SUPREME COURT OF QUEENSLAND

CITATION:	*R v Porter* [2013] QCA 128
PARTIES:	**R** **v** **PORTER, Troy Darren** (applicant)
FILE NO/S:	CA No 311 of 2012 CA No 340 of 2012 DC No 40 of 2012 DC No 133 of 2012 DC No 943 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application Application for leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2013
JUDGES:	Holmes, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In Appeal No 311 of 2012:** **1. Refuse the application to adduce evidence.** **2. Refuse the application for leave to appeal from the decision in the District Court dismissing the appeal from the magistrate.** **In Appeal No 340 of 2012:** **Refuse the application for leave to appeal against sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – OTHER MATTERS – where applicant convicted in Magistrates Court of breaching a non-contact order – where applicant unsuccessfully appealed decision of Magistrates Court to District Court, under s 222 of the *Justices Act* 1886 (Qld) – where applicant seeks leave, under s 118(1)(b) and s 118(3) of the *District Court of Queensland Act* 1967 (Qld), to appeal the District Court's decision – whether leave to appeal against conviction should be granted – whether District Court: erred in refusing application to adduce further evidence; made material mistakes of fact; reached an unreasonable verdict; caused justice to miscarry; and/or made an error in law

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – where applicant seeks leave to adduce further evidence – where evidence available or known to counsel at trial – whether application to adduce further evidence should be granted

CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – OTHER MATTERS – where conviction for breach of non-contact order activated a partly suspended sentence for three counts of indecent treatment of a child under 12 years – where Magistrate remitted breach of non-contact order, and partly suspended sentence, to District Court for sentencing – where District Court sentenced the applicant to six months for breach of non-contact order, and activated eight months of partly suspended sentence, to be served cumulatively – where District Court set parole eligibility at half-way mark – where applicant seeks leave, under s 118(1)(b) and s 118(3) of the *District Court of Queensland Act* 1967, to appeal against the sentence imposed by the District Court – whether leave to appeal against sentence should be granted – whether sentence manifestly excessive

Child Protection (Offender Reporting) Act 2004 (Qld)
Criminal Code 1899 (Qld), s 23, s 23(2), s 24, s 590AA, Ch 5
District Court of Queensland Act 1967 (Qld), s 118(1)(b), s 118(3)
Drugs Misuse Act 1986 (Qld)
Justices Act 1886 (Qld), s 222, s 223(1), s 223(2)
Penalties and Sentences Act 1992 (Qld), s 43A, s 43B, s 43C(5), s 43F, s 147(2)

Davies v The King (1937) 57 CLR 170; [1937] HCA 27, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, considered
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Porter v The Commissioner of Police [2012] QDC 115, cited
R v Porter; ex parte A-G (Qld) [2009] QCA 353, cited
R v Porter, unreported, Daley JM, MAG-00018310/11, 9 December 2011
Smith v Ash [2011] 2 Qd R 175; (2010) 200 A Crim R 115; [2010] QCA 112, cited

COUNSEL: The applicant appeared on his own behalf
D L Meredith for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of White JA and the orders she proposes.

[2] **FRASER JA:** I respectfully agree with White JA's comprehensive analysis and with the orders proposed by her Honour.

[3] **WHITE JA:** The applicant seeks leave to appeal against the dismissal of his appeal to the District Court from his conviction in the Magistrates Court for breaching a non-contact order.[1] Should his conviction appeal be unsuccessful, he also seeks leave to appeal against the sentence imposed in the District Court (to which it had been committed by the magistrate) for that breach.[2]

[4] The applicant was granted an extension of time to 17 November 2012 within which to seek leave to appeal the District Court dismissal of his appeal.[3] The applicant was also granted an extension of time to 18 November 2012 within which to seek leave to appeal the sentence imposed by the District Court.[4]

[5] The applicant was represented by counsel before the magistrate but thereafter has represented himself.

[6] The applicant wishes to adduce further evidence.[5]

Background

[7] To understand the issues raised on these applications, and before setting out the grounds of appeal, the background needs to be canvassed quite extensively.

[8] On 13 August 2009, the applicant pleaded guilty to three counts of unlawfully exposing a child to an indecent act between 30 July 2007 and 3 October 2008; two counts of breaching a condition of his bail on 4 December 2008; and one count of possessing the dangerous drug cannabis sativa on 3 October 2008. The child was aged between six and seven years. He was sentenced to two years imprisonment suspended after he had served 248 days (the period of pre-sentence custody) with a three year operational period. He was sentenced in respect of each breach of bail to concurrent terms of three months imprisonment. For possession of cannabis he was convicted and not further punished. Pursuant to s 43B of the *Penalties and Sentences Act* 1992, the District Court judge made a non-contact order of two years duration under which the applicant was prohibited from:

- contacting the complainant;
- going within 200 metres of her home;
- going to within 200 metres of the Bald Hills State School.[6]

[9] The Attorney-General appealed against those sentences on the ground that they were manifestly inadequate. The appeal was dismissed.[7]

[10] The applicant had been charged with more serious offences, but on the morning of a s 590AA hearing the prosecution accepted his pleas of guilty to the indecent treatment charges and entered a *nolle prosequi* with respect to the balance.

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1 CA No 311 of 2012.
2 CA No 340 of 2012.
3 CA 311/12, p 609.
4 CA 340/12, p 65.
5 Applicant's 'Form 38 – Application to leave to adduce evidence (rule 108)', filed 21 February 2013.
6 AR CA 311/12, p 297. The complainant was enrolled at this school after the offences came to light.
7 *R v Porter; ex parte A-G (Qld)* [2009] QCA 353.

[11] On 9 December 2011, after a four day summary trial, the applicant was convicted of breaching the non-contact order. The magistrate remitted the sentence for the breach of that order to the District Court. The applicant was also committed to the District Court to be dealt with for breach of the partly suspended sentence which had been imposed on 13 August 2009.

[12] The appeal from the magistrate's conviction order was heard before Shanahan DCJ in the District Court on 11 April 2012.[8] His Honour also heard submissions about sentence in respect of that conviction and the breach of the suspended sentence.

[13] It is necessary to describe more fully the original offences. The following is from the judgment on the Attorney's appeal:

> "[6] The complainant was aged between six and seven years at the time of the offences. She was in Grade Two. The respondent was her teacher. Her parents were friends with the respondent, the friendship having begun in mid 2007. Because of that friendship the respondent would on occasion sleep over at the complainant's family home on the lounge room floor. On occasions the complainant and her family slept over at the respondent's house.
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> [7] The offending conduct occurred on three separate occasions. On the first occasion, at the respondent's home, the respondent masturbated in front of the complainant to the point of ejaculation. He invited the complainant to place her mouth over his penis. She did not do that.
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> [8] The second offence occurred at the complainant's house. The complainant got into the swag in which the respondent was sleeping overnight and the respondent showed the complainant his penis.
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> [9] The third incident occurred at the respondent's home and again he masturbated in front of the complainant to the point of ejaculation.
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> [10] After his arrest the respondent was released on bail subject to conditions which conditions included that he have no contact with the complainant child, or with any child under the age of 14 years unless the child's parent was present. Following the reporting of these offences the complainant child was moved to a new school. On 4 December 2008 the respondent went to that school and, during a morning tea play period, called the complainant and a young friend over to the gate and asked the complainant how she was going and how school was. This was the conduct the subject of the two counts of breaching bail."[9]

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8 *Porter v The Commissioner of Police* [2012] QDC 115. His Honour was the original sentencing judge on 13 August 2009.

9 *R v Porter; ex parte A-G (Qld)* [2009] QCA 353 per McMeekin J with whom Keane and Holmes JJA agreed.

[14] It is also necessary to say something about the applicant's personal circumstances. These were outlined in the Attorney's appeal.[10] The applicant was 36 at the time of the indecent treatment offences and 38 when sentenced. He had some previous convictions relating to the production and possession of dangerous drugs in March 1993 and January 1995 which were described as "somewhat dated". Of significance, when he was 23 he was involved in a motor vehicle accident that resulted in serious injury. He appears to have suffered a closed head injury. He was noted, to the observation of his mother, to have suffered some behavioural changes as a consequence, including difficulty forming relationships with adults, particularly females. A psychologist, whose report was before the original sentencing court, had opined that the applicant exhibited "cortical disinhibition which would be consistent with organic brain damage subsequent to the motor vehicle accident …"[11]

[15] At the time of the Attorney's appeal the applicant was a single man with no dependents. He had qualified as a school teacher in 1995 (that is, after his accident) and had taught in several schools from the beginning of 2006 until October 2008. His counsel informed the District Court at the sentence hearing in 2009 that the breach of his bail conditions (attending at the complainant's school) was innocent. The applicant said he was then unaware that the complainant had moved to a new school and he was in the vicinity to see a psychologist from whom he was obtaining counselling for depression.[12]

The charge the subject of the appeals

[16] The applicant was charged pursuant to s 43F of the *Penalties and Sentences Act* 1992 that on 18 November 2010 at Albany Creek he unlawfully contravened a non-contact order made in the District Court on 13 August 2009.

[17] Section 43B empowers a court to make a non-contact order. Such an order may be made if the offender is convicted of a personal offence.[13] A personal offence means an indictable offence committed against the person of someone.[14] The indecent dealing offences, with which the applicant was charged, and pleaded guilty, were such offences. "Contact" is defined in s 43C(5), relevantly:

> "(a) intentionally initiate contact with the victim … in any way …; or
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> (b) intentionally follow, loiter near, watch or approach the victim …; or
>
> (c) intentionally loiter near, watch, approach or enter a place where the victim … lives, works or visits."

Summary of case against the applicant

[18] The complainant child, the subject of the non-contact order, attended a swimming lesson at the Albany Creek Leisure Centre on the morning of 18 November 2010 with her Grade 5 class and teachers. At about 10.05 am, the children changed back into their uniforms. Afterwards, the complainant came out of the toilet block, where she had changed, and waited near by. She saw a man who looked like the applicant walk near her and wink at her. She immediately told one of her teachers. That afternoon she told her mother and gave a recorded statement to police.

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10 *R v Porter; ex parte A-G (Qld)* [2009] QCA 353 at [16]-[22].

11 *R v Porter; ex parte A-G (Qld)* [2009] QCA 353 quoted at [19].

12 *R v Porter; ex parte A-G (Qld)* [2009] QCA 353 at [21], [22].

13 Section 43B(1).

14 Section 43B(4).

[19] An administrative officer with the Queensland Police Service received a telephone call about 10.35 am that day from the applicant who said he had seen the complainant at the pool. On 22 November 2010 he told his reporting officer that the complainant had walked in front of him whilst he was at the Centre.

[20] Various investigations were carried out to check the truthfulness of the applicant's explanation that it was an accidental encounter. Much of the evidence before the magistrate concerned the results of a forensic examination of the applicant's mobile phone and computer. The latter, in part, related to his access to the school newsletters, which contained dates and the times each class would attend swimming lessons at the Albany Creek Leisure Centre.

[21] The applicant gave evidence but called no other evidence.

[22] The focus of the applicant's case at first instance and on both appeals was that it could not be demonstrated beyond reasonable doubt that he attended at the Albany Creek Leisure Centre on 18 November 2010 for the purpose of contacting the complainant.

Approach to appeals

(i) From District Court to Court of Appeal

[23] Pursuant to s 118(1)(b) and (3) of the *District Court of Queensland Act* 1967 a party dissatisfied with a judgment of the District Court exercising its criminal jurisdiction (other than original criminal jurisdiction under Part 4), including an appeal brought pursuant to s 222 of the *Justices Act* 1886, may appeal to the Court of Appeal only after obtaining the leave of the court. In deciding whether to grant leave, the court will be guided by considerations, such as whether the case involves an important question of law or of general public importance; whether an appeal is necessary to correct a substantial injustice to an applicant; and whether there is a reasonable argument that there is an error to be corrected.[15]

(ii) From the Magistrates Court to the District Court

[24] Pursuant to s 223(1) of the *Justices Act* 1886 an appeal brought to the District Court under s 222 is to be a re-hearing on the evidence given in the proceeding before the magistrate. The applicant sought to adduce further evidence before the District Court. If the District Court is satisfied that there are special grounds for giving leave it may do so "to adduce fresh, additional or substituted evidence".[16] If leave is given the District Court is to consider the further evidence together with the original evidence. Here, the District Court judge refused leave to adduce further evidence and that refusal is a proposed ground of appeal.

[25] When an appeal is a re-hearing on the evidence rather than an appeal proper, Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy*[17] said:

> "… the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of "weighing conflicting evidence and drawing [their] own

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15 *Smith v Ash* [2010] QCA 112 especially at [50] per Fraser JA.

16 Section 223(2).

17 (2003) 214 CLR 118 at 126-127 [25].

> inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect""

In a note of caution, their Honours observed:

> "Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearance of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical."[18]

These principles were referred to by the District Court judge before he embarked on a consideration of the appeal.[19]

Grounds of appeal to the District Court

[26] In his Notice of Appeal to the District Court the applicant's grounds of appeal were:

> "Error in: - the Judge's Judgment
> - Law
> Unreasonable verdict
> Negligent representation of acting legals (Notified to the Queensland Legal Commission)
> Fresh evidence."

[27] The applicant filed an affidavit with attachments containing the "fresh evidence" upon which he wished to rely.

Proposed grounds of appeal to the Court of Appeal

[28] In his Notice of Application for Leave to Appeal to this court the applicant has the same grounds as to the District Court set out above. Additionally, he contends that the correct judgment was not given in light of all material previously and newly presented. This he repeats in the summary in his notice, giving the reason why leave should be granted to appeal:

> "In addition to explanations already supplied in my Grounds for Application, I have supporting evidence the presiding District Court Appeal Judge, failed to address the majority of points raised in both my Outline of Argument and Appeal submissions, which directly related to the Summary Trial. It can also be proven the D.P.P. Crown Prosecutor … distorted facts and in fact lied in her submissions during this District Court Appeal."[20]

The applicant's contentions are expanded in his written submissions and were supported by his oral submissions at the appeal hearing.

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18 At 129 [31].

19 *Porter v The Commissioner of Police* [2012] QDC 115 at [6].

20 AR CA 311/12, p 613.

[29] The evidence that the applicant has indicated in his Form 38 that he wishes to place before the court includes a letter from the applicant to his then solicitor, dated 21 July 2011. In that letter he seeks to have the complainant cross-examined "to face her fears" and urges his solicitor to use statements already provided, or yet to be obtained, in support of his defence. The other documents, apart from relevant court decisions, are Queensland Police Service Statement of Witness from Peta Blackmore, Joanna Alterio, "ZA" and Jodie Ingram. All but ZA are police officers. ZA was the complainant's school teacher who accompanied her to the Albany Creek Leisure Centre for the swimming lesson. Each gave evidence before the magistrate.

[30] The applicant also sought to adduce further evidence before the District Court which included reports from his treating psychologist and general practitioner, statements of support from friends, a relevant location map and a copy of his telephone account. This application was refused and, as mentioned, that refusal is a proposed ground of appeal.

[31] It is convenient to consider the application to adduce the further evidence later in these reasons.

Evidence before the magistrate

[32] The District Court had the benefit of a transcript of the proceedings before the magistrate as well as written submissions from both the applicant and the respondent.

[33] In November 2010 the complainant attended the Bald Hills State School. On 18 November 2010 she went with her class and teachers to the Albany Creek Leisure Centre by bus for swimming lessons. They arrived at the Centre at about 9.05 am. After their lessons they were permitted to play on the water slides because it was the last of their swimming lessons. They remained on the water slides until about 10.05 am. The children then went with their teachers to change into their school uniforms at the public toilet block. The complainant was amongst a group of children who were ready quickly.

[34] The complainant saw a man with sunglasses pushed up on his head, whom she thought was the applicant, pass within approximately half a metre to a metre of her, look at her, and wink. The complainant said she was shocked to see the man she thought was the applicant. He walked towards the canteen, picked up his bag, which was nearby, and left the area.[21]

[35] ZA, who was nearby, said that the complainant told her she had seen a man who was tall like the applicant. She spoke reassuringly to the child but observed that she seemed a little nervous. The complainant walked a few metres away scanning towards the canteen and entrance. ZA reassured her again and she responded, "I saw the man and he winked at me".[22] The complainant was told that if she were feeling anxious she could hold the teacher's hand. After calling the roll they walked through the main entrance to where the bus was waiting. The complainant held the teacher's hand "very tightly"[23] and asked if the teacher would sit next to her on the bus, which she did.

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21 The complainant was interviewed by police on 20 November 2011, AR CA 311/12, pp 298-328. She sketched the locations of various people at the time of the encounter, AR CA 311/12, p 329.

22 AR CA 311/12, p 81.

23 AR CA 311/12, p 81.

[36] There was some conversation between ZA and the complainant's mother, when she came to school to collect her daughter, about the incident. The mother was particularly concerned that the child, who came in at the end of the conversation, should not be upset and suggested to her that it was probably not him. She agreed with the applicant's counsel that at the time her daughter was "pretty vague" and it was not until a few days later that she told her mother that she knew it was "him".[24] It is one of the applicant's complaints that the complainant only came to be certain it was him after she had been exposed to leading questions by adults.

[37] As it transpired, there was no dispute about the applicant's presence on the path at the Albany Creek Leisure Centre. What was in issue was whether the encounter was intentional on the part of the applicant.

[38] The complainant was unshaken in her evidence that the applicant had winked at her.

[39] Joanna Alterio was an administration officer at the Maroochydore Police Station in the Child Protection Investigation Unit on 18 November 2010. At approximately 10.35 am she received a telephone call from a male, identifying himself as the applicant, who asked to speak to Detective Jodie Ingram. Detective Ingram was the applicant's case manager for his reporting obligations under the *Child Protection (Offender Reporting) Act* 2004. She was not then in the office. The applicant told Ms Alterio that he was at the Albany Creek Leisure Centre:

> "… he had just got changed and that he was walking to get a milkshake when he walked past the complainant."[25]

[40] He told Ms Alterio the child's name and said he had had no communication with her and left straight away. He told Ms Alterio that he had been at the pool from between 8.45 am and 10.15 am. Ms Alterio said that the caller seemed "quite intense" and was "talking quite quickly and seemed panicked".[26] Ms Alterio said that she would send an email to Detective Ingram containing that information. The applicant subsequently confirmed that he had made this telephone call.

[41] On 22 November 2010 the applicant made email, then telephone, contact with Detective Ingram. An arrangement was made for him to come into the police station to report some changes to his personal particulars – a requirement of his reporting conditions. He spoke about the encounter. When he attended at the police station the conversation with Detective Ingram was recorded. It was played to the magistrate.[27] The applicant said:

> "Well I went down to um Brisbane to see, um I had two friends I had to see that day, the first friend hadn't responded to my call and they live over at Albany Creek. And I um, I went to the pool there and I've had an old injury on my elbow here and so I went to the pool and did a little bit of swimming in the pool. I grabbed a milkshake. I went down to get um to check that I didn't lost some money on the seat and as I went down there, um the girl was just there, she just walked right in front of me, and I didn't care about looking, I just

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24 AR CA 311/12, pp 87-88.
25 AR CA 311/12, p 30.
26 AR CA 311/12, p 30.
27 Exhibit 4, Transcript of conversation between the applicant and Detective Senior Constable Jodie Ingram; AR CA 311/12, p 295-296.

> turned around … I presumed she was there with her class, um but, I didn't know that they had moved to Albany Creek um so I just knew to leave straight away. And because of what's happened in the past I didn't want them to be making out stories or anything, so I just rang straight away here to let you know but Jo took the message as she said you weren't there … I've had no communication at all, I just wanted to say that I ran into her and I've hope I have did the right thing by walking away … my sister lives just around the corner from it [the pool], and I have been there a few times but, it is certainly not a regular place that I go swimming but um, I was very anxious inside um nervy about the situation and there was no communication but just seeing her again um brought up all these things I have been trying to deal with over the past year and a half I suppose, and brought all these things back up and made me feel really uneasy."

[42] The applicant gave long and detailed evidence before the magistrate about his movements at the Albany Creek Leisure Centre on 18 November 2010. In this evidence he said that he crossed paths with the complainant twice.[28] He now suggests that this was just one incident, which may be a question of characterisation.[29] However, the complainant did not describe the encounter as "crossing paths" more than once. He left the change rooms after changing from his old painting pants in which he had been swimming into his dry clothes, put his towel over a railing and his bag down, and after some reflection, decided to buy a particular drink. Returning from the canteen he realised that he needed more money and passed the hydrotherapy pool where young children were having a swimming class. He said he saw the complainant walk in front of him in a narrow cul-de-sac nearby and they nearly collided. He was not sure if the child was the complainant. He collected his belongings, walked back up the ramp to leave and crossed paths with her again. He said he was "in shock".[30] The first occasion their paths crossed they were "nearly on top of each other",[31] while on the second they were a minimum of two metres apart. He denied winking at her.

[43] Police executed a search warrant at the applicant's home at Buderim on 1 April 2011. They seized his computer tower, mobile telephone, compact disks, playstation, camera and other equipment. Detective Blackmore was the investigating officer. She had also been the investigating officer for the original indecent dealing offences. The applicant contends that she was, in effect, over zealous in her pursuit of him.

[44] Forensic analysis of the applicant's computer and archived web logs revealed that some Bald Hills State School newsletters had either been accessed or downloaded by the applicant's computer. Some contained details of the swimming lessons in which the complainant participated at the Albany Creek Leisure Centre on 18 November 2010. Detective Blackmore gave extensive evidence about what was found. That evidence is set out fully in Shanahan DCJ's reasons at [26], including the canteen sales for a period during that morning, which did not include a milkshake, and that there were 29 public pools between Buderim and the Albany Creek Leisure Centre.

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28 AR CA 311/12, p 187 ll 25-50.

29 Applicant's Outline of Submissions, filed 21 February 2013, p 2 para 2.3. Note: there is another para 2.3 on page 1 of the Applicant's submissions.

30 AR CA 311/12, p 187.

31 AR CA 311/12, p 188.

[45] The applicant admitted in cross-examination that he had accessed a number of the newsletters and explained why. This explanation was rather convoluted. He said he wished to contact a person whom he knew at the school and thought she volunteered at the tuckshop. He knew her by her first name only. The newsletters did not identify surnames (for privacy reasons). However, searching the newsletters would not have greatly assisted because, in cross-examination, the applicant conceded that he did not know if this person did volunteer work in the school tuckshop; he did not know her last name; and he would not recognise it if it had been published.

[46] After the applicant had told police he was trying to find a woman with a particular first name police identified her. "AS" gave evidence in the prosecution case that she had met the applicant through the complainant's parents at a barbeque at their home in December 2007. They subsequently asked if they could bring the applicant with them to a barbeque at her house, to which she agreed. In about February 2008 the applicant took AS's daughter and the complainant to a park and a shopping centre for lunch. The last contact was in May 2008. While her elder child had started in 2008 at the Bald Hills State School, AS did not commence volunteering at the tuckshop until 2010. She did not regard the applicant as a friend. AS had been told of the original charges against the applicant by the complainant's mother.

[47] Forensic analysis revealed that the TransLink website was also accessed from the applicant's computer. On 8 October 2010 an enquiry was made for travel between the applicant's home address and Bald Hills. On 19 October 2010 an enquiry for travel was made between Buderim and the Bald Hills Railway Station. The applicant did not own a car in October 2010 but by 18 November 2010 he did.

[48] The applicant explained how he came to be in the area on 18 November 2010 since he lived in Buderim. He wished to meet two friends ("NP" and "SG"), who were the parents of children he had previously taught at St Andrew's School. There had been some general conversation about meeting but no firm plans. The applicant made an arrangement with SG to meet for lunch on 18 November. The applicant sent NP a text message the evening before indicating that he was planning to be in Brisbane and enquiring if she were able join them. She did not respond. SG lived in Ashgrove, NP at Upper Kedron.

[49] Not having heard from NP the applicant said he decided to go to her address. On the drive down to Brisbane from Buderim the applicant again tried to contact NP without success. However, he realised when he arrived in the vicinity that it was 8.40 am and she was likely taking her child to school and would not be at home. Originally, he said, he had no intention of swimming at the Albany Creek Leisure Centre, but decided to do so. Although he had no swimming things with him, he did have a bath towel and old painting trousers in the back of his car. He had some soreness from house painting. There was a slight inconsistency in as much as he had told Detective Ingram on 22 November 2010 that he had swum to help an old elbow injury. In cross-examination he said that the problem was in his shoulder and upper arm. The applicant variously said the Albany Creek Leisure Centre was not a place he had visited much[32] and later that he had swum there regularly in the past.[33]

[50] When the applicant left the Albany Creek Leisure Centre he drove to NP's house. Before he reached it he telephoned the police station to tell his liaison officer about

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[32] AR CA 311/12, pp 295-296.
[33] AR CA 311/12, p 182.

the encounter. Telstra records show that the applicant made other telephone calls before he accessed the Maroochydore Police Station through directory assistance.

[51] The prosecution called evidence about the telephone conversations the applicant had after leaving the Albany Creek Leisure Centre but before contacting the Maroochydore Police Station. For example, the applicant contacted Mission Australia to cancel a job search appointment with them for that afternoon. He told the Mission Australia representative that he was in Brisbane on family business. The applicant complains that this investigation was only done in the course of the trial. He also complains that a considerable volume of documentary material was given to him at the commencement of the trial.

[52] The prosecution identified a number of inconsistencies in the applicant's evidence, such as his different versions of the incident; why he had gone to the Albany Creek Leisure Centre; his arrangements in relation to his reason for being in Brisbane; the kind of muscle soreness that he was treating with swimming; and the type of drink he bought at the canteen.

[53] The prosecution contended that the applicant's explanation about why he had accessed the Bald Hills State School website was implausible; and it was not believable that his presence at the same time as the complainant at the Albany Creek Leisure Centre was coincidental.

The magistrate's decision

[54] The prosecutor submitted that the mental element in the offence created by s 43F of the *Penalties and Sentences Act* 1992 was one of strict liability. After some consideration of this submission, the magistrate found that the only intention that was required to be proved was an intention to do the acts which constituted a breach of the order. She was satisfied beyond reasonable doubt on a consideration of the whole of the evidence that the contact between the applicant and the complainant was intentional so far as the applicant was concerned. Her reasons involved an extensive analysis of the evidence placed before her, including the following summary at the end:

> "1 [The applicant] was aware of all the terms of his non-Contact Order including the condition that he is prohibited from going to within 200 metres of the Bald Hills State School.
>
> 2 [The applicant] planned his trip to the Leisure Centre at a time when he knew the Year 5 class of which [the complainant] was a member would be swimming there. He obtained this information by accessing the Bald Hills School Website. He attended the centre with the view to contact [the complainant].
>
> 3 [The complainant] was swimming there at the time.
>
> 4 That while at the pool he intentionally approached her by walking past her and winking at her.
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> I am therefore satisfied beyond reasonable doubt that between 10 and 10.15 am on the 18 November 2010 at the Bald Hills Leisure Centre [the applicant] unlawfully contacted [the complainant] by

> intentionally approaching her and winking at her. This contravened paragraph 1 of the non-contact order.
>
> If I am wrong that the definition of "unlawful" in the PSA does not import the definitions in the *Drugs Misuse Act* 1986 nor the *Criminal Code* I will now consider it as if they do. No authorisation, justification or excuse by law has been successfully raised. None were submitted by [the applicant] although the prosecution addressed me on sections 23 and 24 of the *Criminal Code*.
>
> In relation to intention pursuant to section 23(2) "unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result caused by the act or omission is immaterial". As I have found earlier in my judgment this offence is one of strict liability and section 23 does not apply.
>
> In relation to a defence of mistake of fact under section 24 of the Criminal Code the only mistaken belief would be that [the applicant] attended the Leisure Centre in the mistaken belief that [the complainant] would not be in attendance.
>
> I rely on my previous findings that [the applicant] attended the Leisure Centre with the intention of contacting [the complainant] there. Therefore I do not find that it has been properly raised on the evidence.
>
> If I am wrong that the offence is not one of strict liability, in view of my previous findings of totally rejecting [the applicant's] evidence, I find that he has raised no recognisable defence.
>
> I therefore find [the applicant] guilty of the charge."[34]

District Court judge's approach to the magistrate's decision

[55] Shanahan DCJ summarised the findings of the magistrate:

> "[41] On all the evidence, she was satisfied beyond reasonable doubt that the contact between the appellant and the complainant was intentional on the appellant's part. She rejected his evidence that he was not aware of the conditions of the non-contact order as he had been in court when it was made. She noted the evidence concerning the access to the school's website and the appellant's evidence as to his reason for that. She noted that the appellant accessed the website on 5 October 2010 when the newsletter indicated "Alicia S" was volunteering in the tuckshop. The appellant gave no evidence as to how he was going to locate the person Alicia, but he continued to access the website. She noted that those newsletters gave the appellant the information about the complainant's presence at the particular swimming class. She rejected his explanation as to the access to the website as fanciful. The appellant knew

[34] *R v Porter*, unreported, Daley JM, MAG-00018310/11, 9 December 2011, pp 10-11.

the address of the person Alicia because he had visited there. He continued to access the website after the name "Alicia S" appeared. He had had no contact with that person since May of 2008. She was also friends with the complainant's parents and his contact with her had been before he had pleaded guilty to the indecent dealing charges.

[42] She also rejected the appellant's evidence as to why he attended the Leisure Centre. There was no explanation as to why he was so early for a luncheon arrangement. There was no evidence to support his contentions. Both of his friends had refused to talk to the police. She noted inconsistencies in the accounts he had given the police of where his friends lived and his reason for going swimming.

[43] She noted the inconsistencies in his three accounts about how the contact with the complainant occurred. In particular she was concerned that only in his evidence did he disclose that there were two contacts with the complainant at the pool. She found that the second encounter was a recent invention by the appellant to explain differences in his first two versions. There was also an inconsistency as to the type of drink purchased.

[44] She rejected the evidence of the appellant and accepted the evidence of the complainant that the appellant had winked at her. She rejected the appellant's evidence that he was in shock and found that the appellant deliberately winked at the complainant. She found that the appellant intentionally approached the complainant by walking past her and winking at her. She was satisfied beyond reasonable doubt of the guilt of the appellant.

[45] She stated that if she was wrong in her finding that the offence was one of strict liability, she was of the view that no authorisation, justification or excuse by law had been successfully raised. She noted that the contact had to be intentional pursuant to the definitions in the *Penalties and Sentences Act*. She noted that accident would not apply if it was intentional contact. She found that mistake of fact as raised only in the prosecution's submissions did not arise on the evidence.

[46] She concluded that in view of her findings of totally rejecting the appellant's evidence, he had raised no recognisable defence and found him guilty of the charge."[35]

[56] His Honour concluded that the magistrate was in error in holding that the offence was one of strict liability. His Honour was correct to do so. On appeal the respondent did not contend that the offence was one of strict liability. His Honour noted that the definition of contact in s 43C of the *Penalties and Sentences Act* included the term "intentionally" and any alleged contact which founded the offence

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35 *Porter v The Commissioner of Police* [2012] QDC 115.

of unlawfully contravening a non-contact order "must therefore be intentional". But it does not, necessarily, exclude the operation of accident under s 23 of the *Criminal Code*. In order to convict any available defence or excuse pursuant to the provisions of Ch 5 of the *Criminal Code* must be excluded beyond reasonable doubt. His Honour observed that the only applicable defence raised was that of accident, which would be overcome by proof of an intentional contact. Thus the contact constituted an unlawful contravention of the non-contact order.[36]

[57] His Honour concluded that the magistrate's error – that the offence was one of strict liability – did not infect her decision about guilt. The magistrate:

> "ultimately found guilt proved in that no available defences were made out. I take by this that she meant that any defences raised were excluded beyond reasonable doubt."[37]

[58] His Honour proceeded to address each of the applicant's grounds of appeal. In addition to the error of law already canvassed, two errors of fact were alleged to have impact on her decision. They were that the applicant had pleaded guilty to three breaches of bail condition when in fact there were only two; and that she referred to evidence that the school website was stored as a favourite on the applicant's internet explorer when the evidence indicated that the favourite was the school where the applicant had previously taught. While they were errors, his Honour concluded that they played no role in the magistrate's assessment of the case. That must be correct. It was not contested, as his Honour noted, that the applicant had accessed the complainant's school website on a number of different dates, including when the swimming timetable was included.

[59] The applicant had contended that the magistrate erred in her findings that he knew of the non-contact order. It was the case that he had neither been served (as required) with that order nor had the terms of the order read out to him at sentence. But, as his Honour found, the breaches by the applicant of his bail conditions involved contact with the complainant at her new school, which was the school specified in the non-contact order. In his 2009 sentencing remarks his Honour had referred to the unacceptable risk of contact and that such an order would be imposed. Furthermore, his Honour noted that the reasons for judgment in the Attorney's appeal had included the contents of the non-contact order. The applicant had indicated that he had read that appeal judgment. Judge Shanahan concluded[38] that the applicant had known of the terms of the non-contact order. His Honour noted that s 43E(2) provides that any failure to give a person, the subject of the order, a copy of the order does not invalidate the order, or provide an answer to, any alleged breach of the order.[39]

[60] The focus of the applicant's submissions about the failure to provide a copy of the order is really a criticism of the failure by those in authority to abide by the provisions of the Act while pursuing him for what, in his mind, was at best a minor breach.

[61] The District Court judge was correct to conclude that the magistrate was entitled to determine that the applicant was aware of the terms of the order, particularly in relation to non-contact with the complainant.

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36 AR CA 311/12, p 529; Reasons [48].
37 AR CA 311/12, p 529; Reasons [49].
38 AR CA 311/12, p 524; Reasons [22].
39 AR CA 311/12, p 524; Reasons [22].

[62] The applicant had raised before the District Court judge that the magistrate had misunderstood the evidence about the timing of his access to the TransLink website, in that the magistrate had thought that that access was at the same time as his access to the school website. His Honour said that he could find nothing in the magistrate's reasons to that effect. As his Honour correctly, with respect, explained:

> "The import of the evidence was that it revealed access to information about public transport between Buderim and Bald Hills … around the times the appellant was also accessing the school website."

[63] His Honour also referred to another matter which the applicant had suggested demonstrated confusion by the magistrate because of police "claiming I'd previously tried to make contact with the complainant at her school".[40] As his Honour observed, the applicant had made contact with the complainant at the school as admitted by his pleas of guilty to the breaches of his bail conditions. His Honour rightly concluded that there was no misunderstanding of the evidence by the magistrate.

[64] The applicant had contended before his Honour that the magistrate had misinterpreted some facts about his attendance at the Albany Creek Leisure Centre on 18 November 2010. His Honour expressed it in this way:

> "This [the submission] seems to relate to his argument that he would not have sought out the complainant because of a previous incident where the complainant waved at him and he had a panic attack. Presumably from this it could be inferred that the complainant had suffered no ill effects or that the original incidents had not occurred. The only evidence of this contact comes from the appellant. I reject it. I am of the view that the learned Magistrate did not misinterpret the facts in rejecting the appellant's evidence. She was clearly entitled to do so and had the benefit of observing the appellant give his evidence."[41]

No error is demonstrated by this conclusion.

[65] At the appeal in the District Court the applicant had contended that it was unfair for the magistrate to have relied on an inconsistency in his accounts of his actual contact with the complainant because he was asked to remember detail about an event that had occurred a year previously. His Honour thought that many of those inconsistencies, particularly about the type of drink bought, carried little weight in light of the weight of other evidence, however

> "… the appellant's evidence about two incidents of contact was a substantial change. The learned Magistrate found that that was an attempt by the appellant to explain inconsistencies in his previous accounts and was a recent invention. That finding was open to her. There was no error."

[66] His Honour referred to the applicant's contention that he had incompetent representation which affected the conclusions of the magistrate. His Honour

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40 AR CA 311/12, p 530; Reasons [54].

41 AR CA 311/12, p 530; Reasons [55].

observed that much of the evidence which the applicant wished to adduce was irrelevant and inadmissible. The applicant now accepts that that is true for much of that body of evidence. His Honour did have some concern about the proposed evidence from the applicant's general practitioner who has opined that when stressed "the [applicant] had a facial expression where "he raises the right eyebrow and lowers the left eyebrow"".[42] The doctor considered that that might have been the expression used when he came into contact with the complainant and which she confused as a wink. Of this opinion the District Court judge said:

> "It seems to be founded on a scenario involving the appellant becoming anxious as a result of a chance encounter with the complainant. That was not the prosecution case. The prosecution case was this was a deliberate encounter engineered by the appellant. In that regard, it seems to me that this evidence, if it was admissible, carries little weight."[43]

His Honour also noted that the statement of the doctor was dated prior to the trial and that the applicant's legal representatives had decided not to adduce it.

[67] The applicant complained that what the District Court judge concluded were forensic decisions were, in fact, incompetence on the part of his team. However, he had no quarrel with his counsel, Mr McCawley.[44] His criticisms were strongly levelled at his solicitor. Decisions about calling evidence, particularly when statements are held, are very much in the province of counsel. In light of the doubtful nature of their relevance, it cannot be said to have been an error on the part of the District Court judge to decline to receive that evidence. The applicant now says that some, at least, of the statements were misplaced at the trial. The possibility of calling the friends to support his account of arrangements to meet was known to his lawyers and if thought relevant to his defence could have been called. However, as discussed below, these arrangements were not in contest.

[68] His Honour also noted that the applicant complained that the complainant was not properly cross-examined about the exact location where they had crossed paths. His Honour concluded not only was the cross-examination competent, "[i]t was the meeting itself that was important, not exactly where it occurred".[45] His Honour was clearly correct in this conclusion. It would not have assisted the applicant's defence to have persisted in minutiae with the complainant, particularly as her interview with police two days after the encounter was precise and accompanied by a detailed mud map.

[69] His Honour dealt with the applicant's contention of bias and unfairness in the police investigation. As his Honour observed:

> "This could only impact on the appellant if somehow it resulted in a miscarriage of justice. The appellant was convicted on the evidence produced on the trial."[46]

His Honour concluded that there was no unfairness to the applicant in the way the trial was conducted. His Honour noted that the magistrate:

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42 AR CA 311/12, p 530; Quoted at [10] of Reasons.
43 AR CA 311/12, p 523; Reasons [11].
44 Applicant's Outline of Submissions, filed 21 February 2013, para 4.4.
45 AR CA 311/12, p 530; Reasons [57].
46 AR CA 311/12, p 531; Reasons [58].

> "clearly addressed an alternative legal basis in relation to the charge [that is, if it were not an offence of strict liability] and her finding of guilt was clearly open to her on that basis."[47]

Accordingly, his Honour concluded that any errors made by the magistrate were not sufficient to cause the conviction to be overturned.

[70] His Honour then considered the ground of appeal that the verdict was unreasonable, applying the test in *MFA v The Queen*.[48] Of this contention his Honour said:

> "Upon a consideration of the evidence led at the trial, I am of the view that it was clearly open to the learned Magistrate to convict the appellant. A combination of three factors in my view, made the case against the appellant overwhelming. Firstly, it was uncontested that contact between the appellant and the complainant did occur on the morning of 18 November 2010 at her school swimming lesson. That contact (as defined by the Act) also consisted of the appellant winking at the complainant. The complainant was consistent and adamant about that aspect. It was open to the learned Magistrate to accept her evidence and reject the appellant's account that no winking occurred. That finding tends to suggest the contact was not a surprise to the appellant. Secondly, the appellant had travelled many kilometres to visit that particular pool at a time inconsistent with his evidence that he was travelling to Brisbane to have lunch with friends. Thirdly, the evidence of his repeated access to the school's website at times prior to 18 November 2010 and the information available in that access to pinpoint the time, date and place where the complainant's Grade 5 class would attend a swimming lesson is telling. The appellant's account of his reasons for that access, particularly considering its repetition, was rightly rejected by the learned Magistrate. It was spurious in the circumstances when one considers his prior relationship with [AS], who was a friend of the complainant's family."[49]

[71] His Honour concluded that the combination of those factors made any likelihood that the contact was not intentional or accidental non-existent. The contact was proven to be intentional on the applicant's part; therefore the breach of the non-contact order was unlawful and any applicable excuse of accident was excluded beyond reasonable doubt.

Contentions on appeal

(a) Application to adduce evidence

[72] Although not clear from his outline of argument and application to adduce evidence, I have concluded that the applicant wishes to have the statements mentioned above[50] considered on the proposed appeal to demonstrate discrepancies or omissions in their oral evidence before the magistrate. The applicant's counsel would have had these statements. A perusal of the transcript of their cross-examination does not reveal that any relevant matter was overlooked.

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47 AR CA 311/12, p 531; Reasons [59].

48 (2002) 213 CLR 606.

49 AR CA 311/12, p 531; Reasons [61].

50 See para [30] above, which discusses the further evidence that the applicant wishes to adduce.

[73] The appellant's friends, NP and SG were, it seems, approached by investigating police but declined to give statements. They could have been called by the applicant in his case whether or not their statements had been mislaid. However, it was not put to the applicant in his cross-examination that the arrangements (or attempts to do so) were not made.[51] It was more the suggestion that he had cloaked his intention to contact the complainant at the Albany Creek Leisure Centre by making the arrangements to visit Brisbane. But, more strongly, it was contended that the applicant undertook a significant detour to visit one of his friends at Ashgrove and, speculatively, to seek to visit the other friend at Upper Kedron. It was also queried as to why he had left Buderim so early for a lunch engagement.

[74] The application to adduce evidence should be refused.

(b) Errors in the District Court appeal decision

[75] The applicant contends that the District Court judge did not review all of the evidence before the magistrate as required by s 223 of the *Justices Act* 1886. Specifically:

- He continues to express a grievance about not having been given the non-contact order as required by legislation. This really is a complaint about the poor attention to their obligations by the authorities. This complaint leads into a recurring theme throughout the applicant's submissions of what he describes as the unhealthy alliance between the investigating officers and the prosecutor. The applicant complains that, despite immediately revealing the contact to police (which would support its unintentional nature), he has been hounded and subject to a slipshod prosecution which, expensively for him, was protracted in the Magistrates Court. The judge was alive to these concerns but they did not, as his Honour concluded, effect the assessment of the objective facts which were adduced in evidence.

- The applicant complains that the judge was in error in stating that the reason for the applicant's visit to Brisbane on 18 November 2010 was mentioned at a pre-trial hearing. Instead it was a reference to the reason he was accessing the Bald Hills State School website. If that was an error it was a minor one and had no consequences for his Honour's analysis of the evidence. What was important was his Honour's appreciation of the applicant's case, namely, that his access to the school's website and newsletter was for a legitimate purpose to see if he could find a friend through the tuckshop roster; and that he had made plans in advance to travel to Brisbane to see friends.

- The judge discusses the applicant's access to the newsletters. The applicant challenges the following statement:

  > "On 25 January 2010 the school website was again accessed and the school tuckshop information was viewed. Prior to that date, there had been no access to school tuckshop data."[52]

  The footnote reference in the reasons is to transcript 2-47 (AR CA 311/12, p109). This quoted statement does contain an error. After mentioning

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51 AR CA 311/12, pp 204-206.

52 AR CA 311/12, p 526; Reasons [29].

earlier visits to the website, Detective Blackmore said that the Bald Hills State School website was accessed on 25 January 2011, being the first day of school "this year".[53] The detective continued: "This was after the alleged offence".[54] The forensic review of the computer showed that on that day the newsletters' index and the tuckshop page were viewed. Detective Blackmore said that prior to that date there was nothing about school tuckshops. There may have been some lack of clarity about the evidence and it is plain that there is an error in the judgment insofar as the date is 2011 not 2010. The applicant does not appear to appreciate this error. If it be the case that there was no access to school tuckshop data prior to 25 January 2011 as the evidence seems to suggest, it would have added weight to the prosecution case in as much as it would tend to discredit the applicant's explanation that he was interested only in the tuckshop roster. As written by his Honour, it is of no importance at all. Whatever the criticism – either of confusion in the original evidence or of a misstatement of that evidence – it does not impact upon the judge's overall appreciation of the significant evidence about the Bald Hills State School newsletters.

- The evidence about the TransLink investigations is said by the applicant to have been misunderstood by both the magistrate and the judge. There was no misunderstanding. The applicant obtained a car not long before 18 November 2010. As quoted above, the judge correctly observed:

  "The import of the evidence was that it revealed access to information about public transport between Buderim and Bald Hills (where the complainant's school was situated) around the times the appellant was also accessing the school website."[55]

(c) "Unreasonable Verdict"

- The applicant complains that the judge did not address his concerns about the bias and unfairness of the police investigation and the prosecution and ignored the misconduct of his then solicitor. The judge dealt with these issues as they required. Nothing complained about by the applicant went to the heart of the prosecution case – that evidence was presented from which it could be inferred to the requisite standard that the applicant deliberately attended at the Albany Creek Leisure Centre in the hope of encountering the complainant. There was no error in not canvassing every minor discrepancy and every complaint, justified or not, about the overzealous pursuit of the applicant by police and the allegedly reprehensible conduct of his solicitor.

- The applicant is also critical of the judge's decision to exclude his doctor's evidence about his "nervous tick" as a possible explanation for the wink.[56] As discussed above, his Honour's reasons are cogent and correct in light of the prosecution case and, to the extent that it is relevant, the defence case.

(d) "Miscarriage of Justice"

- The applicant contends that it is suspicious that Detective Blackmore found out about his reporting of his contact with the complainant to his liaison

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53 AR CA 311/12, p 109.
54 AR CA 311/12, p 109.
55 AR CA 311/12, p 530; Reasons [54].
56 Applicant's Outline of Submissions, filed 21 February 2013, para 6.3.

officer. On the contrary, it would be surprising that she did not as she was the original investigating officer. The applicant also suggests witness coaching of the complainant and criticises the manner in which she was asked leading questions in her interview. Of this the applicant contends:

> "There are numerous samples of massaging evidence, distorting facts, perjury and not following the modus operandi of the courts, that were displayed by the two investigating officers and prosecutor, that I intend to exhibit at my trial hearing that only promote my grounds for a miscarriage of justice. These prejudiced remarks from the prosecution only support this."[57]

An examination of the transcript before the magistrate, as well as the District Court judge's review of that evidence and the magistrate's decision, does not favour this submission and it should be rejected.

(e) "Error in Law"

- The applicant addresses s 24 of the *Criminal Code*. In effect he complains that his explanation for being at the Albany Creek Leisure Centre casts doubt upon the prosecution case so that he ought not to have been convicted. The applicant quotes[58] the following from *Davies and Cody v The King*:[59]

> "[The court] has consistently regarded that duty [to quash a conviction] as covering not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled."

No error has been demonstrated in the judge's approach to his task under s 223(1) of the *Justices Act*.

Conclusion

[76] The District Court judge reviewed all the relevant evidence as required. He gave earnest consideration to the applicant's contentions and examined with care the application to adduce the doctor's evidence. He analysed the relevant legal provisions finding error in the magistrate's approach to the characterisation of the offence as one of strict liability offence. His conclusion that the magistrate had, nonetheless, addressed the case against the applicant on an alternative, correct legal basis and reached a decision open on the evidence, contains no appealable error.

[77] There has been no miscarriage of justice. The applicant has focused on small, peripheral errors of fact or matters not relevant to the central issue, which was ascertaining his purpose in attending the Albany Creek Leisure Centre on 18 November 2010, coincidentally with the time the complainant's class was there

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57 Applicant's Outline of Submissions, filed 21 February 2013, para 7.6.

58 Applicant's Outline of Submissions, filed 21 February 2013, para 9.

59 (1937) 57 CLR 170 at 180.

for a swimming lesson, and after having accessed the school newsletters which provided that information. The verdict was reasonable on a consideration of the whole of the evidence and his Honour was correct to so conclude.

Orders

[78] The orders I would make are:

1. Refuse the application to adduce evidence.

2. Refuse the application for leave to appeal from the decision in the District Court dismissing the appeal from the magistrate.

Application for leave to appeal against sentence

[79] The applicant obtained an extension of time within which to seek leave to appeal the sentence imposed by Shanahan DCJ in the District Court on 8 June 2012 following his dismissal on 24 May 2012 of the applicant's appeal from his conviction in the Magistrates Court for the breach of the non-contact order.

[80] His Honour activated eight months of the approximately sixteen months remaining of the suspended sentence and ordered six months to be served cumulatively for the breach of the non-contact order. His Honour set parole eligibility at the half-way mark of 7 January 2013.

[81] The applicant contends that that sentence was manifestly excessive.

[82] The relevant facts have been set out earlier in these reasons.

[83] In his sentencing remarks, after referring to the original offending and sentence imposed on 13 August 2009, his Honour summarised the salient evidence in the Magistrates Court and said:

> "In my view, it was clearly a planned and intentional contact on your part. For what purpose, remains unclear but it is also clear that, in my view, it is a serious breach of the non-contact order. … [It] should be treated seriously. It is also, in my view, a serious breach of the suspended sentence."[60]

[84] His Honour observed that the only factor in the applicant's favour was that the offending was of a different nature than the original sex offences. For that reason he concluded it would be unjust to activate the whole of the outstanding suspended sentence.[61] His Honour had regard to issues of totality because he proposed to impose a cumulative sentence in relation to the breach of the non-contact order. As mentioned, in the result, his Honour activated half of the remaining suspended sentence and imposed a sentence of six months to be served cumulatively in respect of the non-contact order.

[85] The applicant, for the most part, confined his submissions at the sentence hearing to a critical analysis of the judge's reasons for dismissing his appeal. His Honour did not indicate to the applicant that those matters were not relevant to the sentence.

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60 AR CA 340/12, pp 30-31.

61 Section 147(2) of the *Penalties and Sentences Act* 1992 requires the court to make an order that the offender serve the whole of the suspended imprisonment unless it is of the opinion that it would be unjust to do so.

He permitted him a great deal of latitude as his submissions covered over seven and a half pages of transcript. With respect to the maximum sentence for the breach[62], which was sought by the prosecutor, the applicant observed that sending him to prison would not work as a deterrent because he maintained his innocence. He was more concerned with his inability to continue therapy with his general practitioner and psychologist whilst he was incarcerated.

[86] This court observed, when considering the Attorney's appeal,[63] that the sentence imposed on 13 August 2009 had proceeded on the basis that the applicant was unlikely to re-offend accepting the opinion of the psychologist. The court noted the impact of the head injury on the applicant and his acceptance of the inappropriateness of his conduct. The court also commented that the breaches of bail entailed attending at the complainant's school and speaking to her and "deserved … condign punishment". In dismissing the Attorney's appeal the court said the sentence reflected adequately those factors.

[87] The applicant's conduct in planning and attending at a place where the complainant was expected to be, and in passing close to her, was very much a repeat of his earlier conduct. In that circumstance a more severe penalty was called for both as a personal deterrent to the applicant and to punish him for repeating his unlawful approach to the child. The sentencing judge could have activated the whole of the suspended sentence in that circumstance. It was ameliorated because the nature of the offending was different (and lesser) than that of the original offences. A sentence of six months, when the maximum is one year's imprisonment was not manifestly excessive.

[88] The application for leave to appeal against sentence should be refused.

Orders

[89] The order I would make is:

Refuse the application for leave to appeal against sentence.

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62 Imprisonment for one year.

63 *R v Porter; Ex Parte A-G (Qld)* [2009] QCA 353 at [35].