SUPREME COURT OF QUEENSLAND

CITATION:	*Commissioner of Police v Flanagan* [2018] QCA 109
PARTIES:	**COMMISSIONER OF POLICE** **(applicant)** **v** **FLANAGAN, Stephen Patrick** **(respondent)**
FILE NO/S:	CA No 156 of 2017 DC No 139 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 21 June 2017 (Ryrie DCJ)
DELIVERED ON:	5 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	19 February 2018
JUDGES:	Philippides and McMurdo JJA and Boddice J
ORDERS:	**1. Grant leave to appeal.** **2. Allow the appeal.** **3. Set aside the orders of the District Court allowing the appeal and instead order that the appeal to the District Court be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL – MISCARRIAGE OF JUSTICE – where the respondent was convicted by a Magistrate of the offences of common assault pursuant to s 335 of the *Criminal Code* (Qld) and deprivation of liberty pursuant to s 355 of the *Criminal Code* (Qld) – where the offences arose as a result of the respondent's conduct while he was on duty as a police officer – where the respondent sought to be excused from criminal responsibility by relying on the defence pursuant to s 24 of the *Criminal Code* that he had an honest and reasonable but mistaken belief – where the Magistrate found the prosecution disproved the respondent acted on an honest and reasonable but mistaken belief – where the respondent appealed against his convictions to the District Court – where the District

Court judge overturned the convictions on the basis the trial had miscarried because the magistrate failed to determine whether the respondent was lawfully exercising a power under the *Police Powers and Responsibilities Act* 2000 (Qld) – where the applicant seeks leave from the Court of Appeal to appeal against the District Court judge's decision – whether the District Court judge erred by concluding it was necessary for the prosecution to prove the force used in assaulting and detaining the complainant was more than reasonably necessary to deal with the offence – whether the District Court judge erred in acting contrary to s 223(1) of the *Justices Act* 1866 (Qld) by not conducting the appeal as a rehearing

Criminal Code (Qld), s 24, s 335, s 355
District Court Act of Queensland Act 1967 (Qld), s 119(2)(b)
Justices Act 1886 (Qld), s 223
Police Powers and Responsibilities Act 2000 (Qld), s 5, s 29, s 30, s 31, s 52, s 60, s 615

George v Rockett (1990) 170 CLR 104; [1990] HCA 26, cited
Johnson v Police [2017] SASC 87, cited
McDonald v Queensland Police Service [2017] QCA 255, considered
Pickering v McArthur [2005] QCA 294, cited
R v Mrzljak [2005] 1 Qd R 308; [2004] QCA 420, cited
Whitelaw v O'Sullivan [2010] QCA 366, considered

COUNSEL: G P Cash QC for the applicant
J Hunter QC for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the applicant
Queensland Police Union Legal Group for the respondent

[1] **PHILIPPIDES JA:**

Background

[2] The respondent, a police officer, was convicted by a magistrate of a charge of unlawfully assaulting the complainant, Mr Lee Povey, pursuant to s 335 of the *Criminal Code* (Qld) (the Code) and a charge of unlawfully depriving him of his personal liberty pursuant to s 355 of the Code.

[3] The charges concerned an incident on 5 May 2015, when the respondent was performing duties as a police officer and stopped Mr Povey, who was travelling along the Landsborough Highway near Longreach. The assault was particularised[1] as being constituted by the respondent pointing his firearm at Mr Povey, threatening him

[1] AB at 143.

with the firearm, pressing it into Mr Povey's back, or a combination of these things. The offence of deprivation of liberty was constituted by demanding or requiring Mr Povey to leave his car, move as directed by the respondent or remain as directed by the respondent, restraining Mr Povey against his car, handcuffing him, or a combination of these things.

[4] The central issue before the magistrate concerned the defence under s 24 of the Code. The magistrate found that the prosecution had disproved that the respondent acted on the basis of an honest and reasonable but mistaken belief that Mr Povey was driving a stolen vehicle and that he was in possession of a firearm and further that the respondent was guilty of the offences.

[5] The respondent appealed against his convictions to the District Court on the basis that the magistrate misdirected himself by not considering whether the respondent's acts were lawful by virtue of the *Police Powers and Responsibilities Act* 2000 (Qld) (the PPRA). Ryrie DCJ (the primary judge) allowed the appeal, set aside the convictions and remitted the matter to the Magistrates Court for rehearing by another magistrate. Her Honour held that the trial had miscarried because the magistrate failed to determine whether the respondent was lawfully exercising a power under the PPRA. That determination concerned whether the respondent had a reasonable suspicion (rather than a reasonable belief) that Mr Povey was driving a stolen vehicle or had a firearm, so as to give rise to powers under the PPRA and, if so, whether the force used by the respondent was reasonably necessary for the purposes of s 615 of the PPRA.[2]

[6] The applicant seeks leave to appeal against the primary judge's decision on the grounds that:

1. the primary judge erred in law in concluding that it was necessary for the prosecution to prove, beyond reasonable doubt, that the force used in assaulting and detaining Mr Povey was more than was reasonably necessary to deal with the offence or offences the respondent reasonably suspected had been or would be committed; and

2. the primary judge erred in acting contrary to s 223(1) of the *Justices Act* 1886 (Qld) (the JA), in that her Honour failed to conduct the appeal as a rehearing, to make her own assessment of the evidence and to form her own conclusions upon the issue of the respondent's guilt.

The Magistrates Court proceedings

The evidence

[7] On the morning of 5 May 2015, Mr Povey was driving his Holden Colorado dual cab utility from Caboolture to his home in Mount Isa. He was travelling with his fiancée, Anna Cruise, who was in the front passenger seat.

[8] Mr Povey's evidence was that about 10 kilometres east of Longreach, he saw a marked police car following behind. The emergency lights and siren of the police car were not activated. He slowed down but was confused. As he saw no

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2 AB at 184.24-184.29.

emergency lights and heard no sirens, he thought perhaps the police car was escorting a wide load. The police car pulled alongside Mr Povey's car on the right. Mr Povey said he saw the respondent police officer pointing angrily to the left side of the road while seemingly shouting. Mr Povey gave evidence that he pulled over to the left when he considered it safe to do so, having regard to what he perceived to be a drop off on the side of the road.[3] After he stopped, Mr Povey reached into the area of the centre console of the car to retrieve his wallet and drivers licence. He said he saw the respondent get out of the police car with his gun drawn and head towards Mr Povey's car with the gun pointed at him. Mr Povey's evidence was that, as the respondent approached, he said, "you know what the fuck this is. Do you know I can put a fucking hole in you with this?"[4] The respondent told Mr Povey to get out of the car and, as Mr Povey opened the door and started to get out, the respondent spun Mr Povey around against the car and put him in handcuffs. As he applied the handcuffs, the respondent told Mr Povey that he had the gun pressed in Mr Povey's back.[5] Mr Povey heard something drop to the ground, which he later saw to be a magazine from the gun.[6]

[9] Ms Cruise gave an account that was substantially similar to that of Mr Povey.[7] She also recorded the latter part of the events on her mobile telephone, the audio recording of which was tendered. It was not disputed that the recording seemed to show the respondent swearing angrily at Mr Povey after he was handcuffed.[8]

[10] The respondent also gave evidence. At the time of the incident, he was a Senior Constable with just over 25 years' experience.[9] His evidence was that he commenced patrols at around 6.00 am on the day in question and was driving east toward Ilfracombe when he saw Mr Povey's speeding car heading west. He decided to intercept Mr Povey. The respondent said he turned on the switch to activate his lights and siren. He said he did not realise until later that they were not working and claimed to have sounded his horn in order to change the tone of the siren.[10] Mr Povey continued for some distance before stopping. According to the respondent, there were a couple of culverts where drains run under the highway. However, the respondent stated that "for a vehicle as capable [as Mr Povey's], there's no impediment for it really to pull off the side of the road… [e]specially once it had slowed down … the speed had reduced quite a bit"[11] and he "could see no reason why the vehicle wouldn't pull over".[12] The respondent "thought – it was confirming to

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3 AB at 13-15.

4 AB at 17.37-17.38.

5 AB at 19.15-19.20.

6 AB at 19.30-19.45.

7 AB at 35-37.

8 Applicant's submissions at [9] which was not contested.

9 AB at 65.6-65.13.

10 AB at 69.30-69.38. There was evidence that the lights and siren were faulty and not working: AB at 43-44.

11 AB at 69.43-70.1.

12 AB at 70.45.

[him] that [he] had a serious matter here, that the car may be stolen, that there may be other offences" and his "risk assessment was … getting higher and higher as the vehicle continued on".[13] He "called up on the radio thinking that [he] was going to have to do an evade"[14] (meaning not chase the vehicle but just call in the details). However, while he was waiting for the operator to get back to him, the indicator on Mr Povey's car came on. He thought the car was going to stop but it continued for a distance before stopping.

[11] The respondent gave evidence that, at the time Mr Povey stopped, his assessment was the stop of Mr Povey as "definitely a high risk stop".[15] In that regard, the respondent said risks were assessed as unknown risk and high risk.[16] He had been in high risk situations before. When doing vehicle "intercepts" he had previously found "Weapons ... stolen vehicles, drugs, found people who were involved and wanted on other offences... Many times".[17] He was also aware that the Landsborough Highway had a reputation for being a conduit for drugs and stolen guns and he had, some weeks before, located a "pipe gun" during a traffic stop.[18]

[12] The respondent gave evidence that he stopped his own car beside Mr Povey's car because he thought that was the best opportunity to keep an eye on the occupants. He could just make out two people in the car through the tinted windows. He said he saw movement toward the centre of the car and thought the person may have been reaching for a weapon. He gave the following evidence:[19]

> "When I've got out of the car and [had] been able to see across into their car, the movement by the people in the car was – I couldn't see their hands and looking down and away. Now, at that stage, … I thought I've got a stolen car. I'm considering the common occurrence where we get warnings for stolen dual cab utes and then property is being – break and enters of properties where weapons have been stolen. And I'm thinking I've got one of those. That, again has heightened my risk assessment. … And with that movement where I couldn't see their hands, I thought that I was dealing with someone who was going for a weapon. … I couldn't tell exactly what they were doing, but it was down and … towards the centre of the car, like someone searching for something. … my risk assessment at that point has just absolutely gone through the roof. I thought I've got something really serious here, so I've gone to the use of force that is – was most appropriate at that stage."

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13 AB at 71.1-71.5.

14 AB at 71.5-71.6.

15 AB at 66.41.

16 Senior Sergeant Hayden also gave evidence that police officers were instructed to that effect: AB at 55.27.

17 AB at 67.35-67.38.

18 AB at 68.10-68.16.

19 AB at 71.34-72.8.

[13] The respondent later that day completed a use of force report as to the production of his gun and the use of handcuffs which was tendered. A dash camera in the respondent's police car recorded some of the events in question, including the respondent pointing his gun in the direction of the complainant. The recording (some six minutes long) was also tendered as evidence as was a recording of the radio transmission between the respondent and Police Communications.

[14] Senior Sergeant Hayden, of the operational skills section of the Police Academy at Oxley, gave evidence of instructions to police on the use of force and as to risk factors, which was summarised by the magistrate in his reasons as follows:[20]

> "… firearms are not to be used unless there are good and sufficient reasons and justified under law, where there is high probability of death or grievous bodily harm. And the use of handcuffs are only to be considered for good and sufficient reasons, … justified by law, and when reasonably necessary … the factors an officer would take into account when making a risk assessment, particularly when intercepting a vehicle [included] … the behaviour of the vehicle, a failure to stop, what is known about the subject, the behaviour of visible occupants of the vehicle."

The magistrate's determination of criminal liability

[15] Before the magistrate, reference was made to various powers under the PPRA. The magistrate accepted the prosecution submission that s 60 of the PPRA was not engaged beyond being a source of power for stopping Mr Povey's vehicle (on the basis of speeding). The magistrate referred also to s 52 of the PPRA as providing the source of the power the respondent was exercising (being a power to investigate offences that he may reasonably suspect as being committed) but also noted the defence concession in relation to s 615 of the PPRA. That concession was that it was not reasonably necessary "to point the pistol or to handcuff Mr Povey because as the truth emerged, the vehicle wasn't stolen, [Mr Povey] was not engaged in criminal activity, he wasn't wanted on warrants".[21]

[16] The focus of defence submissions before the magistrate centred on the real issue of the case being whether or not the prosecution had excluded the operation of s 24 of the Code.[22] In finding that a defence under s 24 had been excluded, the magistrate found:[23]

> "… the Prosecution has satisfied me beyond reasonable doubt that the [respondent] *did not have an honest belief that Povey's vehicle was stolen, that Povey was going for a gun, and that the production of the pistol and the handcuffing was reasonably necessary*. Even if the [respondent] was given the benefit of the doubt in that regard, which I

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[20] AB at 135.22-135.32.

[21] AB at 106.9-106.11.

[22] AB at 105.7-105.10.

[23] AB at 142.23-142.34.

> don't, I'm satisfied beyond a reasonable doubt that the Prosecution would prove those beliefs were not reasonable in the [respondent's] circumstances. They were not held on reasonable grounds." (emphasis added)

The uncontested factual findings made by the magistrate

[17] In the course of reaching his determination that the respondent was guilty of the charged offences, the magistrate made extensive findings including as to credibility. It is important to note that none of those findings were challenged on the appeal to the District Court nor to this Court. The magistrate found Mr Povey to be an honest and reliable witness. On contested matters, he accepted the evidence of Mr Povey over that of the respondent, whose evidence he found to be "implausible" and "inconsistent with objective evidence adduced".[24] In addition, the magistrate made a number of specific adverse findings as to the respondent's credibility.

[18] The magistrate made the following findings as to the circumstances leading up to the charged offences.[25] Having seen that Mr Povey was exceeding the speed limit of 110 kilometres per hour by 16 kilometres per hour, the respondent performed a U-turn and set off to intercept Mr Povey, catching up with him about 53 seconds later. The respondent sounded the horn of the police car and a few seconds later Mr Povey slowed and pulled slightly to the left. As the respondent drew level with Mr Povey, the respondent swore at Mr Povey, saying "Fucking pull over now, cunt",[26] which was recorded on the dash camera (but which Mr Povey would not have heard). The respondent then signalled by hand gestures to Mr Povey to pull over. He then manoeuvred his vehicle back behind Mr Povey. The respondent radioed Mr Povey's registration number to Police Communications, in the course of which Mr Povey activated his car's blinker and continued to slow down.[27] The respondent recommenced sounding his horn and continued to do so until Mr Povey stopped.

[19] The respondent then stopped level with Mr Povey's car. He got out of the police car with his gun drawn, and his arms extended and pointed in the direction of Mr Povey's car, while shouting at Mr Povey to put his hands in the air.[28] As to what was said by the respondent when he pointed his gun at Mr Povey, Mr Povey's evidence was that the respondent said, "Put your effing hands up in the air. Do you know I could put an effing hole in you? Get out of the effing car".[29] The only part disputed by the respondent was the statement, "I can put an effing hole in you". The respondent's evidence, that he said, "I could have put a hole in you", was

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24 AB at 142.4.

25 AB at 133-134.

26 AB at 109.23.

27 AB at 15.27-15.29.

28 AB at 17.29-17.31.

29 AB at 135.35-135.37.

rejected by the magistrate who specifically found the respondent not to be a credible witness on that matter.[30]

[20] In relation to what happened after Mr Povey got out of his car as directed by the respondent, Mr Povey's evidence was that the respondent pointed the gun into his back for the purpose of cuffing his right hand. The respondent was unable to recall that occurring and thought that, if anything had come into contact with Mr Povey's back, it was his ring finger when he moved to cuff Mr Povey. The magistrate accepted Mr Povey's evidence, as plausible and consistent with his having heard something fall to the ground (which, it was not disputed, turned out to be the magazine from the respondent's gun).

[21] The magistrate also specifically found the respondent not to be a credible witness as to his use of the horn, his not knowing that the lights and sirens of the police car were not working and as to the nature of his anger with Mr Povey.

[22] It was not disputed that the lights and sirens of the police car were not working when the respondent intercepted Mr Povey. In finding, contrary to the respondent's evidence, that the respondent knew they were not working, the magistrate rejected the respondent's explanation as to why he used the horn (that he did so to change the tone of the siren and to add another level of noise), having regard to the frequency and manner the respondent sounded the horn.[31] Rather, he found that the manner in which the respondent sounded the horn "was indicative of a person who was angry or extremely frustrated with Povey not pulling over".[32] Further, he considered that the words used by the respondent as he drew level for the first time, "Effing pull over now, C",[33] even though not able to be heard by Mr Povey, "were an early expression of anger" at him. The magistrate also rejected the respondent's evidence that he only became angry with Mr Povey when he realised that the situation was not as bad as he had at first thought. In concluding that the objective evidence established that the respondent was angry with Mr Povey from the time he did not pull over and that his anger did not abate, even when Mr Povey did pull over, the magistrate stated: [34]

> "The beeping of the horn only got more frantic and insistent after [drawing level], even to the point of [the respondent] still beeping when Povey was barely moving and coming to a stop. Whilst the swearing and the shouting at Povey to put his hands up, etcetera, might be indicative of him thinking Povey had a weapon, his calling him a dickhead when asking for his driver's licence and then querying where Menzies was – Povey's address – and saying Povey should have 'effing stayed there', are all in my estimation expressions of anger and frustration, all linked back to Povey not

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30 AB at 135.40-135.45.

31 AB at 136.40-136.46.

32 AB at 137.26-137.27.

33 AB at 137.27-137.28.

34 AB at 137.31-137.38.

> pulling over as quickly as the [respondent] thought as he should have."

[23] The magistrate found that the respondent's lack of credibility in respect of his evidence concerning what he said when pointing a pistol at Mr Povey, his use of the horn, his knowledge that the lights and sirens were not working and his being angry with Mr Povey "damaged his credibility irreparably" with respect to his evidence as to what was "submitted to be honest beliefs". In that regard, the magistrate stated:[35]

> "*I find his evidence implausible and I don't accept his evidence as being credible in the circumstances that he thought Povey's vehicle was stolen simply because it didn't stop as quickly as he thought it could, and which, on the evidence, was not a significant time*. In … the activity log, although he mentions a possible evade, he doesn't make any mention of his thinking that Povey's vehicle was stolen or possibly stolen. And also *on the issue on whether Povey was going for a gun by his making what, on the evidence, was an unremarkable movement, I don't find his evidence to be credible. And that this, in combination - that is, what he thought was stolen and that he was going for a gun – meant that he had to point his pistol and handcuff Povey.*" (emphasis added)

The primary judge's decision

[24] As mentioned, there was no challenge, on the appeal to the District Court, as to any of the factual findings of the magistrate. Nor was it disputed that the actions of the respondent *prima facie* constituted the offences of assault and deprivation of liberty.

[25] The respondent's complaint on the appeal was that the magistrate erred in failing to consider whether the prosecution proved the respondent's actions were unlawful under the PPRA, which was said to amount to jurisdictional error so that the decision was a nullity.[36] It was uncontested that the magistrate appeared to have proceeded on the basis that the respondent's actions were only made lawful under the PPRA if Mr Povey's car was in fact stolen or Mr Povey in fact had a weapon and that, given the defence concession, the only basis for acquittal was s 24 of the Code. It was argued, however, that the magistrate should have only convicted the respondent if he was satisfied that the respondent did not reasonably suspect the car was stolen and there was a weapon or if satisfied that the force used was not reasonably necessary for the exercise of the power under the PPRA. The primary judge accepted the respondent's submission that the magistrate erred in commencing from the proposition that the respondent acted unlawfully when he assaulted and detained Mr Povey, rather than determining that issue.[37] Her Honour found that the magistrate should have but failed to consider:[38]

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35 AB at 142.12-142.30.

36 AB at 207 [9].

37 AB at 184.15-184.22.

38 AB at 182.47-183.5.

> "… the critical issue [being] whether the police officer had, in fact, formed a reasonable suspicion regarding whether the vehicle itself was a stolen one, and subsequently, upon interception of it, whether the complainant, when reaching down, appeared to be doing so for a weapon. And … in those circumstances, whether or not the force that he then used was objectively reasonably necessary force, under [s 615 of the PPRA]."

[26] Her Honour thus having found that a two-step process was required to be undertaken, concluded that, had the magistrate embarked on it, he may well have come to a different conclusion as to guilt. In relation to the issue of reasonable suspicion, her Honour stated:[39]

> "There was certainly, in my mind at least, evidence available to the magistrate to support a finding of suspicion, and, in fact, one that would support a finding of reasonable suspicion. Particularly having regard just to (sic) prior to the actual interception of the vehicle, it is clear that the behaviour of the vehicle itself, and its failure to stop, as evidenced in the video recording taken by the police vehicle, clearly give (sic) rise to some suspicion by the police officer."

[27] Her Honour also held that that evidence ought to have been considered by the magistrate in deciding whether, in the exercise of his PPRA powers, the respondent had used "objectively" reasonably necessary force under s 615 of the PPRA, notwithstanding the conclusion reached by the magistrate as to s 24 of the Code.

[28] In deciding it was appropriate to remit the matter for rehearing to the Magistrates Court, her Honour held:[40]

> "Having regard to the fact that I should always give the magistrate the benefit of having observed and seen the witnesses, and having regard to the election that was made by the prosecution to have these matters heard in the lower Court, and the orders sought by the [respondent] in respect of this appeal, notwithstanding my observations as I've just set out in respect of why I consider an inquiry in respect of what, if any, powers the [respondent] may or may not have been exercising as a police officer, should have been conducted, I nevertheless still consider that this is a matter that ought to be remitted back to the Magistrates Court in order that it may be heard again, in the event that the prosecution elects to do so."

Leave to appeal

[29] The principles concerning appeals to this Court from a decision of the District Court sitting in its appellate jurisdiction were recently comprehensively summarised in

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39 AB at 185.41-185.46.

40 AB at 188.7-188.16.

McDonald v Queensland Police Service.[41] An appeal is available only with leave pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) and, when granted, the appeal is an "appeal in the strict sense" rather than "by way of rehearing".[42] While the Court's discretion is unfettered, leave will not be granted lightly given that the applicant will have already had the benefit of two hearings. The Court's discretion to grant leave is not limited to important questions of law. But leave will usually only be granted where an appeal is necessary to correct a substantial injustice and there is a reasonable argument that there is error to be corrected.[43]

[30] In the present case, the applicant argued that there was an error in law in the decision below which warranted a grant of leave, the error concerning a misapprehension as to the operation of s 24 of the Code and s 615 of the PPRA. It was submitted that the approach adopted by the primary judge, if followed, would "result in a different test for liability applying to police officers who are defendants in criminal proceedings to that applicable to others, with implications for the assessment of a wide range of police conduct".[44] It was further argued that having reached an erroneous conclusion, the primary judge further erred in remitting the matter.

[31] Ground 1 raises an important question of law concerning the construction of s 615 of the PPRA and its interaction with s 24 of the Code warranting the granting of leave. Further, for the reasons set out below, ground 2 also warrants the granting of leave, in that the primary judge concluded the matter should be remitted on the basis that there was evidence available to support a finding that the respondent held a relevant reasonable suspicion and that the use of force was reasonably necessary. However, in so concluding, the primary judge preceded on an approach that was inconsistent with or contrary to uncontested findings made by the magistrate.

Ground 1: Error by the primary judge as to the operation of s 615 of the PPRA

The applicant's submissions

[32] Ground 1 raised the argument that "the primary judge erred in law in concluding that the prosecution was required to prove, beyond reasonable doubt, that the force used in assaulting and detaining Mr Povey was "more than was reasonably necessary to deal with the offence or offences the respondent reasonably suspected had been or would be committed".

[33] The applicant's contention was that the only matter in issue before the magistrate concerned whether the prosecution had proved beyond reasonable doubt that, at the time of the commission of the offence, the respondent did not honestly and reasonably believe in the existence of a state of things that justified the force he used. The primary judge thus erred in considering that the issue which ought to

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41 [2017] QCA 255.

42 *McDonald v Queensland Police Service* [2017] QCA 255 at [12].

43 *McDonald v Queensland Police Service* [2017] QCA 255 at [39], citing *Pickering v McArthur* [2005] QCA 294 at [2] per Keane J.

44 Applicant's Outline at para [17].

have been determined was whether the respondent reasonably suspected a state of things that justified his use of force pursuant to the PPRA. The applicant submitted that the primary judge's error was revealed by her Honour's finding, that the magistrate failed to consider whether:[45]

> "… not only had the Crown proved, beyond reasonable doubt, that section 24 didn't apply, but also whether the Crown proved, beyond reasonable doubt, that the force that was, in fact, used by the appellant was not objectively reasonably necessary force under section 615 of the Act in respect of dealing with an offence, or an offence being committed, of which he was exercising his powers, which he reasonably suspected was occurring at the relevant time."

[34] On that question, the respondent referred to the magistrate's finding that the respondent pointed a gun at and handcuffed Mr Povey in circumstances where he did not honestly, nor reasonably, believe Mr Povey had been driving a stolen car and may have had a firearm in the vehicle. As such, it was submitted, the magistrate had concluded that the force used by the respondent was more than was reasonably necessary and was unlawful.

[35] The applicant challenged the reasoning of the primary judge, as erroneous, essentially on the basis that a reasonable suspicion, where it was *mistaken*, as to the existence of a state of things was insufficient to affect the assessment of criminal liability. That was because it was only an honest and reasonable belief pursuant to s 24 of the Code that could alter the assessment of criminal liability.

[36] It was submitted that, while the existence of a reasonable suspicion was a necessary precondition to the exercise of the powers granted by the PPRA, the manner in which the powers were to be exercised was constrained by considering whether, pursuant to s 615 of the PPRA, the force used was objectively reasonably necessary. That assessment, it was argued, was required to be determined by the facts of a particular case, including where relevant any exculpatory provision, the only such identified as pertinent in this case being s 24 of the Code.

[37] The applicant thus argued that, on the facts as they actually existed in the present case (Mr Povey was driving his own car, had no firearms but was speeding), the respondent's pointing a gun at Mr Povey and pressing it into his back while he was being handcuffed was, on any view, more than reasonably necessary force to respond to those facts, as much being expressly conceded before the magistrate.[46] Nevertheless, it was argued that, given the respondent's evidence that he thought the car might have been stolen and the complainant may have had a firearm, the respondent's liability was, by virtue of s 24 of the Code, to be assessed as if his belief were true, unless the prosecution proved that the belief was not honestly held or was not held on reasonable grounds. It was submitted that the error in the decision of the primary judge was to introduce a less onerous test, that the respondent could use force reasonably necessary to deal with conduct he reasonably suspected, rather than believed, had occurred or would occur. The applicant argued that the mere existence of a reasonable

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45 AB at 187.45-188.04.

46 AB at 106.7-106.14.

suspicion did not entitle the respondent to an assessment of liability that assumed the things suspected to be true, independently of the operation of s 24 of the Code.

The respondent's submissions

[38] The respondent submitted that the primary judge correctly found that the magistrate should have decided, but failed to decide, whether the respondent was acting lawfully before turning to the question of any defence under s 24 of the Code.[47] In that regard, the respondent contended that the offences of assault and deprivation of liberty could only be established if the magistrate was satisfied beyond reasonable doubt that the conduct was unlawful.[48] The respondent's conduct was not unlawful if he was acting within s 52 and s 615 of the PPRA (ie, taking steps, including using force that he considered reasonably necessary to prevent an offence that he reasonably suspected was being or was about to be committed).[49] The magistrate failed to consider whether the respondent's conduct was made lawful by s 52 or s 615 of the PPRA and therefore did not reach the necessary state of satisfaction (beyond reasonable doubt) that the respondent's conduct was unlawful.

[39] The respondent also contended that the applicant's argument as to the construction of s 615 of the PPRA conflated the question of unlawfulness (required by s 335(1) and s 355 of the Code) and the question of mistake of fact (under s 24 of the Code). Unlawfulness was an element of each offence with which the respondent was charged. Section 24, on the other hand, absolved a person of criminal responsibility and was relevant only once the lawfulness under the PPRA had been eliminated. In particular, it was said that the applicant's argument failed to have regard to the following matters:

(a) Where s 52 of the PPRA makes it "lawful for a police officer to take the steps the police officer considers reasonably necessary" (upon the forming of a reasonable suspicion), those steps may include "reasonably necessary force" as regulated by s 615(1).[50]

(b) Whilst the test for determining whether the force used was reasonably necessary is an objective one,[51] regard was to be had to the particular circumstances of the case, as was recognised by the primary judge.[52]

(c) The relevant circumstances for determining whether the force was reasonably necessary are those that exist *at the time* of the conduct in question, which

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47 AB at 184.41-184.47; AB at 185.1-185.6.

48 *Criminal Code*, s 335(1) and s 355.

49 The contention in the written outline that respondent's conduct was not unlawful if he was acting within s 60 and s 615 of the PPRA (ie, using reasonably necessary force to exercise the power of stopping Mr Povey's vehicle to check compliance with traffic laws or to conduct a breath test) was not pursued in oral argument.

50 *Whitelaw v O'Sullivan* [2010] QCA 366 at [26], [43].

51 *Whitelaw v O'Sullivan* [2010] QCA 366 at [27].

52 AB at 185.1-185.2.

include the suspicion formed by the police officer and the steps being taken in the exercise of the relevant PPRA power.

[40] It was, therefore, necessary for the magistrate to consider whether the respondent had a reasonable suspicion (not necessarily a reasonable belief)[53] sufficient to give rise to the right to exercise powers under the PPRA. Thus, where a police officer reasonably suspected that a person was "about to" commit an offence involving serious assault, then s 52(2) of the PPRA authorised the officer to "take the steps the police officer considers reasonably necessary to prevent" that serious assault. Those steps might involve physical force. It was submitted that, when a *retrospective assessment* was undertaken as to whether the officer's steps amounted to reasonably necessary force, the combined operation of s 52 and s 615 of the PPRA made it clear that the *suspicion actually formed* by the officer was a relevant circumstance in that assessment.

[41] The respondent argued that, on the applicant's construction of s 615 of the PPRA, a police officer is authorised by s 52 of the PPRA to use physical force to respond to a situation that he or she reasonably suspected existed, but that the officer's conduct would then be rendered unlawful because the officer's suspicion was not ultimately proved to accord with the actuality. It was submitted that such a construction of s 615 should be rejected. Further, whatever construction of s 615 was adopted, the primary judge was correct to find that the magistrate erred by failing to determine whether the respondent's use of force went beyond what was reasonably necessary for the purposes of the PPRA.

Consideration

[42] Clearly, the respondent could not be convicted of the offences if his conduct was lawful under the PPRA. The magistrate erred in proceeding on the assumption (induced by defence counsel's concession) that the issue of whether the respondent's use of force was reasonably necessary for the purpose of s 615 of the PPRA was to be determined on the true state of affairs at the time of the respondent's conduct. That error led to the magistrate, wrongly, failing to consider whether the respondent's conduct was lawful because of the operation of the PPRA. In other words, whether the prosecution had proven that the respondent was, at the relevant time, not possessed of lawful authority under the PPRA to act as he did.

[43] While several provisions of the PPRA were referred to before the magistrate as a basis for the lawfulness of the respondent's conduct, the only provision relied upon before this Court concerned the power in s 52 of the PPRA which provides:

> "**52 Prevention of offences – general**
>
> (1) This section applies if a police officer reasonably suspects an offence has been committed, is being committed, or is about to be committed.
>
> (2) It is lawful for a police officer to take the steps the police officer considers reasonably necessary to prevent

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53 See *George v Rockett* (1990) 170 CLR 104 at 115-116; *Johnson v Police* [2017] SASC 87 at [30].

> the commission, continuation or repetition of an offence."

[44] Section 52 applies only where a police officer "reasonably suspects" a particular state of affairs to exist, namely, that an offence has been committed, is being committed, or is about to be committed. The holding of a relevant reasonable suspicion is a precondition for the application of s 52 of the PPRA. Schedule 6 of the PPRA contrasts the concept of "reasonably suspects" (meaning suspects on grounds that are reasonable in the circumstances) with that of "reasonably believes" (meaning believes on grounds that are reasonable in the circumstances). The difference between the two states of mind was explained in *George v Rockett*[54] in the following terms:

> "Suspicion, as Lord Devlin said in *Hussien v. Chong Fook Kam*,[55] 'in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove."' The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In *Queensland Bacon Pty. Ltd. v. Rees*,[56] … Kitto J. said:[57]
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> > 'A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to "a slight opinion, but without sufficient evidence", as Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence…'
>
> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."

[45] As the respondent correctly submitted, there is a different intellectual threshold to be met depending on whether a reasonable suspicion or a reasonable belief is required as a condition precedent for the exercise of a power. Suspicion and belief are both concerned with a state of mind as to the existence of things, reached

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54 (1990) 170 CLR 104 at 115-116.

55 [1970] AC 942 at 948.

56 (1966) 115 CLR 266.

57 (1966) 115 CLR 266 at 303.

without actual proof. Further, while they involve different degrees of assuredness as to their existence, both states of mind are concerned with the circumstances *as they appear to be* at the relevant time, rather than the circumstances as they actually are at that time.

[46] Furthermore, while s 52 renders it lawful for a police officer to exercise the power therein on the holding of the relevant suspicion, as was held in *Whitelaw v O'Sullivan*,[58] the exercise of a power under the PPRA is constrained by s 615 of the PPRA. It provides:

> "(1) It is lawful for a police officer exercising or attempting to exercise a power under this or any other Act against an individual, and anyone helping the police officer, to use reasonably necessary force to exercise the power.
>
> *Example—*
>
> A police officer may use reasonable force to prevent a person evading arrest.
>
> (2) Also, it is lawful for a police officer to use reasonably necessary force to prevent a person from escaping from lawful custody.
>
> (3) The force a police officer may use under this section does not include force likely to cause grievous bodily harm to a person or the person's death."

[47] In *Whitelaw*,[59] McMurdo P, with whom Applegarth J agreed, made the following observations as to the interaction between the power under s 50 of the PPRA, which was there under consideration, and s 615 of the PPRA:[60]

> "… s 615 is intended to regulate the use of force in the exercise of the powers conferred upon police officers elsewhere in the Act, including the power conferred under s 50, by requiring that, in the absence of a clear contrary legislative statement, any use of force be limited to that which is reasonably necessary. That is, in addition to the requirement under s 50 that the police officer must subjectively reasonably suspect one of the matters listed in s 50(1)(a)(b) or (c) and also consider the steps he takes, including the use of any force, to be reasonably necessary to prevent the breach of the peace happening or continuing under s 50(2)...
>
> The rights of persons against whom police officers exercise powers are not advanced if, in preventing a mere breach of the peace, police officers are authorised to use any degree of force which the police officers subjectively consider reasonable, without reference to an

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58 [2010] QCA 366.

59 [2010] QCA 366.

60 *Whitelaw v O'Sullivan* [2010] QCA 366 at [26]-[27].

> objective standard. One purpose of the Act is to consolidate and rationalise the powers and responsibilities of police officers. Others are to provide consistency in the nature and extent of the powers and responsibilities of police officers and to standardise the ways powers and responsibilities of police officers are exercised. With those purposes of the Act in mind, I note that the construction I prefer of the inter-relationship between s 50 and s 615 is consistent with s 260 *Criminal Code*. That section authorises a person preventing a breach of the peace to "use such force as is reasonably necessary for such prevention … reasonably proportionate to the danger to be apprehended from such continuance or renewal [of the breach of the peace]". Further, authorising police officers to use force which is not objectively reasonable in preventing a breach of the peace does not seem to me to be consistent with the purpose of the Act of providing powers necessary for effective modern policing and law enforcement. Had parliament intended the extraordinary consequence of authorising police officers to use force which was not objectively reasonable in preventing a breach of the peace, it would surely have stated it in the clearest of terms. Nothing in any interpretation of the interaction between s 50 and s 615 is inconsistent with the Act's stated purpose of enabling the public to better understand the nature and extent of the powers and responsibilities of police officers."

[48] The following may be observed in relation to the powers conferred on a police officer under the PPRA:

(a) The PPRA empowers a police officer, holding a reasonable suspicion as to the existence of certain prescribed circumstances, to stop, detain or search a person or vehicle: see s 29, s 31, s 50 and s 60. The PPRA also empowers a police officer, who reasonably suspects the existence of certain specified circumstances pertaining to the breach of the peace or the commission of an offence, "to take the steps that the police officer considers reasonably necessary" to prevent its commission, continuation or repetition (s 50 and s 52). In each case, the power is enlivened upon the police officer holding the relevant reasonable suspicion.

(b) Where a police officer is exercising or attempting to exercise a PPRA power, s 615 regulates the use of force and only authorises such force as is reasonably necessary to exercise the power.[61] Since a precondition to the lawful exercise of the powers referred to in (a) is the holding of a relevant reasonable suspicion by a police officer, it follows that the holding of such a suspicion is not only an *essential* prerequisite but also a *sufficient* one. It is irrelevant to the exercise of the power under s 615 that it subsequently transpires that the suspicion, although reasonably held by the police officer, was mistaken as to the actual circumstances pertaining at the relevant time.

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61 *Whitelaw v O'Sullivan* [2010] QCA 366 at [26], [43].

[49] The applicant's argument that, where the police officer's suspicion is a mistaken one, albeit reasonably held, s 615 has no application independently of s 24 of the Code proceeds on an erroneous understanding of the powers under the PPRA and s 24 of the Code. It is important that the distinct purposes of the PPRA powers and of s 24 of the Code are kept firmly in mind. The prerequisites for and manner of their operation reflects those different purposes. In that regard, the following may be noted:

(a) The purposes of the PPRA stated in s 5 of the PPRA include the provision of powers necessary for effective modern policing and law enforcement and to ensure fairness to and protection of the rights of persons against whom police officers exercise powers under the PPRA. It is in that context that powers are conferred on a police officer under the PPRA upon a relevant reasonable *suspicion* being held and the exercise of those powers is rendered lawful and thus not the subject of criminal liability. While such powers are conferred on the holding of a relevant reasonable suspicion only, s 615 of the PPRA moderates the force that may lawfully be used in the exercise of such a power. It imposes a purely *objective* test as to whether the force used is reasonably necessary for the exercise of the power.[62]

(b) Section 24 of the Code, is contained in ch 5 of the Code, the purpose of which is to set universal parameters for a defendant's criminal responsibility. Section 24 operates by making a defendant not criminally responsible to any greater extent than if the real state of things had been such as the defendant believed them to be. While such exoneration requires the holding of a *belief* as to a state of things (as opposed to a mere suspicion), inquiry is directed to the *subjective* nature of the belief. That is, the test is whether the grounds held by the defendant for the mistakenly held belief were reasonable, rather than what a reasonable person would have believed,[63] the latter being an objective test of reasonableness.

[50] The primary judge did not err in finding that s 615 operated to make lawful the use of force in the exercise of a power under the PPRA arising on a relevant reasonable suspicion, notwithstanding that the suspicion, as it transpired, was a mistaken one.

Ground 2 – Error by the primary judge in remitting the matter

The submissions

[51] By ground 2, the applicant contended that, having correctly found that there was a failure to consider whether the respondent's conduct was lawful by virtue of the PPRA, the primary judge erred in remitting the matter for hearing. The applicant contended that her Honour ought to have made her own assessment of the evidence and reached her own conclusion as to the guilt of the respondent. The applicant submitted that, had her Honour done so, in circumstances where there was no challenge to the factual findings of the magistrate, she would have been satisfied of the guilt of the respondent on the basis that the force used was more than was

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62 See *Whitelaw v O'Sullivan* [2010] QCA 366.

63 *R v Mrzljak* [2005] 1 Qd R 308 at [21], [53] and [79].

reasonably necessary and, therefore, the conduct was unlawful. It was submitted that a rejection of the evidence of the respondent that he honestly and reasonably believed there were grounds for his use of force necessarily answered the matter of guilt in favour of the prosecution, particularly having regard to the magistrate's conclusions as to the credibility of the respondent.[64]

[52] Because the factual findings of the magistrate were not disputed, it was submitted that this was an appropriate case for this Court to determine the matter, rather than remit it to the District Court for rehearing, as that course would "ensure the determination on the merits of the real questions in controversy between the parties".[65] Thus, even if the primary judge erred in the manner submitted by the applicant, on a correct application of the law or the uncontested facts, the guilt of the respondent was established.

[53] The respondent argued that it was not open to the primary judge to determine whether the respondent was guilty and, likewise, this Court ought not decide that question, since the critical issue depended on an assessment of credit and was never properly ventilated before the magistrate, who made findings of fact about the existence of an honest and reasonable belief, not a suspicion.

Consideration

[54] I agree with the applicant's contention that the primary judge erred in the approach her Honour took in remitting the matter of whether the respondent's conduct was lawful pursuant to the PPRA to the Magistrate's Court rather than determining the issue on the evidence before her. In my view, this Court is able to and should determine that controversy on the uncontested findings made by the magistrate.

[55] The applicant argued that the adverse credit findings made against the respondent, when considering the exculpatory provision of s 24 of the Code as to the force used, meant that the magistrate implicitly made a finding as to the question of the reasonableness of the force used by the respondent in the exercise of a power on the basis of any reasonable suspicion. The primary judge rejected that argument, stating:[66]

> "… any factual findings that [the magistrate] has then made as it related to the [respondent's] credit, as it specifically related to the [respondent's] belief pursuant to section 24 of the Criminal Code, namely, honest and reasonable but mistaken belief, is a different consideration than had his Honour turned his mind to the primary question of whether or not the appellant, as a police officer, had a reasonable suspicion, but not necessarily a belief as such … [r]egarding whether there was a weapon in the car, that the car was stolen, and whether or not that suspicion then gave rights to him as a police officer to exercise certain powers under the [PPRA], which also allowed him to use, objectively, reasonably necessary force in enforcing those powers under section 615."

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64 AB at 142.

65 Section 119(2)(b) of the *District Court of Queensland Act* 1967 (Qld).

66 AB at 185.29-185.38.

[56] While the degree of satisfaction required for the holding of a belief differs from that sufficient to give rise to a mere suspicion, the primary judge erred in finding that, had the magistrate embarked on the two-step process under s 615 of the PPRA, he may have reached a different conclusion as to the respondent's guilt.

[57] The error was in failing to appreciate that, given the uncontested findings, the prosecution had satisfied the magistrate that s 24 of the Code had been excluded beyond reasonable doubt, including on the implicit basis that the magistrate found that the respondent did not himself think the force used by him was reasonably necessary in the circumstances. In that regard, the magistrate rejected, as not credible, the respondent's evidence that he "thought" he needed to respond by pointing the gun and handcuffing Mr Povey, stating:[67]

> "I don't accept his evidence as being credible in the circumstances that he thought Povey's vehicle was stolen simply because it didn't stop as quickly as he thought it could … And also on the issue on whether Povey was going for a gun by his making what, on the evidence, was an unremarkable movement, I don't find his evidence to be credible. *And that this, in combination - that is, what he thought was stolen and that he was going for a gun – meant that he had to point his pistol and handcuff Povey*." (emphasis added)

[58] The rejection of the respondent's evidence as to whether he thought he had to use the force he used provided an insurmountable obstacle to the reaching of a different conclusion as to whether the force used was reasonably necessary for the purposes of s 615 of the PPRA. There was, however, a second fundamental error made by the primary judge in concluding that the matter should be remitted. It concerned her Honour's determination that there "was certainly, in my mind at least, evidence available to the magistrate to support a finding of suspicion, and, in fact, one that would support a finding of reasonable suspicion".[68]

[59] The "evidence" to which the primary judge alluded was set out in her reasons and the respondent urged this Court to have regard to those matters. However, a careful consideration of the "evidence" referred to by the primary judge reveals that her Honour took a view of the evidence that contradicted or was inconsistent with the unchallenged factual findings of the magistrate. In this category are the following:

(a) Firstly, the magistrate found that the tendered video indicated that, in relation to impediments on the roadside, the edges of the road were not even and that there was a moderate drop-off that would or should have been "evident" to the respondent.[69] The primary judge, however, rejected that finding, stating that the drop-off was "not, [to her] mind apparent at all",[70] and assessed it as "minimal" rather than "moderate".[71]

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67 AB at 204.12-204.21.

68 AB at 185.40-185.43.

69 AB at 141.25-141.26.

70 AB at 186.13.

(b) Secondly, the magistrate found that, on the respondent's evidence, the reason he thought that Mr Povey's vehicle was stolen was that the vehicle did not stop earlier. The magistrate rejected that evidence as not plausible or credible, given that the uneven road edges and drop-off were, or should have been, evident.[72] The primary judge on the other hand, found that Mr Povey's failure to stop for "about 45 seconds" after using his indicator "with no impediment to pull off at all", was a factor in the respondent thinking he "may well have been dealing with a heightened risk situation".[73] Indeed, her Honour took the view that the behaviour of Mr Povey's car and his failure to stop "clearly" gave rise to "some" suspicion, notwithstanding the magistrate's finding that the evidence established that the respondent acted in anger and frustration linked to Mr Povey not pulling over as quickly as he thought he should have.[74]

(c) Thirdly, the magistrate, in rejecting the respondent's evidence as to what he thought the circumstances to be, found that the respondent could have called for assistance,[75] which was a matter he took into account. Yet that uncontested finding was rejected by the primary judge as "unrealistic" in concluding that there was evidence to support a finding that the respondent was acting lawfully.[76]

[60] Given the uncontested findings made by the magistrate, the conclusion that the respondent acted in the lawful exercise of a power under the PPRA is not open. It is to be observed that the magistrate emphatically rejected the respondent's evidence that he *thought* Mr Povey's vehicle was stolen, that there was a weapon in it and that that "meant that he had to point his pistol and handcuff" at Mr Povey. The magistrate made three critical findings as to credit that were not challenged:

(a) The magistrate found that the only reason the respondent thought Mr Povey's vehicle was stolen was because Mr Povey did not pull over as quickly as he thought he could have, but that the respondent's evidence in that regard was neither plausible nor credible, particularly given that no mention was made in the activity log of his "thinking that [Mr] Povey's vehicle was stolen or possibly stolen", although a possible evade was.[77]

(b) The magistrate also found that the respondent's testimony as to his thinking Mr Povey was going for a gun by making what the magistrate found on the evidence, to be an unremarkable movement was not credible.

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71 AB at 186.10.

72 AB at 141.20-141.27; 142.12-142.15.

73 AB at 186.28-186.29.

74 AB at 185.44- 185.46.

75 AB at 140.25-140.26.

76 AB at 186.21.

77 AB at 142.16-142.17.

(c) The magistrate expressly found that, while the respondent's shouting at Mr Povey "to put his hands up, etcetera might be indicative of him thinking"[78] Mr Povey had a weapon, the evidence of the respondent's calling Mr Povey "a dickhead when asking for his driver's licence and then querying where Menzies was – [Mr] Povey's address – and saying [he] should have 'effing stayed there'",[79] were all expressions of anger and frustration and all linked back to Mr Povey's failure to pull over as quickly as the respondent thought as he should have. The magistrate thus rejected the respondent's evidence that he only became angry with Mr Povey upon realising that the situation was not as bad as he had at first thought. To the contrary, the magistrate found that the objective evidence established that the respondent was angry with Mr Povey from the time Mr Povey did not pull over and that his anger did not abate, even when Mr Povey did pull over.

[61] Given the magistrate's rejection of the respondent's evidence as to what he thought the circumstances he was facing appeared to be (that the vehicle was stolen and that there was a weapon), there was no basis upon which it was open to find that the respondent held a reasonable suspicion such as to give rise to a power under s 52 of the PPRA, nor to support a finding that the force used was reasonably necessary.

[62] In the circumstances, the uncontested evidence reveals no basis for setting aside of the convictions.

Orders

[63] The orders I would make are:

1. Grant leave to appeal.
2. Allow the appeal.
3. Set aside the orders of the District Court allowing the appeal and instead order that the appeal to the District Court be dismissed.

[64] **McMURDO JA:** I gratefully adopt the summary of the evidence which is set out in the judgment of Philippides JA. I agree with the orders proposed by Philippides JA, for the following reasons.

[65] The respondent was charged with two offences. The first was that the respondent unlawfully assaulted the complainant, by pointing his firearm at the complainant, threatening him with it and pressing it into the complainant's back. The second charge was that he unlawfully deprived the complainant of his personal liberty, by demanding or requiring the complainant to leave his car, handcuffing him and otherwise restraining his movements. On neither charge were the physical acts of the respondent in dispute. The issue was whether, in the terms of s 335 and s 355 of the *Criminal Code* (Qld) ("the Code"), the respondent acted unlawfully.

The relevant statutory provisions

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78 AB at 199.33-199.34.

79 AB at 199.34-199.36.

[66] The prosecution had to prove that the respondent's acts were not lawful, in that they were not authorised under the *Police Powers and Responsibilities Act* 2000 (Qld) ("the PPRA"). On the arguments in this Court, there were two provisions of the PPRA which had to be considered, namely s 52 and s 615.

[67] Section 52 of the PPRA is as follows:

> "52 Prevention of offences – general
>
> (1) This section applies if a police officer reasonably suspects an offence has been committed, is being committed, or is about to be committed.
>
> (2) It is lawful for a police officer to take the steps the police officer considers reasonably necessary to prevent the commission, continuation or repetition of an offence."

[68] Section 615 of the PPRA is as follows:

> "615 Power to use force against individuals
>
> (1) It is lawful for a police officer exercising or attempting to exercise a power under this or any other Act against an individual, and anyone helping the police officer, to use reasonably necessary force to exercise the power.
>
> …
>
> (2) Also, it is lawful for a police officer to use reasonably necessary force to prevent a person from escaping from lawful custody.
>
> (3) The force a police officer may use under this section does not include force likely to cause grievous bodily harm to a person or the person's death."

[69] In *Whitelaw v O'Sullivan*,[80] this Court considered the interaction of s 615 and s 50 of the PPRA which relevantly provides as follows:

> "50 Dealing with breach of the peace
>
> (1) This section applies if a police officer reasonably suspects—
>
> (a) a breach of the peace is happening or has happened; or
>
> (b) there is an imminent likelihood of a breach of the peace; or
>
> (c) there is a threatened breach of the peace.
>
> (2) It is lawful for a police officer to take the steps the police officer considers reasonably necessary to prevent the breach of the peace happening or continuing, or the conduct that is the

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[80] [2010] QCA 366.

> breach of the peace again happening, even though the conduct prevented might otherwise be lawful."

McMurdo P (with whom Applegarth J agreed) held that s 615 qualified the powers conferred upon police officers elsewhere in the PPRA, which would include the powers conferred under s 52, by requiring that in the exercise of those powers, any use of force be limited to that which is reasonably necessary.[81] Where force is used in the exercise of powers otherwise conferred by the PPRA, s 615 authorises the use of that force only if it is "objectively reasonable".[82] Holmes JA agreed, save that in her Honour's view, the only authority for the use of force came from s 615, in that "s 615 operates to supplement rather than qualify s 50".[83]

[70] Although that case was concerned with the interaction of s 50 and s 615, it is clear from the judgments that s 615 would have an identical effect upon the exercise of powers under s 52. At no point in this case has either party suggested otherwise.

[71] Subject to that qualification from s 615, s 52 authorises a police officer to take certain steps if there exist the following circumstances:

- the officer suspects that an offence has been committed, is being committed or is about to be committed;
- that suspicion is reasonably held; and
- the officer considers the steps to be reasonably necessary to prevent the commission, continuation or repetition of an offence.

The operation of s 52 is thereby affected by the state of mind of the police officer in those two respects, as well as by whether the officer's suspicion, about the commission of an offence, is reasonably held.

[72] Where those circumstances do not exist, no power could be exercisable under s 52 and the acts of a police officer, if not otherwise authorised under the PPRA, would be unlawful. Where those circumstances do exist, it will be necessary to consider the application of s 615 where force is used in the exercise of a power conferred by s 52.

[73] The operation of s 615 is not according to the state of mind of the police officer. The question under s 615 is whether, on an objective view, it is reasonably necessary to use the force which is used in the purported exercise of the power. In my opinion, that question is to be answered by reference to the facts and circumstances which then present themselves to the police officer, rather than to the true facts and circumstances as they may emerge by the time of the trial. Take, for example, a case where a police officer is confronted by a person who is holding a firearm, but which, unknown to the officer, is unloaded. In such a case, a reasonable suspicion as to the commission of an offence would arise and s 52 would authorise the officer to take steps which the officer considers to be reasonably necessary to prevent the commission of an offence. In such a case, under s 615 the

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81 Ibid at [26].

82 Ibid at [27] (McMurdo P), [43] (Applegarth J).

83 Ibid QCA 366 at [40].

question of what force was reasonably necessary to prevent the commission of the offence would be considered by reference to the apparent threat from the firearm.

[74] Importantly however, the justification for the exercise of force, according to s 615, requires more than the existence of those three circumstances which confer a power under s 52. The existence of a reasonable suspicion as to the commission of an offence, in the terms of s 52, does not satisfy the requirement of s 615 that, upon an objective view, the force used by the officer be reasonably necessary, in the facts and circumstances with which the officer is presented.

[75] What is the effect of s 24 of the Code upon the operation of s 52 and s 615 of the PPRA? As to s 52, the first of the required circumstances for the operation of that provision, namely the holding of a suspicion about the commission of an offence, must exist. If, in a case such as the present, it is proved that the police officer did not hold such a suspicion, then s 24 of the Code could have no role to play. On the other hand, if in fact the suspicion was held by the officer, the reasonableness of that suspicion could be affected by the operation of s 24, if the officer's suspicion was reasonable upon the factual premise of a state of things which the officer honestly and reasonably, although mistakenly, believed.

[76] The potential operation of s 24 to the question under s 615 of the PPRA is not so clear. The question under s 615 is whether the force used by the officer is, on an objective view, reasonably necessary force, in the context of the facts and circumstances with which the officer is presented. According to the terms of s 615 itself, without reference to s 24, an officer may use reasonably necessary force although mistaken as to whether, in truth, the circumstances are as they appear to be.

The case in the Magistrates Court

[77] In the Magistrates Court, counsel then appearing for the respondent conceded that, in the terms of s 615, it was not reasonably necessary for the respondent to point his pistol at the complainant and to handcuff him. The basis for the concession was said to be that, in truth, the complainant's car was not stolen and the complainant did not have a weapon. That concession involved a legal error. As I have discussed, although the question under s 615 is an objective one, it is to be answered not with the benefit of hindsight and upon the premise of the true facts and circumstances, but instead by reference to the facts and circumstances with which the police officer was presented at the time.

[78] That concession on behalf of the respondent was, unfortunately, accepted by the prosecutor and, understandably, accepted by the magistrate. It was upon that common but erroneous mistake as to the effect of s 615 that the parties argued, and the magistrate considered, the operation of s 24 of the Code.

[79] However, the magistrate made factual findings which although expressed by reference to s 24, were irreconcilable with the respondent's innocence upon the proper interpretation of s 52 and s 615 of the PPRA. The magistrate rejected the respondent's evidence that he thought that the complainant's vehicle was stolen. The magistrate also rejected the respondent's evidence that he thought that the complainant was "going for a gun". He held that the respondent had no honest belief as to those matters. Now, it is correct to say that s 52 can be engaged upon the basis of a reasonable *suspicion*

by a police officer, which might, in a given case, fall short of a *belief* about a relevant matter.[84] However it is sufficiently clear from the magistrate's reasons that the magistrate found that the respondent had no "thought", even a suspicion, that the complainant's car was stolen or that the respondent had been "going for a gun".

[80] Further, the magistrate found that "[e]ven if the defendant was given the benefit of the doubt [as to what he thought about the complainant] … those beliefs were not reasonable in the defendant's circumstances." That finding was explained by the magistrate's analysis of the facts and circumstances with which the respondent had been presented and the absence of any indication from them that the complainant's car was stolen or that the complainant was looking to use or reach for a firearm. Instead, the magistrate found that the respondent's actions had resulted from the respondent's anger from the fact that the complainant had not pulled over when first directed to do so.

The case in the District Court

[81] Because of the way in which the respondent's case was conducted in the Magistrates Court, the magistrate had made no findings in the specific terms of s 52 of the PPRA. This provided the respondent with an opportunity, by different counsel, to argue in the District Court that the magistrate had failed to consider the correct question, which was said to be whether a relevant suspicion was reasonably held under s 52.[85]

[82] The District Court judge accepted that argument. Her Honour said:

> "the critical issue was whether the police officer had, in fact, formed a reasonable suspicion regarding whether the vehicle itself was a stolen one, and subsequently, upon interception of it, whether the complainant, when reaching down, appeared to be doing so for a weapon [and] whether in those circumstances, whether or not the force that he then used was objectively reasonably necessary force, under section 615 of the *Police Powers and Responsibilities Act*."

[83] In her Honour's conclusion, had the magistrate considered those questions, the magistrate may well have come to a different conclusion. Her Honour said that, to her mind, there was evidence to support a finding of a relevant and reasonable suspicion.

[84] Nevertheless, her Honour did not proceed to decide whether, in fact, the prosecution had disproved the existence of relevant powers under the PPRA, and instead she remitted the matter back to the Magistrates Court for a re-trial.

[85] In my respectful opinion, the judge erred in allowing the appeal, although the case has been conducted in the Magistrates Court upon an erroneous basis. As it happened, and with no injustice to the respondent, the magistrate had made clear factual findings which were irreconcilable with either the existence of powers exercisable under s 52, or an authority to use the force which was used in this case,

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84 *George v Rockett* (1990) 170 CLR 104, 115-116; [1990] HCA 26.

85 As well as under ss 29, 30 and 31 of the PPRA, which together with s 60 of the PPRA, were not relied upon in this Court.

consistently with s 615 of the PPRA. To decide the appeal, the District Court judge had to decide whether those findings were erroneously made. Her Honour did not do so. She said that there was evidence to support contrary findings, but she identified no error in the findings which were made.

[86] The magistrate, of course, had seen and heard the relevant witnesses. Unless the magistrate was found to have misused the opportunity that came with doing so, his factual findings were not to be disturbed and upon those findings, there could have been no legal authority from the PPRA for the respondent's actions.

Conclusion

[87] For these reasons the District Court judge ought to have dismissed the appeal. The circumstances of this case warrant the orders proposed by Philippides JA, with which I agree.

[88] **BODDICE J:** I agree with the reasons and orders of Philippides JA. I also agree with the reasons of McMurdo JA.