Court expressly refused to entertain the possibility of a reasonable doubt because the Respondent had failed to lead any evidence that someone else downloaded the images. The trial judge stated:

> As this Court mentioned earlier in these reasons, the cautions that courts have given concerning the use of speculative evidence cuts both ways. The accused has presented this Court with many different hypothetical scenarios in the hopes that this Court will not be convinced beyond a reasonable doubt that he is guilty of the offences with which the Crown has charged him. However, this Court has no evidence before it that would support these hypothetical scenarios.[10]

The Court then summarized the evidence relevant to possession (as outlined above) and made the following finding of guilt:

> [T]his Court finds beyond a reasonable doubt that it was the accused who was the Computer's user when the child pornography was downloaded to the Computer. Most importantly, it finds beyond a reasonable doubt that the accused was aware that the child pornography resided on the Computer.[11]

iii) Decision of the Appellate Court

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[8] In the closing arguments at trial, the Respondent provided an in depth analysis of the facts and highlighted the numerous the gaps in the evidentiary foundation. See the Final Submissions by Mr. McKay in the Court of Queen's Bench of Alberta, March 27, 2013, *Appellant's Record*, Vol. 2, Part III, Tab E, at pp 115-125. [AR2, TAB 3E]
[9] *Trial Judge's Reasons* at paras 78-80. [AR1, TAB 1B]
[10] *Trial Judge's Reasons* at para 66. [AR1, TAB 1B]
[11] *Trial Judge's Reasons* at para 85. [AR1, TAB 1B]

[13] The Respondent advanced three grounds on appeal; two were in relation to the Respondent's *Charter* motions and the third was that the trial judge had erred in finding the offence of possession had been proven beyond a reasonable doubt. The Respondent argued the trial judge failed to appreciate the onus placed on the Crown in a circumstantial case and that convicting the Respondent in the absence of virtually any evidence (other than ownership) was a clear error.

[14] The Appellate Court found that the trial judge had misstated the relevant law and shifted the burden of proof to the accused.[12] After reviewing the evidence, the Appellate Court also found that the conviction was unreasonable and entered an acquittal.[13]

Part II – Statement of the Questions in Issue

Issue 1: Where the Crown's evidence is circumstantial, does the rule in *Hodge's Case* mandate an acquittal where there is an innocent possibility not based in any actual evidence? Put another way, must the Crown disprove all innocent possibilities, whether or not there is any evidence to support them?

> **Respondent's Position:** This question is based on a misapprehension of the relevant law and does not reflect any error by the Appellate Court. The Appellate Court did not require the Crown to disprove all innocent possibilities regardless of whether or not there is any evidence to support them. Rather, the issue is whether the Appellate Court correctly found that the trial judge erred in law and rendered an unreasonable verdict.

Issue 2: Before a case of possession of child pornography can go to a trier of fact, must the Crown prove, beyond any hypothetical possibility, that the accused had exclusive access to the computer throughout the period over which the pornography was downloaded?

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[12] *R v Villaroman*, 2015 ABCA 104, [2015] AJ No 293, Appellant's Record, Vol 1, Part 1, Tab D, pp 70-76 [*ABCA Reasons*] at para 20. [AR1, TAB 1D]
[13] *ABCA Reasons* at para 38. [AR1, TAB 1D]

Respondent's Position: The Appellate Court did not impose this requirement or create this standard. Therefore, this does not constitute an error of law available for this Honourable Court's intervention.

Part III – Statement of Argument

1. Introduction

[15] The trial judge's reasons disclose significant legal errors. A detailed analysis of the trial judge's decision is required in order to properly appreciate why appellate intervention was required. In his recitation of the law, the trial judge drew on legal principles from inapplicable sources and relied on cases that have long been overruled. He misdirected himself on how to draw inferences and assess reasonable doubt and decided the case using the law relevant to preliminary inquiries. This led him to reverse the burden of proof and render an unreasonable verdict.

[16] The Appellate Court recognized these errors and corrected them. Specifically, the Appellate Court explained how the trial judge's approach offended the presumption of innocence[14] and held that guilt is not proven where gaps in the evidence are capable of raising a reasonable doubt.[15] In support of this principle, the Appellate Court cited this Court's decision in *R v Lifchus* and this approach discloses no error. The Appellate Court then considered the evidentiary record and held that the trial judge's verdict was unreasonable pursuant to *Yebes*/*Biniaris*. Again, the Appellate Court was right.

[17] The Appellant claims the Appellate Court required the Crown to "disprove everything" and the effect of the judgment is to create a "mandatory checklist" of items that must be proven to establish guilt in a digital possession case. The Appellant's argument is largely based upon its claim that an "innocent possibility" (i.e. reasonable doubt) must be founded in evidence. The Appellant argues that "conclusions with no foundation in evidence are not rational ones" and any inference of innocence made without an evidentiary foundation constitutes "speculation" or "conjecture."[16] According to this formulation, the Crown need only lead a *prima facie* case and establish that guilt is "an inference" available on the evidence before the burden shifts to the

[14] *ABCA Reasons* at para 14. [AR1, TAB 1D]
[15] *ABCA Reasons* at para 19. [AR1, TAB 1D]
[16] *Appellant's Factum* at para 43.

accused to prove his innocence. The Appellant uses this understanding of the law to argue that the Appellate Court must have committed several errors (which are not found on the face of the Appellate Court judgment) in order to overturn the Respondent's acquittal. The Respondent submits that the Appellant has committed the same legal errors as the trial judge and the position it has taken as a result is unsustainable.

[18] The Appellant also advances a lengthy and esoteric discussion of the history of the rule in *Hodge's Case* for the purpose of urging this Court to re-visit its decision in *R v Griffin.* The Respondent submits that the Appellant's objections to *Griffin* are unfounded and to accede to the Appellant's submissions on this point would dramatically lower the standard of proof in criminal cases and heavily erode the presumption of innocence.

2. The Errors in the Trial Judge's Decision

[19] The trial judge's critical legal error was that he misdirected himself on how to draw inferences and assess reasonable doubt. His statement of the law in this area was highly problematic the following reasons:

- **The trial judge drew from inapplicable sources** – in his statement of the law, the trial judge relied almost solely on passages taken from authorities dealing with *certiorari* applications to quash orders to stand trial. As this Court is well aware, the standard of review on *certiorari* applications is limited to jurisdictional errors. At preliminary inquiry, "an inference" of guilt is sufficient and the presumption of innocence does not apply.

- **The trial judge cited dated and incorrect law** – the trial judge erred in his reliance on the "proven facts" formulation of reasonable doubt set out in *R v McIver*.[17] As the Crown concedes, this is an incorrect statement of law that is contrary to the presumption of innocence and has since been overruled.

- **The trial judge failed to consider binding jurisprudence** – aside from a passing reference to *R v Lifchus*, the trial judge failed to cite any of the binding statements of law from this Court.[18]

- **The trial judge reversed the burden of proof** – the trial judge expressly shifted the burden of proof to the Respondent and failed to give effect to the presumption of innocence.

[17] *Trial Judge's Reasons* at para 49. [AR1, TAB 1B]
[18] *R v Griffin, supra* note 1, [ABA, TAB 17] *R v Walker, supra* note 1,[RBA, TAB 9] *R v JMH, supra* note 1, [RBA, TAB 4] *R v Khela, supra* note *1* [ABA, TAB 23] and the relevant portions of *R v Lifchus, supra* note *1*. [ABA, TAB 25]

(i) The Trial Judge's Articulation of the Question Before Him

[20] The manner in which the trial judge stated the key question before him set the judge on his erroneous path of analysis. The trial judge wrote:

> The Crown's counsel and the accused spent a great deal of time arguing about the inferences that this Court may or may not draw from the evidence that Mr. Sopczak and Mr. LaFontaine provided. Essentially, the arguments may be boiled down to the simple question of whether the totality of the evidence that the Crown has presented to this Court supports **an inference** that the accused committed the offences with which the Crown has charged him. Of course, the inferences that this Court draws from the evidence must satisfy it beyond a reasonable doubt that the accused committed the offences with which the Crown has charged him, based on the Supreme Court of Canada's exhortation in *R. v. Lifcus*, [sic] [1997] 3 SCR 320.[19] [Emphasis added.]

Although the trial judge used the words "beyond a reasonable doubt" his misstatement of the relevant law effectively rendered the standard meaningless and required the accused to positively establish his innocence.

(ii) The Trial Judge's Approach to Inferences

[21] The trial judge instructed himself on how to draw inferences by stating "[t]his Court cannot rely on speculation to support any inferences it might draw. The inferences are drawn from the evidence that the Crown presents to it."[20] In support of this proposition, he cited the following passage from the Ontario Superior Court of Justice case of *R v Latif:*[21]

> [T]here is a considerable difference between speculation and inference, inference being "a truth or proposition drawn from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be establish [sic] is deduced as a logical consequence from other facts or a state of facts already proved or admitted."

That case involved a *certiorari* application to quash an order committing an accused to stand trial. The relevant question was whether the totality of the Crown's evidence at the preliminary inquiry could support "an inference" of guilt thus meeting the test for committal to stand trial.

[22] The trial judge then moved to the issue of "speculation" which he defined as the process

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[19] *Trial Judge's Reasons* at para 43. [AR1, TAB 1B]
[20] *Trial Judge's Reasons* at para 45. [AR1, TAB 1B]
[21] *R v Latif*, [2004] OJ No 5891 at para 4, 65 WCB (2d) 69 [RBA, TAB 5], aff'd (2005), 66 WCB (2d) 327, [2005] OJ No 2952.

of "forming a theory or conjecture without factual basis."[22] He cited two further Ontario Superior Court of Justice cases (*R v Mullings*[23] and *R v Munoz*[24]) and reproduced the following passage from *R v Munoz*:

> Supposition or conjecture is no substitute for evidence and cannot be relied upon as the basis for a reasonably drawn inference. Therefore, it is not enough simply to create a hypothetical narrative that, however speculative, could possibly link the primary fact or facts to the inference or inferences sought to be drawn. As Fairgrieve J. noted in R. v. Ruiz, [2000] O.J. No. 2713 (Ont. C.J.) at para. 3, "Simply because a possibility cannot be excluded does not necessarily mean that a reasonable trier could be justified in reaching such a conclusion on the evidence."[25]

Again, these cases were both decisions on applications for *certiorari* made after preliminary inquiries. The comments made therein expressly addressed the issue of what the Crown must do to satisfy the test for committal.

[23] The trial judge's reliance on these cases caused him to fall into legal error. This is evidenced by his indication that he intended to apply these principles to any arguments the accused might advance. He stated:

> These cautions cut both ways. In other words, the Crown cannot ask this Court to rely on suppositions or conjecture to draw inferences that the accused committed the offences with which it has charged him. Similarly, the accused cannot ask this Court to rely on supposition or conjecture, that flows from a purely hypothetical narrative to conclude that the Crown has not proven he is guilty of the offences with which the Crown has charged him.[26]

The trial judge cited this Court's judgment in *R v Paul*[27] in support of this proposition. It is relevant to note that *R v Paul* was an appeal from a successful application for a non-suit. The question before the Court was not whether there was sufficient evidence for a conviction, but rather whether there was even sufficient evidence for the Court to weigh at the end of the Crown's case.

[24] In instructing himself on how to draw inferences from circumstantial evidence, the trial

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[22] *Trial Judge's Reasons* at para 46. [AR1, TAB 1B]
[23] *R v Mullings*, [2005] OJ No 2962 at para 33, 2005 CanLII 24763 (ONCJ) [*R v Mullings*] [RBA, TAB 7].
[24] *R v Munoz* (2006), 86 OR (3d) 134 at para 31, 205 CCC (3d) 70 (ONCJ) [*R v Munoz*] [RBA, TAB 8].
[25] *Trial Judge's Reasons* at para 46. [AR1, TAB 1B]
[26] *Trial Judge's Reasons* at para 47. [AR1, TAB 1B]
[27] *R v Paul*, [1975] SCJ No 114, [1977] 1 SCR 181 [*R v Paul*] [ABA, TAB 33].

judge cited the following proposition from *R v Mullings*:

> Where the evidence is circumstantial in regards to some elements of the offence, the judge's task is different. The question is whether the elements the Crown seeks to establish by circumstantial evidence may reasonably be inferred from the circumstantial evidence. It requires the judge to engage in a limited weighing of the circumstantial evidence, to determine whether it is capable of bridging the inferential gap between the evidence and the matter to be established, whether it is reasonably capable of supporting the inferences the Crown will ask the jury to draw. [Emphasis added by the trial judge.]

This is, of course, the test established by this Court in *R v Arcuri*.[28] It deals with the test for committal to stand trial when the Crown's case is based on circumstantial evidence. It is not applicable at trial. It speaks of a "limited weighing" of the evidence and does not engage any of the principles relevant to the presumption of innocence and guilt beyond a reasonable doubt (i.e. those found in *R v Griffin, R v Yebes, R v Lifchus* and *R v Khela*).

[25] In further support of the statement of law in *R v Mullings*, the trial judge went on to cite the "proven facts" formulation of reasonable doubt found in *R v McIver*.[29] As the Crown concedes at paragraph 48 of its factum, this formulation is wrong and has been overruled.

[26] Finally, the trial judge also cited the Ontario Court of Appeal extradition case of *United States v Huynh*[30] as further authority for his legal analysis on permissible inferences. This was an appeal from an order of committal for extradition in a drug and money laundering case. As per section 29(1) of the *Extradition Act*,[31] the relevant test in that case was the test for committal at preliminary inquiry.

[27] There is nothing in the trial judge's reasons to indicate he appreciated that the test for committal to stand trial and guilt beyond a reasonable doubt are two very different standards.

(iii) Impact of The Trial Judge's Legal Analysis on his Findings of Fact

[28] After discussing the law, the trial judge went on to review the evidence and make findings. It is clear from his reasons that the trial judge's misdirection on the law led to critical

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[28] *R v Arcuri*, 2001 SCC 54 at para 23, [2001] SCJ 52 [*R v Arcuri*] [RBA, TAB 1].
[29] *Trial Judge's Reasons* at para 49. [AR1, TAB 1B]
[30] *United States v Huynh* (2005), 200 CCC (3d) 305, 66 WCB (2d) 680 (ONCA) [*United States v Huynh*] [RBA, TAB 11].
[31] *Extradition Act*, SC 1999, c 18 [not reproduced.]

errors when it was used to assess the evidence. Most importantly, it caused him to set aside the presumption of innocence and render the burden of proof essentially meaningless.

[29] As noted above, the trial judge found the Respondent guilty of possession based solely on his ownership of the computer. He held that "[b]ecause the child pornography is located on the Computer, and the Computer, by his own admission belongs to the accused, this Court finds beyond a reasonable doubt that the accused was in possession of child pornography."[32]

[30] In his concluding analysis on possession, the trial judge considered some (not all) of the Respondent's arguments on reasonable doubt. Specifically, the trial judge addressed the fact that (a) there was no evidence that the Respondent was the computer's user when the impugned materials were downloaded or viewed, (b) that anyone could have used the Respondent's computer in his absence, and (c) the Crown did not (in the trial judge's words) "proffer adequate evidence" regarding who lived in the Respondent's house.[33]

[31] In the factual circumstances of this case, the deficiencies raised by these arguments precluded any possible finding of knowledge (and thus possession). Aside from a cursory forensic analysis (which was basically limited to the impugned files themselves) the police did not conduct ***any*** investigation of the circumstances surrounding the offence. The only relevant evidence in the case was:

- That the Respondent owned the laptop computer;
- The laptop was not password protected;
- The files at issue existed;
- Some of the files were incomplete;
- The complete files were stored in a music folder;
- Some had been viewed and all had come to be on the computer *via* download using the Limewire software program.

[32] Despite the paucity of evidence, the trial judge dismissed the Respondent's arguments because the Respondent had not led any evidence to support them. The Court would not entertain a reasonable doubt based on a lack of evidence. He stated:

> As this Court mentioned earlier in these reasons, the cautions that courts have given concerning the use of speculative evidence cuts both ways. The accused has presented this Court with many different hypothetical scenarios

[32] *Trial Judge's Reasons* at para 68. [AR1, TAB 1B]
[33] *Trial Judge's Reasons* at paras 78-80. [AR1, TAB 1B]

> in the hopes that this Court will not be convinced beyond a reasonable doubt that he is guilty of the offences with which the Crown has charged him. However, this Court has no evidence before it that would support these hypothetical scenarios.[34]

[33] The critical issue with this finding is that none of the Respondent's submissions at trial were inconsistent with the Crown's evidence. Innocent explanations were readily consistent with the Crown's evidence and should have given rise to a reasonable doubt. The trial judge ultimately held as follows:

> This evidence, along with the testimony that Mr. LaFontaine and Mr. Sopczak provided **are sufficient to bridge the inferential gap and support the inferences that the Crown has asked this Court to draw**.
>
> Accordingly, **this Court finds beyond a reasonable doubt that it was the accused who was the Computer's user when the child pornography was downloaded to the Computer**. Most importantly, it finds beyond a reasonable doubt that the accused was aware that the child pornography resided on the Computer.[35] [Emphasis added.]

[34] The evidence in this case was not even sufficient to meet the test for committal. The Crown advanced a theory that the Respondent was guilty and did not lead any evidence that expressly contradicted that theory. The trial judge found that because the Respondent failed to rebut the Crown's allegation of guilt, he must be guilty. The trial judge failed to hold the Crown to the relevant standard of proof and rendered an unreasonable verdict.

3. The Appellate Court's Decision

[35] The Respondent submits that both the trial judge's legal errors and the unreasonable verdict they caused required intervention by the Appellate Court. The Respondent also submits there were no errors in the Appellate Court's legal or factual determinations.

(i.) The Question before the Appellate Court

[36] The unanimous panel of the Appellate Court framed the main question in the appeal as follows:

> Can the accused rely upon an inference or hypothesis leading to an innocent explanation for the evidence, if it is not based on any evidence, or not based upon proven facts? For conviction, we require that the circumstantial evidence be incompatible with any reasonable state of facts which would not

[34] *Trial Judge's Reasons* at para 66. [AR1, TAB 1B]
[35] *Trial Judge's Reasons* at para 85. [AR1, TAB 1B]

> involve the accused's commission of the crime. Must that innocent state of facts be based upon the evidence? Or can it be based upon lack of evidence?[36]

The Appellate Court noted that both the trial judge and the Respondent Crown were of the view that evidence is required to support an inference of innocence while the defence argued that such a conclusion could be based on a lack of evidence.[37]

[37] The Court also considered the question of whether any rule on this issue should be the same for the Crown and the defence. The Court concluded that such an approach would offend the presumption of innocence and any doubt must only work in favour of the defence.[38] The Court qualified this statement by noting that in order for any doubt to have effect, it must be a reasonable doubt and the case law is clear that speculation will not suffice.[39] In specifically addressing the issue of "speculation," the Court observed that when it comes to an innocent possibility, the distinction between "conjecture" and an "inference" involves more than the strict presence or absence of evidence. It involves a substantive assessment of the likelihood or unlikelihood of the proposed innocent explanation in the circumstances. This discussion was a direct response to the trial judge's refusal to find a reasonable doubt based on a lack of evidence.

[38] The Appellate Court next addressed the issue of whether proving motive and opportunity might suffice to prove guilt (the issue in *R v Yebes*). This discussion was relevant to the appeal because of the trial judge's finding that the accused was guilty of possession because he owned the computer[40] and his finding that the Respondent was the computer's user when the materials were downloaded[41] in the absence of any evidence on these points.

[39] The Appellate Court illustrated the fundamental problem with finding guilt in an evidentiary vacuum using a simple example: if a number of people had the same opportunity to commit an offence, how can the Crown and trial judge single out only one of them for prosecuting and conviction. The Appellate Court's example was readily applicable to this case because other than ownership, there was no evidence that tended to identify the Respondent as

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[36] *ABCA Reasons* at para 10. [AR1, TAB 1D]
[37] *ABCA Reasons* at para 11-12. [AR1, TAB 1D]
[38] *ABCA Reasons* at para 14. [AR1, TAB 1D]
[39] *ABCA Reasons* at para 15. [AR1, TAB 1D]
[40] *Trial Judge's Reasons* at para 68. [AR1, TAB 1B]
[41] *Trial Judge's Reasons* at para 85. [AR1, TAB 1B]

the computer's user. The police did not do *any* investigation other than a cursory forensic analysis. There was *no evidence* regarding how many people *ever* used or had access to the computer and there was *no evidence* that the Respondent himself used it (much less at the material times). How could he be singled out for guilt in such circumstances?

[40] Ultimately, the Appellate Court answered the question of whether a reasonable doubt could be raised by an absence of evidence by relying on this Honourable Court's decision in *Lifchus*. The Appellate Court held as follows:

> We have trouble seeing that circumstantial evidence could prove guilt where it leaves a reasonable (not remote) possibility that the event occurred in a way not involving the accused. A jury cannot act on an unreasonable inference. It is not necessary that there be actual evidence of that innocent possibility; the onus is on the Crown to disprove it. The well-known *Lifchus* test confirms that. The trier of fact must find no evidence, and no gap in the evidence, which raises a reasonable doubt. Such gaps include a gap in the evidential support for an inference needed to prove an element of the offence. That is, of course, a factual question for the trier of fact.[42]

The Disposition of the Appeal

[41] Having corrected the relevant legal issue, the Appellate Court went on to determine the proper disposition of the appeal. The Appellate Court reviewed the nature of the evidence and lack thereof. The Appellate Court also reviewed the various questions raised and left unanswered by the Crown's case. The Appellate Court suggested some evidence that might have been helpful to the Crown in proving their case (i.e. evidence about who lived in the Respondent's house and who used the computer). The purpose of this discussion was not to create some draconian "checklist" as the Appellant now alleges, but rather to demonstrate that there was nothing in the evidentiary record reasonably capable of sustaining a conviction.

[42] Based on the paucity of evidence before the trial judge, the Appellate Court concluded that no properly instructed jury, acting reasonably and judicially could possibly find the Respondent had knowledge of the offending materials (and thus possession). The Respondent submits that this was the correct disposition of this appeal and it ought not be disturbed.

Issue 1: Where the Crown's evidence is circumstantial, does the rule in *Hodge's Case* mandate an acquittal where there is an innocent possibility not based in any actual

[42] *ABCA Reasons* at para 19. [AR1, TAB 1D]

evidence? Put another way, must the Crown disprove all innocent possibilities, whether or not there is any evidence to support them?

[43] The first issue the Appellant advances is whether the rule in *Hodge's Case* mandates an acquittal where there is "an innocent possibility not based in any actual evidence." The Appellant then asks whether the Crown must "disprove all innocent possibilities whether or not there is any evidence to support them." The Appellant suggests both questions be answered in the negative for three reasons: 1) the Crown is not required to disprove all innocent possibilities, 2) speculation is not permitted, and 3) conclusions with no foundation in the evidence are not rational ones.

[44] The first two propositions advanced by the Appellant are trite and do nothing to assist the Appellant's arguments in this case. The Respondent agrees that the Crown is not required to disprove all innocent possibilities. However, the Respondent submits that the Crown is required to disprove all *reasonable* innocent possibilities regardless of whether they arise from the evidence or a lack thereof. The Respondent agrees that as a general principle, speculation and conjecture will not suffice when evidence is required. However, evidence is *not* required to give rise to a reasonable doubt.

[45] The thrust of the Appellant's argument rests on its third proposition: that conclusions with no foundation in the evidence are not rational ones. While this is true in relation to drawing inferences to support a finding of guilt, this Court has clearly held that this principle *does not* apply to inferences that could lead to a reasonable doubt. The Appellant's argument on this point disregards the presumption of innocence and asks this Court to modify the law so that the Crown and defence are held to the same evidentiary standards.

[46] The Respondent submits that the trial judge's decision contained clear errors in law that led to an unreasonable verdict. The Appellate Court simply identified and corrected these errors in a fashion consistent with this Court's jurisprudence. The Appellant has not demonstrated that the Appellate Court committed any legal or factual error and as such, there is no basis to disturb the Appellate Court's conclusions.

1. A Reasonable Doubt Need Not be based on Supporting Facts or Evidence

[47] In its first question to this Court, the Appellant asks whether an acquittal is required

where the circumstances of a case allow for "an innocent possibility not based in any actual evidence." The Respondent submits that the answer to this question must be yes.

[48] The manner in which a reasonable doubt may arise is a matter of settled law; this Court has clearly and unambiguously addressed the issue on a number of occasions. A reasonable doubt is not a finding of fact and does not require any evidentiary foundation; it arises because the Crown has failed to tender sufficient evidence. There is no such thing as an unreasonable acquittal[43] and the usual rule that a finding must be based in evidence does not apply to the reasonable doubt analysis.

[49] These concepts were explained by this Court in *R v Walker*. There, the unanimous Court adopted the following passage from Shape J.A.'s reasons in *R v Kendall*:

> A reasonable doubt need not rest upon the same sort of foundation of factual findings that is required to support a conviction. A reasonable doubt arises where an inadequate foundation has been laid.[44]

Further the Court stated that:

> **A major difference between the position of the Crown and the accused in a criminal trial, of course, is that the accused benefits from the presumption of innocence**. The intervener Attorney General of Ontario argues that "[t]he fact that the accused is presumed innocent doesn't derogate in any way from the judge's duty to correctly apply all applicable legal principles" (Factum, at para. 7). **This is true, so far as it goes, but whereas a conviction requires the prosecution to establish each of the factual elements of the offence beyond a reasonable doubt, no such requirement applies to an acquittal which, unlike a conviction, can rest simply on the *absence* of proof.**[45] [Emphasis added.]

[50] In *R v J.M.H.*, this Court again expressly considered the issue of whether a reasonable doubt must be based on the evidence before a trial judge. The unanimous Court cited its rulings in *Lifchus*, *Walker* and *Biniaris* and held that the usual rule that it is an error of law to make a finding of fact without supporting evidence does not apply to the reasonable doubt analysis. The relevant portion of the Court's decision in that case is as follows:

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[43] *R v Biniaris*, 2000 SCC 15, [2000] 1 SCR 381 at para 33 [*R v Biniaris*] [RBA, TAB 2].
[44] *R v Walker*, supra note 1 at para 26 citing Sharpe J.A. in *R v Kendall* (2005), [2005] OJ No 2457, 198 CCC (3d) 205 at para 98 [not reproduced].
[45] *R v Walker*, *ibid*, at para 22. [RBA, TAB 9]

1. It Is an Error of Law to Make a Finding of Fact for Which There Is No Evidence -- However, a Conclusion That the Trier of Fact Has a Reasonable Doubt Is Not a Finding of Fact for the Purposes of This Rule

> 25 It has long been recognized that it is an error of law to make a finding of fact for which there is no supporting evidence: *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at p. 604. **It does not follow from this principle, however, that an acquittal can be set aside on the basis that it is not supported by the evidence. An acquittal (absent some fact or element on which the accused bears the burden of proof) is not a finding of fact but instead a conclusion that the standard of persuasion beyond a reasonable doubt has not been met**. Moreover, as pointed out in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 39, **a reasonable doubt is logically derived from the evidence or absence of evidence**. Juries are properly so instructed and told that they may accept some, all or none of a witness's evidence: *Lifchus*, at paras. 30 and 36; Canadian Judicial Council, Model Jury Instructions, Part III Final Instructions, 9.4 Assessment of Evidence (online).
>
> 26 **The principle that it is an error of law to make a finding of fact for which there is no supporting evidence does not, in general, apply to a decision to acquit based on a reasonable doubt**. As Binnie J. put it in *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245, at para. 22:
>
> > A major difference between the position of the Crown and the accused in a criminal trial, of course, is that the accused benefits from the presumption of innocence... . [W]hereas a conviction requires the prosecution to establish each of the factual elements of the offence beyond a reasonable doubt, no such requirement applies to an acquittal which, unlike a conviction, can rest simply on the absence of proof. [Emphasis deleted.]
>
> 27 The point was expressed very clearly in *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 33: "... as a matter of law, **the concept of "unreasonable acquittal" is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt**."[46] [Emphasis added.]

This passage adopts the Court's comments in *Lifchus* (that doubt may be based on evidence or a lack of evidence[47]) and is consistent with the Court's statement in *Khela* (that it is an error of law to require an accused to "prove" the facts supporting his innocence). It is also in line with the

[46] *R v J.M.H.*, *supra* note 1 at paras 25-27. [RBA, TAB 4]
[47] *R v Lifchus*, *supra* note 1 at para 30. [ABA, TAB 25]

recent lower court of appeal decisions in *R v Bui* and *R v Pryce*.[48]

[51] The rules governing the assessment of reasonable doubt and drawing inferences are the same in all criminal cases regardless of whether the evidence is direct or circumstantial. Insofar as it applies to reasonable doubt or an inference about an "innocent possibility," the Appellant's claim that "conclusions with no foundation in the evidence are not rational ones" is plainly wrong. Such an approach ignores the presumption of innocence and invites the same errors as those committed by the trial judge.

2. Doubt created by an Evidentiary Vacuum is not "Speculation" or "Conjecture"

[52] In its factum, the Appellant claims that the Appellate Court required the Crown to disprove "every conjecture that could be entertained" and complains that the Crown was held to a standard of having to "disprove everything" which included inferences not founded upon "actual evidence."[49] The Appellant argues that a trial judge cannot acquit without "actual evidence" (as to do so would be to speculate) and the Crown should not be expected to disprove such speculation.[50] These arguments are based wholly on the proposition that 'inferences' arise from evidence and 'speculation' and 'conjecture' do not."[51]

[53] As explained above, a finding of reasonable doubt may be logically derived from an absence of evidence; no factual or evidentiary foundation is required to support an acquittal and there is no such thing as an unreasonable acquittal. As a general rule, the Appellant is right to say that speculation and conjecture cannot take the place of cogent evidence. However, because of the presumption of innocence, this will only apply to an accused where the Crown has already laid an evidentiary foundation that is sufficient for a conviction. In such a situation, it would not be sufficient for an accused to simply posit speculative or remote "what if" scenarios. This is particularly true where the "what if" scenarios are expressly inconsistent with the Crown's otherwise uncontradicted evidence.[52] This does not apply to the circumstances of this case.

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[48] *R v Khela*, 2009 SCC 4 at para 58, [2009] 1 SCR 104 **[**ABA, TAB 23]. *R v Bui*, 2014 ONCA 614 at paras 24-32, [2014] OJ No 4003 [ABA, TAB 10]. *R v Pryce* (appeal by Defaveri), 2014 BCCA 370 at para 11, [2014] BCJ No 2456 [ABA TAB 35].
[49] *Appellant's Factum* at paras 45 and 51.
[50] *Appellant's Factum* at paras 50 and 51.
[51] *Appellant's Factum* at para 44.
[52] This was the case in *R v Dubois*, [1979] AJ No 848, 49 C.C.C. (2d) 501 [RBA, TAB 3]. In this case, the accused's "innocent explanation" could not account for significant inculpatory forensic evidence such as blood and hair on the

Because of the sheer lack of evidence on the issue of possession, "innocent possibilities" arose readily from the Crown's evidentiary foundation. Innocent explanations (i.e. that the Respondent had nothing to do with the acquisition of the impugned materials and did not know they were there) were entirely consistent with every piece of evidence in the Crown's case.

[54] The Appellant accuses the Appellate Court of "miss[ing] the distinction" between inferences and speculation and erring by "entertaining its own conjecture." The Respondent submits that when the Appellate Court's decision is read with a proper understanding of what does and does not constitute "speculation" this argument must be dismissed.

3. The Application of the Law to Circumstantial Evidence

[55] The Respondent submits that the rule in *Hodge's Case* and the academic debates surrounding it are not particularly relevant to this appeal. What is relevant are this Court's statements of law in *R v Griffin* and *R v Mayuran*.

[56] The Appellant argues that this Court's decision in *R v Griffin* is a "Chimera" (that is to say, a fire-breathing amalgamation of a goat, dragon and lion[53]) and that causes more problems than it solves. The Respondent submits that the Appellant is trying to create an issue where none exists and *R v Griffin* does not warrant revision.

[57] The principles embodied in *R v Griffin* are important to ensure the presumption of innocence is meaningfully maintained and the Crown is held to a standard of proof beyond a reasonable doubt. The passage at issue in *R v Griffin*, is as follows:

> We have long departed from any legal requirement for a "special instruction" on circumstantial evidence, even where the issue is one of identification […]. The essential component of an instruction on circumstantial evidence is to instill in the jury that in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty. Imparting the necessary message to the jury may be achieved in different ways […]."[54] [Citations omitted.]

[58] The proper function of the statement of law in *R v Griffin* was explained by this Court in

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instep of the accused's boots, blood on the back of the accused's trousers, the accused's shirt (which was found lying near the deceased) and the fact that fibers matching that shirt were located under the deceased's fingernails.

[53] Homer, The Iliad, Book 6 (not reproduced).

[54] *R v Griffin*, *supra* note 1 at para 33. [ABA, TAB 17]

R v Mayuran.[55] The Court emphasized that while no specifically formulated recitation of the law is required in a circumstantial case, the finder of fact must be properly instructed on the nature of circumstantial evidence, the inferences that can be properly drawn from it and the burden of proof. The relevant passage in this regard is as follows:

> However this Court explained in *R. v. Griffin*, [2009] 2 S.C.R. 42, that "[w]e have long departed from any legal requirement for a 'special instruction' on circumstantial evidence". **What is important is that in cases that rely entirely on circumstantial evidence, the jury is made aware of how they can use that evidence to establish guilt beyond a reasonable doubt. The trial judge in this case explained to the jury the nature of circumstantial evidence, the inferences that can properly be drawn from that evidence, and the burden of proof beyond reasonable doubt.** In my view, the instruction satisfied the test in Griffin (see also *R. v. Fleet* (1997), 120 C.C.C. (3d) 457 (Ont. C.A.), at para. 20, cited in *Griffin*, at para. 33).

[59] The legal principle articulated in *Griffin* and *Mayuran* is not a Chimera. The statement in *Griffin* is "simply a category of analysis used to reach a conclusion regarding proof beyond a reasonable doubt."[56] It is designed to assist the finder of fact in understanding the circumstances under which he or she can properly, reasonably and judicially arrive at a verdict of guilt. The presumption of innocence means that guilt cannot be found if the evidence allows for a rational innocent possibility. The Respondent submits that there is no meaningful difference between the words "rational" and "reasonable." A rational doubt is a reasonable doubt.

[60] Contrary to the view of the Appellant and the trial judge, the Crown in a criminal case is required to establish more than the availability of guilt as an inference. The Appellant's position in this appeal is an attempt to persuade the Court to modify the burden of proof so that guilt can be established on a *prima facie* case. This would dramatically lower the standard of proof and shift the burden to the accused to prove the existence of a reasonable doubt.

[61] The statement of law in *R v Griffin* is crucial to ensuring the standard of proof beyond a reasonable doubt is maintained. It provides a clear and concise way for a trier of fact to satisfy itself that the Crown has met its burden. When the trial decision in this case is considered, the importance of such an analytical tool is clear. The trial judge did not cite the law in *Griffin*. He fatally and repeatedly erred in instructing himself on circumstantial evidence and the inferences

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[55] *R v Mayuran,* [2012] 2 SCR 162, [2012] 2 RCS 162 [*R v Mayuran*] [ABA TAB 26].
[56] *R v Dipnarine*, 2014 ABCA 328, [2014] AJ No 1102 at para 23 [not reproduced].

that can properly be drawn from it and as a result, the decision he rendered was unreasonable and required appellate intervention.

[62] The Appellant also places great emphasis on the cases of *R v Mitchell* and *R v Cooper*[57] and urges this Court to strictly limit the application of the principles in *Griffin* and *Mayuran* to *actus reus*. The Respondent respectfully submits that it is critical for the finder of fact to appreciate the nature of circumstantial evidence, the inferences that can properly be drawn from that evidence, and the burden of proof beyond reasonable doubt regardless of whether or not they are dealing with *mens rea* or *actus reus*. *R v Mitchell* and *R v Cooper* must be read in light of this Court's modifications to the Rule in *Hodge's Case* and are no longer relevant to the law on circumstantial evidence.

[63] The Respondent respectfully submits that the Crown's argument on the first question does not disclose any error on the part of the Appellate Court.

Issue 2: Before a case of possession of child pornography can go to a trier of fact, must the Crown prove, beyond any hypothetical possibility, that the accused had exclusive access to the computer throughout the period over which the pornography was downloaded?

[64] The second question the Appellant poses to the Court is whether the Crown must prove (beyond any hypothetical possibility) that an accused had exclusive access to the computer throughout the period the offending materials were downloaded in order for a case to go to the trier of fact. The Appellant suggests this question should be answered in the negative because 1) proving possession does not require proof of downloading or exclusive access and 2) the Rule in *Hodge's Case* does not apply to individual pieces of evidence, does not apply to *mens rea* and does not require disproof of all hypothetical possibilities.

[65] The Respondent submits that the Appellant has misread the Appellate Court's decision and advanced a question that is not raised by the circumstances of this case.

1. The Appellate Court's Disposition of the Appeal

[66] To determine the proper disposition of the appeal, the Appellate Court considered whether the trial judge had rendered an unreasonable verdict. The Appellate Court reviewed the

[57] *R v Mitchell*, [1964] SCR 471 at pp 477-480, 1964 CarswellBC 67 [ABA, TAB 28] and *R v Cooper*, [1978] 1 SCR 860 at pp 864-865, 874, 877-878, 1977 CarswellOnt 10 [ABA, TAB 12].

evidence and applied the *Yebes*/*Biniaris* test. This was the correct test to apply in these circumstances and the Appellate Court's conclusions readily arise from the evidentiary record.

[67] The Appellate Court did not invoke the rule in *Hodge's Case* (or *Griffin*) to find the verdict in this case was unreasonable. It simply considered whether or not an inference of guilt could possibly arise from the evidentiary record. If such an inference was possible, the analysis would end and the matter would be remitted back for a retrial. The trier of fact would then determine whether or not guilt was the only available inference. The Appellate Court correctly found that the evidence in this case was insufficient to give rise to even an inference of guilt. As such, the verdict was unreasonable. The Appellate Court's never suggested that proof of downloading or exclusive access were required to find possession. The Respondent submits that the Appellant has misread the court's judgment and misapprehended the role that these issues played in this case.

i) Evidentiary Gaps Were Relevant

[68] In its factum, the Appellant claims that the Appellate Court overturned the conviction because there was "no evidence on the long list of topics"[58] identified by the Court. The Appellant then laments that this was unfair because:

> [t]o have disproved all the list items, the Crown would have needed to prove who had theoretical access to the computer for every minute of its existence from September 16 to November 23, 2009. That is, the police would have needed to know where the computer was, and how many people were nearby, in the three months before the police ever knew the computer existed.[59]

[69] This reading of the Appellate Court's decision is simply unfounded. The Appellate Court entered an acquittal because the trial Crown led virtually no evidence on the issue of possession. As a result, there was nothing in the record capable of sustaining a conviction.

[70] The Appellate Court did not create a "checklist." They simply reviewed the factual issues relevant to proving possession and highlighted the fact that the Crown's "skimpy" case left numerous critical questions unanswered. As outlined above, such questions may properly arise from an insufficient evidentiary foundation and do not constitute "speculation" as the Appellant argues.

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[58] *Appellant's Factum* at para 38.
[59] *Appellant's Factum* at para 39.

ii) The Role of Exclusive Possession in this Case

[71] Neither the Respondent nor the Appellate Court have ever suggested that the Crown is required to prove a long period of exclusive possession in order to prove possession of a digital computer file. This is not the law and is not a question raised on the facts of this case.

[72] At trial, the issue of exclusive possession was argued because of the paucity of other evidence. As per this Court's articulation of the law in *R v Yebes*, where the evidence against an accused is primarily evidence of opportunity, the Crown will be required to demonstrate that the accused had exclusive opportunity to commit the offence to sustain a conviction.[60] In this case, the ***only*** reason the Respondent was implicated in the offence was because he owned the computer (and thus, presumably had some opportunity to use it). Absent ***any*** other evidence tending to identify the Respondent as the offender, the Crown needed to lead some evidence to establish (beyond a reasonable doubt) that it was him and not someone else who committed the offence. In the absence of such evidence, a properly instructed trier of fact would have to acquit.

iii) The Alleged Focus on Downloading

[73] The Appellate Court framed the question on possession as "whether the accused put the pornography on the computer or knew it was there."[61] This was a direct response to the two findings that the trial judge made to convict the Respondent.[62] As outlined above, the trial judge specifically found that "it was the accused who was the Computer's user when the child pornography was downloaded" and "most importantly, […] the accused was aware that the child pornography resided on the Computer."[63]

[74] The Appellant argues that the Appellate Court "misdirected itself by focusing on downloading, which was not the issue"[64] and that the Court "overturned the conviction on its analysis of downloading, not of knowledge."[65] Again, the Respondent submits that this reading of the Court of Appeal's judgment is unfounded and the Appellant has misapprehended the relevance of the issues of downloading in this trial.

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[60] *R v Yebes*, [1987] 2 SCR 168, [1987] SCJ No 51 at para 26 [*R v Yebes*] [RBA, TAB 10].
[61] *ABCA's* Reasons at para 2. [AR1, TAB 1D]
[62] *Trial Judge's Reasons* at para 85. [AR1, TAB 1B]
[63] *ABCA Reasons* at para 86. [AR1, TAB 1D]
[64] *Appellant's Factum* at para 52.
[65] *Appellant's Factum* at para 54.

[75] At trial, the fact that the files were downloaded from the Internet was important for two reasons. The first was that it was the ***only*** evidence the Court had about how the files came to be on the computer and was the only evidence capable of distinguishing the files from *cached* files (which would be relevant to a charge of accessing rather than possession).[66] The second reason downloading was important was because many of the files were incomplete. The act of initiating a download is relevant to establishing the requisite element of control over a prohibited image and the offence commences at the moment the download begins even if it is later interrupted.[67]

[76] The issue of downloading was important in the appeal because the trial judge specifically found as fact that the Respondent was the computer's user ***when the files were downloaded***.[68] This finding was the only finding of fact capable of supporting a conviction. The Appellate Court needed to evaluate the reasonableness of this finding in order to properly decide the appeal. Given the huge evidentiary gaps in the Crown's case, the trial judge's finding in this regard was clearly unsustainable and the Court of Appeal's decision in this regard ought not be disturbed.

2. Conclusion on Question 2

[77] The fundamental problem with the Appellant's arguments is that they do not account for the principles enunciated by this Court in cases such as *R v Walker* and *R v JMH*. The Appellant does not appear to contemplate how these principles would have impacted the Appellate Court's evaluation of the record. The Appellate Court was tasked with determining whether a properly instructed jury could possibly convict on the evidence led at trial. Such a jury would know that an evidentiary foundation is not required to give rise to a reasonable doubt and that having a doubt in the face of insufficient evidence is not speculation. The Respondent submits that when these principles are taken into account, the Appellate Court's judgment is straight-forward and does not require any convoluted reasoning to understand.

[78] The Appellant claims that if this decision goes uncorrected, convictions in child pornography cases will be "all but impossible."[69] This is an unsupportable floodgates argument designed to entice intervention in a case where the Crown's evidence failed to support guilt as the only reasonable inference. The Crown remains free to prove knowledge and possession in

[66] *R v Morelli*, 2010 SCC 8 at para 35 [2010] SCJ No 8 [*R v Morelli*]. [RBA, TAB 6]
[67] *Ibid* at paras 23, 142. [RBA, TAB 6]
[68] *Trial Judge's Reasons* at para 85 [AR1, TAB 1B]
[69] *Appellant's Factum* at para 92.

any number of ways. Should the police actually choose to investigate rather than simply seizing a computer from a third party and laying charges, the Crown might have a wealth of information at its disposal to satisfy its burden. The solution is not to alter the law to apply an evidentiary burden on the accused person when the Crown proves ownership of a computer.

[79] The Crown routinely leads evidence to establish the likely user of a computer. Gathering such evidence is neither complicated nor is it particularly difficult. Such evidence often addresses the factual issues raised by the Appellate Court in this case. Here, the Crown chose not to lead any extraneous evidence and should not be allowed to take advantage of the factual uncertainties created by such an approach.

[80] With respect to the forensic examination, the Crown very often leads evidence capable of establishing who used a computer at a given time or to show any user of the computer would be aware of the offending materials. Many of the cases in this area involve evidence about things like email, chat or Facebook accounts that were active at or near the times offending materials were downloaded or viewed. Possession might also be established by independent of evidence of viewing or downloading; if icons pointing to the illegal files were found prominently located on a computer's desktop, knowledge might be inferred for any user.[70] In this case, there was no such evidence. There was no evidence pointing to any particular user and no indication the files would be noticeable where they were stored. Only 17 of the files were complete. There was no evidence regarding whether these were the only files in the Music folder or if they were 17 of several hundred thousand.

[81] The Appellate Court specifically said that if there had been even the most basic evidence about the Respondent's living arrangement and the storage of the computer, they likely would have declined to interfere with the conviction.[71] The Appellate Court did not require proof to a standard of absolute certainty or proof beyond an imaginary or frivolous doubt. It simply applied the relevant test and required some evidence capable of sustaining a conviction before ordering a re-trial. This case does nothing but correct the trial judge's erroneous recitation of the law and remind the Crown that it needs to prove guilt beyond a reasonable doubt. The meaning of such a doubt remains the same. It must be based on reasoning and common sense and it must be

[70] *R v Morelli*, supra note 65 at para 23. [RBA, TAB 6]
[71] *ABCA's Reasons* at para 30. [AR1, TAB 1D]

logically connected to the evidence or lack thereof.[72] There was nothing in the record expressly inconsistent with the Respondent's innocence and his acquittal ought not be disturbed.

PART IV – COSTS

[82] The Respondent makes no submissions regarding costs.

PART V – ORDER SOUGHT

[83] The Respondent asks that the appeal be dismissed.

[84] In the alternative, should the appeal be allowed, the Respondent asks the matter be remanded back to the Alberta Court of Appeal to determine the remaining issues.

ALL OF WHICH IS RESPECTFULLY SUBMITTED DATED at Calgary, Alberta, this ___ day of February, 2016.

IAN D MCKAY
COUNSEL FOR THE RESPONDENT

HEATHER D FERG
COUNSEL FOR THE RESPONDENT

[72] *R v Rhee*, [2001] SCJ No 69, 2001 SCC 71 at para 20 [not reproduced], *R v Avetysan*, [2000] SCJ No 57, 2000 SCC 56 at para 10 [not reproduced].

PART VI - TABLE OF AUTHORITIES

TAB	RESPONDENT'S AUTHORITIES - REPRODUCED	Cited at Paragraph No.
1.	*R v Arcuri*, 2001 SCC 54 at para 23, [2001] SCJ 52	25
2.	*R v Biniaris*, 2000 SCC 15, [2000] 1 SCR 381 at para 33	49, 67
3.	*R v Dubois*, [1979] AJ No 848, 49 C.C.C. (2d) 501	54
4.	*R v J.M.H.*, 2011 SCC 45, [2011] 3 SCR 197	1, 2, 20, 51, 78
5.	*R v Latif*, [2004] OJ No 5891 at para 4, 65 WCB (2d) 69	22
6.	*R v Morelli*, 2010 SCC 8, [2010] SCJ No 8 at para 23, 35, 142	76, 81
7.	*R v Mullings*, [2005] OJ No 2962 at para 33, 2005 CanLII 24763 (ONCJ)	23, 25
8.	*R v Munoz* (2006), 86 OR (3d) 134 at para 31, 205 CCC (3d) 70 (ONCJ)	23
9.	*R v Walker*, 2008 SCC 34, [2008] SCJ No 34	1, 3, 20, 50, 78
10.	*R v Yebes*, [1987] 2 SCR 168, [1987] SCJ No 51 at para 26	25, 39, 67, 73
11.	*United States v Huynh* (2005), 200 CCC (3d) 305, 66 WCB (2d) 680 (ONCA)	27
	APPELLANT AUTHORITIES – NOT REPRODUCED	
	R. v. Avetysan, [2000] S.C.J. No. 57, 2000 SCC 56 at para 10	82
	R v Bui, 2014 ONCA 614 at paras 24-32, [2014] OJ No 4003	51
	R v Cooper, [1978] 1 SCR 860 at pp 864-865, 874, 877-878, 1977 CarswellOnt 10	63
	R v Dipnarine, 2014 ABCA 328, [2014] AJ No 1102 at para 23	60
	R v Griffin, [2009] 2 SCR 42, [2009] SCJ No 28	1, 20, 25, 56, 57, 59, 60, 62, 63, 68
	R v Khela, 2009 SCC 4 at para 58, [2009] 1 SCR 104	1, 20, 25, 51
	R v Lifchus, [1997] 3 SCR 320, [1997] SCJ No 77 [R v Lifchus]	1, 20, 25, 51
	R v Mitchell, [1964] SCR 471 at pp 477-480, 1964 CarswellBC 67	63

	R v Mayuran, [2012] 2 SCR 162, [2012] 2 RCS 162	56, 59, 60, 63
	R v Paul, [1975] SCJ No 114, [1977] 1 SCR 181	24
	R v Pryce (appeal by Defaveri), 2014 BCCA 370 at para 11, [2014] BCJ No 2456	51
	R v Rhee, [2001] SCJ No 69, 2001 SCC 71 at para 20	82

PART VII – LEGISLATION AT ISSUE

Criminal Code, RSC 1985, c C-46, s 163.1(1)

163.1(1)Definition of "child pornography"
In this section, **"child pornography"** means

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;

(b) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;

(c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or

(d) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.

Code Criminel, LRC (1985), ch C-46, s 163.1(1)

163.1(1)Définition de « pornographie juvénile »
Au présent article, **« pornographie juvénile »** s'entend, selon le cas :

a) de toute représentation photographique, filmée, vidéo ou autre, réalisée ou non par des moyens mécaniques ou électroniques :

(i) soit où figure une personne âgée de moins de dix-huit ans ou présentée comme telle et se livrant ou présentée comme se livrant à une activité sexuelle explicite,

(ii) soit dont la caractéristique dominante est la représentation, dans un but sexuel, d'organes sexuels ou de la région anale d'une personne âgée de moins de dix-huit ans;

b) de tout écrit, de toute représentation ou de tout enregistrement sonore qui préconise ou conseille une activité sexuelle avec une personne âgée de moins de dix-huit ans qui

constituerait une infraction à la présente loi;

c) de tout écrit dont la caractéristique dominante est la description, dans un but sexuel, d'une activité sexuelle avec une personne âgée de moins de dix-huit ans qui constituerait une infraction à la présente loi;

d) de tout enregistrement sonore dont la caractéristique dominante est la description, la présentation ou la simulation, dans un but sexuel, d'une activité sexuelle avec une personne âgée de moins de dix-huit ans qui constituerait une infraction à la présente loi.