

## **BOUNDS v THE QUEEN (P54/2005)**

Court appealed from: Court of Criminal Appeal,  
Supreme Court of Western Australia

Date of judgment: 7 January 2005

Date of grant of special leave: 26 October 2005

On 28 May 2003, the appellant, Matthew David Bounds, was charged on indictment with two counts of breach of provisions of the *Censorship Act* 1996 (WA). Count one charged a breach of section 60(4) of the Act, in that on 28 July 2001, the appellant had in his possession child pornography in the form of computer data. Charge two charged a breach of section 59(5) of the Act, that on the same date the appellant had in his possession an indecent or obscene article in the form of computer data.

The appellant had been a student at Curtin University in Esperance, and he was entitled to make use of the University's computer room. In July 2001 the University's system administrator, Mr Philip Jones, discovered a large collection of images stored on the appellant's computer directory. This was subsequently found to comprise 105 images of child pornography which became the subject of count one of the indictment, and 11 other indecent or obscene images which became the subject of count two of the indictment. Mr Jones disabled the appellant's access to the computer room and told University management. The project manager of the Esperance campus of the University, Ms Kathline Michalanney, arranged an interview with the appellant. She asked Mr Jones to be present. The interview took place on 1 August 2001.

At trial, Ms Michalanney gave evidence that she told the appellant that objectionable material had been found in his files on the University's computer network. She said that he acknowledged by nodding his head and mumbling. She said that he said that he was not getting the material for himself and that he was "doing it to sell". Mr Jones gave similar evidence about the meeting. Mr Jones said he and Ms Michalanney stopped the appellant from saying any more after he said he had been doing it for money. Mr Jones and Ms Michalanney prepared notes in relation to what was said at the meeting, and these were tendered in evidence at the trial by consent of the appellant's counsel.

In his evidence, the appellant denied storing most of the objectionable material. He suggested that someone else had learned or guessed his password and had logged on in his name and saved the material. He also disputed that he had been in the computer room at one of the times at which objectionable material was downloaded. He acknowledged that he had saved and filed some of the objectionable material but said this had been sent to him by a computer chatroom acquaintance in Canada and that he had stored it without appreciating what it was.

As to the interview with Ms Michalanney and Mr Jones, the appellant said that he had gone into deep shock once he was told that the police were involved,

and that he could not remember much more of the interview. He said that he did not remember apologising to them, or giving an explanation about selling the material. The appellant was convicted on both counts.

The appeal against both convictions proceeded on several grounds. In relation to the conviction on count one, the appellant submitted that the conviction was unsafe because the trial judge permitted evidence concerning count two to go to the jury for consideration in relation to count one. The appellant argued that because count two should not have been tried on indictment, not being an indictable offence under section 59(5) of the *Censorship Act* and for that reason liable to be set aside, evidence received in relation to count two should not have been available to the jury in considering count one.

On appeal, the Court upheld the appeal in relation to the conviction in relation to count two, and this conviction was quashed. McKechnie J, in the minority, also held that along with quashing the conviction on count two, the conviction on count one should be set aside, and a retrial conducted on that count.

The grounds of appeal include:

- As count two should never have been on the indictment, and as the evidence in support of count two was before the jury, the verdict on count one was flawed;
- The administration of justice in the State of Western Australia is seriously flawed if the verdict on count one is allowed to stand given:
  - (a) the inclusion of count two on the indictment was a fundamental error;
  - (b) evidence of prohibited obscene, indecent and bestiality images (not child pornography) was before the jury;
  - (c) the jury's verdict on count two was a nullity as the offence was not triable on indictment;
  - (d) the trial fundamentally miscarried;
  - (e) the appellant lost a chance of acquittal which was fairly open to him because of the wrongful inclusion of count two;
  - (f) there was no causal link between the obscene and indecent material in support of count two and the proof required concerning count one;
  - (g) the appellant was denied the opportunity of advancing an argument that the indecent, obscene and bestiality evidence was inadmissible on count one as counts one and two were wrongly joined on the indictment; and

- Whether the appellant's trial fundamentally miscarried such that the verdict on count one was unsafe and unsatisfactory so that the matter should be remitted to the District Court of Western Australia for a trial to take place according to law.