DISTRICT COURT OF QUEENSLAND

CITATION:	*Powe v David Hansen on behalf of Logan City Council (No 2)* [2021] QDC 97
PARTIES:	**DESMOND GORDON POWE** (appellant) **v** **DAVID HANSEN ON BEHALF OF LOGAN CITY COUNCIL** (respondent)
FILE NO:	22/2019
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	Beenleigh District Court
DELIVERED ON:	7 June 2021
DELIVERED AT:	Beenleigh
HEARING DATE:	12 March 2021
JUDGE:	Chowdhury DCJ
ORDER:	**1. Convictions on Charges 2, 3 & 4 on Complaint 136354/17, filed 3 July 2017, set aside and no further order made.** **2. Pursuant to s 49 *Penalties & Sentences Act 1992*, a single fine of $35,000 is imposed for the convictions on Charges 6 & 7 on the 3 July 2017 complaint, and Charges 1, 2, 3 & 4 on the 12 December 2017 complaint. The proper officer of the District Court at Beenleigh is to give the particulars of the fine to the State Penalties Enforcement Registry.** **3. The restoration order made by the Magistrates Court on 23 August 2019 is set aside.** **4. Professional costs for counsel and solicitor ordered by the Magistrates Court to be paid by the appellant are set aside.** **5. No order for costs on the appeal.**
CATCHWORDS:	S 222 APPEAL – PLANNING ACT OFFENCES – CONVICTIONS SET ASIDE ON SOME CHARGES – WHETHER NEW TRIAL SHOULD BE ORDERED – SENTENCE – FINES & RESTORATION ORDER - WHETHER EXCESSIVE

LEGISLATION:	*Integrated Planning Act 1997* (Qld) *Justices Act 1886* (Qld) *Local Government Act 2009* (Qld) *Oaths Act 1967* (Qld) *Planning Act 2016* (Qld) *Penalties and Sentence Act 1992* (Qld) *Sustainable Planning Act 2009* (Qld)
CASES:	*Bowman v Brown* [2004] QDC 6 *DPP (Nauru) v Fowler* (1984) 154 CLR 627 *Dyers v The Queen* (2002) 210 CLR 285 *Griffiths v The Queen* (1994) 69 ALJR 77 *Hainaut v Queensland Police Service* [2019] QDC 223 *McDonald v Holeszko* [2019] QCA 285 *McSweeney & Anor v Spiller* [2002] QDC 295 *Tseng v Brisbane City Council* [2020] QDC 48
COUNSEL:	Appellant was self-represented N. Lichti *(Sol)* for the respondent
SOLICITORS:	Appellant was self-represented Minter Ellison for the respondent

Introduction

[1] This is the further judgment following my judgment delivered on 5 February 2021, in which I set aside a number of convictions. Submissions were sought from the parties as to the outcome of the appeal, in particular whether there should be an order to remit the charges for further hearing in the Magistrates Court.

[2] Further submissions from the respondent were filed on 11 March 2021. Significantly, the respondent submitted that the court should not remit charges 2, 3 and 4 on complaint and summons number 136354/17, filed 3 July 2017, for rehearing in the Magistrates Court, having regard to:

1. the nature of the charges, and the convictions which remain, including the convictions with respect to the same properties in relation to the enforcement notices issued by the Council; and

2. the cost and inconvenience of a retrial.

[3] Consequently, the respondent submitted that charges 2, 3 and 4 on that complaint should be dismissed, and the appellant should be resentenced on the remaining convictions, and that the existing enforcement orders relating to each of the

properties should be amended to extend the time for the appellant to comply by six months.

[4] The appellant did not provide any written submissions, but appeared at the resumption of the hearing on 12 March 2021, and handed up to the court a three page submission which relates to the surveys done on two properties, the subject of the enforcement order. The appellant did make oral submissions at the hearing.

Relevant law

[5] The powers of a District Court Judge on hearing an appeal from the Magistrates Court are prescribed by s 225 *Justices Act 1886* ("Justices Act"). In short, a judge may confirm, set aside or vary the appealed order or make any other order in the matter the judge considers just. In particular, if a judge sets aside an order, the court may send the proceeding back to whoever made the order or to any Magistrates Court with directions of any kind for the further conduct of the proceedings including, for example, directions for rehearing or reconsideration.

[6] In DPP (Nauru) v Fowler (1984) 154 CLR 627, the following was said by the Court at 630:

> "*The power to grant a new trial is a discretionary one and in deciding whether to exercise it the court which has quashed the conviction must decide whether the interests of justice require a new trial to be had. In so deciding, the court should first consider whether the admissible evidence given at the original trial was sufficiently cogent to justify a conviction, for if it was not it would be wrong by making an order for a new trial to give the prosecution an opportunity to supplement a defective case. In the present case, the admissible evidence given at the trial satisfies this test. Then the court must take into account any circumstances that might render it unjust to the accused to make him stand trial again, remembering however that the public interest in the proper administration of justice must be considered as well as the interests of the individual accused. The alleged misuse by the respondent of his position as a senior officer of the Phosphate Corporation might have been regarded as a reason in favour of granting a new trial, whereas, on the other hand, the facts that the respondent was no longer on the island of Nauru and that the offences were thought to warrant only one month's imprisonment and a small fine might have been thought to provide arguments to the contrary. These were matters that should have been weighed by the Supreme Court in deciding how its discretion should be exercised.*"

[7] In Dyers v The Queen (2002) 210 CLR 285, Gaudron and Hayne JJ said this at 297:

> "*In these circumstances, it would ordinarily follow that a new trial should be ordered, leaving it to the prosecuting authorities to decide whether to proceed with a new trial. In this case, however, the sentence imposed on the appellant has expired. The decision whether to continue a prosecution is ordinarily a decision for the executive, not the courts. There have, however, been cases where this Court has quashed a conviction, without either ordering a new trial or directing entry of a verdict of acquittal. To make an order that would preclude a new trial would constitute a judicial determination of the proceedings against the appellant otherwise than on trial by jury and in circumstances where it is not held that the evidence adduced at trial required the jury to acquit the appellant. That being so, there should be an order for a new trial despite it being probable that the prosecution will not proceed further*." (references omitted)

[8] Kirby J in the same case observed that the discretion to grant a new trial is one that must be exercised in a principled fashion. His Honour considered that it was undesirable, if not impossible, to lay down fixed rules to govern the exercise of a court's power to order, or refrain from ordering, a new trial where the court concludes that an earlier trial had miscarried, in that case by reason of misdirection by the trial judge. His Honour at [82]-[83] set out a list of factors that have led to the discretion being exercised not to order a new trial. One of those factors include the situation where the prosecution indicates that it does not seek an order for a retrial.[1]

[9] In Hainaut v Queensland Police Service [2019] QDC 223, Morzone QC, DCJ exercised his discretion not to order a new trial upon setting aside a conviction, for the following reasons:

- the relatively minor nature and seriousness of the offending conduct;
- the conduct of the original trial subject to the appeal;
- the extent that the material errors found on appeal were attributable to the conduct of the prosecution, and/or the appellant;
- the defects in the evidence of the original hearing such that, taken at its highest, it will not sustain a conviction;

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1 See also Griffiths v The Queen (1994) 69 ALJR 77.

- the likelihood that the prosecution might, on a new trial, exploit a forensic advantage, present in its case with fresh evidence and in a different way;
- the time and effort of the appellant prosecuting the appeal; and
- the cost, delay and inconvenience of another trial.

[10] As I observed in my first judgment in this matter, this was a difficult and complicated prosecution, which took some five days, with multiple exhibits tendered and numerous witnesses called. The appellant was at a significant disadvantage by representing himself. The respondent here expressly does not seek a retrial of the charges that have been set aside, and in the unique circumstances of this case I exercise my discretion not to remit those charges for further hearing in the Magistrates Court.

Sentence imposed by the Magistrate

[11] The prosecutor referred the Magistrate to the changes in penalty units that occurred from 31 July 2015 to 1 July 2016. For the earlier charges the value of a penalty unit was $117.80, and from 1 July 2016 it was $121.90. The maximum penalty for the offences before 1 July 2016 was $196,137.00; the maximum penalty for the offences after that date was $202,960.50.

[12] The prosecutor submitted that the defendant was a mature man, 78 years of age. On his own evidence, he had more than 50 years of experience in the earthmoving industry. As a result it was submitted that he must have been familiar with the relevant laws and regulations, and in respect of one of the offences involved, 165 Featherstone Road, Chambers Flat, the appellant had sufficient familiarity to seek and obtain a development permit to allow operational works to occur.

[13] It was submitted that *"the effect of the evidence was that in importing the fill and then spreading it, the defendant has obtained a commercial benefit of – to take the very low, it seems, between $1.00 and $8.00."* For the purposes of sentencing, the prosecutor submitted that the sentence should proceed on the basis that the actual benefit obtained was in the order of $1.00 to $3.00 per cubic metre. Consequently, if one adopted the low end of $1.00 per cubic metre, the appellant received a potential commercial benefit of $78,135.00. If one adopted the higher end of $3.00 per cubic metre, there was a commercial benefit of $234,405.00.

[14] The prosecutor submitted that there was no specific evidence about "either localised or broader impacts" of the fill brought onto the various properties by the appellant. There was some evidence from two of the property owners that there were some adverse effects on their property.

[15] The prosecution sought enforcement orders to require the appellant to reinstate each of the properties.

[16] The appellant did not make any submissions on sentence. He complained about being convicted.

[17] The Magistrate gave the following reasons on sentence:

> "*I consider a fine is appropriate. I impose one penalty for the 10 offences pursuant to s 49 of the* Penalties and Sentences Act*. I do record a conviction. In relation to a fine, I accept the appropriate penalty, in my view, taking all the factors into consideration, including the submission on point by Mr Dillon – that is, the nature of the misconduct. A pattern of misconduct – there is a need for specific and general deterrence in relation to offences of this nature.*
>
> *The commercial aspects in respect to the offending. I accept, of course, in relation to another critical factor, in my view, is in relation to the issue of the effect upon flood impact, both up river and down river in relation to some properties. Obviously, there is a matter of some concern in relation to some of the property owners in relation to the status of their property.*
>
> *In respect of the six offences under s 578, I consider a penalty of $25,000 is appropriate. In relation to the penalties under s 594, ss (1), I consider a $10,000 penalty is appropriate for each count. Under s 580, ss (1) offence, again, $10,000 for each count. My calculation is a fine of $190,000. Costs of court of $192.30. In relation to the mentions for professional costs – 11 mentions at $250 a mention, $2,750.*
>
> *In respect of the hearing of professional costs at trial, I accept that it has been a complicated trial going over an extended period of five days. I accept the submissions made by Mr Dillon in relation to the matter. I consider there should be an uplift in relation to the costs pursuant to the Justices Act, section 158B, subsection (2). I do not consider the amount as requested by Mr Dillon to be appropriate. I will adjust that accordingly in relation to the matters before the court today.*
>
> *In respect of counsel fees for five days of hearing, I consider $2,000 a day is appropriate. For attending solicitor for five days, $1,000 a day. Accordingly, I order hearing costs in relation to professional costs for counsel of $10,000. Attendance of a solicitor for the five*

days of hearing, $5,000. I remit all those penalties to SPER, the government agency, in relation to the matter for collection of that penalty.

In the circumstances, and in those – and the nature and the prosecution against Mr Powe, I am satisfied that a restoration order is appropriate as per the draft orders submitted by Mr Powe today.[2] *I make an order against Mr Powe. I order the draft order as per the draft order, which is initialled as to some further amendments under the section 311 and section 312 of the Planning Act, and also in relation to the provisions of the Sustainable Planning Act in s 176 of the Planning Act 2016. In relation to that, I serve a copy. The – my order has been given to you already in relation to the matter. If you want to lodge an appeal, you can do that as of today, and you can do it today but I will then invite you to get some advice first from a legal professional in relation to the matter."*

Restoration/enforcement order

[18] The relevant provisions of the order made by the Magistrate are as follows:

1. The defendant (or the defendant's agent) is to remove from the premises listed in **Annexure A** the fill (encompassing soil, clay, earth and rocks) that was unlawfully imported onto each of the premises so that each of the premises is restored as far as practicable to the condition the premises were in immediately before the fill was imported.

2. The fill must be removed from premises 1 through 3 (inclusive) from the areas shown inside the red broken lines in **Annexure B**.

3. The fill must be removed from premises 4 across the entire premises as shown in **Annexure C** except from where no fill is indicated and from within 10 metres of the new dwelling on the premises.

4. The fill must be removed from premises 5 from the areas shown in pink in **Annexure D**.

5. The shape of the land for premises 1 through 5 (inclusive) must be returned to air borne laser scanning 2013 levels (2013 ALS), in that fill equal to the amount to return the land to the 2013 ALS levels, and specified in **Annexure A**, must be removed from each of the premises.

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[2] In fact, the draft enforcement order was submitted by the prosecution: see Mags Ct R5-17, l 45

6. The fill must be removed from premises 6 from the areas shown inside the green and red areas in **Annexure E**.

7. The shape of the land for premises 6 must be returned to air borne laser scanning 2008 levels (2008 ALS), in that fill equal to the amount to return the land to the 2008 ALS levels, and specified in **Annexure A**, must be removed from premises 6.

8. The fill must be removed from premises 7 from the area shown inside the black broken line (actual fill area) and from inside the blue broken lines in **Annexure F**.

9. The fill removed from premises 7 inside the red broken line (approved fill area) must reduce the height of the fill to the approved height for the 12 May 2015 development approval, being the Australian height datum of 14.50.

10. The shape of the land for premises 7 must be returned to air borne laser scanning 2013 levels (2013 ALS), in that fill equal to the amount to return the land to the 2013 ALS levels, must be removed from premises 7.

11. The fill from premises 1 through 7 (inclusive) must be removed by no later than six months from the date of this order.

12. All fill removed from any premises must be transported and disposed of lawfully.

13. All fill removed from any premises must be removed between the hours of 8.00 am and 5.00 pm on weekdays only, excluding public holidays.

14. After the removal of fill from premises, the defendant must restore the premises to the condition it was in immediately before the fill was imported (e.g. if the premises had grass before the fill was placed onto the premises then the premises must be re-grassed).

15. Following the removal of the fill from premises 1 through 7 (inclusive), the defendant must provide to Logan City Council a plan or plans of survey (completed by a registered surveyor in Queensland) demonstrating the reinstatement of the pre-existing ground contour levels as recorded in the

2008 ALS (for premises 6) and 2013 ALS (for premises 1 through 5 and 7 inclusive).

16. Each of the plans of survey in order 15 must be provided to Logan City Council by no later than three months after work is completed on the given premises.

17. At least seven days prior to entering any premises, the defendant must make reasonable attempts to notify in writing the owner(s) of the premises of the days on which work under this order will be carried out on the premises, the expected period over which the works will be done on the premises and who will be entering the premises to carry out works.

18. If an owner(s) of premises refuses to permit the defendant (or the defendant's agent) onto the premises for the purpose of carrying out works under this order, the defendant must notify Logan City Council in writing within three days that permission to enter the premises has been denied, who denied the access and the reason given (if any) for the refusal.

19. If the defendant is unable to fulfil a requirement of this order, the defendant must make an application to the court to vary the order.

20. This order is made against the defendant personally.

Submissions of the parties on resentence

[19] By way of a written outline filed 11 March 2021, the respondent submitted that although a number of convictions relating to the carrying out of assessable development on four properties on Chambers Flat Road, Marsden had been set aside, the convictions concerning the appellant's non-compliance with the enforcement notices, which also related to those properties, were upheld. Consequently, it was submitted that the overall gravity of the offending remains substantially the same. It was submitted that both general and specific deterrence were relevant.

[20] The following specifics submissions were made by the respondent in its written outline:

"*[26] A significant penalty ought be imposed having particular regard to:*

(i) the maturity of the appellant and his long experience in the earthmoving industry.

(ii) the pattern of offending, which involved dishonest and misleading conduct, in the placement of 78,135m³ of fill across seven flood prone properties, without any assessment of the adverse impacts that the fill might cause.

(iii) the commercial benefit to the appellant, which at $1 to $3 a cubic metre, can be estimated as being between $78,135 to $234,405 or more.[3]

[27] As a consequence of the matters above, the respondent submits that the court ought not further reduce the penalties for the remaining offences below those imposed by the Magistrate.

[28] To the contrary it would be open to the court to adjust the penalties relating to the remaining convictions upwards to more appropriately reflect the overall gravity of the offending, and the need for deterrence."

[21] In respect of the enforcement orders made by the Magistrate pursuant to s 599 *Sustainable Planning Act 2009* ("SPA") and s 176 *Planning Act 2016* ("PA"), those orders required the appellant to reinstate each of the affected properties. It was submitted by the respondent that the convictions in respect of the two enforcement notices issued by the respondent, which relate to the four properties on Chambers Flat Road, Marsden the subject of the June 2017 complaint, still stand.

[22] Significantly, the following was submitted by the respondent in its written outline:

"*[32] Unlawful works had been carried out upon flood affected properties. The works have not been assessed or approved, so that the extent of their impacts is unknown. In the circumstances, it is appropriate that the enforcement orders be maintained, and the appellant be required to remove the fill from each of the properties involved.*

[33] However, the time for compliance with the enforcement order should be varied, to allow the appellant six months to carry out the works."

[3] There was no evidence of the actual financial benefit received by the appellant, nor any financial analysis done on his accounts.

[23] The appellant provided a two page document, which became Exhibit 2 in the hearing before me on 12 March 2021. The first page related to surveys done on the property at 165 Featherstone Road, Chambers Flat. It reads as follows:

> *"There were two surveys done on the 165 Featherstone site. First one at the commencement of the job at Logan Council's request with site every day engineering and planning, surveyor: Ricky Graham. Also in attendance was Logan Council Developer Officer, Nadien* [sic] *Daniels, after the survey was completed Nadien Daniels informed me that the fill area was grass bank to grass bank, all the way around the dam, this was also confirmed by the engineer.*
>
> *Featherstone fill extra fill outside the dam was from two other dams built some years before and the soil was spread around the dams as a primary producer, the farmer, shifted soil around his property and moulded wind rows up to 300 millimetres in height which would give the surveyors extra height in their measurements. I would like the Judge to rethink on Featherstone and call for the Logan Council to resurvey the dams in my presence plus Logan Council's, Nadien Daniels on the first survey which would prove the Logan Council's surveyors were given the wrong start point.*
>
> *The second survey by Logan Council took measurements from the bottom of the pipe that we put in to drain the dam which would mean we would have to take all the fill out and it would still be a dam on the northern end of the other dam on the DA which they classed as excess fill.*
>
> *The dam is now 580 millimetres under the level and the owner is copping it also, the Logan Council gave them permission to build packing sheds on this dam. Logan Council should have to pay to remove or pull down and rebuild elsewhere if the fill is removed.*"

[24] The second page relates to the property of the Hindu Temple at 86-98 Scott Lane, North Maclean. It reads as follows:

> "*I Desmond Powe was working under the supervision of Deepak Kumar, site engineer and owner Rami Puvari at all times. I was spreading gravel supplied and delivered from Pink contractors from the new road section on Chambers Flat. This was put down in the carpark which is the only area I worked in and the onus should be on the church owner not me, Desmond Powe.*
>
> *Logan Council should have given the show cause notice to site management or owner not Desmond Powe. I Desmond Powe worked for D and M J Powe Family Trust and on a wage. Terry Smith, Councillor had my business card who I worked for.*"

Appendix 1 to Exhibit 2 is a map of a proposed subdivision on 481-489 Chambers Flat Road, Park Ridge. The relevance of this is not clear.

[25] The appellant in the course of oral submissions on 12 March 2021 maintained his complaint about the property at 165 Featherstone Road, Chambers Flat. He complained about the survey the respondent did, complaining that the survey was taken from the water level of the dam, which would not give a true reading because the dams are pumped out every day to irrigate the property. He also maintained that since the fill was put on that property the owners have planted crops in the area, and that the respondent had given the owner's permission to build packing sheds on it. The appellant rhetorically asked how he could remove soil when that had occurred.[4]

[26] The appellant also maintained that the properties, especially 165 Featherstone Road, Chambers Flat, had been subjected to two floods in the intervening years, with obvious silt placed upon them.[5]

Financial situation of the appellant

[27] It is clear that the Magistrate did not make any enquiry about the capacity of the appellant to pay a fine, let alone a fine in the amount of $190,000. The appellant did not himself place any information before the Magistrate about his financial circumstances.

[28] Section 48 *Penalties and Sentences Act 1992* ("PSA") states as follows:

> *"(1) If a court decides to fine an offender, then, in determining the amount of the fine and the way in which it is to be paid, the court must, as far as practicable, take into account — (a) the financial circumstances of the offender; and (b) the nature of the burden that payment of the fine will be on the offender.*
>
> *(2) The court may fine the offender even though it has been unable to find out about the matters mentioned in subsection (1)(a) and (b).*
>
> *(3) In considering the financial circumstances of the offender, the court must take into account any other order that it or another court has made, or that it proposes to make—*
>
> *(a) providing for the confiscation of the proceeds of crime; or*
>
> *(b) requiring the offender to make restitution or pay compensation.*

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4 R1-13, l 45.
5 R1-19, l 40.

> *(3A) In considering the financial circumstances of the offender, the court must not take into account the offender levy imposed under section 179C.*
>
> *(4) If the court considers that—*
>
> *(a) it would be appropriate both to impose a fine and to make a restitution or compensation order; and*
>
> *(b) the offender has not enough means to pay both; the court must, in making its order, give more importance to restitution or compensation, though it may also impose a fine.*
>
> *(5) In fixing the amount of a fine, the court may have regard to, among other matters—*
>
> *(a) any loss or destruction of, or damage caused to, a person's property because of the offence; and*
>
> *(b) the value of a benefit received by the person because of the offence.*"

[29] If an offender is found guilty of two or more offences that are founded on the same facts, or form, or are a part of a series of offences of the same or similar kind, the court may impose a single fine for all the offences: s 49 PSA. A fine imposed under this subsection must not be more than the total of the maximum fines that could be imposed for each of the offences: s 49(2).

[30] The court has power to order that a fine be paid by instalments, or to order that the proper officer of the court give, under the *State Penalties Enforcement Act 1999*, particulars of the fine to the State Penalties Enforcement Registry for registration of the fine under s 34 of that Act.

[31] In McDonald v Holeszko [2019] QCA 285, Flanagan J, with whom Sofronoff P and Philippides JA agreed, said this:

> "*[64] Although the magistrate referred to s 48 of the* Penalties and Sentences Act*, the sentencing remarks neither reveal any actual consideration of the financial circumstances of the applicant nor the nature of the burden that a payment of a fine of $40,000 (together with costs) would have on Mr McDonald and his family. Any such analysis of Mr McDonald's financial circumstances, as outlined in [34] to [40] above, would have demonstrated that the applicant's capacity to pay the fine and costs in the amount of $112,468.82 was extremely limited.*
>
> *[65] A consideration of those circumstances leads to the conclusion that the imposition of a penalty in excess of $112,000*

> *constitutes a crushing burden on Mr McDonald and his family. This Court has the benefit not only of the personal financial information that was before the magistrate, but also Mr McDonald's notices of tax assessment. These reveal that he has not generated any taxable income from primary production for the years 2011 and 2013 to 2017.*"

[32] In that case, the appellant McDonald had been found guilty after a summary trial of six offences of carrying out assessable development without an effective development permit, contrary to s 578(1) SPA. Those charges related to allegations that the appellant and his wife had unlawfully cleared native remnant vegetation, between April 2013 and April 2015. The total area of land cleared was alleged to be approximately 1,838.3 hectares. The clearing was for the purpose of feeding livestock at a time in which the appellant and his family had been battling the effects of drought.

[33] As in this case, that appellant was self-represented. The appellant McDonald's wife had also been charged, but the charges were dismissed against her. The Court of Appeal observed that the illegal clearing was vegetation from a least concerned regional ecosystem and not of a more endangered ecosystem. There was no cogent evidence that the property had increased in value because of the clearing, or that any lasting environmental harm was caused.

[34] Significantly, that appellant was issued with a restoration notice following his conviction and sentence in the Magistrates Court. In conclusion, Flanagan J said this:

> "*[81] As to personal deterrence, Mr McDonald ceased clearing once he was issued with a stop work notice under the VMA on 29 April 2015. Subsequent to being sentenced by the magistrate, Mr McDonald is now subject, perhaps for the next 20 years, to the restrictions in clearing on his property arising from the Restoration Notice issued on 26 October 2017 pursuant to s 54B of the VMA. The Restoration Notice is registered on the title and will restrict Mr McDonald's use of the property into the future. The effect of the Restoration Notice is relevant to the issue of both personal and general deterrence. It was not a consideration that the magistrate was able to take into account as the Restoration Notice was issued after Mr McDonald was sentenced.* ***It is, however, a matter that should be taken into account by this Court in exercising the sentencing discretion afresh.***

> *[82] Having regard to the personal financial circumstances of Mr McDonald and the context in which the offending occurred, I would set aside the fine of $40,000 and, in lieu thereof, impose a global fine of $5,000.*
>
> *[83] As to the issue of investigation costs ordered pursuant to s 68C of the VMA and legal costs ordered pursuant to s 157 of the* Justices Act*, no regard was given in the exercise of these discretions to the fact that Mrs McDonald had been acquitted. Although Mrs McDonald as a self-represented person could not seek legal costs against the prosecution, it would have been open to the magistrate to make no order as to costs. In relation to the investigation costs, these should have been discounted by at least 50 per cent.*
>
> *[84] The investigation costs should thereafter have been further discounted having regard to the personal financial circumstances of Mr McDonald.*
>
> *[85] Having regard to these factors, I would fix the sum for investigation costs and outlays at $5,000.*
>
> *[86] In relation to the legal costs ordered by the primary judge, while Mr McDonald was unsuccessful on his appeal against conviction, he has been successful in respect of his appeal against sentence. In those circumstances, I would set aside the order made by the primary judge as to costs and substitute an order that there be no order as to costs. A similar order should be made in respect of the present application.*" (emphasis added)

[35] At the further hearing of this matter on 12 March 2021, I asked the appellant about his current financial position. The following was stated:

(a) The appellant receives a fortnightly payment of $1,000 as a carer's pension for his wife, who has had a stroke.

(b) He has no other source of income such as shares or bank interest;

(c) He cannot work at the moment because of his "problems";

(d) He doesn't own any equipment; he used to hire the equipment he needed from a hire company;

(e) He no longer has his home because he lost it; and

(f) He currently lives in a granny unit on his son's property.

[36] I asked the solicitor for the respondent whether there was any dispute with this. The following exchange took place:

"Q: All right. I just want to make sure that the respondent doesn't dispute the claims of Mr Powe that he's currently in receipt of a carer's pension. He has no other income, no other assets and doesn't own his own home; he's just living on his son's property in a granny flat.

A: I don't have any evidence, your Honour.

Q: Yes.

A: So I can't say firmly that we ---

Q: Yes.

A. --- Agree with it, but, certainly, at this point in time, it's not disputed.

Q: Yes okay [appellant interjecting]: and there's – definitely got nothing. And I did lose me home through a scam thing, so ---

Q: Yes. All right. Thanks.

A: Should be able to say we don't evidence to the contrary.

Q: That's probably a better way of putting it, Mr Lichti, thanks. All right. No. I appreciate your time and assistance, gentlemen. I reserve my further judgment in this matter so adjourn the court."[6]

Comparable cases

[37] It does not appear that comparable sentences were placed before the Magistrate in the court below. One was placed before me: Tseng v Brisbane City Council [2020] QDC 48. The decision in McDonald v Holeskzo, supra, is of some assistance, albeit a vegetation clearing case.

[38] In Bowman v Brown [2004] QDC 6, the appellant was convicted of one offence against s.4.3.1 IPA and two offences against s.4.3.5 IPA. McGill SC DCJ set aside the s.4.3.1 conviction but upheld the convictions on the other two charges. In brief, the appellant owned land at Bald Hills that was zoned "rural", and could lawfully be used for grazing cattle. In respect of the first s.4.3.5 charge, the appellant unlawfully dredged his land for rock, soil and/or sand. The second charge related to the unlawful screening of material so dredged. In respect of all three charges the magistrate had imposed a fine of $15,000 and ordered costs in the sum of $28,240.83.

[39] His Honour said the following at [104]-[105]:

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6 R1-25, R1-26.

"It was submitted before the magistrate that this was a serious breach of the town planning regime, an unauthorised use of land which by its very nature was likely to cause some disturbance or disruption to the lives of people in a rural area. The latter point appears to be directed more to counts 2 and 3 than count 1, although there was then a reference to visual disturbance which may well have been more directed to count 1. Reference was made to what was said to be two comparable decisions, neither of which strikes me as being particularly similar to the circumstances in the present case, although no doubt it is difficult to obtain decisions which are really comparable. It does not appear that any previous offences were alleged against the appellant. At one point counsel suggested to the magistrate that the usual sort of fine for unlawful use prosecutions was of the order of $4000 to $7000.

It seems to me that the magistrate treated this as a fairly serious example of unlawful use offending. Bearing that in mind and taking into account the various submissions made before the magistrate in relation to the question of penalty, I would substitute a fine of $10,000, in default imprisonment for four months, for the fine imposed by the magistrate. That is one penalty in respect of the two counts that remain."

[40] In McSweeney & Anor v Spiller [2002] QDC 295, the appellants had pleaded guilty to using premises in West Woombye as a vehicle depot, that use being unlawful under the town planning scheme for the Shire of Maroochydore. The appellant McSweeney was the principal director and "guiding mind" of the corporate appellant. He had operated a haulage business at the relevant premises since about 1996. At times, he had up to four or five trucks at the premises, but also had employed around 14 people. That was in contravention of the existing town plan.

[41] Robertson DCJ said this:

> "*[11] I am informed that there are no previous decisions of the Court of Appeal or this Court which deal with the levels of penalties for offences against IPA. Without being exhaustive, as each case will depend on its own facts, in my opinion factors likely to aggravate the conduct the subject of a charge under s.4.3.5 are:*
>
> *(a) the period of time over which the offence has been committed;*

> *(b) whether or not the offender has had prior notice from the relevant local authority of the unlawfulness of its actions;*
>
> *(c) the scale and commerciality of the unlawful use;*
>
> *(d) any other conduct (apart from (b)) which suggests a wilful disregard of planning laws;*
>
> *(e) previous convictions for like or similar offences;*
>
> *(f) the potential for environmental harm, and interference with the cultural, economic, physical and social wellbeing of other people in the particular community.*
>
> *As well, the relevant planning schemes and policies for the particular area may apply in such a way as to make the conduct more serious.*"

[42] His Honour further said this:

> "*[13] General and personal deterrence are important principles applicable to sentencing for development offences, so that local authorities are assisted in carrying out their obligations to ensure the orderly and proper use of land in accordance with the relevant Plan. An overall fine of $15,000 represents just over 8% of the maximum. I am not persuaded that the Magistrate has erred in principle in any way. The appeals are dismissed. I will hear further submissions in relation to the costs of the appeal.*"

[43] In Tseng v Brisbane City Council, supra, the appellant placed large amounts of fill on two adjacent parcels of land without first obtaining necessary development approval under s 163(1) PA. The Brisbane City Council contended that the fill was a contaminant that was reasonably likely to enter a waterway. In August 2018, the Council gave the appellant a direction notice, pursuant to s 363E *Environmental Protection Act 1994*, requiring her to remove the fill or to apply for a development approval. The appellant did neither. Consequently, the appellant was prosecuted for three charges, one charge of carrying out assessable development without an effective permit, one charge of unlawfully depositing a prescribed water contaminant in a way so it could reasonably be expected to wash or otherwise move into waters, and one charge of failing to comply with a direction notice without reasonable excuse.

[44] The appellant was convicted after a trial in the Magistrates Court, and fined $40,000 for all three offences. She was also ordered to pay professional costs, filing costs,

witness costs and investigation costs, that amounted to $94,228, which was referred to the State Penalties Enforcement Registry. The Magistrate also made an enforcement order, pursuant to s 176 PA, requiring the appellant to obtain approval for the fill or to remove it. No convictions were recorded. The appellant appealed the conviction, the fines, the costs order, and the enforcement order. In his judgment, Barlow QC, DCJ said this:

> "*[119] The maximum penalties for the offences were, respectively, $567,675, $75,690 and $75,690. The Council submits that the penalty imposed was 6% of the total of those figures and therefore not, on the face of it, excessively high in comparison to the maximum possible exposure. I do not accept that that is an appropriate basis for measuring the severity of the penalty. The sentencing court must take into account the particular circumstances of the offences and the personal circumstances of the defendant. The circumstances of the offences will include whether they were blatant and wilful, whether the defendant committed any of the offences after having been put on notice that they were (or were likely to be) offences, the period of time over which they were committed and the extent of the offences (in the sense of whether they were minor or involved extensive development and risk of contamination).*"

[45] His Honour considered two case summaries prepared by the Brisbane City Council's officers of similar cases that had been dealt with in the Magistrates Court. His Honour said this:

> *"[120] Before the magistrate, the Council referred to two case summaries, prepared by its officers, of cases that had been dealt with in the Magistrates Court. In the first,* Famhall Pty Ltd,[7] *the defendant company had deposited substantial quantities of fill on its land, including in a waterway corridor and resulting in a reasonable expectation that it could move into waters. After receiving an enforcement notice (which I understand to be the equivalent, under the relevant legislation at the time, to a direction notice under the EPA) requiring it to cease operational works and to install erosion and sediment protection, it continued, over a period of some months, to add fill to the site and it installed grossly inadequate protection. In those respects, it was factually very similar to this case. The company's sole director and shareholder gave evidence that the land was worth considerably less than the debt secured by a*

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7 Magistrate Payne, Brisbane, 26 May 2014.

> *mortgage over it and he and the company had no ability to pay a fine. However, the Council demonstrated that the director personally owned several other valuable properties. The magistrate considered that the aggravating features were that the actual waterway was filled and work was done in defiance of the enforcement notice (again, similar to the facts of this case). Her Honour highlighted the importance of both personal and general deterrence that should be reflected in the penalty. The company was fined $40,000 and ordered to pay costs of $12,000, the magistrate having reduced the amount of costs having regard to the large fine.*
>
> *[121] The second case relied on by the Council before the magistrate was that of* Qureshi.[8] *The defendant in that case had imported fill onto a waterway corridor on land bounded by two creeks and, despite having been told that fill could not exceed 100 millimetre above ground level without a development permit, he proceeded to import and spread fill and gravel to depths of 0.5 metres to 1.9 metres. The defendant had also committed other offences on other properties, for which he was also convicted and fined at the same time. He pleaded guilty to all the charges. He was fined a total of $72,000 for all the offences, of which $38,000 was for the filling offences.*
>
> *[122] In* Dixonbuild Pty Ltd v Ipswich City Council *[2011] QDC 185, the defendant was convicted after trial of an offence against s 440ZG of the EPA for unlawfully depositing sand where is* [sic] *could reasonably be expected to enter a roadside gutter. It was fined $20,000. Although the conviction was overturned on the appeal to the District Court, the judge did not consider the penalty to be an improper exercise of the magistrate's discretion. His Honour also noted that the offending was not done blatantly or wilfully, for which a higher penalty might be imposed.*"

[46] The appellant contended that the fine was excessive because the Magistrate did not take into account that she was unemployed, relied on Centrelink financial support (having a pensioner health card) and suffered from chronic mental illness. His Honour observed that the Magistrate had expressly taken those matters into account. It was also established that the appellant was the owner of a valuable property, even if it had been financed by private loans from relatives. There was a report before the Magistrate that concluded that large quantities of sediment were likely to discharge from the fill areas during rainfall events, and that the fill had resulted in a

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8 Magistrate Cornack, Holland Park, 19 November 2018.

loss of flood storage on the site which had the potential to increase flood flows downstream. His Honour observed that there was the potential for serious environmental damage to be caused. Taking into account all the factors and the comparative cases, His Honour considered that while the penalty of $40,000 was substantial, he did not consider that was beyond the bounds of an appropriate exercise of the Magistrate's discretion.

[47] The Magistrate had also made an enforcement order, that required urgent fill removal from areas outside the land owned by the appellant. In respect of the enforcement order, relatively His Honour said this:

> "*[140] Subsection 176(1) of the* Planning Act *provides that, after hearing offence proceedings, a Magistrates Court may make an order (an* ***enforcement order****) for the defendant to take stated action within a stated period.*
>
> *[141] That subsection does not specifically provide that the stated action may only relate to the property where the offence was committed. However, the notes to that subsection gives examples of action that an order may require. All the examples concern the development of the premises the subject of the offence proceedings and subsection (2) provides that the enforcement order may be in terms the court considers appropriate to secure compliance with the Act. Subsection (6) provides that, unless a court orders otherwise, an enforcement order other than an order to apply for a development permit attaches to the premises and binds the owner, the owner's successors in title and any occupier of the premises.*
>
> *[142] It is clear to me that an enforcement order may only concern the development and the land that is the subject of the charge that has been dealt with in the relevant proceeding. As the complaint in this case was limited to development on Ms Tseng's land, it was wrong to make an enforcement order that extended to properties other than that land.*"

Consideration

[48] The learned Magistrate made it clear on sentence that for each of s 578(1) SPA, namely carrying out accessible development without a development permit, each offence warranted a penalty of $25,000. In respect of the two breaches of s 580(1) and s 594(1) SPA, the appropriate penalty was $10,000. Each fine was effectively

cumulative on each other, reaching an overall fine of $190,000. In my view that was clearly excessive, and not supported by any comparable case that could be discovered.

[49] The excessive nature of the fines was aggravated by the terms of the restoration order. The power to make such an order under the SPA was to be found in s 599 of that Act. Relevantly, that section empowered a Magistrates Court to make an order on a defendant it considered appropriate. Such an order may be made in addition to, or substitution for, any penalty the court may otherwise impose. Such an order may require a defendant to "*restore, as far as practicable, premises to the condition the premises were in immediately before development or use of the premises started*". Any contravention of the order is an offence against the Act, with a maximum penalty of 4,500 penalty units or 12 months' imprisonment.

[50] Section 176 PA states relevantly as follows:

> *"(i) After hearing offence proceedings, a Magistrates Court may make an order (an **enforcement order**) for the defendant to take stated action within a stated period.*
>
> *(ii) The enforcement order may be in terms the court considers appropriate to secure compliance with this Act.*
>
> *(iii) An enforcement order must state the period within which the defendant must comply with the order.*
>
> *(iv) An enforcement order may be made under this section in addition to the imposition of a penalty or any other order under this Act.*
>
> *(v) A person must not contravene an enforcement order. Maximum penalty – 4,500 penalty units or two years' imprisonment.*
>
> *(vi) Unless a court orders otherwise, an enforcement order, other than an order to apply for a development permit –*
>
> *(a) attaches to the premises; and*
>
> *(b) binds the owner, the owners successors-in-title and any occupier of the premises.*
>
> *(vii) If the enforcement order does attach to the premises, the defendant must ask the registrar of titles, by notice given within 10 business days after the order is made, to record the making of the order on the register for the premises. Maximum penalty – 200 penalty units.*

*(viii) A person may apply to the court for an order (**a compliance order**) that states the enforcement order has been complied with.*

(ix) If a person gives a notice that a compliance order has been made, and a copy of the compliance order, to the registrar of titles, the registrar must remove the record of the making of the enforcement order from the appropriate register.

(x) If the enforcement order is not complied with within the period stated in the order, the enforcement authority may –

(a) take the action required under the order; and

(b) recover the reasonable cost of taking the action as a debt owing to the authority from the defendant.

(xi) A notice given to the registrar of titles under this section must be in the form, and accompanied by the fee, required under the Land Title Act."

[51] For completeness, similar powers were provided by s 4.3.20 *Integrated Planning Act 1997* ("IPA").

[52] At the hearing on 12 March 2021 I was minded to accept the respondent's submissions that the period for compliance with the order should be extended. However there are a number of concerns about the restoration order. The first concern is that it requires the appellant to remove fill from premises that he does not own nor occupy. Condition 18 of the order requires the appellant to notify the Logan City Council in writing within three days if a land owner or occupier refused to permit the appellant or his agent to carry out the removal works under the order. It is not clear what action, if any, the Council would take following the receipt of such information. Condition 19 requires the defendant to make an application to the court to vary the order, if he is unable to fulfil a requirement of it. If an owner refused such permission, it is difficult to see what variation the court could make, other than to rescind the order in respect of that particular premises.

[53] Conditions 12 and 14 are in my view beyond the power of the Magistrate making an enforcement order under the relevant legislation. While the powers to make an enforcement order under the relevant provisions of the SPA and PA are wide, as McGill SC, DCJ observed in Bowman v Brown, supra at [101], conditions should only be imposed which are necessary to require the removal of the fill deposited in this case.

[54] The most important consideration, however, is that four convictions have been set aside relating to premises the subject of the enforcement order. The fact that the appellant remains convicted of breaching an enforcement notice relating to those properties does not justify the restoration order being in the same terms as it was made. The failure to comply with an enforcement notice is itself an offence, and the appellant could be punished for that.

[55] Another major consideration is that the court cannot be satisfied that the premises in question have not been significantly altered either by the owners or forces of nature since 2017. The appellant in the hearing before me on 12 March 2021 stated that there had been substantial changes to the address at 165 Featherstone Road, Chambers Flat, that there had been two floods through that land, and that the owners had built the packing sheds on the property, as well as crops, making it difficult to remove the soil.

[56] While one should be careful in taking the appellant's statements of fact at face value, the respondent did not challenge his statements that he is currently on a carer's pension, has no other source of income, no assets, and living in a "granny flat" on his son's property. This is a relevant consideration also in respect of whether the appellant is able to comply with the restoration order.

[57] The respondent submitted that the restoration order could still be upheld in respect of the properties the subject of charges which have now been set aside, as those properties were the subject of enforcement notices. In my view failure to comply with an enforcement notice is a separate offence, and it is not appropriate to maintain a restoration order on properties when the substantive charges have been set aside.

[58] Consequently, the restoration order would now apply to two properties, the Hindu Temple at 86-98 Scott Lane, North Maclean, the subject of charge 1 on the complaint filed 14 December 2017, the property at 114-128 Norris Creek Road, Munruben the subject of charge 2 on this complaint, and the property at 165 Featherstone Road, Chambers Flat, the subject of charges 3 and 4 on this complaint.

[59] The appellant in his written submissions and oral submissions stated that in respect of the property at 165 Featherstone Road, Chambers Flat that the owners had

reconfigured the land, planted crops, and built packing sheds on it, making it impossible for him to remove the soil.[9] There was no challenge to this from the respondent.

[60] The following exchange took place during the hearing of 12 March 2021:

> "Court: I reviewed all of that evidence thoroughly, and it seems to me it was open to the Magistrate to accept the evidence of the Council's surveyors on that point. I was going to ask you, Mr Lichti – I mean, events have moved on. I don't know what the state of the properties are now. Is there something that can be negotiated with the Council as to – is it feasible to remove fill, and if so, where's it going to go and all that?
>
> Mr Lichti: We'd thought that the orders as they were drafted kind of contemplated maybe some difficulty with some of the orders. The years that have gone by. In fact, even paragraph 15 allows for a planned survey to be provided – to be done and provided. Now, if …
>
> Court: It has to be provided by Mr Powe; correct?
>
> Mr Lichti: Correct, yes. And so if what Mr Powe is saying is correct, then if the survey done on, say – let's say, for instance, the largest property, Featherstone, shows that the levels are now at a correct height …
>
> Court: Yes.
>
> Mr Lichti: … the known is material is, obviously, required to be removed. If the opposite is correct, well, then the order – the rest of – the remaining of the orders. So we have drafted the orders in a way that contemplated that it may take some time and may – you know, it – would require some of the owners who may have different views and cooperation as well."

[61] It is quite clear that a significant period of time has now passed since the commission of the offences. The order requires the appellant to expend considerable money on engaging earthmoving equipment to reconfigure the properties, to engage a surveyor to conduct surveys and prepare plans to be forwarded to the Logan City Council. It is an offence if the appellant fails to comply with the terms of the order. While it is noted that condition 19 allows the appellant to apply to the court to vary the order, I consider that the order is setting

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[9] Hearing of 12 March 2021, r 1-13, l 45.

up the appellant to fail. In my view the combination of the order in the terms it was made, together with a substantial fine, is excessive in the circumstances.

[62] The planning laws exist for a reason, and it is clearly in the public interest that planning rules and regulations are complied with. The appellant was clearly aware of the requirements for development approvals, and the requirement to comply strictly with any development approval granted. Therefore the remaining convictions are serious. The failure to comply with an enforcement notice is a serious offence in itself. There is clearly the need to reflect both general deterrence and specific deterrence in the fine to be imposed.

In respect of each offence of carrying out assessable development without an effective development permit, contrary to s 578(1) SPA, the learned Magistrate considered the appropriate penalty for each offence was $25,000. He considered that the appropriate penalty for each offence of failing to comply with an enforcement notice warranted a penalty of $10,000 on each charge. In respect of the two charges of contravening a condition of a development approval, contrary to s 580(1) *SPA*, the magistrate considered $10,000.00 fine appropriate for each charge. The total of those fines on the remaining convictions is $90,000.00. Having regard to the level of fines imposed in the cases discussed above, in particular the case of Tseng, and the appellant's limited financial circumstances, I consider a fine in that amount to be excessive. Having regard to all the competing factors, I consider that an overall fine of $35,000.00 is the appropriate sentence in this case. Pursuant to s 49 *PSA*, the court can impose a single fine if an offender is found guilty of two or more offences that form, or are part of, a series of offences of the same or a similar kind. I am satisfied that the remaining convictions are offences of the same or similar kind. A single fine of $35,000.00 is imposed, and pursuant to s 51 *PSA*, I order that the proper officer give, under the *State Penalties Enforcement Act*, particulars of this fine to the State Penalties Enforcement Registry for registration.

[63] The learned magistrate also ordered costs against the appellant, for the following:

1. costs of court - $192.30

2. professional costs for 11 mentions at $250.00 a mention - $2,750.00

3. counsel fees for five days of hearing, at $2,000.00 a day - $10,000.00

4. attendance of a solicitor for five days of hearing - $5,000.00

All of those costs were referred to the State Penalties Enforcement Registry.

[64] In Bowman v Brown [2004] supra, McGill SC DCJ said the following:

> "*[107] With regard to the question of costs, I will not interfere with the magistrate's discretion in relation to the quantification of the respondent's costs of the prosecution. But in my opinion the order in relation to costs ought to reflect the fact that the prosecution was not entirely successful. Although the matter is not always straight forward in relation to prosecutions for summary offences, broadly speaking if a prosecution is successful the complainant receives an order for costs, and if the prosecution is unsuccessful an order for costs will be made in favour of the successful defendant. Where the prosecution succeeds in part and fails in part, in my opinion the costs order should reflect this mixed outcome, at least to some extent. It is not obvious how any particular part of the costs can be said to be referrable either specifically to Count 1, or specifically to Counts 2 and 3. It appears that the whole of the respondent's costs were incurred in prosecuting the three counts, which prosecution ought to have been only partly successful.*
>
> *[108] In these circumstances, in my opinion it is not appropriate to order that the appellant pay the respondent the whole of the costs of the prosecution. On the other hand, the respondent was more successful than the appellant before the magistrate, so no costs should be ordered in favour of the appellant, and the appellant ought to be paying part of the respondent's costs. In all the circumstances, I consider an order that the appellant pay half the respondent's costs of the proceedings before the magistrate appropriate, and substitute an order that the appellant pay costs in the sum of $14,120.41 in default imprisonment for three months. I am conscious of the fact that that will leave the appellant to bear the whole of his own costs of the proceeding before the magistrate. In other respects the appeal is dismissed*."

[65] In McDonald v Holeszko, supra, investigation costs had been ordered against the appellant. The following was said by Flanagan J:

> "*[83] As to the issue of investigation costs ordered pursuant to s 68C of the* VMA[10] *and legal costs ordered pursuant to s*

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10 Vegetation Management Act 1999.

> *157 of the* Justices Act*, no regard was given in the exercise of these discretions to the fact that Mrs McDonald had been acquitted. Although Mrs McDonald as a self-represented person could not seek legal costs against the prosecution, it would have been open to the magistrate to make no order as to costs. In relation to the investigation costs, these should have been discounted by at least 50 per cent.*
>
> *[84] The investigation costs should thereafter have been further discounted having regard to the personal financial circumstances of Mr McDonald.*
>
> *[85] Having regard to these factors, I would fix the sum for investigation costs and outlays at $5,000.00.*
>
> *[86] In relation to the legal costs ordered by the primary judge, while Mr McDonald was unsuccessful on his appeal against conviction, he has been successful in respect of his appeal against sentence. In those circumstances, I would set aside the order made by the primary judge as to costs and substitute an order that there be no order as to costs. A similar order should be made in respect of the present application.*"

[66] The learned magistrate considered that the prosecution of the appellant was a complicated trial, taking up five days. He accepted the submissions of the prosecution that a higher amount for costs should be awarded to them pursuant to s 158BN(2) *Justices Act*. The total professional costs came to $17,750.00. Once again, no consideration seems to have been given to the appellant's capacity to pay that. I consider those costs to be excessive.

[67] The appellant has been substantially successful on appeal, and that fact should be reflected in the costs order.

[68] As the appellant has been successful on a number of charges, and having regard to the substantial nature of the fine I have imposed, I consider in the circumstances that the professional costs ordered by the magistrate should be set aside, and no further order as to professional costs made. Otherwise, the order of the magistrate on costs of the court remains.