

MAGISTRATES COURT OF QUEENSLAND

CITATION: *Queensland Police Service v Ahmed* [2023] QMC 2

PARTIES: QUEENSLAND POLICE SERVICE
v
HUMZA ALI AHMED

FILE NO: MAG-00116818/22(1)

COURT: Magistrates Court at Beenleigh

PROCEEDING: Criminal Trial

HEARING DATE: 2 December 2022

DELIVERED ON: 17 March 2023

MAGISTRATE: Magistrate P M Clohessy

ORDER: **Not Guilty**

CATCHWORDS: CRIMINAL LAW – s 205A Criminal Code – contravening order requiring access information from digital device – “reasonable excuse” – religious freedom relied upon as basis of reasonable excuse- application of *Human Rights Act 2019*

Criminal Code 1899 (Qld) s 205A

Police Powers and Responsibilities Act 2000 (Qld) s 154

Justices Act 1886 (Qld) ss 47, 48 and 76

Human Rights Act 2019 (Qld)

Pascoe v Nominal Defendant (Qld) No 2 [1964] QdR 373

Taikato v R (1996) 186 CLR 454

Commissioner of Police v Barbaro [2020] QCA 230

Chugg v Pacific Dunlop Limited (1990) 170 CLR 249

Callanan v Witness M (2017) 264 A Crim R 349

Innes v Electoral Commission of Queensland [No 2] [2020] QSC 293

Smeltz v Electoral Commission of Queensland (Unreported, Supreme Court of Queensland, Brown J, 27 October 2020)

Accoom v Pickering [2020] QSC 388

Dunlop v Body Corporate For Port Douglas Queenslander CTS 886 [2021] QSC 85

Harrison v President of the Industrial Court [2017] 1 Qd R 515

COUNSEL: Mr T Wise for the Queensland Police Service
 Mr A S McDougall (for the defendant) instructed by Cridland and Hua
 Lawyers

Introduction

- [1] The defendant was charged and proceeded to summary trial with an offence of contravening an order about device information from a digital device pursuant to s 205A of the *Criminal Code 1899 (Qld)* (Criminal Code). The charge read as follows:

That on the 11th day of July 2022 at Kuraby in the State of Queensland one Humza Ali AHMED contravened an order made under section 154(1) of the Police Powers and Responsibilities Act 2000

- [2] The alleged charge relates to a purported failure [without reasonable excuse] by the defendant to provide police with access information to his mobile telephone in accordance with an order to do so contained in a search warrant executed at his residence on 11 July 2022.
- [3] The case was conducted on the basis that the central question to be determined at trial was whether the defendant's adherence to religious beliefs, along with other circumstances of the case, amounted to a reasonable excuse for the defendant to not provide access information to his mobile telephone on the date charged.
- [4] In addition, given the submissions made on behalf of the defendant, the application of the *Human Rights Act 2019* (Human Rights Act) was raised for consideration.

Evidence at trial

- [5] Police executed a search warrant at the defendant's residence on 11 July 2022. The warrant was executed at about 9.20am.
- [6] The warrant contained an order for the provision of access information to any digital device located in the defendant's possession, or to which he had access, pursuant to s 154 of the *Police Powers and Responsibilities Act 2000 (Qld)* (PPRA). The Statement to Occupier which accompanied the search warrant, in accordance with the requirement contained in s 158 of the PPRA, notably did not have the box checked which would have indicated that the warrant empowered the police to require access information to digital devices. This was conceded by the prosecution to have been an oversight by the investigating officers.
- [7] Under the terms of the warrant, the time allowed for compliance with the order for disclosure of access information was by midnight on the day that the warrant was executed. The execution of the search was captured on police body worn camera (BWC) footage which was tendered to the court and two of the officers present for the search also gave evidence.
- [8] At the time of the execution of the search warrant, up to ten people were present at the defendant's residence including four male adults, five women and an unknown number of children. Some of the adults within the residence indicated that they were visitors to the property.
- [9] The defendant claims to be a devout follower of the Islamic faith and the BWC footage of the conduct of the search at the defendant's residence is entirely consistent with that claim.
- [10] From viewing the BWC footage it appeared that all of the women present were wearing traditional Islamic attire including hijab headscarves.

- [11] At the outset, the investigating police appeared to demonstrate some awareness and respect of matters concerning the defendant's Islamic faith. For example, prior to entering the house, the police allowed the women inside the house to put their hijabs on before the male officers entered. A number of Qur'ans and prayer mats were also located within the dwelling. The police officers did not personally touch the religious items and further asked to be advised of any other items within the house of religious significance that they ought be aware of. In relation to the Qur'ans located, rather than touch the items themselves, police requested that the defendant leaf through the pages to show them, which the defendant did after washing his hands (described to police as a process of ablution).
- [12] During the search, the defendant identified his mobile telephone to police which was the only digital device seized.
- [13] The defendant was asked if he wished to provide access to the phone and he responded "no". Rather than being asked if he had a reasonable excuse to decline access, the defendant was asked if he had a "lawful" reason to not provide the PIN access to the phone.
- [14] The defendant was then issued with a notice to appear with respect to the s 205A charge before the court. The defendant was charged with the s 205A offence notwithstanding the terms of the order contained in the search warrant allowed until midnight for compliance.
- [15] Later that day, police returned to the defendant's residence and recorded a further conversation with the defendant. The apparent reason this was done was because the investigating police had initially neglected to issue a caution to the defendant prior to questioning. They attempted to cure this by returning to the property to provide him with the cautions required by the PPRA.
- [16] The defendant indicated that he would like to speak to his lawyer and that he wanted his lawyer present for questioning. Despite this, the questioning continued and the defendant confirmed to police that the reason he didn't provide them with the access information to his phone was because there were "personal things" contained on the phone.
- [17] Despite the order requiring disclosure of the access information, the officer then responded to the defendant that it was "totally within your right to not provide that password".
- [18] Perhaps with a view to confirming whether there was any information likely the subject of legal professional privilege on the phone, as with the case of *Barbaro*¹, the male officer then sought to clarify that there were no "legal" things on the phone just "personal things".
- [19] The defendant then replied "I wouldn't have a clue what you are looking for" and then offered "if there is something specific by all means go through the phone". The police did not take up that opportunity to attempt to advance the matter any further and left the residence for a second time.
- [20] The defendant gave evidence that the subject mobile telephone contained photographs of his wife without wearing a hijab and type written communications between them, the disclosure of which to unrelated males would be against his genuine religious beliefs.
- [21] The defendant further gave evidence to confirm his Islamic faith was genuinely held and the doctrines he adhered to included that it would offend his faith were his wife to appear in person or by photograph "uncovered" ie. without wearing a hijab to men who were not related to her. The defendant also gave evidence that this was the reason that he did not provide the access information to his phone to the male officers. The defendant indicated that it would not

¹ *Commissioner of Police v Barbaro* [2020] QCA 230

offend his faith were a woman to see his wife uncovered so that had arrangements been made for a female police officer to examine the phone this would not have contravened his religious beliefs.

- [22] The defendant accepted that at the time he only told police there were “personal things” on the phone and that he did not tell the police all of the specific details of his reason not to comply with the order. He gave evidence that this was because he wanted to discuss it with his lawyer first and that that he also felt that the police would have charged him regardless of what he said as he did not feel like they were listening to him when he kept asking to speak to his lawyer.
- [23] Defence also called evidence from the Imam from the Holland Park Mosque who has attained a Masters in Islamic Studies to give expert evidence about tenets of the Islamic faith relevant to the present matter. The Imam gave evidence to the effect that in his opinion the covering of the head of a woman was required by Islamic faith and that the covering of the face is optional. He further gave evidence that the head covering was only required before men, apart from her husband, that she is legally entitled to marry. There is no requirement to cover in the presence of other women. The Imam further opined that it would offend the faith to expose photographs of a person’s wife not wearing a hijab to other men apart from close male relatives. The Imam further noted that some women choose not to wear the hijab which is their choice but that if a woman does choose to wear the hijab, showing a photograph with her head uncovered to other men would offend their religious beliefs and be considered a sin. The Imam stated that exposure of intimate communications between man and wife to other men would likewise be unacceptable and not permitted by a devout follower of the Islamic faith.
- [24] The Imam gave evidence that in the context of a police investigation, it would be acceptable for a female police officer to view such photographs and communications.
- [25] Much of this evidence was not challenged. The matter was litigated such that the question raised is whether, in all of the circumstances, the defendant held a reasonable excuse to resist disclosure of the access information.

Submissions of parties

- [26] The defendant submitted that he is not guilty on the basis that he had a reasonable excuse for contravening the order. The defence also argued that the prosecution bore the onus of proof in all respects including negating the existence of a reasonable excuse.
- [27] The defendant further claimed a reasonable excuse as compliance with the order in the present circumstances would have impermissibly prejudiced his religious freedom contrary to the Human Rights Act.
- [28] The defendant placed reliance upon s 48 of the Human Rights Act to interpret the meaning of “reasonable excuse”. The defendant further submitted that the police were required to act compatibly with human rights. In the present case, this would have included making appropriate accommodations to the execution of the search warrant so as not to needlessly infringe upon the religious and cultural sensitivities of the defendant.
- [29] In addition, the defendant submitted that the fact the investigating police officer had incorrectly told the defendant that he had every right not to provide the passcode to the phone was also sufficient to successfully raise a reasonable excuse not to provide the access information, as the defendant was entitled to rely upon this statement made by police.
- [30] The prosecution submitted to the effect that I would be satisfied that the manner of the execution of the order for digital device access information was “compatible with human

rights” applying the proportionality test contained in s 13 of the Human Rights Act. The prosecution further submitted that the defendant bore the onus of proof with respect to establishing a reasonable excuse and further noted that the defendant did not tell police at the time that the reason he did not disclose the passcode to his phone was because it would offend his faith by allowing access to photographs of his wife and intimate communications contained within it. The prosecutor conceded that the police were somewhat “sloppy” in the way they approached the questioning in relation to the s 205A charge given that they initially failed to provide required warnings and that they didn’t explore some of the responses provided by the defendant, nor did they provide him with the opportunity to speak with his lawyer when requested. The prosecutor also conceded that given the phone was secured, and that the time for compliance with the order was until midnight, that there was ample time for police to make further enquiries as to the reasons for denying access including allowing the defendant the opportunity to speak to his lawyer before they took the step of charging the defendant.

Consideration

[31] Matters raised for consideration in the present case are as follows:

- Whether the religious beliefs of the defendant and the statements made by the attending police to the defendant raise a reasonable excuse to refuse to provide access to the contents of the phone. Further, which party bears the onus of proof with respect to “reasonable excuse.”
- Whether the interpretative provision contained in s 48 of the Human Rights Act has application to assist to determine the meaning of the term “reasonable excuse” and whether the Act otherwise has any impact upon the scope and application of the term.
- Whether police are obliged to give proper consideration to, and act compatibly with human rights under the Human Rights Act when executing warrants and orders and when making decisions to charge for failing to comply with digital device access orders.

[32] Section 154(1) of the PPRA provides that a magistrate who issues a search warrant may order a “specified person” to “give a police officer access to ... the access information ... necessary for the police officer to be able to use the storage device to gain access to stored information that is accessible only by using the access information.”

[33] Section 205A of the Criminal Code makes it an offence for a person to contravene an order made under s 154(1) of the PPRA.

Reasonable Excuse

[34] An offence against s 205 A of the Criminal Code will not be committed if the person charged has a “reasonable excuse” for non-compliance with an order to disclose access information concerning a digital device.

[35] The term “reasonable excuse” is commonly employed in legislation and bears its plain meaning. In *Pascoe v Nominal Defendant* (Qld) No 2, it was stated that the term means “a cause which a reasonable man would regard as an excuse.”²

[36] It was observed in *Ganin v New South Wales Crime Commission* that:

There is no apparent reason to read down exemptions for ‘reasonable excuse’...On the contrary, there is every reason to give the words their ordinary construction. They simply ask whether the refusal to answer the question was ‘without reasonable

² [1964] QdR 373 at 378 per Mansfield CJ

excuse'...In accordance with orthodox canons of construction these words would not be given a narrow meaning. They appear in a provision which imposes a criminal sanction for its breach.³

- [37] In *Taikato v R*⁴ it was noted that “what is a reasonable excuse depends not only on the circumstances of the individual case but also on the purpose of the provision to which the defence of “reasonable excuse” is an exception.”
- [38] In *Commissioner of Police v Barbaro*, Sofronoff P conveniently distilled from those general principles, the following three requirements in order that “reasonable excuse” be made out:

Three things can be said about the expression “reasonable excuse”. First, the word “reasonable” connotes that the excuse must be objectively reasonable. Second, whether something is “reasonable” will depend not only upon the particular facts of the case but also upon the statutory context in which the word appears. Third, although it need not be the only reason, the asserted reasonable excuse must actually be a person’s reason for withholding the access information.⁵

Onus of proof

- [39] It is uncontroversial that in order to convict the defendant of the alleged offence, the court must be satisfied beyond reasonable doubt that the charge has been proved.
- [40] With respect to the reasonable excuse element contained within the charge, there is a question as to the onus of proof.
- [41] The prosecution submitted, in reliance on s 76 of the *Justices Act 1886* (Qld) (Justices Act), that the defendant bore the onus of proving that he had a reasonable excuse for not complying with the order to disclose access information.
- [42] The defence submitted that the prosecution was required to negative any reasonable excuse raised on the evidence beyond reasonable doubt.
- [43] The question as to who bears the onus of proof rests on the legislative intention as discerned by its text, context and purpose.⁶
- [44] In *Chugg v Pacific Dunlop Limited*, the reasons of the majority contain the following statement of principle:

... if a matter accompanies the description of an offence, then it will ordinarily be construed as an element of the offence which the prosecution must prove, unless there is something in the form of the language used or in the nature of the subject matter to suggest that it is an exception upon which the defendant bears the onus of proof.

Although the form of language may provide assistance, ultimately the question whether some particular matter is a matter of exception is to be determined “upon considerations of substance and not of form”... One indication that a matter may be a matter of exception rather than part of the statement of a general rule is that it sets up some new or different matter from the subject matter of the rule. ... If the new matter is peculiarly within the knowledge of the defendant, then that may provide a strong

³ (1993) 32 NSWLR 423 at 436 by Kirby P

⁴ (1996) 186 CLR 454

⁵ [2020] QCA 230 at [11]

⁶ *Callanan v Witness M* (2017) 264 A Crim R 349 at [31]

indication that it is a matter of exception upon which the defendant bears the onus of proof.⁷

- [45] Consistent with this common law principle, s 76 of the Justices Act provides the following:

76 Proof of negative etc.

If the complaint in any case of a simple offence or breach of duty negatives any exemption, exception, proviso, or condition, contained in the Act on which the same is framed, it shall not be necessary for the complainant to prove such negative, but the defendant shall be called upon to prove the affirmative thereof in the defendant's defence.

- [46] On its terms, s 76 is confined to simple offences and breaches of duty. The subject charge is an indictable offence, however, the Justices Act defines simple offences as including indictable offences which are dealt with summarily, so the provision is capable of application.

- [47] One question to be determined is whether "without reasonable excuse" in the context of s 205A is an element of the charge required to be negated beyond reasonable doubt by the prosecution, or whether it is an exception to the general rule required to be proved by the defendant who wishes to rely upon it.

- [48] Section 205A provides as follows:

205A Contravening order about device information from digital device

(1) A person who, without reasonable excuse, contravenes—

(a) an order made under the Police Powers and Responsibilities Act 2000 , section 154 (1) or (2) , 154A (2) or 178A (1) ; or

(b) an order made under the Crime and Corruption Act 2001 , section 88A (1) or (2) or 88B (2) ;

commits a crime.

Penalty—

Maximum penalty—5 years imprisonment.

(2) It is not a reasonable excuse to contravene the order on the basis that complying with the order might tend to incriminate the person or expose the person to a penalty.

- [49] It may be immediately observed that the phrase "without reasonable excuse" is incorporated into the charge itself, immediately preceding the description of the obligation to comply with the prescribed orders. It is not set apart from the elements forming the basis of contravention or contained elsewhere in the legislation separate to the provision itself. This suggests that the legislative intent was to incorporate the requirement that the contravention be "without reasonable excuse" as an element of the offence.

- [50] This is supported by reference to the relevant explanatory notes which inserted the phrase "without reasonable excuse" into the offence provision. The notes provide that the

⁷ (1990)170 CLR 249 at 257

amendment was designed to “incorporate the ‘without reasonable excuse’ element into the offence provision” rather than reliance upon the defence in section 154A of the PPRA.⁸

- [51] Further, I note that in the relevant statutory context within the Criminal Code, that s 205A immediately follows s 205 (Disobedience to lawful order issued by statutory authority). Section 205 contains provision for a “lawful excuse” and clearly states that “the proof of which lies on the person.”
- [52] One would expect that, with respect to s 205A, had the legislature intended that the onus of proof lie with the person relying upon the reasonable excuse, that similar wording would be employed.
- [53] For those reasons, I am inclined to the view that “without reasonable excuse” within the context of s 205A was intended by the legislature to be treated as an element of the offence to be negated by the prosecution beyond reasonable doubt once a reasonable excuse is raised upon the evidence.
- [54] I am fortified in that view by the provisional opinion to this effect expressed by His Honour Judge Kent KC DCJ in *Barbaro v Queensland Police Service*.⁹

Amendment of charge

- [55] Having formed the view that “without reasonable excuse” is an element of the charge, it is also apparent that the charge presented before the court was deficient as it did not include the words “without reasonable excuse”.
- [56] This omission was raised at the conclusion of the evidence and the prosecution conceded that this was by oversight. Section 47 of the Justices Act requires a sufficient description of the offence charged and that the description in the words of the legislation creating the offence shall be sufficient in law. This would require including all of the elements of the subject charge.¹⁰
- [57] The court is empowered pursuant to section 48 of the Justices Act to amend the complaint to cure this defect in the charge providing the court is satisfied that it is necessary and desirable in the interests of justice for it to do so. Given that the jurisdiction of the court to hear and determine the charge is dependent upon a valid complaint I am satisfied that an amendment of the charge is necessary.
- [58] I am further satisfied that such an amendment is in the interests of justice as the conduct of the matter was informed by, and in accordance with the wording of the provision itself. I do not consider that defence is prejudiced by such an amendment in those circumstances.
- [59] Accordingly, the charge, as amended, reads as follows:

That on the 11th day of July 2022 at Kuraby in the State of Queensland one Humza Ali AHMED, without reasonable excuse, contravened an order made under section 154(1) of the Police Powers and Responsibilities Act 2000

⁸ *Police Powers and Responsibilities and Other Legislation Amendment Bill 2019* — Explanatory Note at pages 11, 27 and 28.

⁹ [2020] QDC 39 at [29]

¹⁰ *Harrison v President of the Industrial Court* [2017] 1 Qd R 515

Human Rights Act

- [60] The Human Rights Act does not give the human rights set out within it any free-standing operation.
- [61] Instead, the Human Rights Act states the human rights Parliament specifically seeks to protect and promote, and then sets out detailed operative provisions by which those rights are to be protected and promoted.¹¹
- [62] One of the operative provisions contained in the Human Rights Act is the interpretive clause in s 48 which requires that all statutory provisions be interpreted compatibly with human rights, to the extent possible that is consistent with their purpose. Section 48 provides:

48 Interpretation

- (1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.
 - (2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.
 - (3) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
 - (4) This section does not affect the validity of—
 - (a) an Act or provision of an Act that is not compatible with human rights; or
 - (b) a statutory instrument or provision of a statutory instrument that is not compatible with human rights and is empowered to be so by the Act under which it is made.
 - (5) This section does not apply to a statutory provision the subject of an override declaration that is in force.
- [63] The definition of “compatible with human rights” in s 8 makes clear that a proportionality analysis under s 13 of the Human Rights Act is relevant to the interpretative task outlined in s 48.
- [64] That proportionality analysis will only be necessary if an issue concerning statutory interpretation properly arises for consideration.
- [65] Section 48(1) and (2) only allows a court to adopt a human rights compatible interpretation, if that interpretation would also be ‘consistent with the statutory provision’s purpose’.
- [66] It follows that if the meaning of a statutory provision is clear, there will only be one way of reading it ‘consistent with its purpose’.

¹¹ Section 4 *Human Rights Act 2019*

- [67] Therefore, unless there is ambiguity, s 48 has no work to do. There is some authority in this jurisdiction accepting the existence of ambiguity as a threshold enquiry for the potential application of s 48.¹²
- [68] As previously discussed in the authorities above, the term “reasonable excuse” is one which is well known to the criminal law and it bears its ordinary meaning.
- [69] The meaning of the term itself does not seem to me to be ambiguous in this statutory context. It is a deliberately wide term so as to allow the potential application of it to variety of circumstances.
- [70] The real question in this case is not about the meaning of the term “reasonable excuse” but the application of it and whether the circumstances of this case amount to a reasonable excuse.
- [71] In those circumstances, where there is no real argument about the proper interpretation of “reasonable excuse” but rather, whether the circumstances amount to a reasonable excuse, s 48 of the Human Rights Act does not appear to have any operative impact to resolving the issue at hand, though I accept that if it did it may perhaps act to bolster the outcome.
- [72] In addition to the interpretive clause, one of the central ways that the Human Rights Act protects and promotes human rights is by requiring “public entities” to act and make decisions in a way that is compatible with human rights (s 4(b)).
- [73] Among the human rights encapsulated in the Human Rights Act is the freedom of thought, conscience, religion and belief (s 20) and cultural rights generally (s 27). Of further potential relevance to the execution of search warrants and orders are the protection of property rights (s 24) and the protection of privacy and reputation (s 25). The Human Rights Act recognises that the notion of compatibility with human rights includes reasonable and demonstrably justifiable limitations on those rights (s 8).
- [74] Section 13(2) of the Human Rights Act outlines the following relevant factors to consider whether a limitation on a human right is reasonable and justifiable.
- (a) the nature of the human right;
 - (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
 - (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
 - (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
 - (e) the importance of the purpose of the limitation;
 - (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;

¹² *Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293, [256] (Ryan J); *Smeltz v Electoral Commission of Queensland* (Unreported, Supreme Court of Queensland, Brown J, 27 October 2020) p 5, lines 29-38; *Accoom v Pickering* [2020] QSC 388, p 4 (Henry J); *Dunlop v Body Corporate For Port Douglas Queenslander CTS 886* [2021] QSC 85, [68] (Henry J).

(g) the balance between the matters mentioned in paragraphs (e) and (f).

- [75] Section 58 of the Human Rights Act is a further operative provision which makes it unlawful for a public entity to act or make a decision in a way that is not compatible with human rights, or in making a decision, fail to give proper consideration to a human right relevant to the decision.
- [76] The Queensland Police Service is a public entity for the purpose of the Human Rights Act (s 9(1)(c)). In the present case, there was no challenge to the admissibility of any of the prosecution evidence so that the question of unlawfulness of the police actions in the present case has not been raised or relied upon. Therefore, s 58 has no direct application to the triable issues.
- [77] In saying that, the fact that Queensland is now a human rights jurisdiction where police are legislatively obliged to both, properly consider human rights, and act in a manner which is compatible with human rights, does however, form part of the factual matrix of the case at hand. It may then be relevant to some degree to inform the issue as to whether the defendant had a reasonable excuse to refuse to hand over access information to his phone.
- [78] In my view, the obligations imposed upon police by the Human Rights Act to give proper consideration to, and act compatibly with, human rights extends to the manner of execution of search warrants and to the decision to charge with a s 205A offence. In relation to matters involving potential charges pursuant to s 205A, it is incumbent upon investigating police to continue to bear in mind those obligations.
- [79] If it were the case that the police failed to comply with their obligations to either, properly consider, or to act compatibly with human rights, then this may give rise to or bolster the reasonable excuse to withhold information in compliance with the order.

Conclusion

- [80] In the present case, the fact that the defendant genuinely held a religious belief that it would offend his faith to expose photographs of his wife to the male police officers by providing them with the passcode to his phone was not challenged. Nor was it challenged that this was his primary reason for declining to provide his passcode to police on the date in question. At most, it was argued that he did not specifically tell this to police at the time. The determination as to whether the defendant held a reasonable excuse to resist disclosure of the access information does not though depend upon him informing police at the time but depends upon the evidence provided at trial.
- [81] Having had the benefit of hearing and assessing his evidence, I am satisfied that the defendant genuinely held those beliefs and that this was the primary reason that he declined to provide the access information to police. I note that what he did say to police at the time, ie. that the phone contained “personal things” was not inconsistent with the evidence he gave at trial. I am further satisfied that the statements made to the defendant to the effect that he “had every right not to provide the passcode” was apt to mislead the defendant as to his obligations pursuant to the disclosure order contained within the search warrant. This was compounded by the fact that the Statement to Occupier which was provided, and which was meant to outline to him the rights and obligations under the accompanying search warrant, did not indicate on its face that the warrant included an order for the disclosure of access information to subject digital devices.

- [82] In order to successfully be raised, I further need to be satisfied that the reasonable excuse proffered at trial is objectively reasonable having regard to the facts and statutory context.
- [83] The statutory context for s 205A contraventions involves a consideration of the public interest in the efficient and effective conduct of criminal investigations. This strong public interest however, must not needlessly overwhelm the adverse impact on individuals. An assessment is needed of the circumstances in each case to balance the desirability of orders being enforced to assist police investigations, as against the infringement of individual rights, for conduct, which viewed objectively, may reasonably justify excusal from criminal liability for non-compliance. This is particularly so when a custodial sentence may follow a contravention.
- [84] I am satisfied that the circumstances objectively raised a reasonable excuse, particularly when regard is had to the fact that the investigating police were obliged to give proper consideration to, and act compatibly with, human rights in the manner of the execution of the search warrant and in making the decision to charge the defendant. I note that the act of charging occurred prior to the time allowed for compliance that was stated in the order and without providing him the opportunity to speak to a lawyer.
- [85] In the recordings played before the court, the defendant appeared to be largely co-operative and the police did not take up his offer to go through his phone nor did they enquire whether he had a reasonable excuse for not disclosing the access information. The police only enquired if he had a lawful excuse, then denied him the opportunity to speak to his lawyer. In those circumstances, it is perhaps not unsurprising that the reason for the non-disclosure, as was put at trial, was not put to the investigating police. If it had been, then potentially arrangements may have been made to obtain the sought information in a manner which would not have unnecessarily infringed the defendant's religious beliefs. For example, perhaps a female police officer could have accessed the phone. From the footage, it appeared that one was present at the scene. I note that during the execution of the search warrant, the police did take some care to respect the religious and cultural beliefs of the defendant in the manner in which the search was conducted. It is unfortunate that the same degree of care was not able to be taken in relation to the imposition of the s 205A charge.
- [86] For these reasons, I am satisfied that the defendant held a reasonable excuse for contravening the disclosure order made pursuant to s 154 of the PPRA.
- [87] While I have taken the view that once raised, the prosecution bears the onus of proof to negative a reasonable excuse for the purpose of a charge under s 205A, if I am wrong about that, in the present case, I would have also been so satisfied had the onus of proof rested with the defendant.
- [88] Similarly to the observations made by the Court of Appeal at [19] in the s 205A case of *Commissioner of Police v Barbaro*,¹³ which concerned the desire to protect information protected by legal professional privilege, it will of course not be every case where adherence to religious observances will amount to a reasonable excuse to avoid the requirement to provide access information to a digital device pursuant to an order for the purpose of a criminal investigation. As always, much will depend upon the specific circumstances in each individual case. In the present case, it is the constellation of features set out above, which, taken together, gives rise to a reasonable excuse resulting in a finding of not guilty.

Order

- [89] The defendant is found Not Guilty – the charge is dismissed and the defendant discharged.

¹³ [2020] QCA 230