DISTRICT COURT OF QUEENSLAND

CITATION:	*Punchard v Commissioner of Police* [2020] QDC 211
PARTIES:	**NEIL PUNCHARD** (Appellant) **v** **COMMISSIONER OF POLICE** (Respondent)
FILE NO:	4007/19
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Brisbane
DELIVERED ON:	1 September 2020
DELIVERED AT:	Beenleigh
HEARING DATE:	31 July 2020
JUDGE:	Chowdhury DCJ
ORDER:	**1. Appeal allowed.** **2. The sentences imposed by the Brisbane Magistrates Court on 14 October 2019 are set aside.** **3. The Appellant is re-sentenced as follows:** **Charges 1 – 4, 6, 8 & 9: Convicted and not further punished** **Charge 5: 40 hour Community Service Order** **Charge 7: 100 hour Community Service Order** **Convictions are not recorded.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST SENTENCE – S 222 JUSTICES ACT 1880 – POLICE OFFICER – COMPUTER HACKING – WHETHER THE SENTENCE WAS MANIFESTLY EXCESSIVE **Legislation** *Criminal Code 1899* (Qld) *Justices Act 1886* (Qld) *Penalties and Sentences Act 1992* (Qld)

Cases

Botting DCJ, *David O'Neil v T.S. Frilingos*, Indictment No. BD2294 of 2014, judgment delivered 13 March 2015

Commissioner of Police v Betts, Magistrate Shearer, 14 March 2016, unreported

Crowe v Graham (1967-68) 121 CLR 375

Darcy v Commissioner of Police [2007] QDC 053

Forrest v Commissioner of Police [2017] QCA 132

Graham v Queensland Nursing Council [2009] QCA 280

House v The King (1936) 55 CLR 499

Hughes v R [2014] NSWCCA 15

Hughes v R [2014] NSWCCA 15

Lacey v Attorney-General (Qld) (2011) 242 CLR 573

Markarian v The Queen (2005) 228 CLR 357

Mbuzi v Torcetti [2008] QCA 231

Police v Philippi, Magistrate Gett, 22 October 2018, unreported

R v Anderson [1995] 1 Qd R 49

R v Brown, ex parte Attorney-General [1994] 2 Qd R 182

R v Cay (2005) 158 A Crim R 488

R v Marsden [2003] QCA 473

R v Price; ex parte A-G [2011] QCA 87

R v Reid [2004] QCA 9

R v Smith; ex parte A-G [2000] QCA 390

Robinson Helicopter Co Inc v McDermott (2016) 90 ALJR 679

ROV v Commissioner of Police [2017] QDC 324

Storry v Commissioner of Police [2018] QCA 291

Teelow v Commissioner of Police [2009] QCA 84

WorkCover Queensland v Stanley [2010] QDC 48

COUNSEL: J Hunter QC for the appellant
A Edwards for the respondent

SOLICITORS: Gnech & Associates for the appellant
Queensland Police Service for the respondent

Introduction

[1] On 14 October 2019, the appellant was convicted of the following offences in the Magistrates Court at Brisbane:

Charge 1 - That on the 30th day of July 2013 at Capalaba in the State of Queensland [the appellant] used a restricted computer without the consent of its controller and [the appellant] gained a benefit, namely knowledge.

Charge 2 - That on the 24th day of September 2013 at Capalaba in the State of Queensland [the appellant] used a restricted computer without the consent of its controller and [the appellant] gained a benefit, namely knowledge.

Charge 3 - That on the 15th day of October 2013 at Wishart in the State of Queensland [the appellant] used a restricted computer without the consent of its controller and [the appellant] gained a benefit, namely knowledge.

Charge 4 - That on the 23rd day of October 2013 at Capalaba in the State of Queensland [the appellant] used a restricted computer without the consent of its controller and [the appellant] gained a benefit, namely knowledge.

Charge 5 - That on the 20th day of November 2013 at Capalaba in the State of Queensland [the appellant] used a restricted computer without the consent of its controller and [the appellant] gained a benefit, namely knowledge.

Charge 6 - That on the 9th day of December 2013 at Mansfield in the State of Queensland [the appellant] used a restricted computer without the consent of its controller and [the appellant] gained a benefit, namely knowledge.

Charge 7 - That on the 3rd day of February 2014 at Brisbane in the State of Queensland [the appellant] used a restricted computer without the consent of its controller and [the appellant] gained a benefit, namely knowledge.

Charge 8 - That on the 23rd day of March 2014 at Capalaba in the State of Queensland [the appellant] used a restricted computer without the consent of its controller and [the appellant] gained a benefit, namely knowledge.

Charge 9 - That on the 17th day of July 2014 at Capalaba in the State of Queensland [the appellant] used a restricted computer without the consent of its controller and [the appellant] gained a benefit, namely knowledge.

[2] On each charge the learned Magistrate sentenced the appellant to 2 months imprisonment, to be wholly suspended for an operational period of 18 months.

[3] By way of a Notice of Appeal pursuant to s 222 *Justices Act* 1886 (*"Justices Act"*), the appellant appeals against the sentences imposed on the following ground:

1. The sentence imposed was manifestly excessive in all the circumstances.

Relevant facts

[4] At the commencement of the sentence hearing on 14 October 2019, counsel for the prosecution referred to his written submissions, which had been provided to the Magistrate beforehand, he indicated that *"I should tender those and the victim impact statement, which your Honour has"*.[1] The written submissions were not in fact marked as an exhibit. In respect of this appeal the original submissions for the prosecution have been attached to the outline of argument for the respondent. In these circumstances it's prudent to refer to the facts as outlined orally before the Magistrate during the hearing. The following was placed on the record by the prosecution:

> *"The factual circumstances, I've set out in my outline of submissions, but I should place some things on the record. The defendant used two computers on nine occasions over 12 months to access restricted information held by the Queensland Police Service. The two restricted systems that he accessed were called MINDA and QPRIME. They are the mobile integrated network data access. That is the police computer inside police cars. And QPRIME, the Queensland police records management exchange. They are the primary record keeping systems for police. They contain a vast amount of primed information about citizens, their criminal histories,*

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1 R1-3, l 28.

intelligence held about them, flags about them, matters in which they'd been accused, victims or witnesses, the details of their addresses, their phone numbers, any – there's access through those systems to Queensland Transport so that vehicle registration details can be obtained. They truly contain a vast amount of very private and personal information about people.

Now, access to those restricted systems is allowed as part of a police officer's official duties. All police officers receive training in the use of those systems. They are told about the conditions of the use of those systems, which includes not accessing them for personal reasons. Every time those systems are used, a warning appears on the screen reminding police officers of the conditions surrounding the use of those systems. The defendant accessed those systems to obtain information about a friend, [GA] and his friend's ex-partner, [AA], and her new husband, [PK]. On each occasion, he was not acting in any official capacity. The background to that offending is that – if I can use their first names, because they have the same last names – [GA] and [AA] were married. They had three children. Around June 2013, the relationship broke down. They separated and ultimately [AA] came to live with [PK]. They have subsequently married.

The defendant is close friends with [GA], and it appears they went to school together, and from some material I've seen they may have been friends from as young as four years old. They were long term friends. The defendant knew that he shouldn't be accessing these systems to assist [GA]. He knew that not only because of the training he'd received and the warnings which appear on the computer screen each time it's used. But he knew it intrinsically and obviously because he said as much to [GA] in 2012, when [GA] invited him to make some enquiries on the QPRIME system for [GA]. He indicated then that if he did that and it got out, it could be traced back to who did the search and he could lose his job over it, so he wasn't prepared to risk that. Despite that, it appears that he became more and more embroiled in [GA's] family law disputes with [AA]. They were going through quite an acrimonious break-up, and it's in that context that he made searches for information in relation to [GA] but more concerningly in relation to [AA] and her new partner as well.

In short-form, the offences occurred in this way. The first charge was 30 July 2013, when the defendant accessed QPRIME to conduct a search about [GA]. He looked at occurrence information concerning a shop stealing and a be-on-the-lookout warning. On 24 September 2013, Charge 2, he looked up [GA] on the Department of Transport and Main Roads through QPRIME. The third charge on 15 October 2013, again, through QPRIME – through – sorry – through MINDA this time, he accessed the Department of Transport and Main Roads system in relation to [AA's] licence. That would have disclosed whether she was a person of interest in relation to anything.

> *On the fourth charge of 23 October 2013, he used QPRIME to conduct a search again about [AA]. He opened a victim report about her. He accessed Department of Transport and Main Roads information about her. On the fifth occasion on 20 November 2013, he accessed QPRIME, conducted a search about [GA], [GA's] sister and [AA], their licence details, their traffic histories. He again accessed the be-on-the-lookout which he previously accessed. He gained information about [GA's] suspended driver's licence – he had a SPER suspension and passed that onto [GA]. That was one of the two occasions on which he disseminated information, and, ultimately, [GA] later that day, contacted SPER and had that suspension lifted.*
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> *Charge 6, on 9 December 2013, he accessed, through MINDA, the Main Roads – Transport and Main Roads system in relation to [GA's] registration plate. He would have then been told that vehicle was not a vehicle of interest. When he accessed that, he was in the street where [GA's] parents lived and he later bought that car off [GA] in March of 2014. On 3 February 2014, perhaps the most concerning offence, he accessed, through MINDA, a search of the Department of Transport and Main Roads in relation to [PK's] driver's licence – it included his residential address – and he passed that address onto [GA].*
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> *On 24 March 2014, he conducted a search again about [GA] to look at information about [GA] contained within the Department of Transport and Main Roads system through QPRIME, and finally, on 17 July 2014, he used QPRIME to conduct a search about [GA], looked at information about [GA] on the Department of Transport and Main Roads system…*"

[5] There was then a discussion between the magistrate and counsel for the prosecution about the two most serious offences. It does not appear that a summary of Charge 9 was given. The details of Charge 9 in the prosecution outline that was before the magistrate but not made an exhibit, simply states that on 17 July 2014 the appellant used a police computer to access QPRIME to conduct a search about GA and to look at information contained within the Department of Transport and Main Roads systems. According to the activity log of the appellant, he was attending to administration duties at the time.

[6] The prosecutor told the magistrate that the offending took place in the context of acrimonious Family Court proceedings. There were final Family Court parenting orders which required both GA and AA to provide each other with their respective residential details. It turns out that AA did not provide those details contrary to the Family Court order because she was said to be a victim of domestic violence at the

time. No domestic violence orders were in place at the time the appellant passed on this specific address of AA to GA.

[7] The prosecutor submitted that the appellant well knew that AA was not providing her precise address in the context of an acrimonious separation. It was submitted that the appellant took a risk with AA's safety in these circumstances. At the time of the proceedings before the Magistrate, domestic violence orders were in place, as well as Family Court orders, which state that GA must have no contact with AA or the children.

[8] The prosecutor submitted that GA was someone who *"shouldn't have been having contact with [AA] or the children, but I couldn't say that the defendant then knew that at the time. What I submit is that he took a risk."*[2]

[9] The prosecutor submitted that at the time of the alleged offending the:

> *"Family Court situation and domestic violence type situations were in flux at the time of the offending. It's clear that [AA] was reluctant to provide her details. It's a matter where she could have gone back to the Family Court and sought some orders in that regard. Equally, it's a matter where [GA] could have gone back to the Family Court and got some orders in that regard. But instead, he didn't have to because he relied upon the defendant to, for personal reasons, take that risk with her safety, providing that address."*[3]

[10] The prosecutor submitted that the appellant had become involved in an acrimonious marital separation, and made the following submissions:

> *"And he did little to pour cold water on the situation. In fact, in my submission, he inflamed the situation somewhat. And I've outlined some of the messages that he sent to the – to [GA] from 8th September 2013 – it's at the bottom of page 5 of my outline – from 8th September 2013 through to 9th July 2014. And those messages, in my submission, are very, very unedifying. He knew that he shouldn't have been getting involved in the way he did, and showed initial reluctance, exhorting [GA] to do things by the book. But ultimately, he became very embroiled. He advised [GA] what to write in text messages and emails, he gave Family Court advice to [GA], he referred to [AA] in derogatory terms. And her Honour can see that at the bottom of page 5. Although he might say words like:* fuck this bitch over legally. *I attach my submission to the words 'fuck this bitch' and:* is she fuckin delirious? Fuck her. No more negotiations. Court, court, court. *He drafts an email, as your Honour*

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2 R1-7, l 40.
3 R1-8, l 30.

> *will see, on 18th November 2013, to:* … send to the bitch. That will hopefully make her shit herself. *He says to [GA] on 18th November:* you've been quiet for too long. I know you are screaming inside to let loose on her. *11th November:* blah, blah, blah. Whatever. Ha-ha. *Here's a message he suggests that [GA] should send to her. 26th November, suggests that [GA] should wind her up, laugh at her, smash her with the facts, reply with a laugh. And it's in that context that he provides the address where [GA] might find [AA]. On 3rd February 2014, prior to checking the address – this is at paragraph 27 of my outline, your Honour – he sends to [GA] that he doesn't have to ask for the mobile phone number on the phone she gave the boys, that there were ways to get it off the phone, and tell her once he had it to 'piss her off'. And after sending the address in what was clearly an indication that he knew he'd done the wrong thing, he sent a message about, effectively, not telling – [GA] not conveying to [AA] how he found the address out. And he said this:* no need to ask her now. Just tell her you know it now via freedom of information. *I paused to interpolate that was not true. It provided the information and so, was clearly trying to divert attention from himself. And to continue:* she will be pissed. Tell her you got it from his name, not hers. Even better, just tell her you know where she lives and leave it at that lol. She will flip. Don't tell her how. Just send her an email saying, 'I won't ask for your address anymore as I know where you are now. If you won't comply with court orders, I will have to take matters into my own hands. So since I know, I won't bug you anymore.' I await the email and her reply lol. She will fucking explode lmao. *They were seriously risky, in my submission. He continued to provide advice and remained derogatory towards [AA] in numerous subsequent messages."*

[11] The prosecutor drew the learned Magistrate's attention to a suggestion made by the appellant to GA that he should send an email to AA on 25th June 2014 saying:

> "*Dream on, idiot. Just stay in delusional world so you can keep your lies from him. Just remember, I have all the documentation that could have had you charged with perjury if you proceeded at the directions hearing last year. You may lie to him, but you can't lie to me with that crap. I'll always know, so keep dreaming lol.*
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> *Time to bite back every now and then, especially if he reads her emails. Why not? It's not derogatory compared to what she calls you."*

[12] The appellant said in a text message on 9 July 2014 that he was going to turn up at court. The appellant said to GA, *"I just want to see what [PK] looks like and see [AA] shit herself with me there. And will turn up in my Pajero".*

[13] The prosecutor made the submission that the appellant became "*thoroughly involved in what was going on between the two of them and it should have been obvious to*

him more than anybody else the potential risks to [AA] by disclosing to her ex-partner her address in the context of a very acrimonious separation where he was, himself, inflaming the situation".[4]

[14] The Magistrate asked if GA ever turned up at AA's address as a result of the disclosure made by the appellant. The prosecutor replied in the following terms:

> "*I think the answer is no, but might I just make an enquiry of the complainant about that? I think the answer is no, and certainly, there's no evidence on my brief to suggest that that's the case. I'm sorry. I was misinformed. He did turn up to her address at least 12 times and she ended up moving… I understand there's a dispute about that, your Honour. So as I say, it's not part of my brief. So I really – I don't intend to press that point."*[5]

[15] The prosecutor referred to a number of comparable authorities in his outline. It was submitted that they were not *"really comparable authorities"* in this case. It was submitted that the *"usefulness"* of the reports of the psychologist and psychiatrist were affected by the way in which they were produced. It was submitted that both reports came in the context of disciplinary or criminal proceedings, some years after the events, and it appeared that neither author had been provided with the text messages that had been sent by the appellant to GA.

[16] The prosecutor submitted that the circumstances required that general deterrence loomed large. There was a complete breach of trust in his duties as a police officer. By providing the specific address of AA, *"he put at risk somebody who was involved in an acrimonious separation"*. The appellant's actions *"contributed to significant effects upon the complainant, and I have referred to, at best, his timely plea."*[6]

[17] The prosecutor said this:

> "*My ultimately [sic] is that your Honour would consider a sentence of imprisonment, by taking into account the mitigating features of a plea of guilty, his psychiatric and psychological issues, that he has no criminal history and some delay in the manner, as well, perhaps, as that there will be some form of extra-curial aspect of this – that your Honour would – would be within your Honour's discretion to suspend any term of imprisonment your Honour imposes. My*

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4 R1-10, l 30.
5 R1-10, l 45.
6 R1-13, l 45.

> *submission is that regardless of whatever penalty your Honour imposes – that a conviction should be recorded. The offending, in my submission, is just too serious to avoid the recording of a conviction.*"[7]

[18] The solicitor for the appellant set out his personal background in submissions before the learned Magistrate. It was emphasised that the appellant was not charged with causing a detriment to AA, simply that he was charged with obtaining knowledge on all nine charges.

[19] The following submission was made:

> "*Your Honour, the – you've heard already, the Family Law Court order was in place from the 21st November 2013. Condition 5A stated that the mother and the father shall the other parent informed [sic], at all times, of the residential address and contact telephone number. Now, the communication on the 3rd February, which is charge 7, had generally been put that it's the release of the address. But it's not that simple, Your Honour. The evidence is quite clear that [GA] was fully aware of the street name, the street number, and the suburb. The one piece of information he didn't have which was which unit the address was. My client confirmed, by requesting a copy of the Family Court order, that there was a requirement for the parents to show – to disclose the residential address. Once he had received that, he disclosed the address. The only piece that [GA] did not have was the unit number, and that was for the purposes of sending Family Law Court material to that address.*
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> *It is outrightly denied that [GA] attended the address as a result of my client's information. That has not formed part of the brief before today. That puts the offending in a completely different light, in my submission. He has still done the wrong thing, he is still here accepting responsibility, but this is not a case, at all, where there was an aggrieved spouse in hiding from a respondent, and my client provided the address. That's not what this situation was here at all. He had no knowledge – and at that point in time – no domestic violence order had been applied for. He even, unlawfully, as per the other checks, had the benefit of looking on the police computer system to see whether there was any issues, which were not there. So in light of that, his provision of the information is limited to providing the unit number, to the address already known to [GA] for the purposes of Family Law documents to be sent.*"[8]

[20] There was then the following exchange between the Magistrate and the solicitor for the appellant:

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7 R1-14, l 5.
8 R1-19, l 35.

"*Solicitor:* *Thank you, your Honour. Your Honour, so ultimately my submission is, to the characterisation of the conduct. Although still serious, is not to that nth degree, but where – it is alleged in the media, for instance, that [indistinct] was a domestic violence victim hiding from the respondent. That's not what the situation was here at all. There was –*

Bench: *No, but situation here was, that the defendant knew that there was acrimony between the parties. The defendant took it upon himself to give assistance to [GA] in actually locating the specific unit in which [AA] resided when there were comprehensive family law orders in place, which your client either did not inform himself or took [GA]'s word for, but which specifically indicated that there was – although your client knew about it in any event – significant acrimony, and one, two, three – sorry – one, two paragraphs specifically indicating how future disputes should be resolved.*

Solicitor: *Yes, your Honour. There is no dispute about that. My client accepts all of that."*

[21] The solicitor then raised what he submitted was extra-curial punishment, namely media scrutiny of the appellant. The police investigation revealed that information provided to journalists included a false report, in respect of domestic violence orders and the dates they were made. The solicitor made the following submissions:

- The principles of general and specific deterrence could be achieved through sentences other than imprisonment;
- The appellant became *"more and more emotionally involved in this situation"*, resisting initial approaches to do checks and obtain information, ending up *"erring in this judgment in what he did and he regrets that now"*. That conduct, albeit over a period of 12 months, was entirely inconsistent with his life and career as a police officer;
- The appellant was to continue to undertake psychological treatment, following on from his diagnosis as set out in the report of Dr Dodds;
- The appellant will be facing some type of further sanction or further proceedings from the Commissioner of Police by way of discipline;
- The appellant had suffered a *"not insubstantial"* reduction in salary, with further discipline to be administered;

- In the circumstances the appropriate penalty is one of a fine, with the exercise of discretion not to record convictions. If convictions were to be recorded, and the appellant lost his job as a police officer, as a 53 year old man he would need to re-enter the workforce;
- The appellant's otherwise exemplary life was a credit to him;
- As an alternative to a fine, community service was open, however a sentence of imprisonment, either wholly suspended or otherwise, would be excessive in the circumstances.

Exhibits

[22] Exhibit 1 was the "victim impact statement" of AA. In respect of that exhibit, the prosecutor said the following:

> "*Can I just say something about the victim impact statement, your Honour. It is obviously a victim impact statement that reflects the impacts of what the defendant has done, together with the impacts and the background in relation to what's happened with her ex-husband. So I don't say it's solely related to the impacts from what the defendant has done, but he certainly contributed to the impacts upon the complainant. In my submission it is appropriate that your Honour take those impacts into account. Whilst the complainant might not strictly be classed a 'victim' – if I can use that 'term' – in accordance with section 9 of the Penalties and Sentences Act, it is still a relevant matter that your Honour would take into account in a consideration of the appropriate penalty, as your Honour is entitled to do under section 9 of the Penalties and Sentences Act*."[9]

[23] Exhibit 2 was a report from Dr Matthew Worthington, a clinical psychologist, dated 29 March 2017.

[24] Exhibit 3 was a report from Dr James Dodds, consultant psychiatrist, dated 4 October 2019.

[25] Exhibit 4 was a number of character references from the following referees:

- Sergeant Ben Browne;
- Senior Sergeant Stephen John Lees;

[9] R 1-3, R 1-4.

- Sergeant Matthew Moman;
- Dr Martin Wullschleger;
- Councillor Julie Talty, local Councillor for Division 6, Redland City.

[26] Exhibit 5 was a brochure of an *"Attitudinal Drivers' Workshop"*.

[27] In the course of the proceedings, the learned Magistrate said that she would like to have a copy of the Family Court order. That was handed up by the solicitor for the appellant, but it does not seem that it was specifically marked as an exhibit. A copy of the order from the Federal Circuit Court of Australia is on the Magistrates Court file that is before me. The order was made by consent on a final basis on 21 November 2013, which stated that both GA and AA have equal shared parental responsibility for the major long-term issues of the two named children. Paragraph 5 of the order relevantly stated that "*the mother and father shall keep the other parent informed at all times of their residential address and contact telephone number*". Paragraph 21 of the order set out the way in which future disputes should be resolved, including any dispute about "*the interpretation, implementation or enforcement of these orders*". Paragraph 22 stated that both parties had liberty to apply to the court on any matter *"including relating to the implementation meaning an interpretation of the terms herein."*

Decision of the Magistrate

[28] In the course of considered remarks, the learned Magistrate made the following findings:

- The appellant pleaded guilty in a timely way. Those pleas of guilty indicated his remorse. That remorse was confirmed by what was said by the psychologist, Dr Worthington, and the psychiatrist Dr Dodds, and that remorse was accepted to be genuine;
- There has been a delay in the prosecution of the charges against the appellant, by reason of decisions made within the police force on 5 October 2016 and 13 August 2018. Consequently, while the offending occurred when the appellant was 47 and 48 years of age, he was 53 at the time of sentence, and

such delay was a matter that could be taken into account in his favour for sentencing purposes;

- His pay rank was reduced as a result of a decision taken in 2018, and it was reduced for 12 months from the 2016 date, and then stood down in 2018;

- It was not disputed that the appellant had significantly contributed to and received awards for various activities within the police service, in terms of the 2011 floods, the attitudinal drivers' workshop, which the court and other courts around the State consider very highly and refer people to it. It was accepted that he had personally contributed financially to what is required in that course, and any additional monies from fees required from participants had been referred on to charity;

- The appellant had no prior history of any offending at all, which indicated and was accepted that the offending was out of character, even though the offending occurred over a 12 month period. Both expert reports indicated there was a low risk of re-offending;

- Two of the charges involved information actually being released to GA. The most serious of the charges was the release of information on 3 February 2014, of the unit number where AA lived with PK and the two children of AA and GA. GA did not otherwise have that unit number, even though he knew the unit block, the street and the suburb;

- It is serious that the appellant knew that what he was doing was wrong. He had indicated that to GA on an earlier occasion in 2012, when GA asked him to check someone else's address from their licence plate. The appellant also knew that GA could go to the Family Court to obtain the information he needed. The appellant had in fact told GA that and that he did not do so;

- The emails in evidence that were sent by the appellant to GA over the period 8 September 2013 and 9 July 2014, clearly confirmed that the appellant had become involved in the Family Law proceedings. The appellant appeared to have accepted entirely GA's version of events. They did not indicate that the appellant had sought, questioned, or had any information about AA's version of events. The appellant went so far as to instruct GA as to what to write in

those emails, including that GA knew where AA lived, and for an email to be sent which included the words "*if you won't comply with court orders, I will take matters into my own hands*." The appellant had knowledge that AA would "*flip*" or "*fucking explode*" when she learned that GA had her precise address;

- The appellant unquestionably accepted GA's version of events despite the fact that there had been orders made in the Family Court;

- The current situation, as stated to the court, was that there are further Family Court orders denying GA contact with the children, and there is a warrant for his arrest, apparently for a breach of domestic violence orders. It was accepted that any domestic violence orders that do exist were made after the period in which the appellant offended;

- The victim impact statement set out considerable psychological impact upon AA. It was accepted by the prosecution, correctly, that the full extent of the effects on AA was not entirely down to the appellant's offending. It was certainly accepted by the court that some of those effects must be the result of the acrimonious nature of the relationship between GA and AA. However, it was accepted that there was a psychological impact upon AA by reason of her knowledge of GA being aware of where she lived;

- In respect of the appellant's psychological and psychiatric state, there are the two reports put before the court. The psychologist's report confirmed consecutive appointments in March 2017, and the result of testing indicated mild anxiety, and the appellant being prone to distress if reminded of the traumatic events referred to in that report. It was considered "not unreasonable that – by the psychologist – that the severity of those traumatic events influenced his judgment in accessing information to reduce the suffering to GA and his children." However, on the facts there was no mention in any of the emails to any suffering of the children or any concerns of them suffering. The flavour of all the messages that had been referred in the submissions of the prosecution indicate that AA was the clear focus, and her deserving of the treatment that was to be meted out to her;

- The psychologist recommended EMDR treatment, but there was no evidence that any treatment of that kind or any other kind occurred until the appellant consulted the psychiatrist Dr Dodds, after he was charged. The psychiatrist's opinion is based on the appellant's self-reporting, and the psychiatrist himself admitted to a retrospective analysis of the appellant's life experiences before the offending. He also had the psychologist's report. The psychiatrist diagnosed post-traumatic stress disorder as the significant causal factor of the appellant's offending. However, that is at odds with what appears, from the character references, to the appellant's working to a high standard on a daily basis in his employment over a considerable number of years, coupled with evidence that the appellant clearly knew what he was doing was wrong;

- Post-traumatic stress disorder can be a mitigating factor, one that can, and has, in many cases, reduced a defendant's moral culpability or reduce the extent to which general deterrence and specific deterrence principles become relevant.

- In relation to offences of this kind, imprisonment is to be considered as a sentence of last resort and that was borne in mind;

- The comparable cases that had been referred to by both parties was considered. It was observed that there are never any two cases that are directly on point. The closest decision to the current one was the decision in the matter of *Philippi*. In that case there were many more persons affected by that offending, 62 in fact, whose information had been unlawfully accessed. There was no suggestion, however, that any of that released information was similar to the release of information in the instant case. While there was information about many more people, and information on many more occasions, there was no release of information that the prosecution argued, as they do here, that placed the safety of a person at risk. Also in *Philippi's* case, there had been significant issues relating to his son's special needs in 2015, his failed marriage in 2017, his very stressful employment in the Child Protection Investigation Unit, severe financial distress, misuse of alcohol, and at the time of sentence he was medicated, undergoing psychotherapy, and attending alcohol management;

- The appellant's breach of trust loomed large in the proceedings, and reference was made to statements made by judges in R v Reid [2004] QCA 9, R v Smith; ex parte A-G [2000] QCA 390, R v Price; ex parte A-G [2011] QCA 87 and Hughes v R [2014] NSWCCA 15;

- It was accepted by reason of Dr Dodd's report that there was a reduced degree, in terms of consideration of principles of moral culpability, general deterrence, and specific deterrence, but it was not a significant degree, for the reasons that the offending involved the appellant taking a significant risk in relation to the safety of a member of the public. As the appellant knew there was a high level of acrimony between GA and AA, there was an expectation that the police will protect a person such as AA and certainly not take any action to place them at any degree of risk, regardless of whether there were domestic violence proceedings on foot;

- For all of the reasons, the Court was of the view that a term of wholly suspended imprisonment was the appropriate sentence in this case, given that general deterrence loomed large. On each charge the appellant was sentenced to two months' imprisonment, wholly suspended for an operational period of 18 months. That necessitated convictions being recorded.

Submissions on behalf of the appellant

[29] As the appeal notice states, the appellant complains that the sentences imposed by the learned Magistrate are manifestly excessive. Two specific errors are also alleged, namely:

(a) The Magistrate gave excessive weight to the detriment suffered by the complainant, in circumstances where the appellant was not charged with intending to cause any detriment, and much of what she suffered was not attributable to him;

(b) The Magistrate failed to give sufficient effect to the sentencing principle that jail is a sentence of last resort: s 9(2)(a) of the *Penalties and Sentences Act 1992* ("PSA").

[30] It was emphasised that in respect of each charge, it was alleged that the appellant gained a benefit, namely knowledge. He was not charged with causing a detriment

to anyone, let alone AA. It was submitted that the appellant's purpose in communicating the residential address was related to proceedings then underway in the Federal Circuit Court[10] in the course of which parenting orders had been made by consent that required the parties to exchange residential addresses. The wife, AA, had refused to comply. GA was already aware of the suburb, as well as the street and street number, but the address was a block of units, and he did not know to which unit he should address correspondence.

[31] It was submitted that at the time the appellant provided the specific address to GA, "he had no reason to believe that the wife was at any risk of domestic violence. At the highest, it may be said that he knew the dispute was highly acrimonious. Whilst she later successfully sought a domestic violence order, that was not until July 2014, well after the offence in question had been committed." There is no suggestion on the evidence before the learned Magistrate that GA had actually attended the address personally.

[32] It was important to consider that the appellant fell to be sentenced on the basis that he had exposed the wife to a risk of domestic violence, in circumstances where he had told GA that he should write to his wife advising her that if she would not comply with court orders, he would "take matters into his own hands".

[33] In the course of oral argument, senior counsel for the appellant acknowledged that the communications between the appellant and GA were "unattractive". Other adjectives could be used to describe their communications, and it was put in written submissions that both the appellant and GA "relished the *schadenfreude* that the wife's discovery of the revelation of her address would bring."

[34] The history of the matter was set out in the appellant's outline. An initial complaint had been made in June 2016, and the Crime and Corruption Commission referred the matter to the Queensland Police Service Ethical Standards Command, who determined not to charge the appellant with any criminal offence, but to reduce his salary by one pay point for 12 months. The determination not to have the appellant charged was later set aside, and he was served with a notice to appear in December 2018. There had been an unsuccessful attempt to have the proceedings stayed as an

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10 It seems from the Order that the proceedings were pending in the Federal Circuit Court.

abuse of process. The appellant had been subjected to significant stress relating to the charges over a period of about three years, but entered a timely plea of guilty.

[35] The critical effects were summarised as the appellant providing a close friend with information that enabled that friend to address correspondence to his estranged wife, in circumstances where there was a court order in place that required the wife to advise GA where she was living. GA already knew the street address, and at that point in time there were orders in place that provided for shared parental responsibility and 50:50 shared care of the children of the marriage.

[36] While the appellant was aware that the separation was "extremely acrimonious", on the evidence before the Magistrate there was no suggestion of domestic violence at that point in time. The prosecution abandoned any suggestion that GA used the information provided to him to personally visit AA's home address, or to otherwise commit acts of domestic violence against her.

[37] The following submissions were then made:

> "*25. It is therefore difficult to argue that the wife suffered much, if any detriment as a result of what the appellant did. She was, however, entitled to be upset at the breach of her privacy. That said, detriment to her was not a matter that should have loomed large in sentencing.*
>
> *26. Importantly, the appellant was not charged with intending to cause the wife any detriment; rather, it was merely alleged that he obtained the benefit of knowledge of her unit number.*
>
> *27. The text messages that he subsequently sent to his friend cast the appellant in a very poor light, however the extent of their relevance was that they:*
>
> *(a) demonstrated his awareness of the rancour between [GA] and his wife; and*
>
> *(b) showed a lack of insight into the seriousness of what he had done.*
>
> *28. The other offences to which the appellant pleaded guilty were not serious examples of the offence of computer hacking.*
>
> *29. The appellant otherwise had exemplary antecedents, with substantial voluntary contributions to the community that went well beyond his duties as a police officer. Like many police, his mental health has suffered as a result of*

his duties, and like many police in that category, his mental illness went undiagnosed for a good while.

30. This was not a case of such seriousness that the only appropriate sentence was one of imprisonment, even if wholly suspended.

31. Although the Magistrate was not bound by the comparable decisions to which she was referred, they nonetheless were of assistance in determining the appropriate penalty. Noteworthy among them was Betts[11] *a detective of 22 years' experience, whose conduct included accessing the police computer system in order to source prostitutes and drugs for himself. That case resulted in a fine of $8,000 with a recorded conviction. Similarly, in* Philippi,[12] *the offender conducted unlawful checks on 62 people, in many cases sending screenshots of the data to the persons via social media. He was fined $8,500.*

32. A comparison between those cases and the present supports the appellant's argument that the sentence is manifestly excessive.

Submissions of the respondent

On behalf of the respondent, it was submitted that the appellant's attempts to paint the offending as relatively benign are misconceived. In particular, the following submissions were made in the written outline.

"*14. The appellant did nothing to ascertain the true state of affairs, but rather abused his position as a police officer to obtain private information which he intended to share with the complainant's ex-husband. That offending was an escalation of the previous six less serious computer hacking occasions in which he had engaged. Whether he knew of the existence of a history of domestic abuse was not to the point. He did know that there was a high level of acrimony between the parties, and that her ex-husband was trying to obtain the complainant's address. His purpose in obtaining the complainant's address to pass onto [GA], in those circumstances, was to take a serious risk with the complainant's safety. That behaviour was the antithesis of his responsibility as a police officer.*

15. The appellant knew that the Family Court was involved in that [GA] could have gone to Court to resolve any issues about the complainant not providing her address. It must have been obvious to him that she was reluctant to provide

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11 14 March 2016, Magistrate Shearer.

12 22 October 2018, Magistrate Gett.

her address. Rather than ascertain why that might be so or directing [GA] back to the Court he instead unilaterally decided to obtain information by abusing his trusted position to obtain information as to where the complainant was living and to provide it to [GA]. In doing so, there was always the potential for a dangerous confrontation between [GA] and the complainant.

16. To attempt to divorce the circumstances from the appellant's offending and submit that this was a mere invasion of privacy, ignores the position of the appellant and the purposes for which he was obtaining the information. The messages between [the appellant] and [GA] showed his purpose in obtaining that information was to upset the complainant about whom he spoke in derogatory terms.

17. Her Honour specifically recognised that the appellant was not responsible for all of the impact contained within the complainant's impact statement. It was however open to Her Honour to take into account that the appellant's offending was to obtain information which he intended to pass on to her ex-husband. The knowledge that a serving police officer might be prepared to obtain information about her whereabouts with the intention of passing it on to her ex-husband without her knowledge, when she was engaged in an acrimonious separation could not but have had an effect upon her. The learned sentencing Magistrate did not overstate that effect, and there is nothing to support the appellant's contention that Her Honour gave excessive weight to that fact.

18. In any case, complaints about the weight attached to matters which are specifically taken into account in exercising the sentencing discretion are misconceived. Weight is a matter for the sentencing judicial officer.

19. Her Honour also specifically adverted to imprisonment being a sentence of last resort. Again, there is no substance to the appellant's complaint that that factor was not sufficiently taken into account."

Relevant law

[38] This appeal is brought pursuant to s 222 *Justices Act*. Pursuant to s 223 of this Act, the appeal is by way of rehearing on the original evidence. The central task of an appellate court in an appeal by way of rehearing is not to analyse the correctness or otherwise of the decision below, although such an analysis may sometimes be helpful; it is to decide the case for itself. They will often be done by considering only the evidence admitted at first instance, subject to any question of leave to

admit fresh evidence. The appellate court must draw its own inferences from the facts established by the evidence by respecting the advantage of the court at first instance in seeing and evaluating the witnesses: Graham v Queensland Nursing Council [2009] QCA 280, per Fryberg J at [69].

[39] On an appeal by way of rehearing, an appellate court can substitute its own decision based on the facts and law as they stand at the date of their decision on appeal: Teelow v Commissioner of Police [2009] QCA 84.

[40] I sought from the parties further submissions on the correct approach on an appeal to this court against sentence. The critical issue is whether this court has to be satisfied that there was an error in the sentence imposed by the Magistrate, in accordance with the well-known principle set out in House v The King (1936) 55 CLR 499. Supplementary submissions filed on behalf of the appellant submitted that "there appears to be a divergence of opinion as to whether an appellant in an appeal pursuant to s 222 of the *Justices Act* 1886 is required to demonstrate error." Reference was made to the judgment of the Court of Appeal in Forrest v Commissioner of Police [2017] QCA 132. That was an appeal against conviction. Sofronoff P gave the judgment for the Court in an *ex tempore* judgment. His Honour said this from p 4:

> "*It has been said many times that such an appeal by way of rehearing requires an appellate Court to decide the case for itself. Although the reasoning of the Court from which such an appeal has been brought is relevant to be considered by an appellate tribunal, and it is sometimes said that it should be given appropriate weight and even great weight in particular cases particularly where credit is an issue, it is not the function of a court hearing such an appeal merely to consider whether or not the Tribunal at first instance has made an error of fact or law. Nor is there an onus upon an appellant to demonstrate the existence of an error of fact or law, although such a demonstration will go a long way towards winning an appeal. Yet this is precisely what the respondent submitted was the task of the District Court. In this case, a submission which the learned Judge accepted.*
>
> *In paragraph 3.1 of the respondent's outline of argument before the District Court the submission was made that before that Court could interfere with the Magistrate's decision, the appellant had to demonstrate that the Magistrate had acted upon a wrong principle, had allowed extraneous or irrelevant material to guide or affect him or her or had mistaken the facts or had failed to take into account some material consideration.*

> *This submission was supported by reference to the famous* dictum *in* House v The King. *Of course, that case has absolutely nothing to do with the task of an appellate Court in a case like this one. It is authority for the proposition that in an appeal against an exercise of discretion an error of fact or law must be demonstrated before an appellate Court is justified in interfering. The submission was therefore wrong.*
>
> *Yet an appellate Court hearing an appeal by way of rehearing must conduct a real review of the evidence and make up its own mind about the case. That has been established by numerous case: see for example* Fox v Percy, Warren v Coombes, Dwyer v Calco Timbers. *Consequently, the learned District Court judge had to consider each of the grounds of appeal raised by the applicant and, having regard to the evidence led in the Magistrates Court and paying due regard to the advantage that the learned Magistrate had in seeing the witnesses give evidence, determined for himself the facts of the case and the legal consequences that follow from such findings of fact.*
>
> *It is true that this appeal involved a challenge to findings based to a large extent, and perhaps entirely, upon issues of credit. However, the appellant had identified certain matters which, he contended, would lead to the conclusion that the evidence of the police officer should be rejected and that the prosecution had failed to establish the necessary facts to support the convictions. The other grounds of appeal appear to be capable of being determined upon the content of the transcript itself.*" (References omitted)

[41] The appellant referred to the judgment of Bond J in Storry v Commissioner of Police [2018] QCA 291, with whom Sofronoff P and McMurdo JA agreed, in which the following was said:

> "*[14] The learned District Court judge then recorded, correctly, that on the appeal he was required to conduct a real review of the trial, and the learned magistrate's reasons, and make his own determination of relevant facts in issue from the evidence, giving due difference and attaching a good deal of weight to the learned magistrate's view, but that, nevertheless, in order to succeed on such an appeal, the appellant must establish some legal, factual or discretionary error.*"

[42] In Robinson Helicopter Co Inc v McDermott (2016) 90 ALJR 679, the following was said in the joint judgment of French CJ, Bell, Keane, Nettle and Gordon JJ:

> "[*43] The fact that the judge and the majority of the Court of Appeal came to different conclusions is in itself unremarkable. A Court of Appeal conducting an appeal by way of rehearing is bound to conduct a 'real review' of the evidence given at first instance and of the Judge's reasons*

> *for judgment to determine whether the Judge has erred in fact or law. If the Court of Appeal concludes that the Judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings. But the Court of Appeal should not interfere with a Judge's findings of fact unless they are demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or they are 'glaringly improbable' or 'contrary to compelling inferences'. In this case, they were not. The Judge's findings of fact accorded to the weight of the lay and expert evidence into the range of permissible inferences. The majority of the Court of Appeal should not have overturned them."*

[43] In Lacey v Attorney-General (Qld) (2011) 242 CLR 573, the joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said this at 596-597:

> *"[57] Appeals being creatures of statute, no taxonomy is likely to be exhaustive. Subject to that caveat, relevant classes of appeal for present purposes are:*
>
> 1. *Appeal in the strict sense – in which the court has jurisdiction to determine whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision was given. Unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision which should have been given at first instance.*
> 2. *Appeal de novo – where the court hears the matter afresh, may hear it on fresh material and may overturn the decision appealed from regardless of error.*
> 3. *Appeal by way of rehearing – where the court conducts a rehearing on the materials before the primary judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error. In some cases in an appeal by way of rehearing there will be a power to receive additional evidence. In some cases there will be a statutory indication that the powers may be exercised whether or not there was error at first instance.*
>
> *[58] Where the court is confined to the materials before the judge at first instance, that is ordinarily indicative of an appeal by way of rehearing, which would require demonstration of some error on the part of the primary judge before the powers of the court to set aside the primary judge's decision were enlivened." (references omitted)*

[44] The applicant submits that it is difficult to argue that a demonstration of error is not required, given the state of authorities. It was submitted that:

> *"The preferable view is that, to succeed on an appeal against sentence, an appellant must demonstrate that the sentence is not merely excessive, but erroneously so. That is probably merely another way of saying 'manifestly' or 'obviously', but any of those adverbs also comprehend factual, legal, or discretionary error."*

[45] The primary submission of the appellant was repeated, namely that:

> *"The appellant does not point to any specific error, but rather contends that the sentence is manifestly excessive, suggesting that the Magistrate must have erred at some point in determining the appropriate penalty."*

[46] In the addendum submissions on behalf of the respondent, reference was made to decisions of this Court in Darcy v Commissioner of Police [2007] QDC 053 and WorkCover Queensland v Stanley [2010] QDC 48. The respondent acknowledged that there is a dearth of appellate authority on an approach by this court on an appeal against sentence brought under the *Justices Act*. It was submitted that decisions of this court make it clear that *"ordinarily error must be shown, whether specific or latent as in the case of a manifestly excessive sentence"*.[13]

[47] Reference was also made to the decision in Mbuzi v Torcetti [2008] QCA 231, where the difference between an appeal against conviction and an appeal against sentence was discussed.

[48] Ultimately, it was submitted on behalf of the respondent that as this is an appeal against a discretion exercised by the learned Magistrate in sentencing, the principles in House v The King, supra, apply. I accept this for the purposes of this appeal.

Comparable decisions

[49] In the unreported judgment of Botting DCJ, David O'Neil v T.S. Frilingos, Indictment No. BD2294 of 2014, judgment delivered 13 March 2015, the appellant had been convicted of seven counts of computer hacking. He was a Senior Constable of Police in the Queensland Police Service, as was his wife, who was charged and pleaded guilty to 14 charges of computer hacking. Another co-offender, John Robinson, a private investigator, pleaded guilty to 21 charges. In brief, the appellant would access data held on the Queensland Police Service

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[13] CTC v Commissioner of Police [2019] QDC 250; Avery & Ors v Queensland Police Service [2019] QDC 21; Robson v Commissioner of Police [2019] QDC 178.

computer system, and provide such data to Robinson. Robinson was ordered to perform 240 hours community service, and placed on probation for 18 months. A conviction was not recorded. In respect of the appellant's wife, she was ordered to be placed on probation for two and a half years, with no conviction recorded. The appellant was sentenced to six months imprisonment, presumably on each count, to be wholly suspended with an operational of 15 months. As a consequence of the sentences of imprisonment being imposed, convictions were automatically recorded.

[50] Botting DCJ expressed the view that he thought Robinson and the appellant's wife had been fortunate in the orders that they obtained. He considered that it was a serious offence for a serving police officer to provide information known to police to people who are not authorised to receive it. He observed it was a significant breach of trust. However he considered that there was a significant difference in the severity of the sentence imposed on the appellant and that imposed on his co-offenders. Consequently, his Honour set aside the sentences of suspended imprisonment, and imposed a fine of $2,000, with six months to pay. Convictions were not recorded.

[51] In Commissioner of Police v Betts, decision of Magistrate Shearer at Brisbane on 14 March 2016, the defendant pleaded guilty to 51 charges of computer hacking, contrary to s 408E of the *Criminal Code*. A schedule of facts was tendered before the Magistrate, which is not before me. In the sentencing schedule in the folder before the Magistrate, containing the appellant's cases, it was stated that this defendant accessed the police computer system to "source drug dealers and prostitutes for himself". On one occasion, the defendant accessed a crime report for a suspect. That defendant had served in both the Tasmanian Police Service and the Queensland Police Service over a period of 22 years. In Tasmania he had received a bravery award, where he entered a river in the middle of winter to prevent an attempted suicide. Psychiatric material was tendered that established the defendant had suffered from post-traumatic stress disorder as a result of being in a police station at the time of riots on Palm Island in 2004. He resorted to using drugs, to deal with that diagnosis. He lost his 22 year career with the police service, with a significant loss of income.

[52] In his sentencing remarks the learned Magistrate accepted that at the time of the offending the defendant was suffering the residual effects of a post-traumatic stress disorder, but found it difficult to see how that played any real part in his decision to start using drugs and unlawfully access the computer system. He did not think that a community based order was workable, as that defendant was living interstate. For each of the 51 counts a single fine of $8,000 was imposed, which was referred to the State Penalties Enforcement Registry. Convictions were recorded.

[53] On 22 October 2018, Magistrate Gett delivered his sentencing decision in Police v Philippi, unreported. That defendant pleaded guilty to one count of computer hacking, with a circumstance of aggravation that he had gained a benefit. The defendant had pleaded guilty at an early stage. At the time of the offence, the defendant was a Detective Senior Constable with a decade of service in the Queensland Police Service. During the course of an initial friendship with a woman, and then subsequent brief relationship, that defendant unlawfully searched for information about other persons on the police-assigned QLiTE device, on behalf of friends and acquaintances. An investigation and interrogation of the device revealed screen shots that indicated that over about a five month period, details of 62 people were unlawfully accessed from the QPRIME System. Such information included personal histories, occurrence logs, warning flags, incident reports, and logged criminal activity. Screenshots of such information was sent by way of social media to others, but primarily to the woman the defendant was involved with. Two screenshots related to intelligence reports of persons connected with the person he was obtaining information for.

[54] It was submitted on behalf of this defendant that his unlawful activity was done to ingratiate himself with others, in particular the woman he was seeking to be in a relationship with. The defendant had worked in the Child Protection Investigation Unit which was both emotionally taxing and demanding. References from two senior police officers spoke highly of the defendant's policing work, in a pressured environment, and that he demonstrated "a high work ethic, exemplary dedication in great leadership skills".

[55] There was a psychiatric report from Dr Dodds who diagnosed the defendant with a major depressive disorder and probable post-traumatic stress disorder. While those

findings were accepted, it did not reconcile with how the defendant was able to function at a high level as a detective.

[56] The learned Magistrate considered that after having careful regard to the comparable cases, he would have reached the view that the only appropriate sentence would have been one of imprisonment, in the absence of the defendant's mental disorders. He considered in the circumstances that a substantial fine was appropriate, moderated by his current financial circumstances. The defendant was fined the sum of $8,500. The Magistrate considered whether or not a conviction should be recorded. He decided not to record a conviction, despite the seriousness of the offending, because of the psychiatric material, the references, the strong personal antecedents, and the consequences of him potentially losing his job from the Police Service.

[57] I have had regard to all of the comparable sentencing decisions referred to me by both the appellant and the respondent. Like most sentence decisions, there is a wide variety of circumstances, both aggravating and mitigating.

Consideration

[58] It is important to observe that the appellant was not charged with the circumstance of aggravation that he used a restricted computer without consent, with the intention to cause detriment or damage, or caused detriment or damage. He was charged with the circumstance of aggravation that he *"gained a benefit"*, and that benefit was specifically stated by the prosecution to be *"knowledge"*. In Hughes v R [2014] NSWCCA 15, Hall J said this at [129]:

> *"It need hardly be emphasised that police officers are subject to important responsibilities having regard in particular to the position of trust that they occupy. In addition, the importance of maintaining confidentiality of police information is paramount in the effective pursuit of investigative activities and thus the restrictions upon unauthorised persons having access to information including the database information relevant to the present case."*

[59] In R v Anderson [1995] 1 Qd R 49, McPherson JA, with whom Fitzgerald P agreed, observed that a sentence of imprisonment, even if it has been wholly suspended pursuant to s 147 PSA, is a term of imprisonment, within the meaning of s 156(1) of the Act.

[60] In my view, a sentence of imprisonment for these offences, albeit wholly suspended, was excessive when having regard to the precise circumstances of the offending, the mitigating factors, and sentences imposed by Magistrates for this specific offence in other cases.

[61] In Markarian v The Queen (2005) 228 CLR 357, McHugh J said the following at [65] of his judgment:

> *"Unfortunately, discretionary sentencing is not capable of mathematical precision or, for that matter, approximation. At best, experienced judges will agree on a range of sentences that reasonably fit* all *the circumstances of the case. There is no magic number for any particular crime when a discretionary sentence has to be imposed."*

[62] There is no question that the offending constituted a significant breach of trust imposed in the appellant. The duties of police officers necessitates their access to highly sensitive and confidential information. The accessibility of such information obviously provides a temptation to some officers to abuse the trust imposed in them. The Queensland Police Service, alive to that temptation, has put measures in place to warn its officers of the consequences of any misuse of the information, and as evidenced in this case, has the means to trace all access to its database by its officers. The objective seriousness of the appellant's offending was considered at length by the learned Magistrate.

[63] In respect of the most serious of the offences, the disclosure of the precise unit number where the former wife of GA was living, it is important to note the following facts:

1. There was a final court order by consent in place from the Federal Circuit Court that required AA to disclose her residential address to GA.

2. GA already knew the street and apartment complex where AA lived.

3. No domestic violence order was in place with AA as the aggrieved and GA as the respondent.

4. There was no evidence to indicate that the appellant was aware of any allegation of domestic violence levelled by AA against GA. In fact, he specifically checked whether any protection order had been made before releasing the address.

5. GA did not attend the address of AA as a result of the disclosure of the precise unit number by the appellant.

6. The appellant was not charged with causing or intending to cause detriment to AA.

[64] A police officer of the experience and length of service of the appellant frankly should have known better than to involve himself in an acrimonious family dispute. Despite his initial reluctance to get involved, it is clear over the relevant period that the appellant became an active party in supporting GA in his bitter dispute with his former wife, and did so with gusto. The exchanges between the appellant and GA that were in evidence were not simply *"unattractive"*, but were derogatory and offensive. Many of the comments that passed between the appellant and GA would not "pass muster in a tap room or smoke concert", to quote the words of Barwick CJ in Crowe v Graham (1967-68) 121 CLR 375 at 379. It appears that the appellant thought GA was entitled to be offensive toward AA as she had been derogatory towards him.[14]

[65] As the respondent submits, the appellant expressed with some relish the likelihood of AA being distressed and upset once she learned that GA had her specific address. He encouraged GA to lie about the source of the address. He drafted an email for GA to send to AA, stating that if AA wouldn't comply with court orders, GA would have to "take matters into my own hands", which was immediately followed by the words, *"so since I know I won't bug you anymore"*, which qualifies significantly the preceding statement. It is extraordinary that the appellant simply did not advise GA to talk to his lawyers about AA's failure to comply with the address condition of the court order.

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[14] Transcript of Proceedings, R1-10, l.23

[66] The 'victim impact statement' written by AA which became Exhibit 1 requires considerable circumspection. As the prosecutor said in the court below, AA was not a "victim" under the PSA, but the statement was a "relevant circumstance" under s.9(2)(r) PSA. The learned magistrate acknowledged that some of the impacts described by AA *"must be the result of the acrimonious nature of the relationship between [GA] and [AA], it would seem, both before and after these consent orders were made in the Family Court."* While the upset experienced by AA as a result of the appellant's offending is understandable, the fact remains that the appellant was not charged with causing or intending to cause her detriment or damage. It would not have been surprising if objection had been made to the tender of this statement.

[67] In the appellant's favour, he had an exemplary career as a police officer over 18 years at the time of sentence. He received a citation for his efforts during the 2011 flood disaster. He received the Queensland Police Service Medal in 2012, the G20 Summit Citation and the Commonwealth Games Citation.[15] The references from reputable people all spoke highly of him.

[68] The psychiatric report of Dr Dodds highlighted a number of traumatic events in his life, which resulted in the development of *"many symptoms of Post Traumatic Stress Disorder"*, although as the learned Magistrate observed, such symptoms did not prevent him from carrying on his duties as a police officer.

[69] The psychiatrist expressed the opinion that the appellant was unlikely to offend again. Importantly, the appellant had received treatment from Dr Dodds on eight occasions as set out in the report of Dr Dodds, and the psychiatrist observed that *"he will continue to consult me as recommended by me but his current mental state is clearly very much improved compared to the period of time when the offending occurred"*.

[70] It is important to note that the offences occurred in 2013 and 2014, and there is no suggestion of any offending since. The delay in proceeding to prosecution was not the fault of the appellant; the matter had been investigated by the Ethical Standards Command of the Queensland Police Service, and a decision was made to reduce the pay of the appellant, but not to charge him criminally. Subsequently there was a

[15] Transcript of Proceedings, R1-17, l.35

reconsideration of that, and a decision was made in October 2018 that the appellant would be charged with the offences.

[71] At the time of sentence the appellant was 53 years of age, with not only an exemplary record of police service, but other work before he was sworn in as an officer.

[72] It was submitted before the learned Magistrate that the appellant would face some further sanction from the Commissioner of Police. It was not clear on the record the nature of any such sanction.

[73] In ROV v Commissioner of Police [2017] QDC 324, Muir DCJ observed at [29] that s 408E of the Code *"appears to be a unique provision within the Queensland criminal law, as it commences its existence as a simple offence and converts to a crime upon a circumstance of aggravation."*

[74] In that case, ROV was charged with the *simpliciter* version of the offence. Over a week in April 2016 he accessed the police computer system on 80 separate occasions to obtain personal information of other police officers, a sports personality and members of the public. He had a number of serious psychiatric conditions which was a causal factor of the offending. Muir DCJ considered a number of sentencing decisions of Magistrates, which were also before me. Her Honour said this at [28]:

> *"In these cases, the fines range from $1200 to $8000. Although, none of these cases are on all fours with the present case. Many are less serious and some are more serious as the information was used, or disseminated. But most importantly, none of them had medical evidence linking the offending to a diagnosed condition, as is the case before me."*

[75] The sentencing guidelines in s.9(2) PSA apply in this case, in particular the principle that a sentence of imprisonment should only be imposed as a last resort. The learned magistrate at first instance correctly observed that she was not bound by decisions of other magistrates, but it is clear that a pattern has emerged of non-custodial sentences, usually fines, for this offence; sometimes good behaviour bonds for less serious cases. Of course, each case depends on its own circumstances, but consistency in sentencing is essential to maintain confidence in the judicial process.

[76] Despite the serious features of this case, it is not as serious as the case of Philippi, supra. In that case, Magistrate Gett highlighted the gravity of the offending at p.5 of his decision:

> *"You have demonstrated a jaundiced and recalcitrant approach to the sensitive and secured information of others and with a cavalier disregard to the dissemination of such material to a number of other persons. It is this dissemination of information to others, upon their request or on your own motion, is in my view, an aggravating feature of your conduct. Some of the information you accessed concerned sensitive operational information. Such actions, potentially, could have been damaging to others, including, to your police colleagues. You allowed another to actually use police equipment, to access information on others, and you recklessly and foolishly assisted her and others, to obtain the information they sought. You acted selfishly, and with impudence, to discover the identity about [Ms B]'s new partner. Your conduct was protracted, and in instances where you wanted to impress others, or find out information for your own reasons, it was, in my view, deliberate and calculated."*

[77] Having regard to all the circumstances I consider that a sentence of two months imprisonment, wholly suspended was excessive in all the circumstances. That sentence was imposed on each charge, with no distinction for the different circumstances of each charge. An appropriate penalty, weighing up all the competing factors, on the most serious charge, charge 7, is a substantial fine in the range of $8,000 to $10,000, or community service. I consider that a fine at the top of that range is appropriate. Alternatively, 140 hours community service is an appropriate overall sentence in all the circumstances.

[78] I have not received evidence of the financial circumstances of the appellant, nor whether a fine of $10,000 will be a burden, in accordance with s.48(1) PSA. It is implied that he would be able to pay such a fine. I consider that an order for 100 hours community service should be made, subject to the appellant understanding the conditions and consenting to the order. That penalty should be imposed on the most serious charge, Charge 7. It will require the appellant to make a tangible contribution to the community as punishment for his offending. In respect of charge

5, where information was passed to GA about his driver licence, a community service order of 40 hours is imposed, making a total of 140 hours of community service. The period of community service ordered adequately reflects the totality of the offending. The period of each order is 12 months. On each other charge the appellant is convicted and not further punished.

[79] Having set aside the original orders and imposed a community-based order, the discretion whether to record convictions is enlivened. Lawyers for the appellant before me and in the court below submitted that convictions not be recorded. The discretion is granted by s.12 PSA. Relevantly, s.12(2) states as follows:

> *"In considering whether to record a conviction, a court must have regard to all the circumstances of the case, including –*
>
> *(a) The nature of the offence; and*
>
> *(b) The offender's character and age; and*
>
> *(c) The impact that recording a conviction will have on the offender's –*
>
> *(i) Economic or social wellbeing; or*
>
> *(ii) chances of finding employment."*

[80] In R v Marsden [2003] QCA 473, the appellant pleaded guilty to the common assault of his wife. He was sentenced to 240 hours community service and 3 years probation. A conviction was recorded. During the course of submissions and in her sentencing remarks, the learned District Court judge indicated that she had a general policy of recording convictions in domestic violence cases. The Court of Appeal set aside the sentence, resentenced the appellant to 120 hours of community service without recording a conviction. Mackenzie J, with whom McPherson JA agreed, said the following at p.6:

> "It is important to ensure that the sentencing process is as dispassionate as possible and that personal attitudes are not expressed in a way that may lead to the perception that it has been distorted by them."

[81] Wilson J in her judgment at p.8 said this:

"The learned sentencing judge rightly considered domestic violence to be a matter for serious concern in society. Regrettably, she expressed a level of that concern in terms of her own personal view on the issue, rather than the view taken by the law as applied by the Courts. It is the latter which is relevant to the sentencing discretion."

[82] In R v Cay (2005) 158 A Crim R 488, Keane JA said the following:

"One complaint advanced by the appellant is that there was no specific identification of any employment option open to any of the respondents which might be hampered by the recording of a conviction. But the existence of a criminal record is, as a general rule, likely to impair a person's employment prospects, and the sound exercise of the discretion conferred by s 12 of the Act has never been said to require the identification of specific employment opportunity or opportunities which will be lost to an offender if a conviction is recorded. While a specific employment opportunity or opportunities should usually be identified if the discretion is to be exercised in favour of an offender, it is not an essential requirement."

[83] In R v Brown, *ex parte* Attorney-General [1994] 2 Qd R 182 at 185, Macrossan CJ said the correct approach to the exercise of the discretion conferred by s.12 PSA is as follows:

"Where the recording of a conviction is not compelled by the sentencing legislation, all relevant circumstances must be taken into account by the sentencing court. The opening words of s 12(2) of the Act say so and then there follow certain specified matters which are not exhaustive of all relevant circumstances. In my opinion nothing justifies granting a general predominance to one of those specified features rather than to another. They must be kept in balance and none of them overlooked, although in a particular case one, rather than another, may have claim to greater weight."

[84] The appellant was 53 years of age at the time of the sentence in the court below, with no criminal history. He had an extensive work history, leaving school at the age of 15 to support his family after his parents separated, with his father leaving the family home. He worked in a variety of jobs before completing a Diploma of

Justice which allowed him to join the Queensland Police Service in 2002. Apart from these charges, he had an exemplary career with the police.

[85] There was no specific evidence before me that a conviction would result in the appellant's dismissal from the police service, but that was the implication made by the solicitor for the appellant in the court below. Logically a conviction for a serious offence would result in an officer's dismissal; certainly Magistrate Gett in Philippi, supra, considered that a likelihood.

[86] There is no question that the nature of the offences are serious, as I have indicated previously. I accept the most serious charge, Charge 7, did create a risk to AA as the magistrate found, but it was the same risk created by the terms of the Federal Circuit Court order. On the evidence GA never went to the unit where AA was living.

[87] There is no question that the appellant, now 54 years of age, will find it difficult to find work if he loses his job as a police officer, especially in the current climate. Of course, that may be the result of future disciplinary action by the police service regardless of whether a conviction is recorded. It remains, however, a relevant consideration for me in assessing the impact that the recording of a conviction will have on the appellant's economic and social wellbeing, and his chances of finding employment.

[88] The report of Dr Dodds, Exhibit 3, is relevant in that the appellant was experiencing great stress in 2013 as result of the extreme behaviour of a close relative, who was being sexually groomed by a 36 year old man, and together with earlier issues resulted in the appellant experiencing some symptoms of post-traumatic stress disorder, although not to the extent seen in some of the comparable decisions. This occurred around the same time as many of the offences were committed.

[89] The report is also relevant in the opinion expressed by Dr Dodds that the appellant is extremely unlikely to reoffend. That opinion has been borne out as in the intervening 6 ½ years the appellant has not reoffended in any way.

[90] It was submitted by the solicitor for the appellant in the court below that the appellant had suffered "extra-curial punishment" as a result of media scrutiny. It is of fundamental importance that court proceedings be reported by the press, as it is in the public interest. It appears that the police investigation into the appellant

revealed that false information was provided to the media, including a false report and false information concerning the facts of the case, and when domestic violence orders were sought and made. No specific details were put before the Magistrate or before me.

[91] An offender who commits offences, especially a police officer, cannot complain about widespread publicity of his offences. On the other hand, it is critical that all media reports of criminal charges and court proceedings are accurate and balanced. In the circumstances I cannot place too much weight on this issue.

[92] I have particular regard to the following factors in exercising my discretion under s.12 PSA:

- The serious nature of the offences, including a breach of the trust imposed in the appellant, and his active partisanship in acrimonious family law proceedings;
- His age;
- His otherwise exemplary service as a police officer;
- His otherwise good character attested to by the referees, including senior police officers;
- That he had some symptoms of post-traumatic stress disorder during the relevant period;[16]
- That he had been initially dealt with internally by Ethical Standards Command, with a loss of pay-level as punishment, and then the delay caused by the decision to charge him with the criminal offences;
- His excellent prospects of rehabilitation;
- His timely plea of guilty;

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16 The nature of policing is necessarily traumatic, and in this regard the appellant is like many other police officers. It is relevant to have regard to the features discussed by Dr Worthington and Dr Dodds, but they do not amount to the severity one would have with full-blown post-traumatic stress disorder. As the learned magistrate observed, the appellant was still able to function during the relevant period at a high level.

- The adverse impact the recording of convictions will have on his economic and social well-being, and his chances of finding employment.

[93] In the circumstances I exercise my discretion not to record convictions.

[94] I request the appellant's lawyers to explain to the appellant the conditions of the community service orders set out in s 103 PSA, the consequences of breaching the orders, and that the orders may be amended or revoked on his application, the application of the prosecution or the application of an authorised corrective services officer. I request that the appellant file with the court in writing his acknowledgement of the conditions of community service and his willingness to comply with the orders, and to nominate his closest office of Probation & Parole within 7 days. Once filed, the appellant must report to his nearest office of Probation & Parole on the next business day.