SUPREME COURT OF QUEENSLAND

CITATION:	*Ross v Commissioner of Police* [2019] QCA 96
PARTIES:	**ROSS, Shane Anthony** **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	CA No 173 of 2018 DC No 285 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal) Sentence Application
ORIGINATING COURT:	District Court at Southport – [2018] QDC 99 (Muir DCJ)
DELIVERED ON:	24 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	17 April 2019
JUDGES:	Gotterson and McMurdo JJA and Wilson J
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal against sentence dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM DISTRICT COURT – BY LEAVE OF COURT – where the applicant pleaded guilty in the Magistrates Court to offences including the contravening of an order about information necessary to access information stored electronically pursuant to s 205A of the *Criminal Code* 1899 (Qld) – where the applicant appealed the sentences imposed by the Magistrates Court to the District Court – where the District Court dismissed the applicant's appeal – where the applicant seeks leave to appeal the decision of the District Court – whether the application for leave to appeal raises a point of law or question of general or public importance sufficient to grant leave to appeal CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced by the Magistrates Court to 12 months imprisonment, wholly suspended for an operational period of three years, for contravening an order about information necessary to access

information stored electronically pursuant to s 205A of the *Criminal Code* 1899 (Qld) – where the applicant appealed the sentence to the District Court – where the District Court dismissed the applicant's appeal – where the applicant argued the learned District Court judge erred in assessing the applicant's criminality – whether the sentence was manifestly excessive

Criminal Code (Qld), s 205, s 205A, s 552A
Criminal Investigation Act 2006 (WA), s 61
District Court of Queensland Act 1967 (Qld), s 118
Evidence Act 1977 (Qld), s 132C
Justices Act 1886 (Qld), s 222
Penalties and Sentences Act 1992 (Qld), s 9, s 12
Police Powers and Responsibilities Act 2000 (Qld), s 150AA, s 154A, s 154B

ACI Operations Pty Ltd v Bawden [2002] QCA 286, cited
Chadburne v The State of Western Australia [2017] WASCA 216, cited
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, applied
Lenton v The State of Western Australia [2017] WASCA 224, cited
McDonald v Queensland Police Service [2018] 2 Qd R 612; [2017] QCA 255, cited
Osgood v Queensland Police Service [2010] QCA 242, cited
R v Ensbey; Ex parte Attorney-General (Qld) [2005] 1 Qd R 159; [2004] QCA 335, cited
R v Field [2017] QCA 188, cited
R v Freeman [1998] QCA 462, cited
R v Pham (2015) 256 CLR 550; [2015] HCA 39, applied
R v Williams [2015] QCA 276, applied
The State of Western Australia v Doyle [2017] WASCA 207, cited
Weininger v The Queen (2003) 212 CLR 629; [2003] HCA 14, applied

COUNSEL: J A Greggery QC, with A S McDougall, for the applicant
S J Hedge for the respondent

SOLICITORS: Fraser Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Wilson J and with the reasons given by her Honour.

[2] **McMURDO JA:** I agree with Wilson J.

[3] **WILSON J:** On 29 September 2017 the applicant, Mr Shane Anthony Ross, pleaded guilty in the Southport Magistrates Court to five charges:

1. Contravening order about information necessary to access information stored electronically pursuant to section 205A of the *Criminal Code* 1899 (Qld) ("the *Criminal Code*") (charge 1).

2. Possessing dangerous drugs (growth hormone) (charge 2).

3. Possessing dangerous drugs (nandrolone) (charge 3).

4. Offence in relation to unauthorised and prohibited explosives (fireworks) (charge 4).

5. Authority required to possess explosives (fireworks) (charge 5).

[4] The applicant was sentenced to 12 months imprisonment, wholly suspended for an operational period of three years, for charge 1 and was fined $500 for charges 2 to 5 collectively.

[5] The applicant appealed each of the sentences to the District Court of Queensland under section 222 of the *Justices Act* 1886 (Qld). The applicant pursued seven grounds of appeal with respect to the sentence imposed for charge 1:

1. Failing to afford the applicant's solicitor the opportunity to address him in relation to whether a sentence of imprisonment should be imposed.

2. Failing to have regard or sufficient regard to s 9(2)(a) of the *Penalties and Sentences Act* 1992 (Qld) ("the *PSA*") that a sentence of imprisonment should only be imposed as a last resort.

3. Placing too much emphasis on s 9(2)(b) of the *PSA*, that the maximum penalty for the offence was five years imprisonment.

4. Placing too much weight on extraneous matters not supported or evidenced in the proceeding, particularly, in respect of the quantity of phones and the nature of the BlackBerry as being a very secure device.

5. Sentencing on a factual basis adverse to the applicant, namely that he was the owner of and had access to the phones, when this was neither alleged against him nor supported by evidence.

6. Sentencing on a factual basis adverse to the applicant namely that the BlackBerry was a very secure device when such fact was neither alleged against him nor supported by evidence.

7. Taking into account criminal conduct as to the use of, nature of the phones, or their conduct, when such discredible conduct was not alleged against the applicant nor was the subject of any evidence; and did not form part of any of the offences for which the applicant was convicted.

[6] In relation to charges 2 to 5 the applicant argued that the learned Magistrate erred in failing to have regard to section 12 of the *PSA* when recording convictions.

[7] The appeal to the District Court of Queensland was dismissed.[1]

[8] The applicant now seeks leave to appeal the decision of the District Court of Queensland dismissing his appeal pursuant to section 118 of the *District Court of*

---

1 *Ross v Commissioner of Police* [2018] QSC 99.

Queensland Act 1967 (Qld). The application for leave to appeal is confined to the sentence imposed for charge 1, being 12 months imprisonment, wholly suspended for an operational period of three years.

[9] The applicant submits that leave to appeal ought to be granted for two reasons:

1. section 205A was inserted in the *Criminal Code* on 9 December 2016 and sentences imposed for the offences have not been considered by the Court of Appeal; and
2. the sentence imposed on the applicant was manifestly excessive.

[10] If leave is granted, the applicant's grounds of appeal are:

1. the learned District Court judge erred in assessing the applicant's criminality; and
2. the sentence in all of the circumstances is manifestly excessive.

[11] The Court of Appeal exercises a general discretion to grant leave under section 118 of the *District Court of Queensland Act* 1967 (Qld) depending upon the nature of the case. An important point of law or question of general or public importance remains a sufficient, but not a necessary, prerequisite to a grant of leave to appeal.[2]

[12] In this case, the applicant raises a question about the correct approach to sentences under section 205A of the *Criminal Code*, i.e. whether the level of criminal offending being concealed by the refusal to provide access information needs to be determined as a step in the sentencing process.

[13] The Queensland Court of Appeal has not considered this issue, nor indeed any sentences imposed for section 205A *Criminal Code* offences. I am of the view that this application raises a point of law or a question of general or public importance sufficient to grant leave to appeal.

Section 205A of the *Criminal Code*

[14] Section 205A is a fairly recent addition to the *Criminal Code*, having been inserted by the *Serious and Organised Crime Legislation Amendment Act* 2016 (Qld), which was assented to on 9 December 2016. Section 205A states as follows:

> "**205A Contravening order about information necessary to access information stored electronically**
>
> A person who contravenes—
>
> (a) an order made under the *Police Powers and Responsibilities Act 2000*, section 154(1) or (2) or 154A(2); or
>
> (b) an order made under the *Crime and Corruption Act 2001*, section 88A(1) or (2) or 88B(2);
>
> commits a crime.
>
> Maximum penalty—5 years imprisonment."

---

2 *ACI Operations Pty Ltd v Bawden* [2002] QCA 286, p 3-4 (McPherson JA, with whom Williams JA and Holmes J agreed). See also *Osgood v Queensland Police Service* [2010] QCA 242, [9]-[10] (White JA, with whom Holmes and Muir JJA agreed); *McDonald v Queensland Police Service* [2017] QCA 255, [23] (Bowskill J, with whom Fraser and Philippides JJA agreed).

[15] In this case, a Magistrate made an order requiring the applicant to provide access codes to electronic devices pursuant to section 154A(2) of the *Police Powers and Responsibilities Act* 2000 (Qld), which provides:

> "**154A Order for access information after storage device has been seized**
>
> (1) This section applies if—
>
> (a) a storage device is seized under the search warrant and removed from the place; and
>
> (b) either—
>
> (i) the search warrant did not contain an order made under section 154(1) or (2); or
>
> (ii) the search warrant contained an order made under section 154(1) or (2) but further access information is required for a police officer to gain access to information stored on the device that may be relevant evidence.
>
> (2) On the application of a police officer, a magistrate or a judge may make an order requiring a specified person to do a thing mentioned in section 154(1)(a) or (b).
>
> (3) An application made under subsection (2)—
>
> (a) may be made at any time after the warrant has been issued; and
>
> (b) must be made—
>
> (i) if the search warrant was issued by a judge—to a Supreme Court judge; or
>
> (ii) if the search warrant was issued by a magistrate—to a magistrate.
>
> (4) An order made under subsection (2) must state—
>
> (a) the time at or by which the specified person must give a police officer the information or assistance; and
>
> (b) the place where the specified person must provide the information or assistance; and
>
> (c) any conditions to which the provision of the information or assistance is subject; and
>
> (d) that failure, without reasonable excuse, to comply with the order may be dealt with under the Criminal Code, section 205A.
>
> (5) A magistrate or a judge may make an order under subsection (2) only if satisfied there are reasonable grounds for suspecting that information stored on the storage device may be relevant evidence."

[16] A person is not excused from complying with an order made under section 154A(2) on the ground that complying with it may tend to incriminate the person or make the person liable to a penalty.[3]

[17] Under section 552A of the *Criminal Code*, section 205A must be dealt with summarily on prosecution election.

[18] The insertion of section 205A created a new offence punishable as a crime with a maximum penalty of five years imprisonment. It stands in addition to the misdemeanour offence under section 205(1) of the *Criminal Code* which provides for a maximum penalty of one year imprisonment:

> "**205 Disobedience to lawful order issued by statutory authority**
>
> (1) Any person who without lawful excuse, the proof of which lies on the person, disobeys any lawful order issued by any court of justice, or by any person authorised by any public statute in force in Queensland to make the order, is guilty of a misdemeanour, unless some mode of proceeding against the person for such disobedience is expressly provided by statute, and is intended to be exclusive of all other punishment.
>
> (2) The offender is liable to imprisonment for 1 year."

[19] The Explanatory Notes for the *Serious and Organised Crime Legislation Amendment Act* 2016 (Qld) describe section 205A, amongst other relevant provisions, as a "major investigative tool to combat serious criminal activity"[4] introduced "in response to the proliferation of child exploitation material … the increased use of technology to promote and distribute offending material as well as to conceal offending".[5]

[20] The legislature considered that the maximum penalty of five years imprisonment for an offence under the new section 205A was "justified to ensure a balance between the penalty for non-compliance with an order of the court and the maximum penalty for offending behaviour, for example, child exploitation material offences, which may be concealed by technology".[6]

Proceedings before the Magistrates Court

[21] On 20 June 2017 police executed search warrants on the applicant's residence and business address. At his home, police found 10 vials of growth hormone in the refrigerator and two vials of growth hormone in the bathroom. At his workplace, police found a vial of growth hormone, a black bag containing fireworks, five BlackBerry mobile phones, one Apple iPhone and a number of computers. On 18 July 2017 a warrant was obtained to search the mobile phones and computers.

[22] On 17 August 2017 police obtained, from a Magistrate, an authorised order for access information to the mobile phones and computers under section 154A of the *Police Powers and Responsibilities Act* 2000 (Qld) ("the Access Order"). On the same date the applicant participated in a record of interview at the Coomera Police

---

3 *Police Powers and Responsibilities Act* 2000 (Qld) s 154B.
4 *Serious and Organised Crime Legislation Amendment Bill* 2016 (Qld), Explanatory Notes, p 46.
5 *Serious and Organised Crime Legislation Amendment Bill* 2016 (Qld), Explanatory Notes, p 5.
6 *Serious and Organised Crime Legislation Amendment Bill* 2016 (Qld), Explanatory Notes, p 46.

Station where he made admissions to possessing and using the steroids and to being in possession of the fireworks. The Access Order was served on the applicant during this interview. It was explained and the applicant said he understood it. He then told the police that he was unable to provide the passwords but "he would be able to contact the persons who provided the device to him for access [indistinct] police by his lawyer."

[23] The applicant provided access information to the computers, but not to the six mobile phones. The police prosecutor told the learned Magistrate that the applicant had "since advised he could not provide access codes, hence the offence".

[24] The police prosecutor did not make any submissions on penalty, nor any submissions as to the criminality concealed by the refusal to provide the access information in breach of the Access Order.

[25] The solicitor appearing for the applicant made the following submission at the outset:

> "BENCH: So could you tell me, for a start, why your client had five BlackBerries and one iPhone?
>
> MR FRASER: My instructions are they are all old phones, your Honour, and a number of them were also brand new, had not been used. Now, the facts tend to suggest, and it is certainly the case that there were phones found in the premises that were indicated by the defendant to the police as not being his. He informed the police on the police facts, I think it's conceded, that he would make attempts to obtain that information for police but was simply unable to do so.
>
> BENCH: Why?
>
> MR FRASER: It was a 24-hour order. The timeframe was insufficient to allow him to - - -
>
> BENCH: You want to explain to me again why your client had five BlackBerries that were not apparently his?
>
> MR FRASER: I'm not saying they - - -
>
> BENCH: Why should I accept that?
>
> MR FRASER: I'm not saying they all were not his, your Honour. I'm saying that they were a number of old phones and some of the phones were brand new. So I guess it's how - - -
>
> BENCH: Can you explain to me why I shouldn't sentence your client, who has possession of five brand new and old BlackBerries, on the basis that they were not all his. If you have any material to put before me to prove that they were not all his - - -
>
> MR FRASER: No, your Honour".

[26] This submission did not clarify the level of the applicant's criminality, only to the extent that the applicant was sentenced on the basis that the six mobile phones were his.

[27] The applicant was 34 years of age at the time of offending and at sentence, married with three children, educated to year 11 level and had operated his own clothing company for three years. A reference tendered on his behalf described him as a valuable member of the community.

[28] The learned Magistrate was also told that the applicant's solicitor did not intend to delve "too deep" into the charges, as "full admissions were obviously made". No further submissions were made as to the applicant's level of criminality or why he refused to provide the access information in defiance of the Access Order. The applicant's solicitor noted that since the search warrants the applicant had not been asked for his personal mobile phone, thus suggesting that the police may no longer be interested in obtaining any information that may be contained on the phone that he uses daily.

[29] The applicant's solicitor referred to a newspaper article which had reported on a trial heard in the Supreme Court of Queensland at Brisbane where it had been submitted that the drug mule in that case had lied to the police to shield the "real drug kingpin of the Gold Coast", the applicant. It was submitted that the applicant had suffered extra-curial punishment because his reputation was significantly impacted as a result of the media publication. A few days after this newspaper article, a search warrant was executed on the applicant's house.

[30] The applicant's solicitor submitted that the applicant was remorseful for his actions and had accepted responsibility by pleading guilty at the first available opportunity. It was submitted on his behalf that the charges were minor in nature and the extra-curial punishment suffered by the applicant and his family though the media process significantly outweighed the seriousness of the offending.

[31] Against this background, the applicant's solicitor submitted to the learned Magistrate that "a fine would be appropriate, perhaps a substantial fine, as one sentence for all charges before you this morning".

[32] The learned Magistrate's reasons were as follows:

> "BENCH: Mr Ross, in relation to all these charges, you have pleaded guilty at the first available opportunity. Your traffic history and your criminal history are not at all bad for somebody of your age and maturity. You are a family man who has responsibilities and at least has one person prepared to write you a character reference today.
>
> In relation to the four charges that are heard together, the possession of the drugs and the firearm - the fireworks, I think an appropriate penalty for you is a $500 fine, and one fine in respect of all four matters. I intend to impose another penalty in respect of the failing to provide information necessary to access electronically stored information.
>
> It is a serious offence, as you have heard me discuss with the Prosecutor. There are a maximum penalty of five years' imprisonment for such a thing, and I am left having· to decide the basis on which you should be sentenced. Nothing is placed before me to convince me that you did not own those phones, and, as a matter of [common sense], people do not possess phones and have access - possess a number of phones, any number of phones, without having access to them. The very number of phones, indeed, raises question

marks, and the nature of the BlackBerry as a very secure device raises further question marks.

However, taking into … account your plea of guilty, I have decided that, while the sentence that I should impose is one of imprisonment - that you will not be required to serve it immediately. You will be sentenced to a period of 12 months' imprisonment, suspended immediately for three years, in relation to that offence. That has the consequence that, if you stay out of trouble for that three years, you should not serve any part of that. Whether you do that or not is a matter for you. I record convictions in relation to all offences."

[33] The six mobile phones were forfeited in the course of the sentence proceeding.

The District Court appeal

[34] Following a comprehensive analysis of the proceedings and the applicable principles, the learned District Court judge concluded that no error was demonstrated and the sentence imposed was not excessive.

[35] In undertaking the re-hearing required under appeal by section 222 of the *Justices Act* 1886 (Qld), the learned District Court judge expressed a number of conclusions material to her decision, including:

"[46] In my view, the offence created under s 205A of the *Criminal Code* is a serious one which strikes at the heart of the administration of justice. It involves a failure to comply with a court order. It follows that in considering the penalty to impose, it is necessary to take into account the need for general deterrence and denunciation.

…

[53] The Magistrate sentenced the appellant on the basis that he had been found in possession of five BlackBerry phones (some old and some new) and one iPhone and that he owned these devices. Despite a court order that he do so, the appellant failed to provide access codes to six phones. If he had a reasonable excuse it would be expected that he would have pleaded not guilty to the offence. He did not. He pleaded guilty based on his failure to comply with a court order. This guilty plea was made in the context that he had given the police access to other devices and phones. Leaving to one side the Magistrate's comments about BlackBerry's being more secure than other phones, the uncontroversial facts on sentence were that all of the phones were unable to be accessed by the police without the access codes. In other words, all six phones were secure. An order for forfeiture to this effect was sought and obtained at the sentence (without objection).

[54] The Magistrate was sentencing the appellant for offending under a recently introduced offence for which the maximum penalty was five years. The offending involved non-compliance with a court order to provide access codes to six phones found in the appellant's possession. That a term of

imprisonment might be imposed for committing such an offence can hardly in my view be described as unusual.

…

[61] The Magistrate then stated his reasons for imposing a term of imprisonment for the one count. He considered it to be a serious offence with a maximum penalty of five years imprisonment. These are relevant factors under s 9(2)(b) and (c) of the PSA. The Magistrate considered that the very number of phones "indeed, raises question marks" and that the nature of the BlackBerry as a very secure device "raises further question marks". The nature of the offence is that it involved six phones the subject of the Order for Access are also relevant considerations under s 9(2)(c) and (g). It is instructive to recall the High Court's conclusion in *Baumer v The Queen* that apart from mitigating factors, it is the circumstances of the offence alone that must be the determinant of the appropriates sentence.

…

[83] In my view, the offending in this case is well characterised as serious. The new provision was inserted as a tool to combat serious criminal activity. It is not a spur of the moment offence. It is an offence that has the potential to deflect a police investigation into potentially very serious offences.

[84] The applicant failed to comply with the court order to provide access codes to six phones. Whilst the appellant must be given credit for his guilty plea and that he saved the State the time and resource of having to prepare for a trial, I do not accept that he assisted in the administration of justice or that it was a sign of genuine remorse for his offending conduct for count 1. He has acted to the contrary. As I have stated previously, such an offence strikes at the heart of the administration of justice.

[85] There is no evidence or cogent submission before the Magistrate to explain why the appellant gave the police access to some phones and not others. If the appellant had a reasonable excuse it was not offered. The only reasonable inference to be drawn is that he did not want the police to have access to any of the phones because he was hiding something."[7]

The applicant's contentions

[36] The applicant has no dispute with any of the above matters which were set out by the learned District Court judge. The applicant accepts, as a general statement, that the "only reasonable inference to be drawn is that that he did not want the police to have access to any of the phones because he was hiding something" as being the only reasonable inference in any case where access information is withheld contrary

---

7 *Ross v Commissioner of Police* [2018] QSC 99 (citations omitted).

to a court order. However, the applicant submits that it was necessary to go one step further and find, as a relevant fact, on the circumstances before the court, what that potential was and what a court could rationally conclude was the level of seriousness of the offence potentially being held.

[37] The applicant submits that a court needs to determine the factual question of where the circumstances sit within the spectrum of deflecting a police investigation into potentially very serious offences. It is not sufficient to conclude that the applicant was motivated to "hide something" without an assessment of what that involved. Circumstances can readily be envisaged where the refusal to comply with a court order for access information may be motivated by concealing trivial unlawful conduct, or not even unlawful conduct at all, but personally embarrassing conduct. In such a case, the applicant submits the failure to comply with the court order does not frustrate the investigation of serious criminal activity. At the other end of the spectrum, the concealment might be of high-level organised crime. The applicant submits that this factual question is one which must be undertaken by the court for the purpose of assessing criminality and it is not sufficient to refer to general principles about the seriousness of the offence by reference to its legislative purpose or capacity to undermine the administration of justice.

[38] In this case, the applicant submits that the facts presented to the learned Magistrate from which inferences could be drawn about the extent to which the legislative intent was frustrated by the applicant's failure to provide access information were very limited. The facts placed before the learned Magistrate included:

1. the applicant came to the attention of police by reason of a newspaper article which referred to a submission in a closing address; and

2. the applicant had possession of personal use quantities of growth hormones and fireworks.

[39] Those facts, the applicant submits, did not permit the inference that police were investigating serious criminal activity or that the applicant was involved in serious criminal activity. The applicant submits that some support for the conclusion that his conduct was not considered in the most serious category can be gleaned from the election of the prosecution to have the matter dealt with in the Magistrates Court.

[40] The applicant submits that an analysis of section 205A of the *Criminal Code* and its potential to combat serious criminal activity does not, of itself, dictate that a sentence of imprisonment ought to be regarded as the starting point. The exercise of the sentencing discretion remains unfettered by these considerations. The applicant submits that the necessary assessment of the applicant's criminality, together with his personal circumstances and other mitigating factors, reduce the relevance of the principles of personal and public deterrence, punishment and denunciation. They were not so great as to compel the conclusion that a sentence of imprisonment was within the sound exercise of the discretion.

[41] Accordingly, taking into account all of the applicant's circumstances, the applicant submits that an appropriate sentence could be met by a significant fine in the order of up to $2,000.

Discussion

[42] This issue now raised by the applicant was not raised in the District Court appeal, or before the learned Magistrate.

[43] The gravamen of a section 205A *Criminal Code* offence lies in the fact that it stymies an investigation and potentially conceals more serious offending,[8] and has the potential to deflect a police investigation into potentially very serious offences.[9]

[44] It is not always possible for a sentencing judge to determine all of the circumstances surrounding an offence. Prosecuting authorities and a sentencing judge will often have the most limited and imperfect information about how it was that the accused came to commit the offence for which he or she is to be sentenced.[10] This is especially so when the gravamen of the offence is the act of refusing to provide access information for a device in breach of a court order.

[45] As the majority of the High Court said in *Weininger v The Queen* (2003) 212 CLR 629, a sentencing hearing is not an inquisition into all that may bear upon the circumstances of the offences or matters personal to the offender:

> "Some matters may be fixed by the plea or verdict of guilty although, even there, there may be ambiguities (as for example, in some homicide cases where a verdict of manslaughter is returned). Many of the matters relevant to fixing a sentence are matters which either the prosecution or the offender will draw to the attention of the sentencing judge. Some matters will remain unknown to the sentencing judge. The question then becomes, what use is the sentencing judge to make of what is known, and of the matters urged by the parties? This is not just a series of choices for the judge between alternatives. Not only may some things be unknown, some will concern matters in which a range of answers may be open".[11]

[46] The applicant submits that the learned Magistrate should have resolved the question as to the scale of what had been withheld by the refusal to provide access information by the familiar process under section 132C of the *Evidence Act* 1977 (Qld) ("the *Evidence Act*"):

> "**132C Fact finding on sentencing**
>
> (1) This section applies to any sentencing procedure in a criminal proceeding
>
> (2) The sentencing judge or magistrate may act on an allegation of fact that is admitted or not challenged.
>
> (3) If an allegation of fact is not admitted or is challenged, the sentencing judge or magistrate may act on the allegation if the judge or magistrate is satisfied on the balance of probabilities that the allegation is true.
>
> (4) For subsection (3), the degree of satisfaction required varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true.

---

8 *Ross v Commissioner of Police* [2018] QSC 99, [77].
9 *Ross v Commissioner of Police* [2018] QSC 99, [83].
10 *Weininger v The Queen* (2003) 212 CLR 629, [20].
11 *Weininger v The Queen* (2003) 212 CLR 629, [23].

(5) In this section—

allegation of fact includes the following—

(a) information under the *Penalties and Sentences Act 1992*, section 15 or evidence given at a hearing in relation to an order under part 3A of that Act;

(b) information under the *Youth Justice Act 1992*, section 150(3) or in a pre-sentence report under section 151 of that Act;

(c) information given to the court under the *Penalties and Sentences Act 1992*, section 179K;

(d) other information or evidence."

[47] Neither the police prosecutor, nor the applicant's solicitor, sought a finding about the level of offending that was concealed by the applicant's refusal to provide access information. There was no factual dispute. Accordingly, section 132C of the *Evidence Act* was not relevant in this case.

[48] In this case, the applicant pleaded guilty to a number of relatively minor offences, however, these minor offences cannot be assumed to characterise the level of criminality hidden by the applicant's refusal to provide access information. Such an assumption would be speculative. Further, it is noted that there may be occasions where a section 205A offence is the only offence charged. For example, evidence in a conspiracy case or possession of child exploitation material may be wholly contained on a device. In such situations, if a defendant refuses to comply with a court order to provide access information, then it will be forever unknown to the sentencing court the criminal offence(s), or potential offence(s), which have been concealed.

[49] In this case, the level of criminality was unknown to the court because the applicant refused to provide the access information and no submissions were made on his behalf about the reasons why he refused to do so. The learned Magistrate is not expected, in these circumstances, to embark upon a fact-finding investigation to determine the level of criminality hidden by the applicant's refusal to comply with the Access Order.

[50] The learned District Court judge was correct to find that the criminality of this offence was simply that the applicant was hiding something and that, as with the offence generally, there was the potential for it to be a serious offence. No further specific finding could be made in the absence of submissions from either the police prosecutor or the applicant's solicitor.

[51] It was not necessary for the learned Magistrate to have gone one step further and find, as a relevant fact, what the potential criminality was and what a court could rationally conclude was the level of seriousness of the offence(s), or potential offence(s), being withheld.

[52] There may be occasions where submissions are made by the prosecution or the defendants' representative which may mitigate or aggravate a refusal to comply with an order for access information. These matters may be taken into account[12]

---

12 See *R v Field* [2017] QCA 188, [38]-[40].

and if contested then the usual fact-finding process pursuant to section 132C of the *Evidence Act* can be undertaken.

[53] There was no error in the approach of the learned Magistrate or the learned District Court judge in not assessing the applicant's level of criminality.

Sentence not excessive

[54] The applicant submits that the sentence imposed for charge 1 of 12 months imprisonment, wholly suspended for three years, was manifestly excessive. The learned District Court judge, following a rehearing of the evidence which was before the learned Magistrate, determined that the sentence was not excessive.[13]

[55] Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.[14]

[56] The result of the impugned sentence must be "unreasonable or plainly unjust" and the appellate court must infer "that in some way there has been a failure to properly exercise the discretion which the law reposes in the court of first instance".[15] That discretion is governed by the application of relevant legal principles to the facts of the case.[16]

[57] The nature and circumstances of this offence[17] were serious:

1. The applicant contravened a court order to provide access to devices.

2. The court order can only be issued if a Magistrate is satisfied that there are reasonable grounds for suspecting information stored in the device may be evidence of an offence or confiscation related evidence.[18]

3. There were six devices to which the passcodes were not provided in breach of the Access Order. They were all the applicant's devices. All of them were secure in the sense that police could not access them without the passcodes.

4. The applicant made a deliberate and careful choice not to provide the passcodes to the particular devices. He provided passcodes to other computers and devices that were seized by the police but chose not to provide the access codes for the six devices the subject of the offence.

[58] The defiance of a court order is an act that strikes at the foundation to the criminal justice system and there is a need for general deterrence and denunciation when sentencing section 205A *Criminal Code* offences.

[59] There are no decisions from the Queensland Court of Appeal under section 205A of the *Criminal Code*. Some guidance can be gained, however, from the Western Australian

---

13 *Ross v Commissioner of Police* [2018] QSC 99, [89].
14 *R v Pham* (2015) 256 CLR 550, [28] (citations omitted).
15 *Hili v The Queen* (2010) 242 CLR 520, [58] and [59]. See also *R v Williams* [2015] QCA 276, [7].
16 *Hili v The Queen* (2010) 242 CLR 520, [49].
17 *Penalties and Sentences Act* 1992 (Qld) s 9(2)(c).
18 *Police Powers and Responsibilities Act* 2000 (Qld) s 154A(5); definition of "relevant evidence" in s 150AA.

Court of Appeal's considerations of sentences for failing to comply with a data access order under section 61 of the *Criminal Investigation Act* 2006 (WA).[19]

[60] In *Chadburne v The State of Western Australia* [2017] WASCA 216, the Western Australian Court of Appeal dismissed an appeal against a sentence of six months imprisonment, cumulative on 16 years imprisonment for serious drugs offences, for failing to provide access information to an encrypted BlackBerry device.

[61] In *Lenton v The State of Western Australia* [2017] WASCA 224, the Western Australian Court of Appeal dismissed an appeal against a sentence of six months imprisonment, concurrent with eight years imprisonment for drug and weapons offences, for failing to provide the access information to four mobile telephone and a laptop seized by police. The court noted that there should not be any expectation by offenders that sentences for this offence will necessarily be concurrent.[20]

[62] In *The State of Western Australia v Doyle* [2017] WASCA 207, the Western Australian Court of Appeal increased a four year effective sentence to six years for drug supply offences. The nine month concurrent sentence of imprisonment for refusing to give access information to two BlackBerry devices was not disturbed.

[63] Some guidance can also be gained from Queensland decisions in respect of sentences imposed for offences which punish conduct contrary to the administration of justice or in defiance of court orders. In *R v Ensbey; Ex parte Attorney-General (Qld)* [2004] QCA 335, the defendant had shredded and rendered illegible parts of a diary written by a child alleging sexual abuse by a parishioner. A six month term of imprisonment, wholly suspended, was held not to be manifestly inadequate on a charge of damaging evidence with intent.[21] In *R v Freeman* [1998] QCA 462, the defendant refused to take an oath to give critical evidence in a prosecution for serious criminal offences. A nine month sentence, imposed cumulatively to other terms of imprisonment being served, with a nine month delay in parole eligibility date, was held not to be manifestly excessive for contempt of court.

[64] In this case, the sentence of 12 months imprisonment imposed on the applicant adequately reflected the serious offence, which potentially concealed serious crimes and which was constituted by the contravention of a court order. The sentence acts as a sufficiently deterrent sentence against the applicant and others who may be tempted to contravene a court order to protect themselves. The immediate suspension of the imprisonment reflects the plea of guilty and other mitigating features. In all of the circumstances, the sentence was not manifestly excessive.

[65] The appeal should be dismissed.

[66] I would propose the following orders:

1. Application for leave to appeal against sentence granted.

2. Appeal against sentence dismissed.

---

19 That section creates the crime of disobeying a data access order. The maximum penalty is five years imprisonment. The provisions regarding the data access order are similar to those in Queensland, although in Western Australia, the Magistrate must find there are reasonable grounds for suspecting that the device may contain or may be relevant to a serious offence (defined as one with a maximum penalty greater than or equal to 5 years). See sections 57 to 61, *Criminal Investigation Act* 2006 (WA).

20 *Lenton v The State of Western Australia* [2017] WASCA 224, [64].

21 Under section 129 of the *Criminal Code*. Maximum penalty – 7 years imprisonment.