

DISTRICT COURT OF QUEENSLAND

CITATION: *Cobb v Queensland Police Service* [2023] QDC 159

PARTIES: **COBB, Peter**
(Appellant)
v
QUEENSLAND POLICE SERVICE
(Respondent)

FILE NO/S: 3075 of 2022

DIVISION: Appellate

PROCEEDING: Appeal pursuant to s 222 of the *Justices Act 1886* (Qld)

ORIGINATING COURT: Brisbane Magistrates Court

DELIVERED ON: 8 May 2023

DELIVERED AT: Brisbane

HEARING DATE: 8 May 2023

JUDGES: Dearden DCJ

ORDER:

1. Appeal dismissed.

CATCHWORDS: CRIMINAL LAW – APPEAL – APPEAL AGAINST CONVICTION – where appellant convicted of a single charge of computer hacking and misuse – where appellant was sentenced to 18 months good behaviour and recognisance of \$900 – where the appellant submits that the learned magistrate applied an improper construction of s 408E of the Criminal Code to the facts – whether accessing WhatsApp and Facebook Messenger on a personal mobile phone was a restricted computer

COUNSEL: MJ Jackson for the appellant
BA Reynolds for the respondent

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

Introduction

- [1] The appellant, Peter Cobb, was convicted of a charge of computer hacking and misuse, at the Brisbane Magistrates Court on 18 November 2022 after a trial.

- [2] The appellant was released upon entering into a recognisance in the sum of \$900, conditional that he must be of good behaviour for a period of 18 months. No conviction was recorded.¹

Grounds

- [3] The notice of appeal identified the following grounds:
- (1) The learned magistrate erred in applying an improper construction of section 408E [Criminal Code] to the facts, namely, that the explanatory memorandum supported the conclusion that accessing WhatsApp and Facebook Messenger on a personal mobile phone was a “restricted computer” for the purpose of s 408E (Computer Hacking and Misuse); and
 - (2) The learned magistrate erred in applying the wrong onus of proof to the facts, namely, impermissibly reversing the onus of proof (notice of appeal filed 15 December 2022).
- [4] By consent, a third ground of appeal was added at the hearing, namely:
- (3) The learned magistrate erred in applying an improper construction of section 408E [Criminal Code] to the facts.

The law - appeals

- [5] I repeat and adopt my exposition of the law in respect of appeals under the Justices Act 1886 (Qld) as set out in *Jenkins v Commissioner of Police* [2021] QDC 289, [7]-[9]:

[7] The appeal proceeds pursuant to Justices Act 1886 (Qld) (‘JA’) s.222, and is a rehearing (JA s.223).

[8] In McDonald v Queensland Police Service [2017] QCA 255, [47], Bowskill J stated:

“It is well established that, on an appeal under s 222 by way of rehearing, the District Court is required to conduct a real review of the trial, and the magistrate’s reasons, and make its own determination of relevant facts in issue from the evidence, giving due deference and attaching a good deal of weight to the magistrate’s view. Nevertheless, in order to succeed on such an appeal, the appellant must establish some legal, factual or discretionary error.” [citations omitted]

¹ Sentence Transcript T1-21 ll 32-38.

[9] In *Forrest v Commissioner of Police* [2017] QCA 132, Sofronoff P stated:

“...an appellate court hearing an appeal by way of rehearing must conduct a real review of the evidence and make up its own mind about the case.”

Background

[6] Uniquely, this trial proceeded on the basis that the only evidence placed before the learned magistrate was a List of Admissions pursuant to s.644 of the Criminal Code, which are as follows (trial exhibit 1):

1. *At all material times, the complainant was the defendant's ex-partner and an experienced serving police officer.*
2. *At all material times, the complainant and the defendant had separated but were living together at 8218, Magnolia Drive, Hope Island, Queensland.*
3. *At all material times, the complainant possessed a Samsung S7 mobile phone, which was the complainant's old mobile phone.*
4. *Between 4 May 2021 and 2 June 2021, the defendant accessed the complainant's WhatsApp and Facebook Messenger applications, accessing her information on her Samsung S7 mobile phone.*
5. *At the time that the defendant accessed the complainant's Samsung S7 mobile phone, the mobile was password-protected and the complainant had never provided the password to the defendant.*
6. *The complainant did not give permission to the defendant to access her Samsung S7 mobile phone in the way outlined above at paragraph [4].*
7. *The complainant did not consent to the defendant accessing her Samsung S7 mobile phone in the way outlined [D] above at paragraph [4].*

[7] At the conclusion of the prosecution case, the appellant made a "no case" application, which was dismissed. The appellant then chose to neither give nor call evidence, and after submissions, was convicted of the charge.

Discussion

Ground 1 - The learned magistrate erred in applying an improper construction of section 408E [Criminal Code] to the facts, namely, that the explanatory memorandum supported the conclusion that accessing WhatsApp and Facebook Messenger on a personal mobile phone was a "restricted computer" for the purpose of s.408E (Computer Hacking and Misuse).

- [8] The appellant's written submissions identify the argument with some particularity in respect of this ground, and are as follows:²

12. *The source of the error is:*

"I have come to that conclusion based on the fact that, and the greatest assistance I had was to the legislation was out of the explanatory notes that were handed to me. Essentially, the section that was created under section 408E(1) was indicated as:

A person who uses a restricted computer without the consent of the computer's controller commits a simple offence and is liable to imprisonment for two years..."³

13. *The error is that the learned magistrate did not find there was "ambiguity" or an "absurd result" or to otherwise confirm the "ordinary meaning" before having recourse to the explanatory memorandum [see s.14D(1) of the Acts Interpretation Act 1954]. It was noted that the explanatory note did not provide much guidance in any event [see transcript of hearing T1-6 ll 43-47; T1-14 ll 26-34].*

14. *Section 408E(5) defines (relevantly):*

"Computer means all or part of a computer, computer system or computer network and includes, for example, all external devices connected to the computer in any way or capable of communicating with each other as part of a system or network...

...restricted computer means a computer for which -

- (a) A device, code or a particular sequence of electronic impulses is necessary in order to gain access to or use the computer; and*
- (b) The controller –*
 - (i) Withholds or takes steps to withhold access to the device, or knowledge of the code or of the sequence or of the way of producing the code or the sequence, from other persons; or*
 - (ii) Restricts access or takes steps to restrict access to the device or knowledge of the code or of the sequence, or to the way of producing the sequence, to a person or a class of persons authorised by the controller..."*

15. *The appellant submits that the complainant's Samsung S7 mobile phone is not a "restricted computer" for the purpose of s.408E of the Code for the following reasons.*

16. *First, the text (see s.32A of the Acts Interpretation Act 1954; see also R v A2 [2019] 269 CLR 507 at [32] per Kiefel CJ and Keane J) of the definition of a*

² Appellant's Outline of Submissions [12]-[20].

³ Transcript of Decision 1-17 ll 10-16.

"computer" and a "restricted computer" indicate that the provision is directed at a "computer" connected to a "system" or "network" which is restricted by the "controller". In other words, the text of the provision indicates that the "computer" is connected to an intranet or some other similar infrastructure.

17. **Second**, the context [R v A2 [2019] 269 CLR 507, [33]] supports the construction that the provision is aimed at preventing access to confidential information that is contained on an information technology platform or infrastructure or an external device that is connected to a computer system or network on such a platform. That can be seen from other relevant definitions in subsection (5) include:

"Controller means a person who has a right to control the computer's use...

Use, of a restricted computer, includes accessing or altering any information stored in, or communicate information directly or indirectly to or from, the restricted computer, or cause a virus to become installed on or to otherwise affect, the computer" ...

18. And the other context that is relevant is that s.408E is within part 6 [section 14(1) of the Acts Interpretation Act 1954] of the Code dealing with "offences relating to property and contracts", division 2 "stealing and like offences". In particular, s 408E is found in Chapter 37 which is the part of the Code that deals with "offences analogous to stealing".

19. **Finally**, the heading [section 14(1) of the Acts Interpretation Act 1954] of s.408E also supports the construction. Section 408E is headed "Computer Hacking and Misuse". The inclusion of s.408E in this part of the Code with that particular heading provides additional support that the mischief [R v A2 [2019] 269 CLR 507, at [33] per Kiefel CJ and Keane J] is the unauthorised hacking of the files and other information on a computerised system.

20. In light of those reasons, the appellant submits that on a rehearing of the evidence, the appellant does not have a case to answer because the preferable construction is that for an offence to have been committed, the relevant device must involve the unauthorised access of data which is otherwise "connected to the computer in any way" or "capable of communicating with each other as part of a system or network".

[9] The Acts Interpretation Act s.14B(1) & (2) relevantly provides.

Use of intrinsic material and 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 provisions.*

(2) *In determining whether consideration should be given to extrinsic material, and in determining the weight to be given to extrinsic material, regard is to be had to*
-

(a) *The desirability of a provision being interpreted as having its ordinary meaning; and*

(b) *The undesirability of prolonging proceedings without compensating advantage; and*

(c) *Other relevant matters.*

[10] The explanatory memorandum relevantly provides (in respect of Criminal Code s.408D, subsequently renumbered s.408E):

The new section will contain three new offences. Firstly, a person who uses a restricted computer without the consent of the computer's controller commits a simple offence and is liable to imprisonment for two years. ... it is a defence to any of the charges to prove that the use of the restricted computer was authorised, justified, or excused by law.

[11] Admittedly, this text adds nothing to the wording of s.408E, other than to identify that it is a "simple offence", but with respect, there could be no error in the learned magistrate giving consideration to the explanatory memorandum:⁴

... to confirm the interpretation conveyed by the ordinary meaning of the provisions.

[12] The appellant's counsel, in my view, submitted for an interpretation of s.408E, essentially constraining the definition of "computer" to being a device which was connected in some way to a system or network, which strained the meaning of those words to the limits of credulity.

[13] In my view, the learned magistrate, in referencing the explanatory memorandum, did not fall into error and accordingly, this ground of appeal fails.

Ground 2: The learned magistrate erred in applying the wrong onus of proof to the facts, namely, impermissibly reversing the onus of proof.

⁴ *Acts Interpretation Act 1954 (Qld) s 14B(1)(c).*

- [14] This ground arises from a passage in the learned magistrate's reasons, at decision T1-19 LL 1-8, in these terms: -

It is only a defence for this charge to prove that the use of the restricted computer was authorised, justified, or excused by law. None of that evidence is before me. I am also asked to consider the fact that it can be implied that there is an explanation consistent with innocence. However, none of that evidence has been provided before me. The standard is a standard of being satisfied beyond reasonable doubt. That is not beyond all doubt, but it is beyond reasonable doubt. And without any other evidence before me, I find the defendant guilty of the charge.

- [15] It is submitted that the error was the learned magistrate referring to the absence of evidence from the appellant. It is uncontroversial that there is no obligation on a defendant in a criminal trial either to give or to call evidence. However, in the absence of any other evidence before the learned magistrate, other than the agreed facts, there was simply no evidence that could go to the issue of authority, justification, or excuse. I accept that the magistrate has used a poor choice of words in the sentence:

It is only a defence to this charge to prove that the use of the restricted computer was authorised, justified, or excused by law.

- [16] Because, of course, if there was evidentiary basis for that to be considered, it was for the prosecution to prove beyond reasonable doubt that the defence did not apply. However, there was no such evidence, and the unfortunate use of words by the learned magistrate does not in any way, in my view, establish error. Thus ground 2 must fail.

Ground 3: The learned magistrate erred in applying an improper construction of s.408E [Criminal Code] to the facts.

- [17] The appellant does not dispute that the Samsung mobile S7 phone was a computer - an appropriate concession in the light of the decision of *Commissioner of Australian Federal Police v Luppino* [2021] 388 ALR 603, [158] - [162] per Besanko J; [248] per Wigney J & Abraham JJ.
- [18] The applicant submits that the text of the definition of "computer" and "restricted computer" indicates that the provision is directed at a computer connected to a system or network restricted by the controller.

[19] With respect, such a submission must fail on a reading of the ordinary use of the language contained in the definition of computer in s.408E(5).

[20] Relevantly, the provision provides that:

Computer means all or part of a computer ...

[21] The words which then follow extend the definition to cover a "computer system" or a "computer network", and also, inclusively, covers:

All external devices connected to the computer in any way ...

[22] With respect, the definition of "computer" contained in that provision is not confined by whether or not that computer is part of a system or network. That of course, accords with commonsense - a computer may well operate completely and entirely divorced from any system or network connections but remains a computer, and the definition clearly contemplates that as an alternative aspect of a "computer".

[23] What then follows is that the complainant's mobile phone (ie, a computer) was password protected (trial exhibit 1, para 5), which was a code which enabled the "controller" (ie the complainant) to withhold access to the device (a computer).

[24] In circumstances where the agreed facts accept the defendant's access of a Samsung S7 mobile phone, without the complainant's permission or consent, all elements of the offence have been made out.

[25] Subject to the caveat that I indicated above, the learned magistrate correctly concluded that the defendant had no authorisation, justification, or excuse to access the complainant's mobile phone, given that, on the whole of the evidence, there was simply nothing to raise even the faintest possibility of such a defence. It became unnecessary for the prosecution to exclude it beyond reasonable doubt.

[26] It follows from this analysis that ground 3 must also fail.

Order.

[27] I make the following orders:

(1) Appeal

dismissed.

