MAGISTRATES COURT OF QUEENSLAND

CITATION:	*Queensland Police Service v Neuman (No 2)* [2017] QMC 15
PARTIES:	**Queensland Police Service** **v** **David Brendan Neuman**
FILE NO/S:	Toowoomba Mag No 221/17
ORIGINATING COURT:	Toowoomba Magistrates Court
HEARING DATE:	On the papers
DELIVERED ON:	7 July 2017
DELIVERED AT:	Toowoomba Magistrates Court
MAGISTRATE:	G Lee
ORDER:	**No order as to costs. The charge is dismissed.**
CATCHWORDS:	Criminal Law – acquittal - costs
:	The following legislation was cited: *Justices Act 1886, ss 158, 158A & 159* The following cases are cited: *Bell v Carter; ex parte Carter* [1992] QCA 245
APPEARANCES:	Senior Sergeant E. Engwirda for the prosecution Mr S. Zillman of counsel for the defendant instructed by Gilshenan and Luton for the defendant

1. On 9 June 2017 I delivered judgment in finding David Brendan Neuman (the defendant) not guilty of an offence under section 408E(1) of the *Criminal Code* (Q'ld)[1] "that on 17 December 2015 at Gatton … [he] used a restricted computer without the consent of the Commissioner of the Queensland Police Service …"[2].

2. As counsel for the defendant applied for costs, I deferred making formal orders dismissing the charge on 9 June 2017. This was to afford the parties an opportunity to consider my reasons for judgment before any costs application was to proceed[3].

3. However, on 22 June 2017 submissions for the defendant seeking costs according to the scale in Schedule 2 of the *Justices Regulation* 2004[4] were received by the court. On 30 June 2017 submissions from the prosecution opposing liability for costs was received by the court. The prosecution do not dispute the quantum of costs should an order for costs be made[5]. Further, on 3 July 2017 the prosecution emailed a copy of two statements to the court of its only witness Ms QFN. That email was also copied to the solicitors for the defendant. Later on 3 July 2017 the parties consented by email to the costs application being determined on the papers without the need for further oral submissions.

4. The power to award costs is a creature of statute. There is no power to award costs unless the power is expressly or by necessary implication conferred by statute: see for example *Besgrove v Larson* [2001] QDC 144 at [3] per McGill DCJ and the cases cited therein. The power to award costs is conferred by the *Justices Act* 1886 (JA).

5. Relevantly, upon dismissal of a complaint, section 158 JA[6] provides:

> **158 Costs on dismissal**
> (1) When justices instead of convicting or making an order dismiss the complaint, they may by their order of dismissal order that the complainant shall pay to the defendant such costs as to them seem just and reasonable. …

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[1] In Chapter 37 (Offences analogous to stealing) of Part 6 (Offences relating to property and contracts).
[2] *Queensland Police Service v Neuman* [2017] QMC 6.
[3] In *Bell v Carter; ex parte Carter* [1992] QCA 245, in considering section 159 *Justices Act* 1886, the Court of Appeal said at page 5 of the joint judgment that it was necessary a formal dismissal be deferred until costs can be determined. Section 159 *Justices Act* 1886 provides:

> **The sum allowed for costs to be specified in the conviction or order**
> The sum allowed for costs shall in all cases be specified in the conviction or order or order of dismissal, or order striking out a complaint for want of jurisdiction.

[4] Paras [10] & [11] submissions for the defendant.
[5] Para [2] submissions for the prosecution.
[6] In Division 8 (Costs) of Part 6 (Proceedings in the case of simple offences and breaches of duty).

6. Costs considered to be "just and reasonable" are those provided for in the scale in Schedule 2 of the *Justices Regulation* 2004[7]: section 158B (1) JA. The claim here is for scale costs and not a higher amount that would require a consideration of factors in section 158B (2) JA.

7. Despite section 158 (1) JA, costs in favour of a defendant against a police officer can only be made upon dismissal of a complaint if it is proper to do so: section 158A (1). Section 158A(2) then provides for an inclusive range of matters to be taken into account in deciding if it is proper to award costs:

> (2) In deciding whether it is proper to make the order for costs, the justices must take into account all relevant circumstances, including, for example—
> (a) whether the proceeding was brought and continued in good faith; and
> (b) whether there was a failure to take appropriate steps to investigate a matter coming to, or within, the knowledge of a person responsible for bringing or continuing the proceeding; and
> (c) whether the investigation into the offence was conducted in an appropriate way; and
> (d) whether the order of dismissal was made on technical grounds and not on a finding that there was insufficient evidence to convict or make an order against the defendant; and
> (e) whether the defendant brought suspicion on himself or herself by conduct engaged in after the events constituting the commission of the offence; and
> (f) whether the defendant unreasonably declined an opportunity before a charge was laid—
> (i) to explain the defendant's version of the events; or
> (ii) to produce evidence likely to exonerate the defendant;
> and the explanation or evidence could have avoided a prosecution; and
> (g) whether there was a failure to comply with a direction given under section 83A; and
> (h) whether the defendant conducted the defence in a way that prolonged the proceeding unreasonably; and
> (i) whether the defendant was acquitted on a charge, but convicted on another.

8. Section 158A was inserted into the JA after the decision in *Latoudis v Casey* (1990) 170 CLR 534[8] in which it was observed by majority that an order for costs is compensatory in nature and that costs would be awarded in the exercise of a statutory

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[7] Made pursuant to section 266 JA.
[8] *Justices Legislation (Miscellaneous Provisions) Act* 1992, No 40, section 91; para [5] submissions for the prosecution.

discretion to a successful defendant in summary proceedings[9]. Section 158A provides for a range of factors to consider in determining whether an order for costs against a police officer is proper.

9. Three grounds were relied on by the defendant to support the view that an order for costs in his favour would be proper. First, as the charge was under the Criminal Code carrying a maximum term of 2 years imprisonment, a conviction would have had significant consequences on his career as a police officer[10]. As to this, while it was acknowledged that a conviction might have had extra curial consequences, the prosecution submit this does not go to the question of whether costs are proper[11].

10. This is not a ground expressly referred to in section 158A (2). However, that does not mean to say it is something that should not be taken into account. Having said that, I tend to agree with the prosecution that little if any weight should be placed on this ground. No doubt consequences would be adverse for anyone in the public sector convicted of this offence necessitating a vigorous defence.

11. The second ground relied on by the defendant is that there was a failure to properly investigate: section 158A (2) (b) JA. The statements provided made no reference to the phone call made by Ms QFN to the defendant at 8.51 am on 17 December 2015 and no attempt was made by investigators to obtain an account of that conversation which was a critical factor in the decision to acquit[12].

12. In response the prosecution said this is mistaken. A three page statement was obtained from Ms QFN on 17 December 2015 in which she made no reference to the phone call or the text messages[13]. A further 10 page statement was obtained from Ms QFN on 15 June 2016. Both statements have been provided without objection.

13. On this ground, it is convenient to set out the prosecution's submissions as follows (footnotes omitted):

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[9] See *Summary Offences Law and Practice Queensland*, The Law Book Company, at [JA.158.40] & [JA.158.60]
[10] Para [9(a)] submissions for the defendant.
[11] Para [11] submissions for the prosecution.
[12] Para [9(b)] submissions for the defendant.
[13] Para [13] submissions for the prosecution.

12. The second ground is mistaken. It suggests that the police made "no attempt …to obtain from Ms [QFN] an account of [the] conversation with the [defendant] at 8.51 am on 17 December. This is not the case.

13. A three page statement was obtained from Ms [QFN] in relation to the allegation of a domestic violence breach. The statement was made on 17 December 2015, that is, on the same day as the events in question. Ms [QFN] did not make any reference to the phone call or text messages with the [defendant] in that statement.

14. A further ten page statement was taken from Ms QFN. This latter statement was ostensibly intended to address the complaint made against the [defendant]. Ms QFN detailed her relationships with [Mr BQ] and with the [defendant]. She also supplemented her earlier statement by addressing the events of 17 December 2015.

15. Ms [QFN] speaks to one telephone conversation with the [defendant]. She suggests that she thinks she 'made the telephone call after the seventeenth of December 2015 but cannot be sure of dates'. The phone records procured by the investigators do not suggest some other call; apart from some calls which apparently go to voicemail, there are no other calls evident other than the call at 8.51 am on 17 December.

16. Ms [QFN's] description of that call is that she 'contacted [the defendant] about a KTM motorcycle which was stolen from [her]. Her evidence at the hearing was that the KTM motorcycle was, at least in part, a topic of her conversation in the phone call. Her statement does not suggest she raised any concerns for her safety or issues with domestic violence in the telephone call. Rather, she called to find out if 'what Gympie police told [her] about [the motorcycle] being a civil matter was right [and that the [defendant]] told [her] it was the choice of the police to make it a civil matter'.

17. There was no suggestion by Ms [QFN] that the phone call she had with the [defendant] canvassed domestic violence or that any advice was given to her by the [defendant] in respect of domestic violence. To the contrary, she stated that '[A]s far as I am aware [the defendant] knew [Mr BQ] and I were in a relationship … I don't think he knew [Mr BQ] and I had separated'.

14. I note that after having read Ms QFN's second statement, the picture painted therein is completely at odds with the picture painted by her evidence at trial.

15. Further, the words in section 158A (2) (b) provide for "failure to take appropriate steps to investigate a matter coming to, or within the knowledge of the person responsible for bringing …the proceeding". Here, the phone call was identified but, contrary to the impression she gave in court, Ms QFN failed to say in her statement to police that she told the defendant during that phone call that she was in fear of Mr BQ and that the defendant had advised her to call "000". In her second statement she was

asked about her contact with the defendant prior to being shown a print out of the text but could not remember "a lot of detail"[14]. She was then shown the text but still did not think to mention the phone call earlier that day expressing fear of Mr BQ[15]. Those matters were critical to the outcome and they did not come to and were not within the investigator's knowledge when the more detailed statement was made. In terms of section 158A (2) (b) JA, the question is what other "appropriate steps" could have been taken to investigate the matter to unearth facts purely within Ms QFN's knowledge and which only came to light when she gave evidence at trial. In my view, there was no failure of the person responsible for bringing the prosecution on the issue raised by the defendant.

16. The third ground is that there are no disqualifying factors in section 158A (2) JA to decline an order for costs[16].

17. In response, it is convenient to recite the prosecution's response leading on from the second ground (footnotes omitted):

> 18. This leads naturally to the third ground raised by the [defendant]. The defendant chose to exercise his right to silence. He did not provide any explanation and, importantly, did not disclose the content of the telephone call. He gave no indication that he considered the access to the restricted computer 'was necessary on reasonable grounds to lessen or prevent a serious threat to the life, health, safety or welfare of Ms [QFN]'.
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> [I interpolate here that this was the effect of his evidence at trial.]
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> 19. Both Ms [QFN's] statements had been disclosed no later than November 2016. The content of phone calls was uniquely within the knowledge of Ms [QFN] and the [defendant]. [The defendant] did not record the contact with Ms [QFN] in the Gatton Criminal Investigation Branch daily occurrence sheet, his official police diary or his official police notebook[17]. It was apparent that Ms [QFN] had not made reference to any discussion during a phone call about domestic violence despite comprehensively detailing her contact with the applicant.
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> 20. [The defendant] did not himself or through his legal representatives raise the matter of the telephone call with the prosecution prior to being charged[18].

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[14] Para [38] of her second statement.
[15] Para [39] of her second statement.
[16] Para [9(c)] submissions for the defendant.
[17] Reference was made to a statement of Inspector Stephen Matthew Angus dated 12 October 2016 who was the officer who charged the defendant. There was no objection to this reference.
[18] The Bench charge sheet indicates the defendant was charged on 6 July 2016.

> 21. Nor was the content or importance of the telephone call raised through the case conference process The [prosecution] submits that the inclusive language of s 158 (2) [sic] should be read as accommodating the more recent case conferencing process and, in particular, s 158 (2) (f) [sic] should not be read as excluding post charge conduct by the [defendant].

18. These factual matters have not been challenged in this application. In terms of section 158A (2) (f) JA I am satisfied that the defendant unreasonably declined an opportunity of explaining his version of events before being charged. I am also of the view that, given the case conferencing process introduced by the Moynihan reforms, this would have been a perfect opportunity of explaining his version of events then and which may have avoided continuation of the prosecution. He failed to do so. The version presented at trial was pivotal to the decision to acquit.

19. Another matter not argued in submissions by the parties is that in my reasons for judgment I found that after the defendant had accessed QPRIME in response to Ms QFN's request, he did not take any other action to inform the Gympie police about the breach of the domestic violence order [19] and that this was a factor in support of the view that his access to QPRIME was not work related. When asked why he didn't take any action on the domestic violence breach, his response was "Because I'm a detective and that's not what I do"[20]. He then continued to say that Ms QFN knew what to do after being informed that there were no warrants. This is incongruous with his expressed concern to lessen or prevent a serious threat to her life, health, safety and welfare. Yet, as a detective, he saw fit to text her when he did.

20. In failing to take any other action after accessing QPRIME the defendant may well have "brought suspicion upon himself by conduct engaged in after the event" in terms of section 158A (2) (e) JA given his expressed concerns for Ms QFN's safety in order to lessen or prevent a serious threat to her life, health, safety and welfare. While I found this to be a factor towards a conclusion that his access to QPRIME was not work related, he was acquitted for other reasons outlined. However, this is a factor relevant to the question of costs. The same could be said about the defendant's failure to record this event in the daily occurrence sheet, his official police diary or notebook.

21. In my view, it is not proper to award the defendant his costs.

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[19] *QPS v Neuman* [2017] QMC 6 at [59].
[20] Transcript 1-35 lines 10 – 16.

22. The charge is dismissed with no order as to costs.