DISTRICT COURT OF QUEENSLAND

CITATION:	*Commissioner of Police v Stjernqvist* [2022] QDC 95
PARTIES:	**COMMISSIONER OF POLICE** (Appellant) v. **BAILEE ROSE STJERNQVIST** (Respondent)
FILE NO/S:	DC 137/2021
DIVISION:	Appellate
PROCEEDING:	Appeal under s 222 of the *Justices Act* (Qld)
ORIGINATING COURT:	Magistrates Court at Townsville
DELIVERED ON:	27 April 2022
DELIVERED AT:	Townsville
HEARING DATE:	8 April 2022
JUDGE:	Lynham DCJ

ORDERS:

1. **Leave is granted pursuant to s 224(1)(a) of the *Justices Act 1886* to extend the time for filing the notice of appeal to 27 July 2021.**

2. **Leave is granted pursuant to s 224(1)(c) of the *Justices Act 1886* to amend the notice of appeal to comply with the approved form prescribed for an appeal under s 222 *Justices Act 1886.***

3. **Allow the appeal.**

4. **Set aside the sentence of 18 months probation imposed in the Magistrates Court at Townsville on 22 June 2021 for the evasion offence (Charge 1 of 5 – BCS #: 2102219255).**

5. **The matter is remitted to the Magistrates Court at Townsville for rehearing and reconsideration.**

6. **There be no order as to costs.**

CATCHWORDS: CRIMINAL LAW – APPEAL AGAINST SENTENCE – INTERPRETATION OF SENTENCING PROVISIONS – appeal pursuant to s 222 Justices Act 1886 - where the respondent pleaded guilty to a number of offences including an evasion offence under s 754 *Police Powers and Responsibilities Act* 2000 – where the respondent was sentenced to 18 months probation for evasion offence – whether magistrate erred in imposing probation for the evasion offence – whether s 754 excluded the imposition of probation as a sentencing option for an evasion offence – where notice of appeal was filed out of time – whether time should be extended to file the notice of appeal pursuant so s 224(1)(a) *Justices Act* 1886 – where notice of appeal did not conform with the prescribed form – whether using the wrong form to commence the appeal renders the appeal incompetent – whether the notice of appeal should be amended pursuant to s 224(1)(c) *Justices Act* to comply with the prescribed form.

LEGISLATION: *Acts Interpretation Act* 1954 (Qld) s 14A, s 14B, s 41, s41A
Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld)
C*riminal Law (Criminal Organisations Disruption) Amendment Bill* 2013 (Qld)
District Court Act 1967 (Qld) s 118
Justices Act 1886 (Qld) s 222, s 222C, s 223, s 224, s 227, s 228
Justices Act 1902 (NSW) s 127
Penalties and Sentences Act 1992 (Qld) s 91, s 101, s 180A
Police Powers and Responsibilities Act 2000 (Qld) s 754
Police Service Administration Act 1990 (Qld) s 2.3, s 4.1, s 4.8, s 11.1
Serious and Organised Crime Legislation Amendment Bill 2016 (Qld)
Uniform Civil Procedure Rules 1999 (Qld) r 786
Weapons Act 1990 (Qld) s 50, s 50B

CASES: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27
Broederlow v Commissioner of Police [2019] QDC 228
Callender v Edwards (1972) 66 QJPR 102
Campbell v Galea [2019] QDC 53
Chisholm v Williams & Commissioner of Police [2010] QDC 68
Commissioner of Police v Broederlow (2020) 5 Qd R 296
Commissioner of Police v Magistrate Spencer (2014) 2 Qd R 23
Corporate Affairs Commissioner v Bain (1991) 5 ACSR 97
Cronin v Commissioner of Police [2016] QDC 63
Day v Hunter [1964] VR 845
Doig v Commissioner of Police [2016] QDC 320

Forbes v Jingle [2014] QDC 204
Owen v Edwards [2006] QCA 526
R v Tait [1999] 2 Qd R 667
R v Mundy [2011] QCA 7
Sbresni v Commissioner of Police [2016] QDC 18
Skinner v Queensland Police Service [2016] QDC 138
R v Ham & Anor [2016] QDC 255
The Queen v DS [2019] QSC 288
The Queen v Lewis (Unreported sentencing decision, Supreme court of Queensland, Brown J, 9 March 2018)
Lacey v Attorney-General (Qld) (2011) 242 CLR 573

COUNSEL T. Schmitt for the Appellant
D. Honchin for the Respondent

SOLICITORS: Queensland Police Service Legal Unit for the Appellant
Aboriginal and Torres Strait Islander Legal Service for the Respondent

Background

[1] On 19 June 2021 police performing mobile patrols in a suburb of Townsville observed two vehicles travelling at speed. The respondent was the driver of one of those vehicles. Police attempted to intercept the respondent's vehicle for purposes of conducting a license check and a roadside breath test. The respondent drove down a number of back streets with police following. When unable to get close enough to the respondent's vehicle to obtain registration details police activated their lights and siren. The respondent did not stop but continued to drive at speed and made overt attempts to evade police. Police elected to abandon their attempts to intercept the respondent's vehicle. However, a short time later police located the respondent sitting in the vehicle which was stopped on the side of the road.

[2] As a result of the respondent's conduct in continuing to drive after police had activated their lights and siren, she was charged with an evasion offence contrary to s 754 *Police Powers and Responsibilities Act* 2000 (Qld) ("PPRA").

[3] On 21 June 2021 the respondent pleaded guilty to a total of twelve traffic offences which had been committed by her on various dates over the preceding three months, including the evasion offence. Following sentencing submissions, the sentencing Magistrate adjourned the sentence until the following day in order to give consideration to what sentence should be imposed on the evade offence. On 22 June 2021, with the exception of one charge which attracted a $400 fine, the respondent was placed on probation for 18 months on the remaining charges including the evasion offence for which the respondent was also disqualified from holding or obtaining a driver's licence for 2 years.

[4] The Commissioner of Police appeals pursuant to s 222 *Justices Act* 1886 (Qld) ("JA") the sentence imposed upon the respondent, but only in respect of the 18 month probation order imposed by the Magistrate on the evasion offence. Aside from issues raised by the respondent as to the competence of this appeal, the sole issue for

determination is whether the Magistrate erred in concluding that a probation order was open in respect to the evasion offence.

[5] This appeal raises for consideration (and not for the first time) the proper interpretation of statutory minimum terms of imprisonment which are prescribed for an offence provision such as s 754 PPRA. As decisions of this court considered below bear out, there has been a difference of views expressed as to the construction of the penalty provision contained in s 754 PPRA and whether, for example, a penalty such as probation is a sentencing option that can be imposed for an evasion offence. It can be accepted, as did the Magistrate who sentenced the respondent, that conflicting views expressed by this court as to the proper construction of the penalty provision contained in s 754 PPRA has led to inconsistent sentencing practices, especially in the Magistrates Court, in sentencing for an evasion offence. For this reason, the appellant also seeks an order pursuant to s 227 JA that I state, in the form of a special case for the opinion of the Court of Appeal, a question as to the proper construction of s 754 PPRA.

Competency of the appeal

[6] The respondent raises two issues in relation to the competency of this appeal. The first relates to whether the Commissioner of Police who is named as the appellant is competent to bring the appeal rather than the police officer who preferred the charge against the respondent. In essence, what the respondent submits is that as s 222(1) JA confers a right of appeal on "a person who feels aggrieved as complainant, defendant or otherwise", it is the police officer who charged the respondent rather than the Commissioner of Police who is for purposes of s 222(1) the person who is "… aggrieved as complainant". Therefore, the proper appellant who has standing to initiate this appeal is the police officer who charged the appellant and not the Commissioner of Police. The point taken is a novel one given that even on a cursory review of appeals initiated under s 222 JA and heard either in the District Court or on further appeal by the Court of Appeal, it is common for the Commissioner of Police to be named either as the appellant or respondent. The identification of the Commissioner of Police as a party to an appeal is not however universal and it is also not uncommon for the individual police officer who preferred the charge to be named as a party to an appeal.

[7] The issue raised by the respondent is whether the Commissioner of Police does have standing to bring an appeal pursuant to s 222 JA. In my view the Commissioner does. The office of the Commissioner of Police is established by s 4.1 *Police Service Administration Act* 1990 *(Qld).* Section 11.1 of the same Act deems that any reference in any Act or document to the Commissioner of Police is taken to be a reference to the Commissioner of the Police Service. The responsibility of the Commissioner of Police is prescribed under s. 4.8 of the Act to include the efficient and proper administration, management or functioning of the police service in accordance with law and authorises the Commissioner of Police to do, or cause to be done, "all such lawful acts and things as the Commissioner considers to be necessary or convenient for the efficient and proper discharge of the prescribed responsibility". The statutory functions of the police service are prescribed in s 2.3 of the Act to include "the upholding of the law".

[8] In *Owen v Edwards* [2006] QCA 526, Jones J at [27] observed with respect to the standing of a person to commence an appeal under s 222 JA:

> "The limitation in the ambit of persons who can claim to be "aggrieved" has been the subject of judicial consideration. Only the parties can properly be referred to as either complainant or defendant.[1] Consequently, the reference to "a person who feels aggrieved…otherwise" is clearly a reference to someone who is not a party to the original proceedings."

[9] Jones J then referred at [27] to *Day v Hunter* [1964] VR 845 where it was held:

> "…it will not be established merely by the applicant swearing that he 'feels aggrieved', for if that were the case a stranger to the proceedings, with no real or direct interest therein, could bring himself within the words by so swearing. These words were clearly intended to exclude from the operation of the section the common informer and other busybodies, who have no real or direct interest in the proceedings in which the decision sought to be reviewed was given, and to prevent them from intermeddling officiously therein.
>
> That this is the proper construction of the words in question here finds support, we think, in the speech of Lord Herschell LC in *Powell v Birmingham Vinegar Brewery Co* [1894] AC 8 at p 10, where the question he had to consider was whether the respondents were 'persons aggrieved' within the meaning of s 90 of the Trademarks Act 1883.
> …
>
> Whether he can bring himself within these words depends on the facts of the case, and whether he is able to show that he is really and directly interested in the proceedings."

[10] At [28] Jones J concluded:

> "That test has, for example, been applied to allow appeals to be brought by an objector in a licensing matter by a police officer in connection with domestic violence cases.[2] The application of that test to the person who currently stands in the shoes of the complainant for the purpose of pursuing the prosecution is clearly a person who is in a position to 'feel aggrieved' such as to allow the institution of an appeal under this legislation."

[11] It has also been accepted that "the basic premise that section 222 concerns persons whose legal situation is directly affected" and that "while not affected by the circumstances of an offence, those who run the prosecution of it by virtue of that role are directly affected, and undoubtedly have standing."[3] In light of the statutory functions conferred upon the Commissioner of Police under the *Police Service Administration Act* which include upholding of the law, there can be no doubt in my view that the Commission of Police is a person with a direct interest in the present appeal and does have standing to bring it.

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[1] Citing s42 JA.
[2] *Edwards v Raabe* (2000) 117 A Crim R 191.
[3] *Chisholm v Williams & Commissioner of Police* [2010] QDC 68 at p. 5.

[12] The second issue raised by the respondent challenging the competency of the appeal relates to the notice of appeal which was filed by the appellant to initiate the appeal. Inexplicably, and what was an obvious error by the drafter, in the footer of the notice of appeal filed reference is made to "Form 96, Version 1 Uniform Civil Procedure Rules, Rule 786". The notice of appeal identified the first respondent as the sentencing Magistrate and the second respondent as Ms Stjernqvist. Orders have previously been made removing the first respondent as a party to the appeal with the consequence that Ms Stjernqvist is now the only respondent to the appeal.

[13] The JA is clear as to the procedure to be followed to appeal an order under s 222 JA. To start an appeal an appellant must file a notice of appeal in the District Court Registry: s 222(3) JA. The notice of appeal must be in the "approved form": s 222(8) JA. The term "notice of appeal" is defined to mean "a notice of appeal under section 222(3), (4) or (5)" JA: s 221 JA. In addition to being in the approved form, the notice of appeal must also state (a) the appeal grounds, (b) the details required under s 222C JA and (c) the name and address of the respondent: s 222(8). Section 222C JA concerns the contact details and address for service of the appellant.

[14] It is not in contest that the approved form to commence an appeal under s 222 JA is a Form 27, which is available on the Queensland Courts website. It is also not in contest that rule 786 *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") is concerned with a notice of appeal for appeals to a court other than the Court of Appeal, which would include to the District Court. However the availability of an appeal to which a notice of appeal in accordance with rule 786 relates is expressly made subject to "any Act".[4] As s 222 JA provides an avenue of appeal to an aggrieved from a sentence imposed in the Magistrates Court it will be immediately obvious that rule 786 could not have been relied upon by the appellant to appeal the respondent's sentence.

[15] I have observed already that it is inexplicable why the appellant filed a notice of appeal which is not in the correct form and which refers to a provision in the UCPR that does not confer any right of appealing the sentence imposed. In bringing the appeal the appellant, as the prosecuting agency, is expected to exercise that right as a model litigant. A model litigant would at least be expected to file an appeal under s 222 JA by using the prescribed form. The appellant's failure to do so at the very least demonstrates a fundamental ignorance of the appeal procedures under s 222 by the person who drafted the notice of appeal. The error in using the wrong form was first identified by the respondent in their outline of submissions. The appellant concedes the error and has sought to cure it by applying to amend the notice of appeal pursuant to s 224(1)(c) JA by substituting it with a notice of appeal in the correct form. The effect of the application would be to convert the contents of the notice of appeal filed into the prescribed form.

[16] In support of the application to amend the notice of appeal so that it conforms with Form 27 the respondent relies upon s 228 JA. That section provides "No appeal shall be defeated merely by reason of <u>any defect whether of substance or of form</u> in any notice of appeal or in the statement of the grounds of appeal." The appellant contends that s 228 JA is expressed in broad terms and here, as the defect in the notice of

[4] *Uniform Civil Procedure Rules* 1999 (Qld) r782(1).

appeal relates to the form of the notice of appeal, by operation of s 228 the appeal should not be defeated by reason that the wrong notice of appeal was filed to commence the appeal. The respondent on the other hand submits that s 228 JA should be interpreted as having application only where the appeal has been commenced using the approved form and as the appellant commenced the appeal using the wrong notice of appeal and in fact referred in the notice of appeal to an alternative appeal procedure provided for under the UCPR, s 228 JA does not assist the appellant.

[17] Section 228 JA and its analogue in s 127 *Justices Act* 1902 (NSW) has received some judicial consideration. The origin of s 228 JA was traced by Demack DCJ (as his Honour then was) in *Callender v Edwards* (1972) 66 QJPR 102 where an appellant in a s 222 JA appeal made application to add a further ground to the notice of appeal. In granting the application his Honour expressed the view that "the power of amendment given by s 228 should be construed widely to include the power to amend a notice of appeal by adding a fresh ground of appeal", observing that "this also accords best with the general nature of an appeal under s 222 which does involve in certain cases a hearing *de novo*. It does ensure that the full merits of an appeal can be canvassed without undue restrictions by technicalities."[5]

[18] Section 127 *Justices Act* 1902 (NSW) was considered by the New South Wales Court of Appeal in *Corporate Affairs Commissioner v Bain* (1991) 5 ACSR 97. The section provided "No appeal shall be defeated merely by reason of any defect, whether of substance or of form, in any notice or statement of grounds of appeal." An issue arose as to whether a notice of appeal which named the wrong appellant could be amended by substituting the Corporate Affairs Commissioner as the appellant. Upon an indication by the Judge hearing the application that he was inclined to allow the amendment his Honour, without making orders, referred as a question of law to the New South Wales Court of Appeal whether the District Court had jurisdiction to hear the appeal. It was held that in circumstances where the *Justices Act* permitted an individual who filed the appeal to give notice of such an intention, the precise subject matter of the appeal was set out in the notice, the error related to the identification of the wrong appellant and was in the nature of a clerical error the notice of appeal was sufficient to attract the jurisdiction of the District Court. In so finding, the court expressed the view that "If objection is taken to a notice of appeal which does not go to the merits of the case, and the respondent can demonstrate no prejudice, the court should not allow the appeal to be defeated by such objection."[6]

[19] The notice of appeal filed by the appellant is headed "Notice of Appeal – District Court". It identifies the decision being appealed as "the decision of [the Magistrate] dated 22 June 2021 by which it was ordered/decided that: Sentenced the [respondent] to a probation order for a period of 18 months." The ground of appeal is expressed as follows:

> "That the sentence was not open to Her Honour as a matter of law having convicted the defendant of an Evasion Offence against s 754(2) of the *Police Powers and Responsibilities Act* 2000".

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[5] *Callender v Edwards* (1972) 66 QJPR 102, 105-106.
[6] *Callender v Edwards* (1972) 66 QJPR 102 at 103.

[20] Having regard to the requirements stipulated for a notice of appeal prescribed under s 222(8) JA, in addition to the appellant's notice of appeal stating the appeal ground it also includes the details required under s 222C JA as well as the name and address of the respondent. Therefore, for purposes of the appellant's compliance with s 222(8) JA, the appellant's notice of appeal states each of the matters required by the section but is defective because it is not in the approved form. Section 228 JA expressly provides that "any defect whether of substance or of form in any notice of appeal" shall not defeat an appeal commenced under s 222 JA. As explained, the section has been construed broadly and where objection is taken to a notice of appeal which does not go to the merits of the case and where the respondent can demonstrate no prejudice, a court should not allow the appeal to be defeated by such objection.

[21] Here, whilst I accept that the fault in commencing the appeal using the wrong form lies squarely with the appellant, in circumstances where the notice of appeal otherwise is in compliance with s 222(8) JA, in that it contains all of the information required to be included in a notice as prescribed under the section, in my view commencing the appeal using the wrong form is a defect which attracts the operation of s 228 JA such that it should not defeat the appeal. That is, the defect in the notice of appeal can be categorised as one of form for the purposes of s 228 JA and does not go to the merits of the appeal. Accordingly, in the circumstances under consideration here, I am satisfied that by operation of s 228 JA the appellant's appeal should not be defeated by reason of the failure by the appellant to use the prescribed form when commencing the appeal.

[22] Section 224(1)(c) JA confers on the court the power to amend a notice of appeal. Whether leave to amend a notice of appeal should be granted involves considerations of whether it is in the interests of justice to do so and whether the opposing party will be prejudiced by allowing the amendment. In circumstances where there is a defect in the appeal by reason that it was commenced by the appellant using the wrong form, where I am satisfied that the defect in using the wrong form is one to which s 228 JA applies, and where the notice of appeal otherwise contains all of the details prescribed under s 222(8) JA including the decision being appealed and the ground of appeal, I am satisfied that the appellant should be permitted under s 224(1)(c) JA to amend the notice of appeal to ensure that it is in the prescribed form. Given the nature of the amendment sought, which is to correct the notice of appeal to ensure it complies with the prescribed form, I am satisfied that the respondent will not be prejudiced and that it is in the interests of justice to allow the amendment to the notice of appeal.

[23] The appellant also applies for an extension of time for filing the notice of appeal. On 21 July 2021, and therefore within the prescribed appeal period, the appellant forwarded by email to the District Court Registry in Townsville the notice of appeal. It would appear that the person who prepared the notice of appeal was of the belief that the notice of appeal could be filed via email. It could not. A hardcopy of the notice of appeal was also posted to the District Court Registry and was received on 27 July 2021. This is the date for purposes of s 222(1) JA that the notice of appeal was filed. As a consequence, the notice of appeal is to be treated as having been filed 5 days out of time necessitating the appellant needing an extension of time in order to pursue the appeal. Section 224(1)(a) confers on the court a discretion to extend time for filing a notice of appeal. On an application for an extension of time the court is required to consider whether any good reason has been shown to account for the delay

in bringing the appeal and, more broadly, whether it is in the interests of justice to grant the necessary extension.[7] It is apparent that the appellant had wrongly assumed that the notice of appeal could be filed by email and sought to do so within the time limit prescribed. That assumption was wrong. However, for purposes of whether an extension of time should be granted to the appellant, it is a relevant consideration that at least an attempt was made by the appellant to file the notice of appeal within time by emailing it and that it was ultimately filed 5 days out of time. It is not contended by the respondent that she would be prejudiced were an extension of time for the filing of the notice of appeal be granted. In these circumstances, bearing in mind the notice was ultimately filed 5 days out of time, I am satisfied that it is in the interests of justice to grant the appellant an extension of time in which to file the notice of appeal.

Reasons of the Magistrate

[24] Aside from the issues of the competency of the appeal and whether a special case be stated to the Court of Appeal pursuant to s 227 JA, the only issue which is raised on this appeal is whether the Magistrate erred by concluding that a period of probation was a sentence which is open for the evasion offence.

[25] In the course of sentencing submissions it was initially submitted by the prosecutor that probation was not open as a sentencing option for the evasion offence and that the minimum sentence that could be imposed for that offence was a fine of 50 penalty units or 50 days imprisonment served wholly in a corrective services facility. The respondent's solicitor contended for probation. The Magistrate asked to be provided with any decisions which had considered the penalty provision contained in s 754 PPRA and whether probation was open for the evading offence and adjourned sentence to the following day.

[26] The following day when the sentencing hearing resumed, the Magistrate was referred by the police prosecutor to *Commissioner of Police v Broederlow* (2020) 5 Qd R 296 as well as the decision of Devereux DCJ (as his Honour then was) in *Doig v Commissioner of Police* [2016] QDC 320. The Magistrate expressed the view that as *Broederlow* involved an appeal against a sentence imposed in respect to an offence under the *Weapons Act* 1990 (Qld) ("WA") which involved a provision "well-removed" from s 754 PPRA, on her reading of *Broederlow* the Court of Appeal had not disapproved of the reasoning of Henry J in *Commissioner of Police v Magistrate Spencer* (2014) 2 Qd R 23 that it was open to a court to impose probation for an evading offence.

[27] In sentencing the respondent the Magistrate noted that the judgment of Henry J in *Commissioner of Police v Magistrate Spencer* had been decided prior to s 754 PPRA being amended. The Magistrate expressed the view that *Broederlow* could be distinguished as it involved an appeal relating to the construction of a penalty provision contained in the WA which was drafted differently to the penalty provision contained in s 754 PPRA and therefore it was not authority for the proposition that probation was excluded as a sentencing option for an evasion offence. The Magistrate noted however that there was no clear authority on the point and that it needed

[7] *R v Tait* [1999] 2 Qd R 667 at 668; *R v Mundy* [2011] QCA 7, per Fraser JA at [2].

appellate court clarification. Accepting that a sentence of probation was open for the evasion offence the Magistrate sentenced the respondent to 18 months probation.

The statutory provisions

[28] In so far as is relevant, s 754 PPRA which was in force at the time of the respondent's offending provided:

> "**754 EVASION OFFENCE**
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> (1) This section applies if, in the exercise of a power under an Act, a police officer using a police service motor vehicle gives the driver of another motor vehicle a direction to stop the motor vehicle the driver is driving.
>
> (2) The driver of the motor vehicle must stop the motor vehicle as soon as reasonably practicable if a reasonable person would stop the motor vehicle in the circumstances.
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> Penalty -
>
> Minimum penalty - 50 penalty units or 50 days imprisonment served wholly in a corrective services facility.
>
> Penalty -
>
> Maximum penalty - 200 penalty units or 3 years imprisonment."

[29] Section 754 PPRA has, since its inclusion in the PPRA, been subject to a number of amendments. Most notably for purposes of this appeal, the "minimum penalty" provision in s 754(2), was amended by the *Criminal Law (Criminal Organisations Disruption) Amendment Act* 2013 (Qld).[8] The amendments included inserting after "50 penalty units" the words "or 50 days imprisonment served wholly in a corrective services facility."

[30] By contrast, the section as enacted when considered by Henry J in *Commissioner of Police v Magistrate Spencer* provided, in so far as is relevant:

> "**754 Offence for driver of motor vehicle to fail to stop motor vehicle**
>
> (1) This section applies if, in the exercise of a power under an Act, a police officer using a police service motor vehicle gives the driver of another motor vehicle a direction to stop the motor vehicle the driver is driving.

[8] In force as of 17 October 2013.

(2) The driver of the motor vehicle must stop the motor vehicle as soon as reasonably practicable if a reasonable person would stop the motor vehicle in the circumstances.

Minimum penalty - 50 penalty units.

Maximum penalty - 200 penalty units or 3 years imprisonment."

[31] There have been further amendments to the section since 2013 none of which are material to the present appeal. For example, the section was amended by changing the section title to "Evasion Offence" in 2018 in response to a review and recommendations made in a 2011 report by the then Crime and Misconduct Commission.[9]

[32] The issue which is raised on this appeal can be expressed simply: did the Magistrate err by concluding that a period of probation was open for an evasion offence under s 754(2).

[33] The construction of the penalty provision contained in s 754(2) PPRA in its pre-2013 amended form was considered by Henry J in *Commissioner of Police v Magistrate Spender* albeit in the context of a judicial review application. Following a plea of guilty to a charge of failing to stop a motor vehicle when directed, contrary to s 754 PPRA, the third respondent was fined $5,500 (equivalent to 50 penalty units) by a Magistrate who believed that the imposition of a fine was mandatory. However, after sentencing the third respondent, later that same day, the Magistrate ordered the sentence to be reopened and when the matter next came before the court the Magistrate found that his sentencing order was a nullity and he adjourned the matter for resentencing before a different Magistrate. When subsequently resentenced by a different Magistrate the third respondent was placed on probation for six months. The applicant Commissioner of Police applied for judicial review of certain decisions by the first and second Magistrates in reopening the sentence including the finding that the sentence originally imposed was a nullity and by resentencing the third respondent.

[34] In dismissing the application Henry J considered whether the minimum and maximum penalty provisions prescribed for an offence under s 754 PPRA precluded the imposition of a period of probation. Ultimately his Honour concluded that they did not, reasoning:

"[15] A breach of s 754 is punishable with imprisonment. Section 91 of the *Penalties and Sentences Act* 1992 (Qld) provides a probation order may be made if 'a court convicts an offender of an offence punishable by imprisonment'.[10] It follows that probation could be imposed by way of penalty under s 754.

[16] That possibility is not excluded simply because the maximum penalty is said to be a fine 'or' imprisonment. Section 180A of the *Penalties and Sentences Act* explains such a provision means the sentencing court 'may' impose a fine

[9] *Police Powers and Responsibilities and Other Legislation Amendment Act* 2018; *Police Powers and Responsibilities and Other Legislation Amendment Bill* – Explanatory Notes at p.5.
[10] Also see s 101, which is of a similar effect in respect of community service.

or imprisonment or both. That section's language is permissive. It does not prescribe that a fine or imprisonment or both are the only forms of sentence that can be imposed under such a provision. It leaves alive the characterisation of s 754 that it is an offence punishable with imprisonment and thus does not exclude the availability of probation under s 91.

[17] What though of s 754's reference to a 'minimum penalty' of 50 penalty units? Where, as here, a minimum as well as a maximum penalty is specified then the penalty must not be less than the minimum and not more than the maximum. However, there appears to be no reason grounded in statute or principle why a period of probation ought be regarded as a lesser penalty than a fine. They are inherently different forms of penalty and their relative harshness will vary subjectively, depending on their duration or amount and on the individual circumstances of the offender. Further, the fact that probation arises as a sentencing alternative to imprisonment, whereas a fine is a sentencing option even for offences that are not punishable with imprisonment, suggests as a matter of principle that probation should not be regarded as a lesser sentencing option than a fine.

[18] Section 754's reference to a minimum penalty of 50 penalty units requires that where a fine is imposed it must be at least 50 penalty units. However, it does not require that a fine must be imposed. To construe the penalty provision for the offence in that way would be to ignore that it is also an offence punishable with imprisonment and, it follows, with probation. The wording of s 754 does not inevitably require the imposition of a fine or exclude the availability of a sentence of probation."

[35] The effect of the 2013 amendment to the minimum penalty provision in s 754(2) PPRA was first considered by Harrison DCJ in *Forbes v Jingle* [2014] QDC 204, where his Honour concluded that despite the amendment probation remained open as a sentencing option for an offence under s 754, his Honour explaining:

"[26] The issue that arises here is whether or not the insertion of the words "served wholly in a corrective services facility" after the reference to the minimum penalty of 50 penalty units or 50 days imprisonment means that this was not an offence punishable by imprisonment for the purposes of s 91 of the PSA.

[27] As Henry J said in *Commissioner of Police Services* (Qld) (supra) there appears to be no reason grounded in statute or principle why a period of probation ought to be regarded as a lesser penalty than a fine.

[28] Clearly, the offence is one to which s180A of the PSA applies. Therefore, on its ordinary meaning, s 754 as amended still appears to me to be an offence punishable by imprisonment for the purposes of s 91 of the PSA. It follows, therefore, that the learned Magistrate had the power to make a probation order under s 92(1)(b) of the PSA.

[29] There are numerous ways in which the legislation could have been expressed so that the options of probation and/or good behaviour bonds were unequivocally excluded, but no attempt was made to do so."

[36] The reasoning of Harrison DCJ in *Forbes v Jingle* has been followed by the majority of decisions of this court which have considered the penalty provision in s 754(2) PPRA. In *Sbresni v Commissioner of Police* [2016] QDC 18 the appellant was fined $5,692.50 (equivalent to 50 penalty units) for each of two offences of failing to stop a motor vehicle contrary to s 754(2) PPRA. The appellant appealed those sentences on the ground that the Magistrate had erred in fettering his sentencing discretion by interpreting s 754(2) as precluding probation as a sentencing option open for the failing to stop offences and by declining to follow the decision of Harrison DCJ in *Forbes v Jingle.* In circumstances in which it was conceded on appeal by the Commissioner of Police that probation was a sentencing option open to the Magistrate, Robertson DCJ concluded that it would not be appropriate to go behind that concession, allowed the appeal and resentenced the appellant to probation and community service.

[37] In *Cronin v Commissioner of Police* [2016] QDC 63 the appellant was fined $5,900 (equivalent to 50 penalty units) for an offence of failing to stop a motor vehicle contrary to s 754 PPRA. In circumstances in which the Commissioner of Police conceded on appeal that the Magistrate had impermissibly fettered his sentencing discretion, the appeal was allowed and the appellant resentenced. There was a similar outcome in *Skinner v Queensland Police Service* [2016] QDC 138 in which the Magistrate when sentencing the appellant for an offence under s 754 PPRA was said to have failed to appreciate the proper effect of minimum and maximum penalties prescribed for the offence. Applying the reasons of Harrison DCJ in *Forbes v Jingle* it was accepted on appeal at [11] that probation was a sentencing option open for the offence of failing to stop a motor vehicle. A sentence of 3 months imprisonment suspended after 50 days combined with a two year probation order was set aside and in lieu the appellant was resentenced to two years probation. It was also found that the combining of a suspended term of imprisonment with a probation order was also prohibited under the *Penalties and Sentences Act* 1992 (Qld) ("PSA") and that this was a further basis upon which to allow the appeal.

[38] In *Campbell v Galea* [2019] QDC 53 the appellant police officer appealed a sentence of probation imposed upon the respondent for an offence of failing to stop a motor vehicle contrary to s 754 PPRA on the ground that, in light of the decision of Devereux DCJ in *Doig v Commissioner of Police*, the only penalties which were open for the offence were either a fine or imprisonment or both. In dismissing the appeal, it was noted by Long SC DCJ at [21] that it was common ground that the decision of Harrison DCJ in *Forbes v Jingle* had not been appealed and that until the decision of Devereux DCJ in *Doig v Commissioner of Police* there had been no other reasoned expression of a contrary view in this court as to probation being open for an offence under s 754 PPRA. His Honour further noted that *Forbes v Jingle* had been followed and applied in both *Sbresni v Commissioner of Police* and *Skinner v The Commissioner of Police* in circumstances in which it had been expressly conceded by the respondent Commissioner of Police that the Magistrate had erred by sentencing the particular appellant on the basis that probation was not open as a sentencing option. Ultimately his Honour concluded at [45] that there is no express nor necessary implication of exclusion of sentencing options that are otherwise made available to a court dealing with an offence under s 754(2) PPRA and that the expression of the maximum and minimum parameters in the section related only to the imposition of each respective sentencing option, where such an option is considered appropriate.

[39] As has been noted, the decision of Devereux DCJ in *Doig v Commissioner of Police* represents the only contrary view to a line of cases from this court which have followed the decision of Harrison DCJ in *Forbes v Jingle* as to it being open to a court to impose probation for an evasion offence under s 754(2) PPRA. In *Doig* the appellant was sentenced in the Magistrates Court in respect to a number of traffic offences including a charge of failing to stop a motor vehicle for which she was sentenced to 9 months imprisonment with parole release fixed after serving 2 months. Ground 4 of the appeal argued that the Magistrate erred in finding that if he considered a period of imprisonment was the appropriate sentencing option then he was constrained by s 754 PPRA to require the appellant to serve at least 50 days of imprisonment to be actually served when the discretion was not so constrained in light of *Forbes v Jingle*, *Sbresni v Commissioner of Police* and *Skinner v Commissioner of Police*. In rejecting the appellant's submission with respect to ground 4, Devereux DCJ observed:

> "[39] In my respectful opinion, there are two difficulties with the reasoning in *Spencer* and *Forbes*. First, it is not enough to say that because an offence is punishable by imprisonment a probation order is open if a specified minimum penalty is provided for. The question becomes, as Henry J said, what of the minimum penalty provision? If a court were to be required to assess the relative punitive strength of different orders, the question would be not whether, in the abstract or in a particular case, probation is a less serious penalty than a fine, but whether probation would be a less serious penalty than a fine of about $5,500. In any case, the answer that a court must assess the relative punitive strength of different orders in each case requires that there be some hierarchy of sentences, which is the second difficulty."

[40] His Honour concluded:

> "[50] Once this distinction is understood, the meaning of the penalty provision in s. 754, taken with ss. 41 and 41A of the *Acts Interpretation Act* and s. 180A of the PSA, is tolerably clear. The range of sentences available to a court under s. 754 is limited to a fine or imprisonment or both not less than the minimum and not greater than the maximum. If this leads to a conclusion which seems unreasonable in a particular case, or which compels the imposition of a fine inconsistent with the capacity of a defendant to pay, that is the result of the legislation."

[41] The construction of minimum and maximum sentencing provisions has also been considered by this court in relation to offences under the WA. *R v Ham & Anor* [2016] QDC 255 involved two applicants charged with a series of offences which included in count 3, unlawful supply of weapons contrary to s 50B WA. In so far as was relevant to the charge, s 50B WA provided:

> "(1) A person must not unlawfully supply a weapon to another person.
>
> Maximum penalty -
> ….

(c) if paragraphs (a) and (b) do not apply

(i) for a category D, H or R weapon—500 penalty units or 10 years imprisonment; or

….

Minimum penalty -

….

(e) for an offence, committed by an adult, to which paragraph (c)(i) applies, if the weapon is a short firearm and the person does not have a reasonable excuse for unlawfully supplying the weapon 2 ½ years imprisonment served wholly in a corrective services facility."

[42] At issue was whether the minimum penalty prescribed in s 50(1)(e) excluded probation or community service as sentencing options. In concluding that the section did not exclude these sentencing options, Chowdhury DCJ reasoned:

"[15] … The argument for the respondent is that while the maximum penalty provided by s. 50B(1)(c) does not exclude the operation of ss. 91 and 101 *Penalties and Sentences Act* 1992, the provision of a specific minimum sentence under subsection (e) necessarily does exclude their operation. There is a superficial attraction to the argument, but as has been made clear by the applicants, it would have been easier for the legislature to specifically state that those sections did not apply. The decisions in *Forbes v Jingle*, supra, and *Sbresni v Commissioner of Police* [2016] QDC 18, supra, have direct application to the interpretation here."

[43] A similar conclusion was reached by Chowdhury DCJ in *Broederlow v Commissioner of Police* [2019] QDC 228. The appellant had been sentenced in the Magistrates Court in respect to a number of charges including a charge of unlawful possession of a category H weapon in a public place, contrary to s 50 WA. As the weapon was possessed in a public place that appellant was liable under s 50(1)(d)(iii) WA to a minimum penalty of "1 year's imprisonment served wholly in a corrective services facility." For this offence the appellant was sentenced to 12 months imprisonment with a parole release date fixed at the end of that term.

[44] In allowing the appeal against sentence and finding that the Magistrate erred in holding that probation was not a sentencing option which was open for the offence, Chowdhury DCJ reasoned:

"[68] In *R v Ham & Anor* I stated that there was a "superficial attraction" to the argument that was accepted by the learned Magistrate in the court below, and clearly accepted by Devereaux DCJ in *Doig* and Brown J in *Lewis*. On being required to reconsider the issue at some length, I concede that the argument is more than superficial and has real substance.

[69] However, I remain of the same view of the relevant provisions of the Weapons Act 1990 that I expressed in *R v Ham & Anor*. That is consistent with the interpretation that has now been followed by a significant number of judges of

> this Court, as helpfully analysed by Long SC DCJ in *Campbell v Galea*. That line of precedent should be followed, consistent with the principles I enunciated earlier."

[45] For purposes of providing some certainty to Magistrates when sentencing for offences contrary to s 754 PPRA, his Honour also expressed the view at [85] that on the clear preponderance of authority in this court, and in the absence of any contrary authority from the Court of Appeal, a sentencing court under s 754 PPRA has sentencing options which include the imposition of probation and community service. Likewise at [86], his Honour expressed the view that for an offence contrary to s 50(1)(d) and (e) and s 50B(1)(d) WA, a sentencing court has sentencing options which include probation and community service.[11]

[46] The Commissioner of Police sought leave to appeal the decision of Chowdhury DCJ in *Broederlow v Commissioner of Police* pursuant to s 118 *District Court Act* 1967 (Qld), the sole issue on the appeal being whether his Honour erred in concluding that probation was open with respect to the WA offence. In *Commissioner of Police v Broederlow* (2020) 5 Qd R 296, Morrison JA, with whom Sofronoff P and Mullins JA agreed, in allowing the appeal concluded that the words "wholly served in a corrective services facility" contained in s 50(1)(d) WA were to be constructed as excluding consideration of a sentence which is not served in a corrective services facility including a probation order. It is whether the construction of the penalty provision in s 50(1)(d) WA applies also to s 754(2) PPRA that is raised for consideration on this appeal.

[47] On the appeal in *Broederlow,* when arguing that probation was not a sentencing option open for an offence of unlawful possession of a weapon in public under s 50 WA the Commissioner of Police placed particular reliance on the decision of Bowskill J (as her Honour then was) in *The Queen v DS* [2019] QSC 288. Before considering the consequences of the reasoning of the Court of Appeal in *Broederlow* to the minimum penalty provision contained in s 754 PPRA, it seems to me that it will be helpful to first consider the construction of the minimum penalty provision in s 50 WA endorsed by Bowskill J in *DS*.

[48] Bowskill J, in the course of sentencing DS for various offences which included an offence of unlawful supply of a category H weapon contrary to s 50B(1)(c)(i) WA, had to determine "whether, on the proper construction of s 50B(1) of the *Weapons Act*, s 50B(1)(e) prescribes a mandatory minimum penalty of 2 ½ years imprisonment served wholly in a corrective services facility; or whether it was open to the sentencing court to impose some other penalty, for example probation."[12] It had been argued by counsel for *DS* that the minimum penalty of 2 ½ years imprisonment to be served wholly in a corrective services facility prescribed under s 50B(1)(e) would only apply where a period of imprisonment was imposed and that as the section did not expressly exclude the operation of s 91 PSA, probation was a sentencing option open on the section.

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[11] The appeal having been allowed, the appellant was resentenced by Chowdhury DCJ on the WA offence to 2 years probation: *Broederlow v Commission of Police* [2019] QDC 241.
[12] At [40].

[49] In support of the submission that probation remained open as a sentencing option the accused's counsel placed reliance on this court's decisions in *R v Ham & Anor*, *Broederlow v Commissioner of Police* and C*ampbell v Galea*. Bowskill J summarised what she understood to be the reasoning in each of those decisions as to why it was open to a court to impose probation for a minimum penalty offence such as s 50B(1)(e) WA:

> "[62] The reasoning in *R v Ham*; and expanded upon in *Broederlow* (by reference to *Campbell v Galea*) is as follows:
>
> 1. There is no ambiguity in the section; therefore no need for any resort to extrinsic materials (such as the explanatory notes).
>
> 2. The "minimum penalty" provision in s 50B (and s 50) does not expressly exclude the operation of s 91 of the *Penalties and Sentences Act*.
>
> 3. Accordingly, since the offence under s 50B (and s 50) is an "offence punishable by imprisonment", the discretion available to the sentencing court under s 91 of the *Penalties and Sentences Act* to make a probation order is unaffected, and remains a sentencing option.
>
> 4. The "minimum penalty" provided for in s 50B (and s 50) only applies where the punishment imposed is a sentence of imprisonment.
>
> 5. Where the sentencing court exercises its discretion under s 91 to make a probation order, the "minimum penalty" provision does not apply.
>
> [63] Similar reasoning is adopted in *Campbell v Galea*; with Long SC DCJ also holding, further to points 2 and 4, that since references to a maximum penalty are not construed as limiting the sentencing options available to a court only to the types of penalty specified (for example, a fine or imprisonment), nor should a reference to a minimum penalty be so construed. Rather, reference to a minimum penalty ought to be construed only as the minimum for the particular type of penalty which is specified, and not as implicitly excluding other sentencing options (at [37])."

[50] Bowskill J noted that a contrary view as to the construction of s 50B WA had been expressed by Brown J in her sentencing remarks in *The Queen v Lewis*[13] before observing:

> [66] In my respectful view, the conclusion reached as to the construction of the minimum penalty provision in s 50B (and s 50) of the *Weapons Act* in *R v Ham* and *Broederlow* is incorrect. Similarly, I disagree that the reasoning in *Campbell v Galea* at [37] supports such a construction. In my view, the construction articulated by Brown J in *The Queen v Lewis* is correct.
>
> [67] The provision must be construed according to the words used, having regard to the context, which includes the purpose and policy objective of the

[13] (Unreported sentencing decision, Supreme court of Queensland, Brown J, 9 March 2018).

provision. The policy objective was, quite clearly, to impose a mandatory minimum punishment, in the form of a specified period of time in actual custody, to meet the objectives of community protection and deterrence. A construction of the "minimum penalty" provisions of s 50B which avoids the operation of those provisions does not achieve the purpose of the legislation. It is not to the point to say that the provision is not ambiguous, therefore reference may not be made to extrinsic materials. Those extrinsic materials, in particular the explanatory notes, inform the purpose (policy objective) of the provision, and it is necessary and appropriate to have regard to them, as part of the context in which the provision is to be construed; and also to confirm what appears to be the ordinary meaning of the provision. What is not permissible is to rely upon extrinsic materials to alter the otherwise clear meaning of a statutory provision; but that is not the issue here.

[68] Further, whilst it is the case that the "minimum penalty" provision in s 50B does not expressly exclude the operation of s 91 (probation) (or s 101, community service); that is the clear intent, and effect, of the words that are used. To expressly provide, in the circumstances of s 50B(1)(e), that the minimum penalty is 2½ years imprisonment, served wholly in a corrective services facility, is plainly inconsistent with the exercise of a discretion to instead impose a punishment by way of a probation order or a community service order. By virtue of s 41 of the *Acts Interpretation Act*, the meaning of "minimum penalty" is that the offence, upon conviction, is punishable by a penalty no less than that
"minimum penalty".

[51] As was observed by Bowskill J in *DS* at [42] and by Morrison JA in *Broederlow* at [15], the accepted approach to construing a statute is to ascertain the intended meaning of the words used. That process must be undertaken having regard to the context for the provision, for as was explained by the High Court in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47]:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of the legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."

[52] As has also been explained by Bowskill J in *DS* and by Morrison JA in *Broederlow*, both ss 14A and 14B *Acts Interpretation Act* 1954 (Qld) ("AIA") are relevant to construing a minimum penalty provision such as contained in s 754 PPRA. Section 14A(1) provides:

> "**14A Interpretation best achieving Act's purpose**
>
> (1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation."

[53] When s 14A(1) uses the term "purpose" that is defined to include "policy objective".[14] Section 14B(1) then provides:

> "**14B Use of extrinsic material in interpretation**
>
> (1) Subject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation -
>
> (a) if the provision is ambiguous or obscure - to provide an interpretation of it; or
>
> (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable - to provide an interpretation that avoids such a result; or
>
> (c) in any other case - to confirm the interpretation conveyed by the ordinary meaning of the provision."

[54] As was also explained by Bowskill J in *DS* at [45] and more recently by Morrison JA in *Broederlow*[15]:

> "Section 14B enables consideration to be given to extrinsic material capable of assisting in the interpretation of a provision of an Act, in the circumstances set out in s 14B(1). This includes, in sub-s (a), if the provision is ambiguous, to provide an interpretation of it; and, in sub-s (c), to confirm the interpretation conveyed by the ordinary meaning of the provision. As defined in s 14B(3), "ordinary meaning" means the ordinary meaning conveyed by a provision having regard to its context in the Act and to the purpose of the Act."

[55] In both *DS* and *Broederlow*, although the provision under consideration was in each case said to be unambiguous, the Explanatory Notes to the amending Bill which introduced mandatory minimum periods of imprisonment for s 50 and s 50B WA offences were nevertheless called upon to aid in the construction of each provision in order to confirm the interpretation conveyed by the ordinary meaning of the provision. The minimum penalty provision contained in s 754(2) PPRA is also in my view unambiguous. Nevertheless, and applying the approach to construction of Bowskill J in *DS* and Morrison JA in *Broederlow*, it seems to me that for the same reasons, the Explanatory Notes relevant to the introduction of the amended form of s 754(2) PPRA can be called upon to confirm the interpretation of the section.

[56] In the case of s 754 PPRA, the Explanatory Notes to the C*riminal Law (Criminal Organisations Disruption) Amendment Bill 2013* amending the minimum penalty provision prescribed in s 754(2) PPRA to include, in addition to a fine of 50 penalty units, "or 50 days imprisonment served wholly in a corrective services facility", included the following:

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[14] Schedule 1 AIA.
[15] At [14].

"**Policy objectives and the reason for them**

…..

increase the mandatory minimum penalty for the offence in section 754 (offence for driver of motor vehicle to fail to stop motor vehicle) to 50 penalty units or 50 days imprisonment to be served wholly in a correctional services facility; or, for an offender who is a participant in a criminal organisation, 100 penalty units or 100 days imprisonment to be served wholly in a correctional services facility."[16]

[57] The Explanatory Notes also included:[17]

> "The Bill will increase the minimum mandatory penalty under section 754 of the *Police Powers and Responsibilities Act* 2000 to 50 penalty units or 50 days imprisonment served wholly in a corrective services facility, and a 2 year driver licence disqualification. The mandatory minimum penalty for participants in criminal organisations will be 100 penalty units or 100 days imprisonment served wholly in a corrective services facility, and a 2 year driver licence disqualification. The Bill not only affects the rights and liberties of participants in criminal organisations but **includes any person who makes the decision not to stop a motor vehicle when directed to do so by police. It recognises that stringent police pursuit policy to protect the community from injury and damage often overrides the need to pursue and tough penalties need to be in place to deter offenders from failing to stop their vehicles.** The tougher penalties aimed at members of criminal organisations are necessary as these organisations have demonstrated they are not as easily deterred from offending as other citizens.
>
> …….
>
> Clause 64 amends section 754 to specify the mandatory minimum penalty when a driver fails to stop a motor vehicle when directed to do so by a police officer. The mandatory minimum penalty is 50 penalty units or 50 days imprisonment wholly served in a correctional services facility, and a 2 year driver licence disqualification. The mandatory minimum penalty for participants in criminal organisations will be 100 penalty units or 100 days imprisonment served wholly in a corrective services facility, and a 2 year driver licence disqualification. **The clause requires the minimum imposition of either the minimum fine or minimum sentence of imprisonment and excludes other sentencing options, for example a good behaviour order, probation, or a suspended sentence**."

[58] Finally, the Explanatory Notes to the *Serious and Organised Crime Legislation Amendment Bill* 2016, which amended the minimum penalty provision prescribed under s 754(2) PPRA to its current version, included the following:[18]

> "The offence of failing to stop a motor vehicle when directed to do so by police (the 'evade police' offence) carries a mandatory minimum penalty of 50

[16] At p.4.
[17] At p.8; pp. 27-28.
[18] At pp. 22-23.

days imprisonment served wholly in a corrective services facility or 50 penalty units. The maximum penalty for the offence is 3 years imprisonment or 200 penalty units.

The 2013 suite added a circumstance of aggravation to the offence of failing to stop a motor vehicle when directed to do so by a police officer. The circumstance of aggravation is being a Serious and Organised Crime Legislation Amendment Bill 2016 participant in a criminal organisation. Committing the offence with the circumstance of aggravation attracts a mandatory minimum penalty of 100 days actual imprisonment or 100 penalty unit fine and a two year driver's licence disqualification.

The majority of the Taskforce held the view that the offence of evading police is very serious regardless of whether it is committed by a participant in a criminal organisation or any other citizen (see pages 318-319 of the Report). The Bill reflects the Taskforce's recommendation (recommendation 41) by providing for the immediate repeal of this circumstance of aggravation.

The mandatory minimum penalty for the simpliciter offence, that was introduced to support the 'no police pursuit' policy, will not be impacted by the removal of the 2013 circumstance of aggravation."

[59] The task of ascertaining legislative intention "must also have regard to the rules of construction, common law and statutory, which are known to parliamentary drafters".[19] As was explained by Morrison JA in *Broedelow*[20] the rules of construction necessarily include ss 41 and 41A AIA. Section 41 AIA provides:[21]

"**41 Penalty at end of provision**

In an Act, a penalty specified at the end of -

(a) a section (whether or not the section is divided into subsections); or

(b) a subsection (but not at the end of a section); or

(c) a section or subsection and expressed in such a way as to indicate that it applies only to part of the section or subsection;

indicates that an offence mentioned in the section, subsection or part is punishable on conviction (whether or not a conviction is recorded) or, if no offence is mentioned, a contravention of the section, subsection or part constitutes an offence against the provision that is punishable on conviction (whether or not a conviction is recorded) -

(d) if a minimum as well as a maximum penalty is specified - by a penalty not less than the minimum and not more than the maximum; or

[19] *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [43]-[44]; *Broederlow supra* at [19].
[20] At [19].
[21] Section 41A AIA, which applies to a penalty other than at the end of provision, is expressed in similar terms to s41 AIA.

(e) in any other case - by a penalty not more than the specified penalty."

Consideration

[60] As noted earlier, the issue raised on this appeal is whether the minimum penalty provision for an evasion offence prescribed under s 754(2) PPRA of "50 penalty units or 50 days imprisonment served wholly in a corrective services facility" excludes probation as a sentencing option.

[61] The language used in s 754(2) PPRA is clear and unambiguous. The section defines the offence: a driver of a motor vehicle must stop the motor vehicle as soon as reasonably practicable if a reasonable person would stop the motor vehicle in the circumstances. Provision is then made under s 754(2) for a minimum and maximum penalty. Having regard to ss 41 and 41A AIA, the offence is to be construed to mean that it is punishable by a penalty not less than the minimum and not more than the maximum.[22]

[62] The purpose or policy objective of the minimum penalty provision in s 754 PPRA can be discerned in the Explanatory Notes. The purpose or policy objective recognises that the failure by the driver of a motor vehicle to stop their vehicle when directed to do so by a police officer is very serious. The "no police pursuit" policy also recognises that police pursuits expose innocent motorists to the risk of serious injury and therefore the protection of the community from injury and damage overrides the need by police to pursue motorists who evade police. To support a "no police pursuit" policy, s 754(2) PPRA prescribes tough penalties in the form of a mandatory minimum penalty of a substantial fine or a term of actual imprisonment. The objective of those minimum penalties is also to deter motorists from failing to stop their vehicle when directed by police to do so. The legislature announced its approach when amending s 754 PPRA in 2013 by specifying that the minimum penalty provision "requires the minimum imposition of either the minimum fine or minimum sentence of imprisonment and excludes other sentencing options, for example a good behaviour order, probation or a suspended sentence."

[63] It is submitted on behalf of the respondent that although the minimum penalty prescribed under s 754(2) PPRA is either a fine or a term of imprisonment, because the provision does not expressly exclude the operation of s 91 PSA, it remains open to the court in the exercise of its sentencing discretion to impose a sentence of probation or community service for the offence. The respondent relies principally upon the decisions of this court summarised above to support that construction. In light of the judgment of Morrison JA in *Broederlow* and the construction there endorsed with respect to the minimum penalty provision contained in s 50(1)(d)(iii) WA, that submission, in my view, cannot be accepted.

[64] Section 754 PPRA is to be construed according to the words of the provision having regard to its context including the purpose and policy objectives of the provision. As is made clear in the Explanatory Notes referred to above, the policy objective for

[22] That conclusion is supported by s180A PSA, which applies to maximum penalty provisions and specifies that the maximum penalty may be a fine or imprisonment.

amending the minimum and maximum penalty for the offence is clear – to impose a mandatory minimum punishment in the form of a substantial fine (minimum of 50 penalty units) or a minimum of 50 days actual imprisonment in order to meet the objectives of protecting the community from injury or damage by the maintenance of a "no police pursuit" policy and to provide a deterrent punishment. As was explained by Bowskill J in *DS* at [67], it is not to the point to say that s 754 is not ambiguous therefore reference to extrinsic material is unnecessary. Rather, the Explanatory Notes inform the policy objective of the section and it is appropriate to have regard to them, as did the Court of Appeal in *Broederlow*, as part of the context in which the section is to be construed. Moreover, by operation of s 14B(1)(c) AIA, reference to the Explanatory Notes is permitted where they will assist in confirming what appears to be the ordinary meaning of the section.

[65] In *Broederlow*, in construing s 50(1)(d) WA as excluding probation as a sentencing option, Morrison JA explained:

> "[27] The sequence of providing only maximum penalties for subsections (a)-(c) and minimum penalties for subsections (d)-(e), identifies those in subsections (d) and (e) as a separate subdivision of penalties depending upon the nature of the offence. Thus s 50(1) should be understood as meaning that if the offence of unlawful possession is committed then a maximum penalty will apply under subsections (a)-(c), but notwithstanding that, if the offence falls into the categories dealt with in subsections (d) and (e) then the offence attracts a mandatory minimum penalty.
>
> [28] Secondly, the way in which the provision specifies the penalty is, in my view, entirely unambiguous. It requires the period of imprisonment to be served "wholly in a corrective services facility". Those very clear words exclude serving a penalty outside a corrective services facility. A probation order is just such a penalty.
>
> [29] Thirdly, ss 50(1)(a)-(c) all provide for a maximum penalty depending on the circumstances. Properly construed in accordance with s 41 of the *Acts Interpretation Act*, that is taken to mean that the offence is punishable by a penalty not more than the maximum. That conclusion is supported by s 180A of the *Penalties and Sentences Act* 1992 (Qld) which applies to "maximum penalty" provisions, and specifies that the maximum penalty may be a fine or imprisonment.
>
> [30] Equally, the application of s 41 of the *Acts Interpretation Act* is that where the phrase "minimum penalty" is used in ss 50(1)(d) and (e), that is construed to mean that the offences are punishable by a penalty not less than the minimum. Given the words used in the penalty itself, that can only refer to a penalty that is not less than the period to be served wholly within a corrective services facility."

[66] As the reasons of Morrison JA explain, the requirement that a period of imprisonment be served "wholly in a corrective services facility" are very clear words which exclude serving the period of imprisonment outside a corrective services facility. As probation and community service are both sentencing orders that can only be

performed outside a corrective services facility, both are excluded as penalties that can be imposed. In my view the reasoning of Morrison JA applies also to the minimum penalty provision contained in s 754 PPRA and brings to an end the debate which has been expressed in earlier decisions of this court as to whether it is open to a court to impose probation for an evasion offence. Like s 50(1)(d) WA, where s 754(2) PPRA prescribes the "minimum penalty" to include a period of 50 days imprisonment "served wholly in a corrective services facility", those words are also very clear and, applying the reasoning of Morrison JA in *Broederlow*, are in my view to be construed as also excluding a penalty such as probation or community service.

[67] What about the reasoning of Henry J in *Commissioner of Police v Magistrate Spencer* that probation is a sentencing option open for an offence under s 754 PPRA? The construction of s 754 favoured by Henry J was of course made in respect to the section as it existed prior to the 2013 amendments. It will be recalled that when considered by Henry J s 754 carried a minimum penalty of a fine of 50 penalty units only and a maximum penalty of a fine of 200 penalty units or 3 years imprisonment. As Henry J's reasons make clear, it was because the offence was punishable by imprisonment that it followed that the discretion conferred under s 91 PSA to make a probation order was unaffected and probation remained a sentencing option. Although s 754(2) prescribed a minimum penalty of 50 penalty units which by operation of ss 41 and 41A AIA meant that a penalty not less than the minimum fine had to be imposed, his Honour concluded that there appeared to be no reason grounded in statute or principal why probation ought to be regarded as a lesser penalty than a fine.

[68] The construction of the penalty provision contained in s 754 PPRA endorsed by Henry J must now be considered in light of the amendment to its minimum penalty provision effected in 2013 as well as the decision in *Broederlow*. It will be recalled that the "minimum penalty" provision in s 754(2) was amended in 2013 to include, in addition to the existing penalty of 50 penalty units the penalty "<u>or 50 days imprisonment served wholly in a corrective services facility</u>." It is that requirement, having regard to the construction of those words endorsed by Morrison JA in *Broederlow*, that settles the debate as to whether a court can impose probation for an evasion offence, it being decided by Morrison JA that those words albeit in a different provision operate so as to remove the sentencing option of probation.

[69] What about the minimum penalty provision contained s 754(2) PPRA being expressed differently to s 50(1)(d) WA? It is argued on behalf of the respondent that as there are differences in the way each section expresses its minimum penalty the construction of s 50(1)(d) WA endorsed by Morrison JA in *Broederlow* does not apply to s 754(2) PPRA. Most notably, reliance is placed upon s 50(1)(d) WA prescribing only one minimum penalty (a term of imprisonment to be served wholly in a corrective services facility) whereas s 754(2) PPRA prescribes both a minimum fine of 50 penalty units or a minimum term of 50 days imprisonment.

[70] The construction of s 50(1)(d) WA endorsed by Morrison JA in *Broederlow* was focused upon whether the requirement that the term of imprisonment prescribed for the offence be served "wholly in a corrective services facility" excluded probation as a sentencing option. Ultimately his Honour concluded that it did. That s 50(1)(d) WA does not also carry as part of its minimum penalty a fine is, in my view, of no consequence to whether it is open to a court to impose probation for an evasion

offence. As s 91 PSA expressly provides, a probation order may be imposed "if a court convicts an offender of an offence punishable by imprisonment". If, applying the reasoning of Morrison JA in *Broederlow*, the discretion under s 91 PSA to make a probation order for an offence punishable by imprisonment is excluded where the minimum penalty prescribed includes a period of imprisonment to be served wholly in a corrective services facility, even where the offence is also punishable by way of a fine the discretion to impose probation will still be excluded.

[71] That construction is not affected by the maximum penalty contained in s 754(2) PPRA having regard to ss 41 and 41A AIA which prescribe that where an offence has a minimum as well as a maximum penalty, it is to be punished by a penalty not less than the minimum and not more than the maximum. For purposes of s 754(2) PPRA that must be taken to mean that the range of sentencing options available to a court when sentencing an offender for an evasion offence is limited to a fine or imprisonment or both not less than the minimum and not greater than the maximum.

[72] Finally, the respondent also seeks to place reliance on the observations of Morrison JA in *Broederlow* at [34] that "the wording of s 754 is well removed from that in ss 50(1)(d) and (e)" in support of the submission that the construction of the minimum penalty provision in *Broederlow* does not apply to s 754 PPRA. It is apparent that his Honour's observation that s 754 was "well removed" from s 50(1)(d) and (e) WA was made in respect to s 754 PPRA as it existed when considered by Henry J in *Commissioner of Police v Magistrate Spencer*. As has been observed already, the section then under consideration did not prescribe a minimum penalty which included imprisonment to be served in a corrective services facility. In my view it is obvious that his Honour's observations were made in respect to the section before it was amended to include a minimum penalty 50 days imprisonment to be wholly served in a corrective services facility and his Honour's observations cannot be interpreted as suggesting that s 754 PPRA is to be constructed differently to s 50(1)(d) WA.

[73] In conclusion, whilst it can be accepted, as the respondent submits, that the "minimum penalty" prescribed in s 754(2) PPRA does not expressly exclude the operation of a provision such as s 91 PSA (probation) or s 101 PSA (community service), in my view that is the clear intent and effect of the words used in the section. The decisions of this court where s 754 has been constructed as not excluding probation as a sentencing option must now be considered in light of the decisions of Bowskill J in *DS* and the Court of Appeal in *Broederlow*. Having regard to these decisions, in my view *Broederlow* puts to an end any debate about the operation of s 754 PPRA and whether, despite the express terms of that section requiring either a minimum fine of 50 penalty units or a minimum period of 50 days actual imprisonment, it is open to a court to impose probation for an evasion offence. The amendment to s 754(2) PPRA which resulted in the minimum penalty provision to be extended to include, in addition to a fine of 50 penalty units, a period of 50 days imprisonment to be "served wholly in a corrective services facility", applying the construction of those words endorsed in *Broederlow,* operates to remove the sentencing option of probation for an evasion offence.

[74] Therefore, by operation of ss 41 and 41A AIA the range of sentences which are available to a court when sentencing for an evasion offence under s 754 PPRA is limited to a fine or a period of actual imprisonment or both, not less than the

minimum and not more than the maximum prescribed. Although, as observed by Devereux DCJ in *Doig* at [50], this construction of s 754(2) may lead to the imposition of a sentence that seems unreasonable in a particular case or which compels the imposition of a fine which exceeds the capacity of a particular defendant to pay, that is simply a consequence of the legislation.

[75] Finally, as I noted earlier, the appellant also seeks an order that pursuant to s 227 JA I state in the form of a special case for the opinion of the Court of Appeal a question of law, namely: can a court imposing a sentence for an offence against s 754(2) PPRA impose a sentence other than a fine or period of imprisonment not less than the minimum and not more than the maximum prescribed. The basis upon which the order is sought is said to be the conflicting decisions of this court on the construction of the penalty provision in s 754 PPRA and whether probation is a sentencing option open for an evasion offence. The respondent does not oppose a special case being stated to the Court of Appeal. I decline to make the order sought under s 227 JA. In my view any debate about the operation of s 754 PPRA reflected in earlier decisions of this court as to whether a court can impose probation for an evasion offence under s 754 PPRA has been settled by the Court of Appeal in *Broederlow*. For that reason it is unnecessary to state a special case to the Court of Appeal for an opinion on the construction of the penalty provision contained in s 754 PPRA.

Conclusion

[76] Having regard to my conclusion that a sentence of probation is not open to a court to impose on an evasion offence, the Magistrate erred in sentencing the respondent to probation for the evasion offence. Accordingly, I would allow the appeal and set aside the order made by the Magistrate with respect to the evasion offence. As the respondent will need to be resentenced in accordance with the sentencing options explained herein which are available for an evasion offence, it is appropriate in my view to remit the resentencing of the respondent to the Magistrates Court.

[77] I make the following orders:

1. Leave is granted pursuant to s224(1)(a) of the *Justices Act* 1886 to extend the time for filing the notice of appeal to 27 July 2021.

2. Leave is granted pursuant to s 224(1)(c) of the Justices Act 1886 to amend the notice of appeal to comply with the approved form prescribed for an appeal under s 222 Justices Act 1886.

3. Allow the appeal.

4. Set aside the sentence of 18 months probation imposed in the Magistrates Court at Townsville on 22 June 2021 for the evasion offence (Charge 2 of 4 – BCS #: 20013689931703292948).

5. The matter is remitted to the Magistrates Court at Townsville for rehearing and reconsideration.

6. There be no order as to costs.