SUPREME COURT OF QUEENSLAND

CITATION:	*Atkinson v Gibson* [2010] QCA 279
PARTIES:	**ATKINSON, Simon James** (applicant/appellant) **v** **GIBSON, Patrick Darren** (respondent/respondent)
FILE NO/S:	CA No 37 of 2010 DC No 2 of 2008 DC No 208 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURTS:	District Court at Cairns
DELIVERED ON:	15 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	25 August 2010
JUDGES:	McMurdo P, Fraser JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. **Grant leave to appeal against the orders made in Appeal No. 2 of 2008 in the District Court at Cairns dismissing the applicant's appeal against the orders made in the Magistrates Court at Cooktown on 6 December 2007 that the charge of committing a public nuisance be dismissed as there was no case to answer, and awarding costs pursuant to s 232(1) of the *Justices Act* 1886 (Qld) of $9,222 to be paid to the Registrar within thirty (30) days.**
2. **Order that:**
    a. **Set aside those orders made in the District Court and instead allow the appeal to the District Court in Appeal No. 2 of 2008.**
    b. **Set aside the orders made in the Magistrates Court at Cooktown ruling that there was no case to answer and dismissing the charge that the respondent committed a public nuisance at Hopevale on 30 November 2006.**
3. **Grant leave to appeal against the orders made in the District Court at Cairns in Appeal No. 208 of 2008**

dismissing the appeal against the order made in the Magistrate's Court at Cooktown on 6 August 2008 that costs be awarded in favour of the respondent in the amount of $32,000, and awarding costs pursuant to s 232(1) of the *Justices Act* 1886 (Qld) of $9,222 to be paid to the Registrar within thirty (30) days, allow the appeal and set aside the orders made in the District Court to that extent, but otherwise refuse leave to appeal against the orders made in the District Court at Cairns in Appeal No. 208 of 2008.

4. **Direct that each party file a written submission by 4.00 pm on 29 November 2010 as to the appropriate consequential orders, including as to costs in the Magistrates Court, the District Court, and this Court.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF THE COURT – GENERALLY – whether the grounds of appeal relied on by the applicant raises a question of general public importance sufficient to attract a grant of leave

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – OTHER CASES – where the applicant sought leave to appeal against orders made by the primary judge dismissing the applicant's appeal from decisions of the Magistrates Court – where the Magistrate held that there was no case to answer and dismissed the charge of committing public nuisance against the respondent – where the applicant argued the primary judge erred in concluding that the Magistrate was correct in finding that the respondent had no case to answer on the public nuisance charge – where the Magistrate found that it was not open on the prosecution evidence to find that the area where the alleged public nuisance occurred was a "public place" as the road had temporarily lost its public character due to its use by the police as a "static interception site" – where the applicant argued that the relevant part of the road was a public place and that the primary judge erred in failing to find that the Magistrate erred in inferring that members of the public were excluded – whether it was open on the prosecution evidence to find beyond reasonable doubt that the part of the road where the events occurred was at that time a "public place" pursuant to the *Summary Offences Act* 2005 (Qld)

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – OTHER CASES – where the Magistrate acquitted the respondent of assaulting and obstructing the applicant in the performance of his duties – where the Magistrate found that an assault was not satisfied on his findings – whether the

primary judge erred in concluding that the Magistrate was correct to find that the respondent's actions did not constitute assault – whether the primary judge erred in concluding that the Magistrate was correct in finding that the prosecution could not prove beyond reasonable doubt that the respondent had actually attempted to strike the applicant as particularised – whether the primary judge erred in concluding that it was open to the Magistrate to find that excessive force had been employed by the police

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – OTHER MATTERS – where the applicant argued the primary judge failed to conduct a rehearing on the evidence – whether the primary judge failed to make her own determination of the relevant facts and issues in concluding that the Magistrate's findings were open on the evidence

APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF THE COURT – COSTS ORDERS – where the Magistrate ordered the applicant to pay the respondent's costs – whether the primary judge erred in concluding that the Magistrate was correct in allowing higher costs pursuant to s 158B of the *Justices Act* 1886 (Qld)

Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984 (Qld)
Acts Interpretation Act 1954 (Qld), s 14A(1)
Criminal Code 1899 (Qld), s 245
District Court of Queensland Act 1967 (Qld), s 118(3)
Justices Act 1886 (Qld), s 158B(2), s 222
Liquor Act 1992 (Qld), s 185
Police Powers and Responsibilities Act 2000 (Qld), s 26, s 29, s 30, s 33, s 31, s 32(m), s 59, s 60, s 60(2), s 60(4), s 62(2), s 68, s 68(2), s 615(1), s 790
Summary Offences Act 2005 (Qld), s 5, s 6(1), s 6(2)(a)(ii), s 6(2)(b), s 6(3)

ACI Operations Pty Ltd v Bawden [2002] QCA 286, applied
Atkinson v Gibson [2010] QDC 10, related
Dowling v Robinson [2005] QDC 171, cited
DPP (NSW) v Hardman (2002) 37 MVR 137; [2002] NSWSC 714, cited
Forte v Sweeney; ex parte Forte [1982] Qd R 127, applied
Hughes v Fingleton (1977) 17 SASR 433, cited
Kris v Tramacchi [2006] QDC 35, cited
Mansfield v Kelly [1972] VR 744, applied
Mbuzi v Hornby [2010] QCA 186, applied
McKenzie v Stratton [1971] VR 848, applied
Melbourne Corporation v Barry (1922) 31 CLR 174; [1922] HCA 56, applied
Parsons v Raby [2007] QCA 98, cited

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
R v Trifyllis [1998] QCA 416, cited
Rodgers v Smith [2006] QCA 353, applied
Rowe v Kemper [2009] 1 Qd R 247; [2008] QCA 175, cited
Ryan v Nominal Defendant (2005) 62 NSWLR 192; [2005] NSWCA 59, applied
Schubert v Lee (1945) 71 CLR 589; [1946] HCA 28, discussed
Stevenson v Yasso [2006] 2 Qd R 150; [2006] QCA 40, cited
Zinace P/L v Tomlin & Ors [2003] QCA 102, applied

COUNSEL: M B Lehane for the applicant/appellant
J D Henry for the respondent

SOLICITORS: Department of Public Prosecutions (Queensland) for the applicant/appellant
O'Reilly Stevens Bovey Lawyers for the respondent

[1] **McMURDO P:** The applicant should be granted leave to appeal,[1] but limited to an appeal from the District Court order dismissing the applicant's appeal from the Magistrates Court order that the respondent had no case to answer on the charge of committing a public nuisance, and the related costs orders in both the Magistrates Court and the District Court.

[2] The appeal raises the meaning of the term "public place", both under the *Summary Offences Act* 2005 (Qld) and, arguably, more generally. This is a matter of potentially wide community importance justifying the grant of leave to appeal, even though the applicant has already appealed unsuccessfully to the District Court.

[3] The magistrate found that police officers had established a road block on McIvor Road, near Hopevale in far north Queensland. The police had stopped cars and detained people and vehicles there whilst conducting investigations under the *Liquor Act* 1992 (Qld). The respondent was alleged to have committed the public nuisance in the area of the road block between detained cars. The magistrate identified the issue in determining whether the respondent had a case to answer on the public nuisance charge as:

> "Has this place where the [respondent] was, lost its status as a public place? Is it still a place open to or used by the public? Could a member of the public wander in between the two cars without restriction?"

[4] The magistrate determined:

> "… that a reasonable member of the public would not go there for fear of interfering with the police.
>
> Reasonable people would avoid the area and would consider the area not available for their general use. A properly instructed tribunal could not, on the evidence before this Court, find the place between the two cars was a public place."

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1 Under s 118(3) *District Court of Queensland Act* 1967 (Qld).

[5] In the applicant's appeal from that ruling, the District Court judge concluded that:

> "the Magistrate's finding that the respondent's behaviour did not interfere with [the appellant's] use or enjoyment of a public place was correct."

[6] "Public place" is relevantly defined in the *Summary Offences Act* as:

> "… *public place* –
>
> (a) means a place that is open to or used by the public, whether or not on payment of a fee;"[2]

[7] It is common ground that the roadway where the respondent is alleged to have committed the public nuisance was ordinarily "a place open to or used by the public". The respondent's argument, accepted by the magistrate and the District Court judge, was that the area lost its status as a public place because the public were temporarily excluded from it by the police road block.

[8] An analogous argument was rejected by Sangster J in *Hughes v Fingleton*.[3] Hughes was summarily charged with behaving in a disorderly manner in a public place under s 7 *Police Offences Act* 1953-1975 (SA).[4] He entered a partly enclosed area of the Adelaide Festival Theatre Plaza containing a dais and chairs where official guests were seated, including Her Majesty, The Queen; His Royal Highness, the Duke of Edinburgh; the South Australian Premier; and other dignitaries. Hughes unfurled and waved a "Eureka" flag, whilst calling out "Smash Colonial relics – independence for Australia". He appealed against his conviction for behaving in a disorderly manner in a public place contending that the area was not a public place as the public were excluded from it at the time of his actions.

[9] In rejecting that argument, Sangster J noted that the definition of "public place" in the *Police Offences Act* was inclusive and not exhaustive; and that the question whether a particular place is a "public place" is a question of fact. Sangster J concluded that the Adelaide Festival Theatre Plaza was clearly a "public place", with or without resort to the statutory definition. The demarcation of part of the Plaza for the temporary use by some persons so that others were temporarily excluded did not take away its character as a "public place". The partial and temporary exclusion of the public in these circumstances was merely an organisation of the orderly use of the whole area as a public place on that particular occasion. [5]

[10] In my opinion, those observations are analogous to the present case, even though the relevant definition of "public place" under the *Summary Offences Act* was not, in terms, inclusive. As I have noted, it is common ground that the area where the

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2 Sch 2, Dictionary.

3 (1977) 17 SASR 433.

4 The term "public place" was defined as "4.(1) In this Act, unless the context otherwise requires or some other meaning is clearly intended - … 'public place' includes – (a) every place to which free access is permitted to the public, with the express or tacit consent of the owner or occupier of that place; and (b) every place to which the public are admitted on payment of money, the test of admittance being the payment of money only; and (c) every road, street, footway, court, alley or thoroughfare which the public are allowed to use, notwithstanding that that road, street, footway, court, alley or thoroughfare, is on private property."

5 (1997) 17 SASR 433, 438-439.

respondent allegedly committed the public nuisance was a road which was ordinarily a public place, that is, "a place open to or used by the public". On the evidence before the magistrate, it was not open to find that this area ceased to be a public place because the police officers were exercising control over it so that temporarily, "a reasonable member of the public would not go there for fear of interfering with the police". Any temporary exclusion of the public from that area was an organisation of the orderly use of the roadway as a public place in the circumstances pertaining at that time. It follows that the appeal must be allowed.

[11] The remaining issues raised by the applicant do not justify the grant of leave to appeal in respect of those issues.

[12] Subject to those observations, I agree with Fraser JA's reasons and proposed orders.

[13] **FRASER JA:** The applicant, Sergeant Atkinson, has applied under s 118(3) of the *District Court of Queensland Act* 1967 (Qld) for leave to appeal against orders made in the District Court at Cairns on 5 February 2010 dismissing his appeal from decisions of the Magistrates Court at Cooktown. At the close of the prosecution case in the Magistrate's Court the Magistrate held that the respondent, Mr Gibson, had no case to answer on a charge that he committed a public nuisance at Hopevale on 30 November 2006 and dismissed that charge. The respondent then called evidence in his defence of the other charges that he assaulted and obstructed a police officer (Atkinson) in the performance of his duties. The Magistrate acquitted the respondent of those charges and ordered the applicant to pay the respondent's costs of his successful defence, fixed in the sum of $32,000.00.

[14] The grounds of the application for leave to appeal are that:

1. The learned Judge erred in concluding that the learned Magistrate was correct in finding that there was no case to answer in respect of the offence of committing a public nuisance;

2. The learned Judge erred in concluding that the learned Magistrate was correct to find that the respondent's actions did not constitute an assault;

3. The learned Judge erred in concluding that it was open to the learned Magistrate to find that excessive force had been employed so that the applicant was no longer acting in the execution of his duty;

4. The learned Judge erred in concluding that the learned Magistrate was correct to allow a higher amount for costs pursuant to section 158B(2) of the *Justices Act* 1886 (Qld); and

5. The learned Judge failed to conduct a rehearing on the evidence.[6]

[15] The Court heard full argument on the footing that if leave were granted the Court would also decide the appeal.

Background

[16] On 30 November 2006 the applicant and two other police officers waited on McIvor Road at a place between Cooktown and the Hopevale Aboriginal Community.

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[6] This ground was added by leave granted at the hearing of the application.

There was an Alcohol Management Plan in force in the Community. The police officers directed the drivers of three vehicles to pull over onto the side of the road, for the purpose of enforcing or monitoring compliance with the statutory provisions under which the Alcohol Management Plan was in force.

[17] There were substantial conflicts between the evidence of the police and the evidence of the defence witnesses about the events that followed. The parties accepted that the following passage in the reasons of the primary judge accurately summarised the evidence given at the trial in the Magistrates Court:

> "[10] The roadblock was described by police as a "static interception site". Sergeant Simon Atkinson was dealing with a vehicle which had earlier been intercepted when two other vehicles approached which were intercepted by Senior Constables Johnson and Stallard. Johnson approached the driver of the first vehicle and Stallard approached the driver of the second vehicle in which the respondent was a passenger. Stallard indicated to the driver of the vehicle to pull over to the side of the road. Sergeant Atkinson was still talking to the driver of the vehicle he had intercepted and was moving alcohol exhibits from that vehicle to the rear of the police vehicle. Stallard asked the occupants of the vehicle in which the respondent was a passenger to get out and they complied. The respondent, who was drunk, alighted from the back seat on the left-hand side of the vehicle.
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> [11] Atkinson's evidence was that as he was moving between the vehicle he had intercepted and the police vehicle, he saw that the respondent had walked from the rear of his vehicle to the point where he, Atkinson, was talking to the driver and others in the vehicle that he had intercepted. This was between two intercepted vehicles. Atkinson's attention was drawn to the respondent because he could hear him swearing, although he could not then hear exactly what he was saying. Atkinson went on –
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> > "At that time I was walking back to the vehicle, I heard Mr Gibson say to me, "What are you doing with all that fucking beer?" I basically ignored him; it wasn't anything to do with me at that point in time. As I've moved to the back of the vehicle to take some more of the alcohol to the police vehicle, he's - Mr Gibson's then said to me, "How long are you bastards going to be here anyway?" I said, "Look, please just move away, stop swearing, it's nothing to do with you." At that point Mr Gibson's then turned [indistinct] facing me, he said, "Oh, you're all just a bunch of fucking cunts anyway", and he raised his middle left finger at me."
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> [12] Atkinson's evidence continued –
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> > "At that point, I informed Mr Gibson that he was under arrest for being a public nuisance. He's then taken up a fighting stance, he's raised his fists towards me, he's thrown a couple of punches at me, they didn't connect with me. I told him to calm down. He's then tried to rush past me. I've tried to take hold of him but he was pretty slippery. My hands slipped over his shoulders, he's ducked out of my grip. He's then moved over towards the middle of the road, then turned and faced me and raised his fists again. I told him

> to calm down. He's thrown another couple of punches at me, none of which connected me. Then Senior Constable Johnson has come from my right-hand side and tried to grab hold of the defendant. They've both fallen, fallen to the other side of the road from the momentum, fallen to the other side of the road into a nearby ditch on the far side of the road, where Johnson and Mr Gibson have then had a struggle .... I've walked over to them. I saw that Gibson had hold of Johnson's shirt. I told him to let go. I struck Gibson once in the chest area with the top knuckle of my hand. I struck him with a blow to the chest area in an attempt to distract him to gain control of him. I noticed that a very short time after that, Gibson's then tucked himself in, put his hands underneath him, which makes it hard for us to - to get control of his hands to handcuff him."

[13] Neither Johnson or Stallard heard anything of what was said by the respondent to Atkinson initially.

[14] The driver of the vehicle intercepted by Atkinson, Gavin Allum, gave evidence that he heard the respondent saying to Atkinson, "How long are you bastards up here?" and Atkinson responding, "Shut your fucking mouth or I'll put you in gaol", to which the respondent replied, "I'm just fucking asking". Other occupants of the vehicles gave similar evidence.

[15] Regarding the alleged assault, Senior Constable Stallard said that she saw Atkinson and the respondent opposite each other, one to two metres apart and that the respondent's hands were clenched up in the air and he was throwing some punches in the direction of Atkinson who also had his hands clenched and was in a fighting stance.

[16] Senior Constable Johnson's evidence in this regard was –

> "At this time I have just been looking around and observed to see Sergeant Atkinson standing approximately in the middle of the road with the defendant. He appeared to be struggling with the defendant. I then run past Senior Constable Stallard getting her attention on the way and attempted to restrain the defendant...I observed Sergeant Atkinson's hands were up like that either attempting to - to restrain him or to hold him back from himself and that it appeared that the defendant was trying to throw punches at Sergeant Atkinson."

[17] Johnson confirmed in cross-examination that the first view he had of anything physical was Atkinson touching the respondent. On his account Atkinson was holding both his arms out in front towards the top of torso height touching the defendant's upper torso/lower neck area.

[18] Witnesses called by defence gave similar versions of Atkinson grabbing the respondent around the collar area, the neck or the throat.

[19] Johnson conceded that he ran at the defendant and impacted into the side of his body in a manner which was close to the nature of a tackle of the upper torso which propelled the respondent backwards.

[20] Witnesses for the defence described Johnson's actions variously as "slinging him over the other side of the road" and "throwing him over on the other side of the road or to the ground" or "grabbing the respondent, taking him over the road and knocking him into the bank".

[21] Atkinson acknowledged that the momentum of Johnson's movement and contact with the respondent caused Johnson and the respondent to fall to the other side of the road into a ditch. Atkinson agreed that Johnson impacted with, "enough force to move a human body across the road in reaction to it".

[22] The defence witnesses Allum, Cobus, Gibson and McIvor all describe the respondent being pushed, wrestled or forced to the ground by the police.

[23] Johnson's evidence as to what occurred once the respondent fell to the ground was as follows:-

> "I believe the defendant fell first, not on top of the defendant. I then attempted to get to my feet to restrain the defendant while he was holding onto - onto my shirt to prevent me from standing up. At this time I've told him numerous times to release my shirt and to comply with police directions. He failed to do so, so I then punched the defendant once to the ribs. This may have caused the defendant to release my shirt. I then stood up properly and the defendant has then placed his arms underneath himself on the road. I have then attempted to remove his arms from underneath him, all the time telling the defendant to release his arms so that he can be restrained. He failed to do so and eventually we managed to remove his arms from underneath him and handcuff him behind his back."

[24] Stallard's evidence was that when she went over to Johnson and the respondent – "The defendant was on the ground and Senior Constable Johnson was trying to get his hands out from underneath him... He was face down on the ground ...[his hands] were tucked underneath his chest."

[25] Stallard said that Johnson was trying to get the respondent's hands out from underneath him, as was she. Eventually she was the one to handcuff the respondent. Stallard described her positioning with respect to the respondent as follows:-

> "I had my left knee on the top part of his back. I'm not sure where my right knee was, my left knee was on top of him and I was just trying to get his hand out from underneath from the left side."

Stallard said that she had her body weight on the knee which was on the respondent's back.

[26] The witnesses called for the defence spoke of Atkinson putting his knee into the respondent's back and pulling his head back by the hair while Johnson pulled his arms back and hit him twice in the face or head.

[27] The respondent was examined by a doctor at the Cooktown Hospital at 7.40 pm on 30 November 2006 when he was found to have abrasions on his

right elbow, a linear abrasion on his right upper arm, tenderness to his right inside shoulder blade, bruising on his forehead and a small laceration on the inside of his upper lip. The state of the injuries was consistent with them having been caused earlier the same day."

Ground 1: The learned Judge erred in concluding that the learned Magistrate was correct in finding that there was no case to answer in respect of the offence of committing a public nuisance

[18] Subsection 6(1) of the *Summary Offences Act* 2005 (Qld) makes it an offence to commit a "public nuisance offence". Subsections 6(2) and (3) provide:

"(2) A person commits a public nuisance offence if –

(a) the person behaves in

(i) a disorderly way; or

(ii) an offensive way; or

(iii) a threatening way; or

(iv) a violent way; and

(b) the person's behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public.

(3) Without limiting subsection (2)

(a) a person behaves in an offensive way if the person uses offensive, obscene, indecent or abusive language; and

(b) a person behaves in a threatening way if the person uses threatening language."

[19] At the time of the alleged offence the *Summary Offences Act* 2005 (Qld) defined "public place" as meaning "a place that is open to or used by the public, whether or not on payment of a fee".[7]

[20] The particulars of the public nuisance offence were that at a specified time and place the respondent used offensive language and gestures and the respondent's behaviour interfered with the applicant's enjoyment as he found the respondent's behaviour offensive. Those particulars invoked s 6(2)(a)(ii) (that the respondent behaved in "an offensive way") and s 6(2)(b) (that the respondent's behaviour interfered with the "enjoyment of, a public place by a member of the public").

[21] At the close of the prosecution case the respondent submitted that there was no case to answer. The Magistrate held that on the evidence for the prosecution the respondent's words and gesture could be found to be offensive, that the applicant

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[7] Schedule 2, Reprint No. 1B, as in force 21 July 2006. The definition has since been amended by the addition of a new paragraph so that it expressly includes "busway land" and "rail corridor land" under the *Transport Infrastructure Act* 1994 (Qld): see Schedule 2, Reprint 2B, as in force 10 December 2009.

was a member of the public, and that an inference was open that the respondent's behaviour interfered with the applicant's "enjoyment" of the place, in the sense of the ability to be free of unacceptable annoyance. The respondent did not argue in this Court that the Magistrate erred in so holding.

[22] The ground upon which the Magistrate decided that there was no case to answer was that it was not open to find that the part of McIvor Road where the events occurred was at that time a "public place". It was common ground that McIvor Road was a public road, but the Magistrate held that the effect of conduct of the police was that the place on the road where the events occurred had temporarily lost its public character. The Magistrate held that this was a discrete part of the road, off the part where vehicles normally drive; that the use being made of it was not a "regular use"; that this "static interception site" was a "special site not defined by any markings but defined by the use being made of it by the police"; that the cars were pulled up by force of law; and that the persons and vehicles were detained there and not permitted to leave until the police had finished their investigations. The Magistrate concluded that a reasonable member of the public would not go to that place "for fear of interfering with the police". Reasonable people would avoid that area and consider it not available "for their general use". For those reasons the Magistrate concluded that on the prosecution evidence it was not open to find that the area of road between the cars was a "public place".

[23] In the appeal to the District Court, the primary judge summarised the Magistrate's findings and reasoning and the parties arguments in the appeal to that Court. Her Honour observed that the authorities cited for the parties were not helpful in these different circumstances,[8] and concluded that having regard to the police evidence as to their beliefs and expectations regarding the vehicles they intercepted, and the occupants of those vehicles, the Magistrate's finding was correct.[9]

The parties' arguments

[24] The applicant argued that the part of the road between the vehicles was a public place because it was a public road. Its status did not change merely because the police temporarily detained members of the public for the purposes of a search. The primary judge erred in failing to find that the Magistrate erred in inferring that members of the public were excluded by the police from that place. In any event, any such exclusion would not deprive that place of its status as a public place. The applicant argued that the definition of "public place" in the *Summary Offences Act* 2005 (Qld) did not require that the public's right to use the relevant place must be immediate and unrestricted.

[25] The respondent pointed to the requirement that an interpretation which will best achieve the purpose of the *Summary Offences Act* 2005 (Qld) was to be preferred to any other interpretation,[10] and to the object of that Act, expressed in s 5, of "ensuring, as far as practicable, members of the public may lawfully use and pass through public places without interference from acts of nuisance committed by others." The respondent argued that it was consistent with that object and the

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8 *Forte v Sweeney*; *ex parte Forte* [1982] Qd R 127; *Director of Public Prosecutions (NSW) v Hardman* (2002) 37 MVR 137; *Kris v Tramacchi* [2006] QDC 35; *Dowling v Robinson* [2005] QDC 171.

9 *Atkinson v Gibson* [2010] QDC 10 at [32]-[42].

10 *Acts Interpretation Act* 1954 (Qld), s 14A(1).

definition of "public place" that the necessary quality of such a place is that members of the public can be present in the place in the exercise of free will and are free to leave by their own choice, even if they have to pay a fee to be present. It followed that a location which might normally be a public place might lose that status if, even temporarily, it is not open to use by the public and all present within it were not there in the exercise of free will and were not free to leave by their own choice.

[26] The respondent argued that the part of the road where the events occurred, whilst ordinarily a public place, had been robbed of that quality at the relevant time by its use as a "static vehicle interception site". The respondent referred to the Magistrate's holding that: "All persons and vehicles were detained there and not permitted to leave until the police had finished their investigations." The evidence of the police officers was that every vehicle approaching the roadblock was directed to stop and that the occupants of the vehicle had been given no choice but to comply with police directions to get out of their vehicles. The applicant agreed in cross examination that the occupants of vehicles who were required to step out of their vehicles "were in our custody at that point in time".

[27] The respondent argued that, given the remoteness of the location it was unlikely that any member of the public who was not already "detained as part of the exercise that police were conducting" would be present or would attempt to enter into the "static interception site", and it should be inferred that the police would have prevented any such event from occurring. The police officers had directed each of the three drivers of the vehicles to stop their vehicles on the side of the road off the carriageway, apparently exercising the power given to police officers by s 60 of the *Police Powers and Responsibilities Act* 2000 (Qld) ('*PPRA*') to require a person in control of a vehicle to stop the vehicle for the purpose of enforcing the provisions of the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* 1984 (Qld). A person who does not comply with such a requirement to stop a vehicle commits an offence under s 60(2) of the *PPRA* unless the person has a reasonable excuse. Section 62(2) provides that a person in control of a vehicle which has been required to stop pursuant to s 60 "must ensure the vehicle remains at the place where it is stopped… for the time reasonably necessary to enable the police officer to perform a function or exercise a power" under s 60.

[28] The respondent referred to police powers to prevent unwanted intrusions into the "static interception site", depending on the circumstances, as including the power to arrest for hindering police in the performance of their duties,[11] the power to arrest for obstruction of investigators under the *Liquor Act* 1992 (Qld),[12] the power of police officers to give pedestrians, drivers and passengers directions for the safe and effective regulation of traffic,[13] the power of a police officer to require a person who is in or who has just left a vehicle to do or not to do anything the police officer reasonably believes is necessary to preserve the safety of the police officer, the person, or other persons,[14] and the power of a police officer exercising or attempting to exercise a power under the *PPRA* or any Act against an individual to use reasonably necessary force to exercise the power.[15] The respondent argued that in

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11 *PPRA*, s 790.
12 *Liquor Act* 1992 (Qld), s 185.
13 *PPRA*, s 59.
14 *PPRA*, s 68(2).
15 *PPRA*, s 615(1).

any event it was reasonably open to the Magistrate to infer that members of the public would not regard the place as open to their use and would not go there for fear of interfering with the police. The authorities demonstrated that the primary judge was right to accord weight to that view of the Magistrate.[16] The respondent contended that in these circumstances the place where the respondent was alleged to commit the public nuisance offence was "the antithesis of a public place".

[29] The respondent argued that there may be a temporary loss of the quality of a place as a public place because the definition did not focus on any particular status, such as public ownership, but rather upon a potentially variable quality, namely the access to and use of the place by the public. He argued that so much was also indicated by the absence from the definition of "public place" of the qualification which appears in the definition of the same term in the *PPRA*, namely, "and whether or not access to the place may be restricted at particular times or for particular purposes".[17]

Consideration

[30] The question is whether it was open on the prosecution evidence to find beyond reasonable doubt that the part of McIvor Road where the events occurred was at that time a "public place" within the meaning of that term as it is used in Division 1 of Part 2 of the *Summary Offences Act* 2005 (Qld). In my respectful opinion such a finding was plainly open.

[31] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute; the process of construction must begin by examining the context of the provision; and the statutory provision must be given the meaning that the legislature is taken to have intended.[18]

[32] The relevant statutory object in s 5 of the *Summary Offences Act* 2005 (Qld) was "ensuring, as far as practicable, members of the public may lawfully use and pass through public places without interference from acts of nuisance committed by others". That object does not shed particular light upon the content of the term "public places", but no reason appears why police officers should be excluded from those "members of the public" whom that Act was designed to protect. Nor is it likely that the legislature intended to deny protection to members of the public who congregate at one place on a public road as a result of the exercise of police powers. The exercise of some police powers under the *PPRA* is likely to result in such a congregation of people in the vicinity of police. On the face of it, that is a situation in which the object expressed in s 5 has particular application. That is so regardless of the array of statutory powers available to the police in defined circumstances to control some aspects of the conduct of members of the public, including drivers of and passengers in vehicles.

[33] In *Schubert v Lee*[19] the question was whether Mr Schubert's conduct in a lane had obstructed the passage of traffic on a "road or footpath" under a particular regulation. "Road" was defined as including any street, road, lane etc "open to or used by the public". The High Court observed:

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16 *Stevenson v Yasso* [2006] QCA 40 at [36]; *Parsons v Raby* [2007] QCA 98 at [24]-[25].

17 *PPRA*, Schedule 6, definition of "public place" at (a).

18 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-384 [69]-[78].

19 (1945) 71 CLR 589 at 592 per Latham CJ, Rich and Dixon JJ.

> "The definition contained in the statute might very readily have been limited to "public" streets, roads, lanes, etc, but such a limitation has not been included in the definition. The words "open to or used by the public" are apt to describe a factual condition consisting in any real use of the place by the public as the public – as distinct from use by licence of a particular person or only casual or occasional use. It may be necessary to distinguish places open to members of the public as such from places left open by the owner but obviously intended only for the use of a particular description of person, for example, visitors to his shop or other premises. Prima facie the words of the section mean streets, etc which actually are open to or used by the public, so that there is some need for protection of the public in the use of such streets, etc."

[34] The respondent argued that *Schubert v Lee* decided that the present question is merely one of fact and that there was no error in the Magistrate's finding of the relevant facts. In *Schubert v Lee* there was insufficient evidence to establish that the lane used by Mr Schubert had ever been dedicated to the public as a highway. The statement that the words "open to or used by the public" describe a "factual condition" consisting in any real use of the place by the public as the public must be understood in that context.

[35] This case is different from *Schubert v Lee* because it was common ground here that the relevant conduct occurred on a public road. The definition of "public place" in the *Summary Offences Act* 2005 (Qld) applies when the place is either open to the public or used by the public. It is open to question whether factual questions about public use or access can deny the character as a "public place" of a public road. Except where there is some clear statutory provision to the contrary, members of the public have the right to be on public roads for the purpose of exercising the public right of travelling on those roads.[20] It might be thought that, subject only to the exercise of legislative power which has the effect of lawfully excluding the public from a section of public road at the relevant time, such a place must necessarily be regarded as being "open to the public". In relation to a similar definition which was in issue in *Ryan v Nominal Defendant*, Santow JA observed that:[21]

> "…in the case of a place which the public have an entitlement to use, the place will be said to be "open to the public" regardless of whether in actual fact it is a place which the public can enter without impediment. This is because the public have a collective right vis-á-vis the (usually governmental) owner to use the place, and any member of the public who in fact uses it can reasonably expect others to be using it also. In such a case it is unnecessary to consider the question of whether the place is "used by the public"."

[36] However Santow JA made it plain that this observation was a tentative one and it was not necessary to decide the point in that case. It is also not necessary to decide it here. If the Magistrate's decision is viewed as one which depended upon the facts of the particular case it was nonetheless unsustainable.

[37] In *Mansfield v Kelly*[22] Newton J, delivering the judgment of the Full Court of Victoria, said:

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20 *Melbourne Corporation v Barry* (1922) 31 CLR 174 per Higgins J at 206.

21 [2005] NSWCA 59; (2005) 62 NSWLR 192 at 212, paragraph [82].

22 [1972] VR 744 at 746.

> "There are, of course, numerous statutory provisions which make conduct of various descriptions "in a public place" an offence. In every such case the nature and subject-matter of the provision and the evil which it was intended to prevent are no doubt relevant to its interpretation, as was in fact pointed out by Nelson J in *McKenzie v Stratton* [1971] VR 848."

[38] That passage was quoted with approval by WB Campbell, Douglas and DM Campbell JJ agreeing, in *Forte v Sweeney; ex parte Forte*.[23] In *McKenzie v Stratton*, Nelson J also observed that generally when an offence is defined in terms of a public place, it is the public nature of the offence, which is the evil which the legislature is designed to restrain.[24] Applying that observation to the statutory provisions here directs attention to the question whether the road retained its public character. In my respectful opinion there can only be one answer to that question. The place where the alleged offence occurred retained its public character throughout. This was not akin to a case in which the relevant conduct occurred inside a structure which shielded the action from members of the public.[25] Here there was no barrier to prevent members of the public hearing and seeing what the respondent said and did.

[39] Once the drivers of the three vehicles had been required by police officers to stop their vehicles on the side of the road it could hardly be said that they and their passengers were not entitled to continue to exercise their rights as members of the public to remain on the road. No doubt they were obliged to respect the rights of other road users and to refrain from obstructing the police in the lawful exercise of their powers, but the driver and other occupants of the vehicles were entitled to be on that part of the road in their capacity as members of the public. Similarly, the fact that the police officers were entitled to exercise various statutory powers did not deny their entitlement as members of the public to be present on the road. On the prosecution evidence at least one member of the public – the applicant (who the Magistrate found to be a member of the public for this purpose) – in fact saw and heard what the respondent did and said at that place. That section of road retained its public character.

[40] Other members of the public, the other police officers and the drivers and occupants of the vehicles might reasonably have ventured onto that particular stretch of road, as is indicated by the applicant's apparent unconcern about the respondent's presence at that place before the respondent allegedly embarked upon the conduct charged as an offence. But even if that were not so it would not matter. The fact that the number or conduct of people present on a particular section of a public road renders it unlikely or even practically impossible for others to enter the same place at the same time (as where, for example, there is a queue of cars waiting bumper to bumper at traffic lights or a group of pedestrians shoulder to shoulder on a crossing) is not apt to deny the public character of the road at that place. There was no legal or factual impediment to other members of the public being on the road in a position close enough to see and hear what the respondent said and did, even if other people were unlikely to have ventured onto the particular stretch of road between the applicant and the respondent. It was not appropriate to confine attention to the

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23 [1982] Qd R 127 at 129.

24 [1971] VR 848 at 849-851.

25 Compare *Mansfield v Kelly* [1972] VR 744.

precise section of the road upon which the applicant and respondent stood. The public character of that place derived not only from the right of the public to be in that particular spot but also from the right of the public to be on immediately adjacent sections of road from which the respondent's conduct might have been seen and heard.

[41] One matter upon which the Magistrate relied in concluding that the public right of access to a section of the road had been lost was his finding that the police had "detained" all present. In my respectful opinion there are two reasons why this finding did not support the conclusion. The first is the absence of evidence to justify the finding that the police had detained anyone. The Magistrate did not identify either the source of the police power to "detain" the people in the vehicles or any evidence that supported that finding. The police officers did not explain the source of their supposed power to detain the drivers and occupiers of the vehicles. The drivers of each of the three vehicles complied with their obligations under s 60(2) of the *PPRA* to stop their vehicles when they were required to do so. Section 62(2) obliged those drivers to ensure that their vehicles remained at that place for the time reasonably necessary to enable the police officers to exercise the powers in s 60(4), including the powers to search the vehicles and seize suspected evidence of the commission of an offence. That did not authorise police to detain the drivers, much less the passengers. Under s 68 a police officer may require the person in control of a vehicle to give the officer reasonable help to enable the officer to effectively exercise a power under that chapter of the Act and may require the person in control of a vehicle, or a person who is in or has just left the vehicle, to do or not to do anything the police officer reasonably believes is necessary to enable the officer to safely exercise a power under a transport Act in relation to the vehicle or to preserve the safety of the police officer, the person or other persons. The evidence did not reveal that the police purported to exercise those powers (other than to direct that the vehicle's occupants get out of the vehicle) or any occasion for their exercise, which in any event would not have justified the detention of the respondent or anyone else.

[42] The applicant referred to the power conferred by s 31 of the *PPRA* to detain occupants of vehicles in circumstances specified in s 32(m), namely, where there is something in the vehicle which "may be something the person intends to use to cause harm to himself, herself or someone else". I am unable to accept that the legislative purpose extended to the grant of a police power to detain a person, or only a person residing in a community where an alcohol management plan is in force, merely on the ground that the person subsequently intends to consume alcohol which is in their car. No other provision was identified which authorised the police officers to detain the drivers or the passengers, merely because they were in vehicles lawfully stopped under s 60. The drivers and passengers may have thought that they were not free to leave on foot, it might have been impracticable for them to do so, or they might simply have preferred to wait whilst the police officers completed their searches and seizures of alcohol; but the police officers' beliefs that those present were "detained" had no legal basis.

[43] The second reason why the asserted detention was irrelevant is that the lawful detention of a member of the public at a public place does not of itself have the effect of excluding that person's entitlement to be present at that place as a member of the public, just as it does not have the effect of excluding any other person from

exercising the same public right. An arrest, or "detention", upon a public road simply does not bear upon the public character of the road.

[44] The Magistrate erred in upholding the respondent's submission that there was no case to answer on the ground that it was not open to find that the place of the alleged offence was a public place. On the evidence in the prosecution case the alleged offence certainly occurred at a "public place" because it occurred on a public road.

Leave to Appeal

[45] Some very surprising results would follow from the decision in the District Court. Similar congregations of members of the public and police by the sides of roads where police officers exercise their powers under the *PPRA* and the *Liquor Act* 1992 (Qld) are not unusual. The *PPRA* authorise the temporary detention of drivers for a variety of purposes, including at roadblocks setup to apprehend criminals and persons who have been unlawfully deprived of liberty[26] and for the purpose of random breath tests.[27]

[46] The respondent argued that leave to appeal should be refused because the question whether the location of any particular activity is in a "public place" must depend upon the facts of the particular case. If so, that would not deny the importance of the issue in this case. It arose in a fairly typical case where members of the public and police congregated by the side of a road as a result of the exercise of police powers. The effect of the ruling is that in similar cases members of the public and police officers, who find themselves in similar situations may be denied the protection against interference with their use of public places which is the expressed object of Division 1 of Part 2 of *Summary Offences Act* 2005 (Qld). This ground raises a question of general public importance which should attract a grant of leave to appeal.[28]

[47] I would grant leave to appeal and allow the appeal on this ground.

Ground 2: The learned Judge erred in concluding that the learned Magistrate was correct to find that the respondent's actions did not constitute an assault

[48] The prosecution gave particulars of the charge that the respondent assaulted a police officer in the performance of the officer's duties that:

> "the defendant was informed he was under arrest for the offence of committing a public nuisance and the defendant then attempted to strike Sergeant Atkinson on a number of occasions."

[49] In the applicant's evidence at the trial he described two occasions when the respondent had raised his fists and thrown a couple of punches. The applicant gave evidence that he and the respondent were perhaps less than one or two metres apart

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26 *PPRA*, s 26.

27 *PPRA*, s 60, the provision on which police replied in this case. Further provisions of the *PPRA* authorise police officers to search persons in a public place without a warrant in prescribed circumstances: ss 29, 30 and 33.

28 See *ACI Operations Pty Ltd v Bawden* [2002] QCA 286; see also *Zinace Pty Ltd v Tomlin* [2003] QCA 102; see also *Mbuzi v Hornby* [2010] QCA 186 at [13], citing *Rodgers v Smith* [2006] QCA 353 at [4].

when he asked the respondent to stop swearing. On the second occasion they were "still a couple of arms length away". He accepted in cross examination that on both occasions there was enough distance between the two that unless the respondent moved closer, "the position where he was throwing these punches was such that you wouldn't need to defend yourself at all because they simply weren't within range of hitting you", and that the respondent did not in fact move closer. In relation to the second occasion, Stallard gave similar evidence that the applicant and the respondent were a metre to two metres apart from each other when she saw the respondent throwing some punches towards the direction of the applicant. Johnson's evidence was that he saw the respondent take up a fighting stance and throw a number of punches at the applicant, none of which hit so far as he was aware, and that the applicant did not have to move away.

[50] Witnesses called by the respondent gave a very different version of events, describing the applicant as the aggressor and as having grabbed the respondent around the collar area or neck. Johnson also said that he saw the applicant holding both of his arms out touching or near the respondent's upper torso or lower neck.

[51] The Magistrate referred in detail to the evidence of the witnesses and made the following findings of fact. The respondent was very drunk. He abused the applicant in the terms which the applicant described. The applicant said that he was going to arrest the respondent for public nuisance. The applicant then attempted to grab the respondent around the shoulder area. The respondent took up a fighting stance and threw some air swings at the applicant. When the applicant then moved towards the respondent, the respondent evaded him. The applicant was then met with the second fighting stance and more air swings. The applicant then did not move in on the respondent, but remained out of reach, "standing off this much smaller but very drunk man, telling him to calm down." The Magistrate concluded that on the whole of the evidence, the taking up of the fighting stance and the throwing of the punches in the applicant's direction could either have been a threat and attempt to apply force, or they could be simply "the acts of a drunken man showing bravado with no apparent ability to actually apply force to [the applicant]". The Magistrate found there was no danger of the applicant being actually hit and that there was neither actual contact nor any apparent present ability to actually apply force.

[52] Section 245(1) of the *Criminal Code* 1899 (Qld) defines "assault" as follows:

> "A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an ***assault***."

[53] The Magistrate found that the definition of assault was not satisfied on his findings, there having been no actual contact and no actual or apparent present ability to apply force.

[54] In the District Court the primary judge referred to the evidence and findings by the Magistrate and concluded that the Magistrate's finding the respondent had not assaulted the applicant was correct, that the prosecution could not prove beyond a reasonable doubt that the respondent had actually attempted to strike the applicant as particularised, and that in any event the applicant did not disclose any reason why the arrest was necessary and therefore lawful.

[55] In this Court the applicant argued that although the respondent was intoxicated at the time there was no suggestion that he was in such a state of stupefaction that he couldn't use his limbs, that it was self evident that a present ability to apply force existed, and that in holding otherwise the Magistrate must have misinterpreted s 245 of the *Criminal Code*. The applicant argued that to suggest that the respondent's acts were simply "bravado", meaning that the respondent might not have actually intended to strike the officer, did not exclude criminal responsibility because if the respondent meant the acts to be a threat he was criminally liable. The applicant also argued that the primary judge's conclusion that there was no evidence that an arrest was necessary was inconsistent with the Magistrate's findings (in his no case ruling) that it could be inferred that the applicant arrested the respondent to prevent a repetition of the public nuisance offence.

[56] It is necessary to consider only the primary judge's conclusion that the prosecution failed to prove an attempt to strike the applicant. As was submitted for the respondent, the prosecution particularised the alleged assault as an attempt to apply force, not as a threat. There was no amendment to those particulars during the trial. In that context the respondent did not give evidence himself but cross examined the prosecution witnesses and elected to call evidence. I see no reason to question the submission made for the respondent that his cross examination of the police witnesses and the manner in which he conducted the defence case were influenced by the particulars. As late as closing addresses, the prosecutor in terms accepted that it was bound by the particulars. The case is therefore not like *R v Trifyllis*,[29] in which at the close of the Crown case the trial judge allowed the case to proceed where the evidence in the Crown case was sufficient to prove an unlawful assault which differed from that which had been particularised. The applicant should not be permitted to depart from the particulars for the first time on appeal.

[57] The applicant did not argue that there was any error in the primary judge's decision that the prosecution had failed to prove any actual attempt by the respondent to strike the applicant as particularised.

[58] There was no error in the Magistrate's decision to dismiss the assault charge.

Ground 3: The learned Judge erred in concluding that it was open to the learned Magistrate to find that excessive force had been employed so that the applicant was no longer acting in the execution of his duty

[59] The particulars of the charge that the respondent obstructed a police officer in the performance of the officer's duties were that, "whilst Sergeant Atkinson and other police attempted to effect the defendant's arrest he struggled to such an extent that handcuffs were required to be placed on him."

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29 [1998] QCA 416.

[60] The facts found by the Magistrate contradicted that charge. The Magistrate instead found that in circumstances in which there was no immediately apparent danger to the applicant, who was two arms length away from the respondent who was not moving towards him, Johnson had used great force in crash tackling the respondent, a much smaller man who was drunk, propelling them both across half the road into a ditch. The Magistrate held that rather than the police being required to use handcuffs to effect the respondent's arrest, the respondent was defending himself against an unlawful assault by police.

[61] The primary judge reviewed the relevant evidence and the Magistrate's finding and held that it was open to the Magistrate on the evidence to conclude that excessive force had been used by Johnson, and subsequently by the other police officers, that the respondent was entitled to struggle in self defence, and that in fact was what he was doing. The primary judge also found that in any event, the police were not, at that stage, acting in the execution of their duties.

[62] The applicant argued that the primary judge erred by failing to have regard to the speed at which the relevant events unfolded, it being apparent that Johnson reacted immediately and instinctively to what reasonably appeared to him to be an assault on the applicant.

[63] That argument raises no question of principle or general importance of a kind which justifies affording the prosecution a third opportunity to pursue this charge. I would refuse leave to appeal on this ground.

Ground 5: The learned Judge failed to conduct a rehearing on the evidence

[64] The applicant argued that in finding in relation to the obstruct police charge that the Magistrate's findings were "open on the evidence" the primary judge failed to make her own determination of the relevant facts and issues by drawing her own inferences and conclusions, as is required in the hearing of an appeal under s 222 of the *Justices Act* 1886 (Qld).[30] That is certainly arguable, but this is nevertheless not an appropriate case for the grant of leave to appeal on this ground. Having regard to the significant advantage which the Magistrate had of seeing and hearing the witnesses give evidence as the case unfolded and the obligation of the District Court in an appeal under s 222 of the *Justices Act* 1886 (Qld) to give "due deference and [attach] a good deal of weight to the magistrate's view",[31] a challenge to the Magistrate's findings of fact does not enjoy sufficient prospects of success to justify the grant of leave to appeal to this Court.

[65] I would refuse leave to appeal on this ground.

Ground 4: The learned Judge erred in concluding that the learned Magistrate was correct to allow a higher amount for costs pursuant to section 158B(2) of the *Justices Act* 1886 (Qld)

[66] I am not persuaded that the primary judge erred in upholding the costs order made by the Magistrate having regard to the result in the District Court, but it is unnecessary to discuss the arguments on that topic. If, as I would hold, the Magistrate's ruling that there was no case to answer in respect of the public

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30 See *Rowe v Kemper* [2008] QCA 175 per McMurdo P at [3]-[5].

31 *Stevenson v Yasso* [2006] QCA 40 at [36]; see also *Parsons v Raby* [2007] QCA 98 at [24].

nuisance offence should be set aside, that would falsify one of the material bases upon which the Magistrate made the costs order. It does not necessarily follow that the costs order would have been different had the Magistrate ruled that there was a case to answer on that charge, but the case for a materially different order would certainly have been strengthened had the respondent been convicted of the charge.

[67] Subject to my remarks under the next heading, it seems necessary to set aside the costs order and remit the issue of costs for further hearing and determination in the Magistrates Court.

Proposed Orders

[68] The appropriate orders appear to be to grant leave to appeal, allow the appeal, set aside the orders of the Magistrate dismissing the public nuisance charge and the costs order, remit those matters to the Magistrates Court at Cooktown, and direct that Court to proceed with the hearing of that charge and the determination of the appropriate costs order according to law.

[69] In view of the public expense that must have been incurred in the prosecution of the public nuisance charge to date and the acquittals on the more serious charges, the view is open that there should be no further hearing in the Magistrates Court. There is the difficulty, however, that this Court should not express any conclusion about the respondent's guilt or innocence of the public nuisance charge because, had the Magistrate ruled that the respondent had a case to answer on that charge, the respondent might have conducted the proceedings differently at the trial; and the respondent's guilt or innocence of that charge might materially bear upon the appropriate costs order. Bearing in mind matters of this character, at the hearing of the application the Court intimated that if it granted leave and allowed the appeal, it would allow the parties an opportunity of making submissions as to the appropriate consequential orders.

[70] I would make the following orders:

1. Grant leave to appeal against the orders made in Appeal No. 2 of 2008 in the District Court at Cairns dismissing the applicant's appeal against the orders made in the Magistrates Court at Cooktown on 6 December 2007 that the charge of committing a public nuisance be dismissed as there was no case to answer, and awarding costs pursuant to s 232(1) of the *Justices Act* 1886 (Qld) of $9,222 to be paid to the Registrar within thirty (30) days.

2. Order that:

   (a) Set aside those orders made in the District Court and instead allow the appeal to the District Court in Appeal No. 2 of 2008.

   (b) Set aside the orders made in the Magistrates Court at Cooktown ruling that there was no case to answer and dismissing the charge that the respondent committed a public nuisance at Hopevale on 30 November 2006.

3. Grant leave to appeal against the orders made in the District Court at Cairns in Appeal No. 208 of 2008 dismissing the appeal against the order made in the Magistrate's Court at Cooktown on 6 August 2008 that costs be awarded

in favour of the respondent in the amount of $32,000, and awarding costs pursuant to s 232(1) of the *Justices Act* 1886 (Qld) of $9,222 to be paid to the Registrar within thirty (30) days, allow the appeal and set aside the orders made in the District Court to that extent, but otherwise refuse leave to appeal against the orders made in the District Court at Cairns in Appeal No. 208 of 2008.

4. Direct that each party file a written submission by 4.00 pm on 29 November 2010 as to the appropriate consequential orders, including as to costs in the Magistrates Court, the District Court, and this Court.

[71] **MULLINS J:** I agree with Fraser JA.