DISTRICT COURT OF QUEENSLAND

CITATION:	*Commissioner of Police v Keating-Jones* [2022] QDC 56
PARTIES:	**COMMISSIONER OF POLICE** (appellant) **v** **NATHAN JOHN KEATING-JONES** (respondent)
FILE NO/S:	D211/20
DIVISION:	Appellate
PROCEEDING:	Appeal pursuant to s 222 of the *Justices Act* 1886 (Qld)
ORIGINATING COURT:	Magistrates Court at Maroochydore
DELIVERED ON:	16 March 2022
DELIVERED AT:	Maroochydore
HEARING DATE:	9 June 2021
JUDGE:	Long SC, DCJ
ORDER:	**"The Order made in the Magistrates Court at Maroochydore on 20 November 2020, that the charge brought pursuant to s 80(11) of the *Transport Operation (Road Use Management) Act 1995* be 'permanently stayed as an abuse of justice', is set aside."**
CATCHWORDS:	APPEAL – Section 222 *Justices Act 1886* (Qld) – where defendant had been sentenced for an offence of dangerous operation of a motor vehicle whilst adversely affected by alcohol – discussion of the application of s 16 of the *Criminal Code* to the same punishable acts – where permanent stay of proceedings ordered on charge brought pursuant to s 80 of *Transport Operations (Road Use Management) Act 1996* to avoid "abuse of justice" – whether the order to stay the charge was appropriate – where any conviction in respect of the summary offence would attract, pursuant to ss 86(1)(a) and 90B *Transport Operations (Road Use Management) Act 1996*, a further cumulative six month statutory disqualification of the defendant's licence – whether any relevant sense of unfairness and oppression in pursuit of the charge warranted the stay – whether a legislatively required disqualification may establish unfairness or oppression APPLICATION – Section 223(2) *Justices Act 1886* (Qld) – where communications between legal representatives of the

parties was sought to be adduced as evidence – whether special grounds for giving leave to adduce fresh additional or substituted evidence for the hearing of the appeal – where such evidence was unnecessary to determine the appeal – where application was discontinued

LEGISLATION: *Acts Interpretation Act 1954*, ss 4, 45

Criminal Code Act 1899, ss 2, 7, 11, 16, 17, 229B, 328, 328A, 365A, 365C, 585, 624, 648, 650, 651, 652

Human Rights Act 2019, ss 34, 48

Justices Act 1886, ss 222, 223, 225

Penalties and Sentences Act 1992, ss 187, 189

Transport Operations (Road Use Management) Act 1996, ss 79, 79A 80, 86, 90A, 90B, 90D

CASES: *Adams v Slattery* [2014] QDC 55
Fox v Percy (2003) 214 CLR 118
Grassby v The Queen (1989) 169 CLR 1
House v R (1936) 55 CLR 499
Jago v District Court (NSW) (1989) 168 CLR 23
Pearce v The Queen (1998) 194 CLR 610
Pullen v O'Brien [2014] QDC 92
Ridgeway v Parravicini [2008] QDC 38
Robinson Helicopter Co Inc v McDermott (2016) 90 ALJR 679
R v Barlow (1997) 188 CLR 1
R v Dibble Ex-parte Attorney-General (Qld) [2014] QCA 8
R v Elhusseini [1988] 2 Qd R 442
R v Goulden (1991) 55 A Crim R 303
R v Grannigan [2004] QDC 268
R v Kiripatea [1991] 2 Qd R 686
R v R and S; ex parte Attorney-General of Queensland [2000] 2 Qd R 413
R v Tricklebank [1994] 1 Qd R 330
Teelow v Commissioner of Police [2009] QCA 84
Walton v Gardiner (1993) 177 CLR 378

COUNSEL: C Cook for the appellant
N Boyd for the respondent

SOLICITORS: Office of the Director of Public Prosecutions for the appellant
McGinness & Associates for the respondent

Introduction

[1] On 17 December 2020, a Notice of Appeal was filed in respect of the order made in the Magistrates Court at Maroochydore, on 20 November 2020, permanently staying a charge premised upon the assertion that "he upon a requisition duly made by …. a police officer under sub-section (8) of section 80 of the said Act failed to provide as prescribed a specimen of his breath for analysis".

[2] This charge arose out of the involvement of the respondent in a motor vehicle accident on 31 August 2019, as a consequence of which he was charged with dangerous operation of a motor vehicle while adversely affected by an intoxicating substance. That other charge was committed to the District Court and on 21 August 2020, the respondent pleaded guilty to the indicted offence of dangerous operation of a motor vehicle while adversely affected by alcohol and was sentenced to six months imprisonment, wholly suspended for an operational period of six months. No order for disqualification of his driver licence was made but it was noted that by statutory effect of s 86(1) of the *Transport Operations (Road Use Management) Act 1996* ("*TORUM*"), that entitlement would be disqualified for a period of six months from that sentence date. That offending conduct was noted, in the sentencing remarks, to have occurred as follows:

> "The facts of the offence that you committed are summarised in Exhibit 2. Very briefly, in late August of that year, you and a whole bunch of other men, it seems, were at a rural property here on the coast for a buck's party. You had been out on a pub crawl, using a bus to travel. That dropped all of you off back at the property in the afternoon. Some people set off walking up what it seems was quite a long driveway to the house, which is set back and up a hill. You, though, got your ute, and when you were at the bottom of the hill, a number of people got into the tray and the back of the ute, and you drove up the driveway. You were very drunk at the time. A little while later, when your breath was tested, you returned a result of 0.167 per cent blood alcohol concentration.
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> There were eight people, it seems, in the back of the car. As you got close to the house, you were distracted by noise and actions of people who were already up at the house. In the result, you steered first left, then, it seems, you over-corrected to the right, lost control, perhaps quite briefly, but in the event, your car rolled down a small embankment. The extent to which that occurred because you were drunk, or the extent to which it happened because you were

> distracted is, of course, impossible for me to know, but being drunk as you were obviously had a role to play, and that is reflected, at least in part, by the circumstance of aggravation to which you have pleaded guilty."[1]

[3] The charge brought pursuant to s 80 of *TORUM*, was subsequently the subject of an application brought in the Magistrates Court that it "be permanently stayed either as an abuse of process or as a consequence of the operation of s 16 of the *Criminal Code".*[2]

[4] The Acting Magistrate who dealt with the application, on 20 November 2020, dismissed it as far as it relied upon the application of s 16 of the *Criminal Code Act 1899* (Qld) ("*Criminal Code*") but made the order to permanently stay the charge upon the following reasoning:

> "Turning to the application to permanently stay this charge as an abuse of process and proceeding on this basis that this Court has implied power to exercise – or make such an order, I accept that Judge Cash QC was aware of this charge when he sentenced the defendant for the indictable offence. I gleaned that from the District Court statement of facts document. Further, I have formed the opinion that, apart from mandatory license disqualification upon conviction for this offence, no further penalty would be imposed in relation to this offence.
>
> I am also satisfied that if a further period of mandatory disqualification is imposed for the fail to supply a specimen of breath charge, such mandatory disqualification would totally fetter the ability of this Court to give effect to the principle of totality, that is – or in this way: taken at its absolute highest, the acts of the defendant on the date of both offences would not have attracted a total concurrent license disqualification exceeding six months for each offence. As such, a concurrent term cannot be imposed. In these circumstances, the discretion of the Court to impose an appropriate penalty is defeated. And to proceed with the charge would be unjust and unfair and would result in an abuse of justice. The charge is, therefore, totally stayed as an abuse of justice [indistinct] matter?"[3]

Despite the incomplete transcription of the last sentence in that passage, it is also to be noted that the endorsement of the order made by the Acting Magistrate on the bench charge sheet was in the terms: "charge permanently stayed as an abuse of justice".

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1 Transcript of sentencing remarks of His Honour Judge Cash QC, dated 21/8/20, at p 2.9-28.
2 Applicant's written submissions to the Magistrates Court, at [4].
3 D2.25-42.

The Appeal

[5] Subject to any granting of leave to adduce new evidence, this appeal is to be conducted as a rehearing on the record of the proceedings below.[4] The obligation of the Court has been generally noted as follows:

> "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."[5] (Citations omitted)

In an earlier cited decision,[6] it was observed in respect of a court conducting an appeal by rehearing on the record that:

> "Such courts must conduct the appeal by way of rehearing. If, making proper allowance for the advantages of the trial judge, they conclude that an error has been shown, they are authorised, and obliged, to discharge their appellate duties in accordance with the statute."

Such general observations must be viewed in the context of the powers available to the appeal court, which here and pursuant to s 225(2) of the *Justices Act* 1886 includes power, upon setting aside an order, to remit a proceeding, "with directions of any kind for the further conduct of the proceedings including, for example, directions for rehearing or reconsideration". Such power may be seen to particularly allow for circumstances where it is inappropriate for the appeal court to otherwise rehear and determine the proceeding.

[6] In this instance, the appeal is directed to an order made by the Acting Magistrate upon an application which effectively determined the matter without any hearing of the charge and which sought the application of legal principle to largely uncontentious circumstances. The question upon rehearing this matter, upon this appeal, is whether those circumstances warranted the application of legal principle

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4 Section 223(1) *Justices Act 1886*.
5 *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679 at [43].
6 *Fox v Percy* (2003) 214 CLR 118 at [27].

sourced in the implicit power of a court to control its own processes, to stay the prosecution of a charge brought before that court as an abuse of process.[7]

[7] However, it is also to be noted that the exercise of such power in respect of a criminal charge has been described as follows:

> "As was pointed out in *Jago*[8]https://www-westlaw-com-au.ezproxy.sclqld.org.au/maf/wlau/app/document?snippets=true&ao=&src=docnav&docguid=I5db04f7c9d5d11e0a619d462427863b2&srguid=&startChunk=2&endChunk=2&nstid=&nsds=&isTocNav=true&tocDs=AUNZ_CASES_TOC - FTN.19, the question whether criminal proceedings should be permanently stayed on abuse of process grounds falls to be determined by a weighing process involving a subjective balancing of a variety of factors and considerations. Among those factors and considerations are the requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice."[9]

Accordingly and having regard to the description of a remedy available in the nature of an exercise of judicial discretion, this appeal is be determined by application of the principles recognised in *House v R:*[10]

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary Judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

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7 See: *Grassby v The Queen* (1989) 168 CLR 1 at 16-17.
8 *Jago v District Court (NSW)*(1989) 168 CLR 23, at 30-34, 59-61, 72 and 76-78.
9 *Walton v Gardiner* (1993) 177 CLR 378, at 395-396.
10 (1936) 55 CLR 499, at 504-505. Cf: *Teelow v Commissioner of Police* [2009] QCA 84, at [20]-[21] and *Pullen v O'Brien* [2014] QDC 92 at [31] - [37].

The issues

[8] Whilst this appeal is brought only in respect of the order staying the prosecution of the charge brought pursuant to s 80 of the *TORUM* and there is no cross-appeal nor contention raised that the Acting Magistrate was in error in concluding that s 16 of the *Criminal Code* did not operate to prevent further punishment of the respondent, the arguments otherwise presented below and in this Court are complicated by some analogy and reference to considerations arising in respect of the application of s 16.

[9] For the appellant, it is correctly contended that the Acting Magistrate was right to reject the application of s 16 because of the difference in the punishable acts involved in the respective offences.[11] It is also correctly pointed out that the respondent's submissions to the Acting Magistrate were incorrect in two salient respects:

(a) first, in a contention that the circumstance of aggravation attaching to the offence of dangerous operation of a motor vehicle, was established by the operation of s 365C(1)(d) of the *Criminal Code* and by the fact of his commission of the offence pursuant to s 80(11) of the *TORUM*. Quite apart from any understanding derived from s 365C(2) as to the absence of conclusiveness of the provisions in s 365C(1)(c) and (d), s 365A specifically provides for the applicability of s 365C only in respect of certain specified offences. These do not include any offences pursuant to s 328A; and

(b) secondly, in reliance upon the sentencing proceedings in the District Court proceeding in awareness of the failure to provide a specimen of breath for analysis,[12] where there was no indication of the offence constituted by any such act being taken into account in the sentence then imposed on the respondent, either as permitted by s 189 of the *Penalties and Sentences Act* 1992 or expressly or otherwise.

[10] An initial difficulty with the submissions of the respondent in support of the determination to stay the charge, is a continued inappropriate reliance upon the

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11 See: *R v Dibble Ex-parte Attorney-General (Qld)* [2014] QCA 8, *R v Tricklebank* [1994] 1 Qd R 330 and Adams v Slattery [2014] QDC 55 at 1[18].

12 Due to a footnoted reference in the Statement of Facts placed before that Court and reference to that fact in oral submissions.

deeming provision in s 365C.[13] However, it may be noted that by a combination of s 80(24) and (24A) of the *TORUM* the adverse effect of alcohol for the purposes of a charge under s328A of the *Criminal Code*, may be conclusively established in the same way as the influence of alcohol is conclusively established for an offence under s 79(1) of the *TORUM.* That is, by proof that any sample provided upon request pursuant to s 80(8) indicated a result which was over the "high alcohol limit".[14]

[11] Further, it is to be noted that there are contentions that the continued prosecution of the s 80(11) offence:

(a) would result in an effect of double punishment for the deemed conduct of driving under the influence, described as being cognate to driving whilst adversely affected; and

(b) an absence of public interest and legitimate purpose in the continuation of the prosecution, such that it was an affront to justice.[15]

Whilst it may be noted that these contentions of the respondent are not directly reflective of the narrower basis upon which the Acting Magistrate proceeded, it will be necessary to return to both that reasoning and these broader contentions, in due course.

[12] For present purposes and particularly having regard to the reliance upon the notion of double punishment, it is to be noted that the respondent also makes reference to s 45 of the *Acts Interpretation Act* 1954, which provides:

> **Offence punishable only once**
>
> (1) If an act or omission is an offence under each of 2 or more laws, the offender may be prosecuted and punished under any of the laws, but the offender may not be punished more than once for the same offence.
>
> (2) Subsection (1) applies to a law unless an Act otherwise expressly provides.
>
> (3) In this section—
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> **law** includes the common law."

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13 See Respondent's written submissions filed 1/3/21, at [5].
14 See s 80(24A)(c), s 79(3) and s 79A(3) of the *TORUM.*
15 See Respondent's written submissions filed 1/3/21, at [5].

And also s 34 of the *Human Rights Act* 2019, which provides:

> **Right not to be tried or punished more than once**
>
> A person must not be tried or punished more than once for an offence in relation to which the person has already been finally convicted or acquitted in accordance with law.

[13] The relevance of the reference to the latter provision is in understanding that pursuant to s 48(1) of the *Human Rights Act* 2019:

> "All statutory provisions must to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights."

The right recognised in s 34 is stated in broad terms, referable to what is recognised at common law as a general principle against "double jeopardy" in the application of criminal laws. In Queensland, that principle finds particular expression in s 16 and s 17 of the *Criminal Code*. As may be noted, s 45 of the *Acts Interpretation Act* 1954 is to similar effect as s 16, in focus upon double punishment and may be observed to be also directed at the same punishable act or omission constituting more than one offence but expressly subject to statutory provision otherwise.[16]

[14] It is also appropriate to note that it is a central tenet of the appellant's submissions that the approach of the Acting Magistrate was to avoid the application of expressly provided statutory consequences of the respondent's offending. Whereas for the respondent, such an outcome is contended to be appropriate because of the contended focus upon dealing with the charge, having regard to the prospective outcome. Accordingly, it is the contention that it is the statutory consequences of a conviction for the s 80(11) offence which, in the circumstances, would constitute or effect the necessary sense of oppression or injustice which warrants the stay of that charge. In that regard, reference is made to the following statements of principle, in *Pearce v The Queen*:[17]

> "To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences

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16 See also s 4 of the *Acts Interpretation Act* 1954.
17 (1998) 194 CLR 610.

> overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts."[18]; and
>
> "In Australia, concerns with "double jeopardy" have come to be expressed at common law in differing ways by an evolutionary process which has crossed what often in the legal system is a false divide between substance and procedure. Thus, even if a plea in bar is not available, successive prosecutions may be an abuse of process. It should also be accepted that the inclusion of separate counts for what in substance, if not entirely in form, is the same offence may be an abuse of process….
>
> However, the principles involved in the notion of "double jeopardy" also apply at the stage of sentencing. They find expression in the rule of practice, "if not a rule of law", against duplication of penalty for what is substantially the same act." (citations omitted)[19]

[15] In *Pearce*, and in respect of sentencing, it was particularly noted that the issue of double punishment may arise because of the requirement for fixing an appropriate sentence for each offence which is dealt with, in the context of also fixing an appropriate overall or effective sentence by engagement of issues of cumulation or concurrence and totality considerations.[20] As there explained,[21] the issue is not avoided by the imposition of wholly concurrent sentences.

[16] Such considerations are reflected in established sentencing practices where convictions may be entered but no punishment imposed where there are findings of guilt for offences which are subsumed within or are particulars of another overarching offence. For instance, it was noted in *R v Elhusseini,*[22] in respect of an indictment charging an offence of trafficking in a dangerous drug together with charges of supply and possession of dangerous drugs and possession of money obtained from supplying dangerous drugs (each representative of a particular of the trafficking offence), that s 16 would operate, so that:

> "… whilst the guilty verdicts on each of the counts would be recorded, the sentencing Judge would impose sentence on the trafficking count, but not with respect to the others which involved the 'same act or omission'."[23]

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18 Ibid at [40], per McHugh, Hayne and Callinan JJ.
19 *Pearce v The Queen* (1998) 194 CLR 610 at [67]-[68], per Gummow J.
20 Ibid at [45].
21 Ibid at [43]-[49], per McHugh, Hayne and Callinan JJ.
22 [1988] 2 Qd R 442
23 Ibid at 455. See also *R v Kiripatea* [1991] 2 Qd R 686 and *R v Goulden* (1991) 55 A Crim R 404 at 413.

A similar position has been recognised as applicable to offences subsumed as particulars of an offence of torture.[24] An express statutory exception appears in s 229B of the *Criminal Code*, in respect of an indictment charging an offence of maintaining an unlawful sexual relationship with a child together with other offences of a sexual nature. [25]

[17] Because of the context it provides to the determination of the Acting Magistrate and the extent to which the broader approach of the respondent in this appeal attempts to assimilate his position to one of being actually charged with an offence under s 79(1) of the *TORUM,* it is convenient to discuss established principles in respect of the application of s 16 of the *Criminal Code* later and in the context of considering the appropriateness of the order staying the prosecution of the charge in this instance. However, it is first necessary to note some issues arising from the appellant's application to adduce new evidence.

New Evidence

[18] Here the appellant made application, pursuant to s 223(2) of the *Justices Act,* for leave to adduce "new evidence". Such an application would require that the Court is satisfied that there are "special grounds" for giving leave to adduce "fresh additional or substituted evidence" for the hearing of the appeal. That application was opposed by the respondent and upon the hearing of this appeal, was not ultimately pressed by the appellant.[26]

[19] It is convenient to note that the nature of the material to which that application was addressed was communications between the legal representatives of the parties, prior to the proceedings where the respondent was sentenced in the District Court on 21 August 2020, to support a contention that it was open to the respondent to have sought to have the charge which was stayed by the Acting Magistrate brought before the District Court to be dealt with pursuant to s 651 of the *Criminal Code*, in conjunction with offence of dangerous operation of a motor vehicle while adversely

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24 *R v R and S; ex parte Attorney-General of Queensland* [2000] 2 Qd R 413 at [15].

25 As now appears in sub-sections (7), (8) and (9) and when introduced by by the *Criminal Code, Evidence Act and other Acts Amendment Act* 1989, No. 17, appeared as sub-section (2).

26 Although there was in the context of subsequent written submissions, an incidental entreaty to admit this material, this was not the subject of joinder between the parties, particularly as to the requirements of s 232(2) of the *Justices Act* 1886 and for the reasons otherwise expressed, it remains unnecessary to dwell upon this application.

affected, and that the necessary accumulation of any statutory or other driver licence disqualification, as may be noted to have been an influential factor in the reasoning of Acting Magistrate, may thereby have been avoided.

[20] In the first instance, it is unnecessary to have any evidence, new or otherwise, in order to note that it was open to the respondent to have sought to engage the processes allowed by s 652 of the *Criminal Code,* with every expectation that the charge would have been dealt with together with the indicted offence in the District Court. Secondly, there is, as noted in more detail below, difficulty in concluding that doing so would have allowed for any different effect in respect of the mandatory statutory consequences of any conviction of the respondent of both offences.

[21] Although the effectively common submission of the parties, is that any conclusion to the effect submitted by the appellant may not require departure from my earlier conclusion in *Adams v Slattery,*[27] having regard to differences in the combination of charges in issue, that concession may not be accepted. However, more important considerations are the unusual circumstances sought to be addressed in the earlier decision and the apparent absence of contest and therefore detailed consideration as to the application of s 90B of the *TORUM*. It is also necessary to consider the contention raised here as to the application of s 90B, to determine the appropriate context in which to consider the central issue raised as to the order staying the charge. This is so, notwithstanding that, as the appellant points out, this provision can no longer be applicable to the respondent's position, because the statutory disqualification of his driver licence, because of his conviction of the offence of dangerous operation of a motor vehicle while adversely affected and pursuant to s 86(1) of the *TORUM,* expired in February 2021. However and as may be noted from the reasons given by the Acting Magistrate, it was an understanding of the potential impact of these statutory provisions as to the disqualification of the respondent's entitlement to a driver licence, when the matter was before him on 20 November 2020, which was an essential underlying consideration in his reasoning.

[22] The point which the appellant seeks to make is that whilst the respondent did, when the matter came on for hearing before the Acting Magistrate, confront the prospect

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27 [2014] QDC 55. Although noting that the conclusion there reached appears to have been the subject of common ground or, at least, absence of contest.

of an accumulated disqualification of at least a further six months (due to the operation of s 86(1) and s 90B),[28] he may have been able to avoid such an outcome if he had sought to have both charges dealt with together in the District Court. As maintained and developed in further written submission,[29] that is contended upon the basis that the application of s 90B may have been avoided by a finding that the respective offences were committed at the same time.

[23] The essential difficulties with the contention are first that, in my view correctly as to this issue, the respondent's position is that the offences in issue here are not committed at the same time or perhaps more pertinently, that the offences were committed at different times and within the purview of s 90B. The charge is framed curiously, as follows:

> "That on the 31st day of August 2019 at Verrierdale in the Magistrates Courts District of Maroochydore in the State of Queensland one Nathan John Keating-Jones was guilty of an offence against section 79(1) of the Transport Operations (Road Use Management) Act 1995 in that he upon requisition duly made by Rodney John KIERNAN a police officer under sub-section (8) of section 80 of the said Act failed to provide as prescribed a specimen of his breath for analysis".[30]

However and as the material before the Acting Magistrate made clear, whilst the respondent's act of driving the motor vehicle occurred at a private property at Verrierdale, the failure to provide the specimen of breath upon requirement, occurred subsequently and after "[h]e was transported to a Police Station".[31]

[24] It may be observed that whatever view is to be formed as to the relevant punishable act in each instance,[32] and notwithstanding any sense of proximity or relationship between them, the conduct or omission to provide the requisitioned specimen of breath for analysis and constituting the offence pursuant to s 80(11), occurred temporally and geographically separately to the conduct or act of dangerous

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28 S 86(1) is engaged in respect of the offence committed pursuant to s 80(11), as explained in *Adams v Slattery* [2014] QDC 55, at [14]-[15] by deeming effect of s 80(11)(d) and (e) of guilt of an appropriate offence pursuant to s 79(1) and liability to "the same punishment in all respects, including disqualification from holding or obtaining a Queensland driver licence."

29 Appellant's further written submissions, filed 13/7/21, at [13]-[22].

30 This may be seen to be reflected in the respondent's contentions as to a sense of equivalence with an offence pursuant to s 79(1).

31 See the written submissions made to the Acting Magistrate, for the Applicant at [1] and the Prosecution at page 1 under the heading: "Factual basis".

32 As discussed further, below.

operation of the motor vehicle with the attendant circumstance of being adversely affected by an intoxicating substance.

[25] Secondly, it is not apparent as to how any conclusion as to the application of s 90B would or could differ according to the different occasions when the s 80(11) offence may have been dealt with.

[26] At least in order to further explain the second conclusion and notwithstanding the absence of express contrary contention, to determine that there is no implication of error in the underlying conclusion of the Acting Magistrate that if he dealt with the s 80(11) offence before him, s 90B would be applicable, it is convenient to further examine the operation of that section, which provides as follows:

> **"90B Cumulative periods of disqualification for offences committed at different times**
>
> (1) This section applies if—
>
> (a) a person is disqualified (the ***initiating disqualification***)—
>
> (i) under a relevant disqualifying provision for a drink driving offence; or
>
> (ii) under a section 89 disqualification; or
>
> (iii) under a section 90 disqualification; and
>
> (b) before the period of disqualification for the initiating disqualification ends, the person is disqualified again on 1 or more occasions (a ***later disqualification***) as mentioned in paragraph (a).
>
> (2) However, this section does not apply if section 90C applies.
>
> (3) Each period of disqualification whether for an initiating disqualification or later disqualification takes effect cumulatively with each other period of disqualification.
>
> *Examples—*
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> 1 D is charged with a drink driving offence. Before the court hears that charge D is charged again with a drink driving offence. The court convicts D of both offences and disqualifies D for a period of 2 months for 1 offence and a period of 4 months for the other offence. The total period of disqualification is 6 months.
>
> 2 D commits a drink driving offence on 25 December 2008 and commits another drink driving offence on 1 January 2009. A court convicts D of the 1 January offence on 2 January 2009 and disqualifies D for a period of 2 months. On 1 February, the court convicts D of the 25 December offence and disqualifies D for a period of 4 months. The total period of disqualification is 6 months."

[27] Terms used in this provision are defined in s 90A, including the term "disqualified", which is defined to mean "disqualified from holding or obtaining a Queensland

driver licence." It may then be observed that the operation of the provision is premised upon the fact of such disqualification occurring "under a relevant disqualification provision for a drink driving offence". It may then be observed that:

(a) "relevant disqualifying provision" is defined by reference to a number of provisions of the *TORUM*, which provide for a period of such disqualification upon conviction of a relevant offence either by statutory effect (irrespective of an order of a court), or by mandating such a court order (within respectively stated parameters), or which allow for such an order as an exercise of sentencing discretion (such as s 187 of the *Penalties and Sentences Act* 1992). Importantly for present purposes, s 86 of the *TORUM* is included; and

(b) "drink driving offence" is defined to encompass an offence against specified provisions of the *TORUM*, relevantly including: "section 79(1) … to the extent it involves a motor vehicle" and "section 80(11)", and also includes "a dangerous driving offence", which is defined in s 90A, as follows:

> "***dangerous driving offence*** means an offence against the Criminal Code, section 328A(1) or (4) if the offence is accompanied by a circumstance of aggravation that, at the time of committing the offence, the person charged with the offence was adversely affected by an intoxicating substance."

[28] The attention given to whether the respective offences were committed at the same or different times is premised upon the heading to s 90B. Although that heading is part of the Act and not to be ignored in the interpretation or construction of the section,[33] the difficulty is that the provision itself contains no indication that its operation is limited to acts committed at different times. Rather, the provision itself is engaged simply upon the basis of there being more than one relevant disqualification effected in respect of separate "drink driving offences". Moreover, s 90D(1) provides that:

> "**90D Other matters about cumulative periods of disqualification**

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33 S 14(2) *Acts Interpretation Act* 1954.

> (1) For sections 90B and 90C, the following is immaterial to the cumulative effect of disqualifications—
>
> (a) whether the periods of disqualification are imposed or ordered at the same hearing;
>
> (b) whether an offence or charge that resulted in a period of disqualification (or the conviction or sentence for the offence or charge) happened before or after another offence or charge (or the conviction or sentence for the other offence or charge) that resulted in a period of disqualification;
>
> (c) the order in which the periods of disqualification are imposed or ordered."

It is therefore clear that the legislative intent is for application of s 90B to all relevant disqualification periods, whether imposed or ordered at the same or different hearings.[34] Further, the terms of s 90B appear to unambiguously have applicability to relevant disqualifications in respect of multiple offences, irrespective of whether or not there are different punishable acts and notwithstanding that those acts occur contemporaneously. In such circumstances, it is recognised that the heading may not be effective to limit the operation of the section.[35] In this instance, it is unnecessary to further consider that issue, as it is clear that what is involved here are respectively relevant offences which were committed at different times.

[29] In any event, it may also be observed that there is nothing in these provisions and particularly having regard to s 90D(1) which supports a view that s 90B could operate differentially according to whether the respective offences by which it is engaged are dealt with at the same or separate hearings.

Appropriateness of the order to stay the charge?

[30] Accordingly, there was no error in the underlying conclusion or basis upon which the Acting Magistrate acted, that any conviction entered for the summary offence

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34 The only exception, which does not require consideration here, is noted in s 90B(2).

35 *Silk Bros Pty Ltd v State Electricity Commission (Vic)* (1943) CLR 1 at 16.

before him would, pursuant to s 86(1)(a) of the *TORUM*, attract the statutory consequence of:

> "Disqualification by such conviction and without any specific order for a period of six months from the date of such conviction from holding or obtaining a Queensland driver licence".

And that pursuant to s 90B, such disqualification would take effect cumulatively to the disqualification also effected pursuant to s86(1), when the respondent was dealt with in the District Court. This is because of the effect of s 80(11) of the *TORUM*, which relevantly provides:

> "(11) **Guilt of offence and liability for failing to provide specimen**
>
> If a police officer makes a requisition under subsection (8), (8C) or (9) in relation to a person driving, attempting to put in motion or in charge of a motor vehicle, tram, train or vessel, and the person fails to provide as prescribed in this section—
>
> (a) a specimen of the person's breath for analysis by a breath analysing instrument; or
>
> (b) a specimen of the person's saliva for saliva analysis; or
>
> (c) a specimen of the person's blood for a laboratory test;
>
> each of the following applies—
>
> (d) the person is guilty of an offence that is taken to be an offence against the appropriate provision of section 79(1);
>
> (e) the person is liable to the same punishment in all respects, including disqualification from holding or obtaining a Queensland driver licence, as the person would be if the offence were actually an offence committed by the person against the appropriate provision of section 79(1)."[36]

[31] Hence, what has already been observed as to the form of the charge in the bench charge sheet. Although, as already noted, there is also direct reference to the relevant punishable act or omission of failure to comply with the requisition made pursuant to s 80(8) and it may be noted that a heading to the written formulation of the charge in the bench charge sheet, expresses it as an offence pursuant to:

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[36] It may be noted that s 80(11A) also specifically provides for means of defending such an allegation, referable to the operative punishable act or omission of failure to provide the requested specimen.

> "s 80(11) FAIL TO PROVIDE SPECIMEN OF BREATH FOR ANALYSIS (B.A.S) OR BLOOD FOR TEST ON REQUIREMENT".

[32] It may be that the curious formulation of the charge has contributed to the contentions made for the respondent in this Court, seeking to assimilate his offence to one actually committed as proscribed by s 79(1). Clearly it is not to be so assimilated, except to the extent that it is taken to be punishable to the same effect.

[33] It is first necessary to examine the narrower reasoning of the Acting Magistrate, in the context of what has been noted as to the clearly different punishable acts to which the respective offences were directed. That terminology reflects the approach of the Court of Appeal to the application of s 16 in a number of cases including *R v Tricklebank*,[37] as adopted in *R v Dibble*; *ex-parte Attorney-General (Qld)*.[38] As was observed in *Dibble*, in respect of the earlier decision in *Tricklebank*:[39]

> "The test of same punishable acts or omissions articulated by Hanger CJ was subsequently applied by McPherson JA and Demack J in *R v Tricklebank*. Their Honours did not regard the addition of an aggravating circumstance of being adversely affected by alcohol to a dangerous driving charge as having transformed the act of dangerous driving into the same act of drink-driving of which the offender had been punished in the Magistrates Court."

[34] Whilst *Tricklebank* was concerned with the comparison of the indictable offence of dangerous driving of a vehicle while adversely affected by alcohol with the summary offence of driving with a prescribed blood alcohol concentration, with reasoning to a conclusion that there were different punishable acts involved, that reasoning may well be instructive to a comparison of effectively the same indictable offence and the summary offence of driving under the influence of liquor. Particularly, by noting that such influence is by s 79(3) conclusively presumed, if the result of any test, consequent to a requirement under s 80(8), is such as to satisfy a court that "at the material time the defendant was over the high alcohol limit", which relevantly and pursuant to s 79A(3) means that "the concentration of alcohol in the person's breath is, or is more than, 0.150 grams of alcohol in 210L of breath". Such concentration may be conclusively proved, for a period up to three hours prior to any testing in accordance with the requisition made pursuant to s 80(8), by

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37 [1994] 1 Qd R 330.
38 [2014] 238 A Crim R 511 at [21] – [23].
39 Ibid at [21].

evidence in accordance with s 80(15G) as to the indication obtained on such testing. [40]

[35] As has been noted, the Acting Magistrate did not proceed upon any basis of seeking to assimilate or compare the summary charge before him, with the situation of a defendant facing an actual charge of an offence under s 79(1) of the *TORUM*. Rather, the Acting Magistrate critically reasoned upon the basis that "to proceed with the charge would be unjust and unfair and would result in an abuse of justice" because of the unavoidable statutory consequence of the conviction of the respondent. As he put it:

> "I am also satisfied that if a further period of mandatory disqualification is imposed for the fail to supply a specimen of breath charge, such mandatory disqualification would totally fetter the ability of this Court to give effect to the principle of totality, that is – or in this way: taken at its absolute highest, the acts of the defendant on the date of both offences would not have attracted a total concurrent license disqualification exceeding six months for each offence."

[36] Although a view may be open that the underlying premise, as to what may have been an appropriate exercise of sentencing discretion, may have failed to duly reflect the separate nature of the offending that occurred here, pursuant to s 80(11), it is unnecessary to dwell upon that. The starting point is to note that neither the effect of s 86(1) nor s 90B was to fetter any exercise of sentencing discretion. The provision in s 86(1) may be contrasted, in this respect, with the subsequent provisions of s 86, for instance those respectively set out in sub-section (2) and which mandate a minimum and maximum period of disqualification, by court order, in respectively stated circumstances. However, there could be no suggestion that any such mandate or fetter can be avoided, as opposed to taken into account, upon totality considerations or as to the overall effect of a sentencing exercise. All the more so, must be the same conclusion as to the statutory effects of s 86(1) and s 90B, in the absence of any court ordered disqualification. And the alternative explanation of the Acting Magistrate's conclusion must be viewed, as contented by the appellant, as no more than an expression of desire to avoid the application of expressly provided statutory consequences of the respondent's offending. Indeed

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[40] Alternatively, it may be noted, that the fact of being under the influence of liquor or a drug might be established by proof of the observable signs of such influence upon the person.

such conclusion is implicit in his choice of language in terms of a finding of abuse of "justice" rather than "process".

[37] The real question for the Acting Magistrate, as encompassed in the broader submissions of the respondent, is as to whether there was any relevant sense of unfairness or oppression warranting a stay of the prosecution of the charge where there will be such unavoidable statutory consequences, rather than any sense of perceived unfairness or oppression in what the legislature has seen fit to enact. Such an approach is consistent with the general statements of principles which has been noted from *Walton v Gardiner* and *Pearce*.[41]

[38] Therefore, any relevant sense of unfairness and oppression must be found in the pursuit of the charge and not merely in the fact that the legislature has provided for such outcomes. To do otherwise, would be immediately at conflict with any consideration as to maintenance of public confidence in the administration of justice. Here it may be noted that the legislative policy has been to specifically provide for the noted consequences and in the case of s 90B to expressly provide for the combination of the type of offence dealt with in the District Court with an offence against s 80(1), as well as against s 79(1).

[39] Accordingly, it may be seen that the approach of the Acting Magistrate was in error as to legal question to be considered in the exercise of his discretion.

[40] As to the broader basis, incorporating an appropriate test and upon which the respondent seeks to uphold the order for the stay, there is reliance upon two decisions of this Court in respect of situations where the related summary offence was one pursuant to s 79(1) of the *TORUM*. However and despite the observation which has been made as to the potential influence of the reasoning in *Tricklebank*, in each instance, it was found that the same punishable act was involved in the offences of dangerous driving or operation of a vehicle while adversely affected by intoxicating substance and driving under the influence of liquor.[42] And in each instance, the finding that there were common punishable acts and that s 16 applied,

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41 See also the earlier discussion of narrower and wider approaches to the remedy of permanently staying criminal proceedings, in *Walton v Gardiner* (1993) 177 CLR 378 at 392-395, in particular reference to the Court's earlier decision in *Jago v District Court (NSW)* (1989) 168 CLR 23 and where it was noted to be a remedy to be granted only in exceptional circumstances (at 31, 53, 60 and 76).

42 *R v Grannigan* [2004] QDC 268, at p 7.25; *Ridgeway v Parravicini* [2008] QDC 38 at [55].

provided the foundation for the order staying the prosecution of the summary offence.

[41] In the later decision, that was in upholding the validity of an order of a magistrate, upon appeal, and in direct reference to the earlier conclusion,[43] which was reached in respect of a summary offence which had been transmitted to be dealt with in the District Court, along with other offences including the indicted offence of dangerous operation of a vehicle while adversely affected by an intoxicating substance.[44]

[42] In the earlier decision, the reasoning is expressly in contemplation of the issue as to whether or not a conviction for the summary offence, without further order as to penalty, involves any punishment, with the conclusion that it would, in the sense of the clear future "potential to have that effect", because of the effect of identified provisions in s 79 of the *TORUM* and s 328(2)(b) and (3)(b) of the *Criminal Code* allowing for "greater punishment to be imposed on the second or subsequent conviction for a drink-driving offence".[45] Although, it was also made clear that a further pragmatic consideration related to the inability, otherwise, to declare pre-sentence custody referable to all of the offences.[46]

[43] Also, in the earlier decision,[47] there is reference to s 7 of the *Criminal Code* which provides:

> "When an offender is punishable under the provisions of the Code, and also under the provisions of some other statute, the offender may be prosecuted and convicted under the provisions either of the Code or of such other statute, so that the offender is not twice punished for the same offence."

[44] The doubtful conclusion, which may also be difficult to align with the established approach in other comparable instances,[48] was "[t]hat seems to equate prosecution and conviction with punishment".

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43 *Ridgeway v Parravicini* [2008] QDC 38, at [59]-[60].
44 See: *R v Grannigan* [2004] QDC 268, at p 3.30.
45 *R v Grannigan* [2004] QDC 268, at pp 8.25-9.5.
46 Ibid at pp 11.49-12.5
47 Ibid at p 70.40-50.
48 See paragraph [16], above.

[45] There might also be a need to reconsider the approach, in each of these cases, in the light of the decision in *R v Barlow*,[49] in explication of the definition of an "offence" in s 2 of the *Criminal Code*, to have effect:

> "To denote the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment."

That is because and as necessary context to determining the operation of s 16 of the *Criminal Code*, in reference to the "same act or omission", s 2 provides:

> "An act or omission which renders the person doing the act or making the omission liable to punishment is called an ***offence***."

[46] That might also require consideration of the extent to which there may be discerned from the provisions of the *Criminal Code* generally, any distinction between conviction and punishment. For example, for present purposes, as might be discernible from s 585, s 624, s 648 and s 650. Such distinction has been recognised in respect of the application of s 11 of the *Criminal Code*. For instance, in *R v PAZ,*[50] where reference is made to s 41 and s 41A of the *Acts Interpretation Act 1954*, which provide for references to a penalty (defined in Schedule 1, as meaning "forfeiture and punishment") in a statutory provision, indicating that the offence or contravention "is punishable on conviction (whether or not a conviction is recorded)".

[47] It might also be necessary to consider whether, despite s 16 not (in contrast to s 45 of the *Acts Interpretation Act 1954*) being expressed to be subject to any other statutory intention, express or otherwise, it is a provision which is directed at the orders which may be made in the exercise of sentencing discretion upon conviction of an offence, rather than any consequences of such conviction which may inure by statutory effect.[51]

[48] However, it is unnecessary to dwell upon such considerations. As was properly conceded for the respondent, the present situation is distinguishable from the

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49 (1997) 188 CLR 1, at p 9.

50 [2018] 3 Qd R 50, at [179]-[180].

51 As has been noted above, a paragraph [16], there has always been an express statutory exclusion of the effect of s 16, in the later introduced s 229B of the *Criminal Code*, so that an offender charged with the relevant offences in one indictment: "may be convicted of and punished for any or all of the offences charged".

situation where the summary offence is pursuant to s 79(1) of *TORUM*.[52] And it is acknowledged that as determined in *Adams v Slattery*,[53] the punishable act constituting an offence under s 80(11) of the *TORUM* is not the same as that for s 79(1) and that s 16 of the *Criminal Code* is inapplicable.[54]

[49] Nevertheless, the contention is that the situation still presents an issue of double punishment because of the contended alignment of the offence pursuant to s 80(11) in that it "is deemed to be an offence of driving under the influence and is punishable as such".[55]

[50] It is, upon this basis, contended that the prosecution of the offence against s 80(11) is an abuse of process, in that doing so "is contrary to public interest and would erode confidence in the administration of justice".[56] In support of that contention are further submissions which, contend for lack of utility other than further punishment of the respondent and include that:

(a) "allowing the prosecution to continue would, for all practical purposes, result in the respondent being punished twice for the same (deemed) act of driving under the influence;[57]

(b) The prosecution serves no legitimate purpose and only seeks to punish the respondent again because the offence may be technically available; the prosecution is unnecessarily duplicative and oppressive".[58]

It is further contended that:

> "A stay is the appropriate remedy because:
>
> (a) Upon conviction for an offence against s.80(11), the respondent will be subject to a mandatory period of disqualification; and
>
> (b) The fact of the conviction will render the respondent liable to greater punishment in the future should he be convicted of a similar offence."[59]

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52 Respondent's written submissions filed 1 March 2021, at [39].
53 [2014] QDC 55, at [12].
54 Respondent's written submissions filed 1 March 2021, at [40] – [42].
55 Ibid, at [43] and [46].
56 Respondent's written submissions filed 1 March 2021, at [52].
57 Ibid, at [49].
58 Ibid, at [51(a)].
59 Ibid, at [53].

[51] These submissions should not be accepted. The correctly made concession that there are different punishable acts is the starting point. But here those punishable acts relate to not just separate and distinct breaches of the law but also distinctly separated conduct in doing so. In short, the respondent has compounded his later admitted conduct of dangerously operating a motor vehicle whilst adversely affected by alcohol, by refusing to provide the specimen of his breath, when lawfully required to do so. Given the legislative scheme pursuant to which that lawful requirement was made, it may be discerned that at least recognition of the sentencing purpose of deterrence (both general and personal) would be relevant to dealing with the offence committed pursuant to s 80(11) of the TORUM and that not only is there appropriate public interest in the continued prosecution of this offence but that it is the staying of this prosecution which may be seen as more likely to erode confidence in the administration of justice.

[52] Moreover, there is no relevant sense of duplication or oppression. It is not correct to contend that "the respondent would be punished twice for the same (deemed) act of driving under the influence". As has been noted he would be punished for his separate conduct in refusing to comply with the lawful requirement and the true effect of s 80(11)(d) and (e) is that such an offence "is taken to be an offence against …. section 79(1)" for the purpose that he is "liable to the same punishment in all respects …. As [he] would be if the offence were actually an offence committed …. against …. Section 79(1)". As earlier noted, the effect is to deem such an offender liable to the same punishment as he or she would have been if the reading was at or over the high alcohol limit.

[53] Further and as is noted in the submission made for the appellant,[60] to conclude otherwise and to allow the stay to remain would not properly recognise the exceptional nature of the availability of the remedy in respect of an abuse of process, nor it can be observed, the underlying principles for such remedy. As Mason CJ observed in *Jago v District Court of NSW*:[61]

> "The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this

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60 Appellant's written submissions filed 1 February 2021. At [26].

61 (1989) 168 CLR 23 at 30.

> way if it concludes from the conduct of the prosecutor … that the Court processes are being employed for ulterior purposes or in such a way … as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the Court."

Conclusion:

[54] The appeal is allowed and there will be an order pursuant to s 225(1) of the *Justices Act 1886* that:

> "The Order made in the Magistrates Court at Maroochydore on 20 November 2020, that the charge brought pursuant to s 80(11) of the *Transport Operation (Road Use Management) Act 1995* be 'permanently stayed as an abuse of justice', is set aside."

There will be a further order pursuant to s 225(2) for the further conduct of the proceedings in respect of that charge in the Magistrates Court, with the parties having an opportunity to be heard as to whether or not that should be accompanied by a direction and any other ancillary order to be made.