DISTRICT COURT OF QUEENSLAND

CITATION:	*Tierney v Commissioner of Police (No. 2)* [2020] QDC 33
PARTIES:	**NOEL JAMES TIERNEY** (applicant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	212/2018
DIVISION:	Appellate
PROCEEDING:	Appeal pursuant to s 222 of the *Justices Act* 1886
ORIGINATING COURT:	Magistrates Court at Noosa
DELIVERED ON:	13 March 2020
DELIVERED AT:	District Court at Maroochydore
HEARING DATE:	Heard on the papers (last written submissions received on 28 February 2020)
JUDGE:	Long SC, DCJ
ORDER:	**In addition to the orders made by this Court on 29 January 2020, it is further ordered that the order made by the Magistrate on 30 November 2018: that the applicant pay $750 by way of witness expenses, be set aside and replaced by an order that the complainant pay the defendant's costs of the trial, in the amount of $2,375.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST CONVICTION FROM MAGISTRATES COURT – COSTS – Indictable offence heard summarily – Where the Magistrate's finding of guilt was set aside and replaced with a finding of not guilty – Whether s 232(4) of the *Justices Act* 1886 applies to preclude any order in respect of the costs of the appeal – Discretion to award costs of trial
LEGISLATION:	*Acts Interpretation Act* 1954 s 44 *Criminal Code* ss 552B, 552C *Justices Regulation* 2014 Sch 2 *Justices Act* 1886 ss 4, 27, 158A, 222, 225(3), 232(4), 232A

CASES:	*Bowles v Sanders* [2002] QDC 13
	Flynn v Commissioner of Police Service [2012] QDC 99
	Starkey v Commonwealth Director of Public Prosecutions (No. 2) [2013] QDC 132
COUNSEL:	CFC Wilson for the applicant
	KA Milbourne for the respondent
SOLICITORS:	Wallace O'Hagan Solicitors for the applicant
	Office of the Director of Public Prosecutions for the respondent

[1] On 29 January 2020 this Court delivered judgment allowing the appeal brought by the applicant against his conviction in the Magistrates Court at Noosa on 30 November 2018, of an offence of unlawful stalking. Orders were made setting aside the finding of guilt made against the defendant and replacing that with a finding of not guilty and consequently setting aside the sentencing orders made on 30 November 2018 save for the making of a restraining order pursuant to s 359F of the *Criminal Code*, which was varied to continue in force up to and including 29 November 2020. At that time, issues as to costs were reserved and adjourned to be heard on the papers with written submissions. This judgment is in respect of those costs issues.

[2] The applicant, as the successful appellant, seeks orders awarding him costs in accordance with the maximum allowances pursuant to Schedule 2 of the *Justices Regulation* 2014, both in respect of his successful appeal to this court and also in respect of his successful defence, in the outcome, of the charge brought to trial in the Magistrates Court. It may be noted that upon the reservation of the issues as to costs, it was asserted for the applicant that the outcome in respect of the making of the protection order pursuant to s 359F of the *Criminal Code* was an option specifically raised with the prosecution prior to that trial, as a means of avoiding the necessity for the prosecution of the allegation of unlawful stalking and that contention has not been put in issue on this application.

[3] The primary contest is in respect of the application for the costs of the appeal. The appropriate exercise of discretion in respect of the application for an award of costs in respect of the trial in the Magistrates Court may be addressed shortly and conveniently at the outset.

[4] Consistently with what is pointed out by the respondent as to the proceedings in the Magistrates Court, occupying two days on 23 and 30 September 2018, there is no contention that the appropriate amount of any award would be $2,375. Such an award may be made pursuant to s 158A of the *Justices Act* 1886 ("*Justices Act*"), if the Court is satisfied that it is proper that the order for costs should be made. That is because pursuant to s 225(3) of the *Justices Act* and upon the reservation of the issue as to costs, this court may now exercise any power that could have been exercised by the Magistrate. In the exercise of that discretion, it is necessary to take into account all relevant circumstances including those specifically set out in s 158A(2). It is properly conceded by the respondent that having regard to such considerations, it is open to this court to make the award and also conceded that there are a substantial number of considerations that favour the applicant's position in that regard. It should therefore be concluded that it is proper to award the applicant the costs of the proceedings in the Magistrates Court.

[5] There is however substance to the respondent's contention that an award of costs of the appeal is prohibited by s 232(4) of the *Justices Act*, which provides:

> "(4) No order as to costs may be made on –
> (a) the hearing or determination of an appeal in relation to an indictable offence that was dealt with summarily by justices; or
> (b) any proceeding preliminary or incidental to an appeal mentioned in paragraph (a)."

It is common ground that the offence of unlawful stalking is an indictable offence, which was in this instance dealt with summarily pursuant to the *Justices Act* and specifically in accordance with the provisions of s 552B(1)(f) of the *Criminal Code*.

[6] The contentions revolve around the reference in s 232(4)(a): "by justices". It is acknowledged that the following definition is found in s 4 of the *Justices Act*:

> "**justices** or **justice** means justices of the peace or a justice of the peace having jurisdiction where the act in question is, or is to be,

> performed, and includes a magistrate and, where necessary, a Magistrate's Court".

However, the contention for the applicant is that:

> "In context the phrase in s 232(4) means that an award of costs is not able to be made where the original [hearing] was presided over by two justices of the peace; as opposed to a magistrate. It is notable that the plural form of 'justices' is used, it is submitted deliberately."

In support of that contention it is further submitted that if a contrary intention were intended, the legislature might have easily said so in clear language, to the effect that costs were not able to be ordered at all. For instance, by deletion of what is contended to be the completely unnecessary addition of the words "by justices".

[7] Apart from pointing to instances where this court has acted upon the basis that s 232(4) of the *Justices Act* precluded an order for costs of an appeal, in similar circumstances (but without any reference to the distinction contended by the applicant),[1] the respondent points out that an effect of the definition in s 4 is to provide that the term justices "includes a magistrate", in addition to "justices of the peace or a justice of the peace having jurisdiction where the act in question is, or is to be, performed".

[8] It is then pointed out that in contrast to some other powers that may be performed by a single justice of the peace pursuant to the *Justices Act* 1886,[2] the power to hear and determine a complaint is set out as follows:

> **"27 Hearing of complaint**
> (1) Subject to the provisions of any other Act, every complaint shall be heard and determined by a Magistrates Court constituted by 2 or more justices.
> (2) If any Act authorises a matter of complaint to be heard and determined by—
> (a) a Magistrates Court constituted by 1 justice; or
> (b) 1 justice;
> that matter of complaint may be heard and determined by a Magistrates Court constituted by 1 justice."

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1 *Flynn v Commissioner of Police Service* [2012] QDC 99, *Bowles v Sanders* [2002] QDC 13 and *Starkey v Commonwealth Director of Public Prosecutions (No. 2)* [2013] QDC 132, with the further notation that the decision in *Bowles v Sanders* is in respect of an appeal from a stipendiary magistrate in respect of an offence of unlawful stalking.

2 See in particular Pt 3, Div 3.

And as far as dealing summarily with indictable offences is concerned, reference is made to chapter 58A of the *Criminal Code*, which allows for this to occur and provides as follows, as to the constitution of a Magistrates Court which so deals with such a charge:

> **"552C Constitution of Magistrates Court**
> (1) A Magistrates Court that summarily deals with an indictable offence under this chapter must be constituted by—
> (a) a magistrate; or
> (b) justices appointed under subsection (3) for the place at which the Magistrates Court is being held.
> (2) Jurisdiction of the justices mentioned in subsection (1)(b) is limited to an offence—
> (a) that is dealt with on a plea of guilty; and
> (b) that the justices consider they may adequately punish by the imposition of a penalty not more than the maximum penalty they may impose under section 552H; and
> (c) for an offence involving property—that involves property, or property damage or destruction, of a value not more than $2,500.
> (3) For subsection (1)(b), the Attorney-General may by gazette notice appoint a justice for a place specified in the gazette notice.
> (4) A justice appointed under subsection (3) must be a justice of the peace (magistrates court) who the Attorney-General is satisfied has appropriate qualifications.
> (5) A gazette notice may only specify a place appointed for holding a Magistrates Court—
> (a) that is within a local government area of an indigenous local government under the *Local Government Act 2009*; or
> (b) that the Attorney-General considers is remote.
> (6) The *Justices of the Peace and Commissioners for Declarations Act 1991*, section 29(4)(a) is subject to subsections (1) to (3)."

The effect is that particular justices who are not magistrates may only be gazetted to deal summarily with indictable offences in remote locations and only upon guilty plea, amongst the other stated limitations. Notably there is no stipulation or allowance for indictable offences which may be dealt with summarily, to be dealt with by less than two such justices.

[9] Accordingly, the interpretation contended for the applicant would mean that s 232(4) would have an extremely limited and apparently illogical scope of operation. Such an interpretation is not to be accepted, as it fails to accommodate the

legislative history and contextual considerations in the *Justices Act*, which indicate that such a restricted interpretation of s 232A(4) is not intended.

[10] First it is necessary to note that the provision is part of the "*Justices Act* 1886" and as originally enacted, there was no reference to magistrates exercising powers pursuant to the Act. It may also be noted that the current definition of "justices or justice" was substantially introduced by the *Justices Act Amendment Act* of 1964 (as from 1 January 1965) and effectively as part of a transition from the petty sessions system which had operated in Queensland prior to and after the creation of the colony, on 6 June 1859, albeit in the following form:

> "'Justices' or 'justice' – Justices of the Peace or a Justice of the Peace having jurisdiction where the act in question is, or is to be, performed: The term includes a Stipendiary Magistrate and, where necessary, a Magistrates Court constituted under and in accordance with this Act."

It may be noted that the definition then appeared in s 4 with the following introduction:

> "In this Act, unless the context otherwise indicates or requires, the following terms shall have the meanings respectively assigned to them, that is to say:-"

Whereas, for present purposes, the introduction in s 4 is now simply stated as:

> "In this Act –".

[11] Understandably, an effect of the definition inserted in 1965 was to include a Stipendiary Magistrate and a Magistrates Court,[3] within the definition, in circumstances where the Act was otherwise replete with references to the powers exercisable by "justices". And as has already been noted, such references remain in the Act, including in s 27, as it relates to the jurisdiction in respect of hearing and determining complaints. As has been further noted, other subsequent legislative provisions, have imposed restrictions upon when such matters may be so heard and determined by justices or a justice, rather than by a magistrate.

[12] Section 232(4) was introduced by s 65 of the *Courts Reform Amendment Act* no. 38 of 1997 (as from 18 July 1997) and when the definition of "justices or justice" in s

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3 The word "stipendiary" was deleted by s 70(2) of the *Civil and Criminal Jurisdiction Reform in Modernisation Amendment Act* No. 26 of 2010 (as from 13 August 2010).

4, was already substantially in the same form as it now appears. The adoption, in s 232(4), of the reference to "an indictable offence that was dealt with summarily by justices", may be further noted to have occurred in the context that:

(a) the provision relates to the exercise of jurisdiction in respect of an appeal which is provided by s 222 of the *Justices Act*, in terms which, since 1949, have been referable to "an order made by any justices or justice in a summary manner upon a complaint for an offence or breach of duty"; and

(b) where, for present purposes, it may be noted that the concept of "summary proceedings" is provided by s 44 of the *Acts Interpretation Act* 1954, relevantly as follows:

> **"44 Summary proceedings**
> (1) In an Act, a provision of the type mentioned in subsection (2) means that a proceeding for an offence, or a specified offence, against the Act is a summary proceeding under the *Justices Act 1886*.
> (2) Subsection (1) applies to provisions of the following type—
> (a) a provision to the effect that a proceeding for the offence is to be heard and decided summarily;
> (b) a provision to the effect that a proceeding for the offence is to be heard and decided by or before justices or a magistrate;
> (c) a provision to the effect that the offence is a summary offence or is punishable on summary conviction or summarily;
> (d) a provision for an offence that does not expressly or impliedly make the offence an indictable offence.
> (3) In an Act, a provision that provides that another type of proceeding is to be heard and decided summarily, or before justices or a magistrate, means that the proceeding is a summary proceeding under the *Justices Act 1886*."

[13] Whilst it is conceivable that the interpretation of s 232(4) contended by the respondent, may have been achieved without the inclusion of the words "by justices", and that the inclusion of those words should be regarded as deliberate, it should not be concluded the restricted interpretation contended by the applicant, was the legislative intention. In context, it may be seen that the inclusion of those words is consistent with the approach taken elsewhere in the Act and particularly apt to engage:

(a) with the language used in s 222, as the provision initiating any proceeding in which the application of s 232(4) might arise for consideration; and

(b) the definition of "justices" in s 4 of the *Justices Act*.

In fact, it may be observed that a logical conclusion of the applicant's contention may be to, at least, put in doubt the right which he has exercised in bringing his appeal pursuant to s 222 of the *Justices Act*.

[14] Accordingly, there can be no order in respect of the costs of the appeal to this Court. Otherwise and in addition to the orders made on 29 January 2020, it is further ordered that the order made by the Magistrate on 30 November 2018: that the applicant pay $750 by way of witness expenses, be set aside and replaced by an order that the complainant pay the defendant's costs of the trial, in the amount of $2,375.