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TRANSCRIPT OF PROCEEDINGS

MAGISTRATES COURT

MACCALLUM, Magistrate

MAG-00000385/16
MAG-00146337/16(3)

POLICE	**Complainant**
and	
DANIEL DENIS BANKS	**Defendant**

IPSWICH

9.15 AM, FRIDAY, 15 SEPTEMBER 2017

DECISION

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

BENCH: In this matter, Mr Banks appears before this Court on 23 charges, pursuant to section 408E of the Criminal Code, that on various dates between the 31st of October 2013 and the 30th of October 2015, he used a restricted computer without the consent of the Commissioner of Police, and thereby gained a benefit, namely, knowledge. Mr Banks pleaded not guilty to the charges. For the record, of course, I note that the Prosecution bears the onus of proving the elements of the charge beyond reasonable doubt. Mr Banks, at the time these offences are alleged to have been committed, was a serving member of the Queensland Police Service.

The Crown alleges that Mr Banks accessed QPRIME on 20 occasions via his Service-issued desktop computer, and on three occasions via a Service-issued QLiTE device. During the searches of QPRIME, Mr Banks obtained information about a number of people, including his wife; his wife's former partner, Shane Fraser Jones; his wife's grandfather; an associate of Mr Jones, Jordan Courtney; other police officers; and also himself. Some of the searches related to addresses and vehicle registration numbers.

Mr Hunter QC, for Mr Banks, conceded that his client had used the computer for the purposes indicated, but whether, by virtue of his employment as a police officer, he was authorised to access QPRIME as outlined by the Crown, and whether there was a benefit to Mr Banks; in other words, is knowledge a benefit? A formal admission of facts was provided, and is exhibit 1. In that document, there were 16 admissions made, including the following:

> *That the defendant was, on the 24th of August 2013, appointed to the position of general duties officer at the Goodna Police Station;*
>
> *That the QPRIME system is stored on a computer owned by the Queensland Police Service;*
>
> *That a code, in the form of a unique password, for accessing and/or using the QPRIME system is issued to each police officer employed by the Queensland Police Service;*
>
> *That the defendant was a person to whom a code was allocated, which comprised the user ID number and a password;*
>
> *That on the dates and times contained within the statements of Gayle Anna Jeffries, searches and perusals of record were undertaken by Mr Banks, and at the places as alleged in the bench charge sheets.*

Additionally, the exhibit 2 outlines the particulars of the charges, which included the following:

That QPRIME is stored on computers owned by the Queensland Police Service, for which a unique code is necessary to gain access to or use the computer system;

That the Controller of the QPRIME system took steps to withhold knowledge of the code from all other persons, and/or the Controller of QPRIME system took steps to restrict access to knowledge of the code issued to the defendant;

The defendant was, at all relevant times, a serving officer of the Queensland Police Service;

That the defendant was a person who possessed a code to enable him to access the QPRIME system;

On each occasion subject to a charge, the defendant accessed information stored in the QPRIME computer system;

The defendant had consent to access information stored in the QPRIME computer system;

This consent was limited to circumstances in which he had an official purpose related to the performance of his duties as a police officer;

On each occasion subject to a charge, the defendant accessed information for which he had no official purpose relating to the performance of his duties;

That on each occasion subject to a charge, the defendant did not have the consent of the Controller of the QPRIME computer system when the defendant accessed the information stored in the QPRIME computer system;

That the defendant gained a benefit, or intended to gain a benefit;

That the benefit was an advantage, namely, knowledge.

Further particulars attached to exhibit 2 set out the detail of the benefit alleged to have been gained as a consequence of each access to QPRIME. As indicated in exhibit 1, Mr Banks admits using a restricted computer, but disputes that such use was without consent, and disputes that he gained a benefit, which has been particularised as being knowledge.

The Crown has helpfully supplied a spreadsheet setting out the dates on which QPRIME was accessed by Mr Banks, the manner by which the search was conducted, and the records search. This document was not admitted as an exhibit, so I will, for current purposes, simply refer to it as summary of QPRIME searches. This document essentially sets out the evidence upon which the Crown relies, and I do not therefore propose to repeat the information in bulk.

The Crown submits that the only purpose for which Mr Banks could access QPRIME was for an official purpose. In respect of charges 2 and 3 of the group of four charges, the Crown alleges that Mr Banks made two searches via a QLiTE device. In respect of charge 2 of the group of four, the evidence is that the search commenced at 1612.40 on the 8th of October 2015, and a search of a vehicle with registration number 056THE was conducted. The records viewed at this time related to the make and model of the vehicle and details of the registered owner. At the same time, records relating to David Frederick Thomas Downard were also viewed. On this date, Mr Banks is noted on the duty roster as being sick and not on duty.

Charge 3 of the group of four relates to a search via a QLiTE device, which commenced at 0718.42 on the 14th of October 2015. On this occasion, a vehicle search in respect of registration number 492JXH was conducted. The records viewed related to the make and model of the vehicle as well as the registered owner's details. In addition, records relating to Daniel Denis Banks – that is, the defendant – were accessed, as well as information relating to a lack of CrimTrac records in respect of him. On this date, Mr Banks was recorded in the duty roster as being on a rest day.

In respect of these charges, it would therefore be very difficult to accept that Mr Banks was performing any official duty. In relation to all other charges set out in the summary of QPRIME searches, Mr Banks is recorded as being on duty, performing a variety of functions.

Superintendent David Johnson gave evidence that during the period of 2013 to 2015, he was a business manager with the Queensland Police Service, and had responsibility for QPRIME, which included the evolution of QPRIME, the controls and the use of that system. He described the means by which a person can access the police computer system, by inputting a user ID and a unique password. The user ID is generally the person's payroll number. Once access is gained, QPRIME is launched by way of an icon, which then displays a warning screen and a security screen, which contains the terms and conditions of usage. This then requires the user to click on either the OK button or Cancel button. If OK is pressed, the user proceeds into the QPRIME system; and, obviously, if Cancel is pressed, the user cannot proceed further into that system. Exhibit 40 is a screenshot of a warning screen that comes up upon first launching the QPRIME program. Item 1 of that warning reads as follows:

> *Access to and use of any information on this computer system is for authorised users only. Any unauthorised access and use (for example, the use of another's user ID) is strictly prohibited. By accessing or using this system, you are representing that you are an authorised user. You are not authorised to access information for personal reasons.*

The next screen displayed is headed "Reason for system access", and enables the user to access a drop-down box which contains a list of reasons why access to the system is sought. Exhibit 41 is a screenshot of this screen. From the summary of QPRIME searches provided by the Crown, it seems that Mr Banks has provided a

reason for accessing QPRIME which, when done from the desktop, has been noted as "occurrence". There has been no reason provided where access has been obtained via the QLiTE device. During the course of his evidence, Superintendent Johnson gave evidence of the controls put in place to access QPRIME, as well as providing, by way of exhibits, a number of policy documents, which set out a lot of those controls.

Exhibit 42 is the Queensland Police Service Standard of Practice. This document sets out, amongst other things, the improper use of information and communication technology and improper access or use of Queensland Police Service information. Exhibits 43 and 44 set out, respectively, the use of information and communication technology facilities and devices, and system access control.

From these, it is apparent that the Queensland Police Service has many protocols in place for access and use of the Queensland Police Service computer system and its various applications. The term "occurrence", which was the reason chosen by Mr Banks for accessing QPRIME, is interpreted as being either the commencement of an investigation or a step taken in the investigation. The whole of the evidence given by the Crown witnesses is that Mr Banks had no official role in the matters which he accessed and which were the subject of investigation or action by other police officers.

It is equally clear that the Queensland Police Service has many protocols surrounding access to QPRIME, and the access to and use of information contained within the QPRIME application. Exhibit 40 makes it very plain that access to QPRIME information is not authorised for personal reasons, and that by accessing the system, the user is representing, he or she is an authorised user. Mr Banks had to accept those provisos when he clicked OK on the opening page of the QPRIME application.

Counsel for Mr Banks has raised a number of issues about section 408E. Hopefully I have understood the argument properly, and if so, it seems that the essence of the argument for the Defence is that (1) at all relevant times, Mr Banks was a police officer, and therefore entitled to use the QPRIME system. It is submitted that, pursuant to section 792 of the Police Powers and Responsibilities Act 2000:

> *A police officer performing a function of the police service is performing a duty of a police officer even if the function could be performed by someone other than a police officer.*

Secondly, that the obligations of the police officer include those functioned outlined at section 2.3 of the Police Service Administration Act 1990, and that this does not exclude Mr Banks from assisting in respect of a matter which involved his wife; thirdly, that the consent provided to Mr Banks was in respect of access to the computer, not the programs or application thereon; fourthly, that the reference to "computer" in section 408E refers only to the hardware, not the software; fifthly, that mere knowledge is not a benefit, as there is no evidence that Mr Banks obtained an advantage by accessing the information; sixthly, that even if knowledge is a

benefit, there is no evidence that he acquired such knowledge; and finally, that use contrary to the Queensland Police Service protocols is not a matter for criminal liability, but may rather be the subject of a disciplinary sanction.

Section 408E says:

> *A person who uses a restricted computer without the consent of the computer's controller commits an offence.*
>
> *(2) If the person causes or intends to cause detriment or damage, or gains or intends to gain a benefit, the person commits a crime and is therefore liable to –*

a greater punishment. Subsection (5) of that sets out the definitions in relation to the various terms contained within the section. "Benefit" is defined is including:

> *...a benefit obtained by or delivered to any person.*
>
> *"Computer" means all or part of a computer, computer system or computer network and includes, for example, all external devices connected to the computer in any way or capable of communicating with each other as part of a system or network.*
>
> *"Controller" means a person who has a right to control the computer's use.*

And I will not bother reading out "damage", "detriment" or the – sorry. "Information" is also defined as including:

> *...data, file, document, or computer language or coding.*

And:

> *"Restricted computer" means a computer for which a device, code or a particular sequence of electronic impulses is necessary in order to gain access the computer; and (b) the controller withholds or takes steps to withhold access to the device, or knowledge of the code or of the sequence or of the way of producing the code or the sequence, from other persons; or restricts access or takes steps to restrict access to the device or knowledge of the code or of the sequence, or to the way of producing the sequence, to a person or a class of person authorised by the controller.*

And "use" is defined as:

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

It is submitted by the defence that the definition of "computer" in section 408E subsection (5) should be interpreted as referring only to the hardware, not the software, and that whilst the section refers to devices, it does not refer to information. If the definition of "computer" "means all or part of a computer, computer system or computer network," then why would that not include software? Further, I would have thought that reference to "devices" was for the purposes of ensuring that accessing a computer system and/or the network, by way of, for example, an iPad, an iPhone, a tablet or a smartphone, or any other external device, was intended to be covered by the section.

Further, if it is accepted that the definition of "computer" includes the sum of its parts, including software, then that must include the information contained within the system. The absence of reference to data does not necessarily mean that the section should be interpreted as being only in relation to access to the hardware of the computer.

Mr Hunter also submits that because Mr Banks was issued with access codes to the computer by the controller, this means that the controller is consenting to access, rather than use of the computer. If this proposition is accepted, then one might wonder how a person might get to use a restricted computer.

The evidence discloses that the person is given a user ID and password, which enables access to the computer, and thereby use of the facilities and applications therein. QPRIME is one of the applications within the computer system, and again, before accessing that application, the person seeking to get into that application has to make a conscious acceptance of the conditions of use and access.

Some examples have been cited by Mr Hunter in which he submits that sending private emails, checking bus timetables, checking Facebook or buying a movie ticket, which are for personal use, might be regarded as breaching the law. It is not for this Court to determine if such actions are a breach of section 408E subsection (1), but accessing an application which contains sensitive information within that computer system is another matter altogether. I am also aware that the Commissioner has issued certain directions in relation to other usages of the computer which might amount to personal reasons, but that is a separate issue altogether.

Mr Hunter submits that section 408E was inserted into the Code to cover situations where access is by means of hacking, by which user IDs, passwords are cracked or bypassed, or a person who used another employee's ID or password, and is thereby acting without the consent of the controller. If that were the case, then a person who used his or her own ID and password to gain entry to QPRIME and obtain information about a suspect in an investigation in which that officer had no involvement, and had no useful information to provide, would not be covered. Of course, if that information was passed on to the suspect, that could result in a significant injustice, but may potentially also not be covered on the interpretation suggested. It is unlikely that this was the result intended by the legislature.

QPRIME contains a lot of information. Superintendent Johnson, at page 65 of the transcript, stated that it contains all Queensland Police Service information in relation to persons, locations, telephone numbers, property items, domestic violence, missing persons, sudden death, crime and intelligent holdings. Much if not all of this information may be sensitive, and therefore it would be essential to protect the integrity of that information base. If the interpretation submitted for were applied, then, as already noted, this could result in grave injustice to that information base.

This is not, in my view, a case where Mr Banks accessed an open computer, such as appears to have been the case in the decision referred to, namely, in the Supreme Court of the State of Oregon v Nascimento. The facts of that case disclose that Ms Nascimento used a computer to print out lottery tickets for which she did not pay. Her access was by way of a computer that had been activated by a store manager so that subsequently any employee could use the terminal to print tickets without any additional authentication or permission. Her use was not restricted, which is different from the Queensland Police Service situation, where a person's access is via entry of a user ID and password. The footnote to this judgment on page 45 says:

> *In interpreting the term "authorisation" for the purposes of this case, we do not mean to suggest that an employer or other computer owner may not devise means to restrict the scope of access that it authorises for particular users.*

The particular circumstances of the case were then described, and the footnote then goes on to say:

> *A different analysis of "authorisation" could be called for if an employer, through use of security codes, password-protected data or encryption, blocks an employee from access to certain computer functions or data. In similar vein, Orin Kerr suggests that the policy issues involving "unauthorised" use should be resolved by using authentication requirements ... and considering access to be "unauthorised" when "a user bypasses an authentication requirement, either by using stolen credentials or bypassing security flaws to circumvent authentication."*

On the one hand, this can be viewed as supportive of the Defence argument, but I respectfully suggest that this has to be considered in the light of the particular circumstances of each case. As already noted, Mr Banks had to use his user ID, his password, and make a positive selection by clicking OK, to enter QPRIME.

Whilst it is submitted on behalf of the defendant that policy documents do not override the law, and that, of course, cannot be disputed, they clearly provide the framework operating for use and/or access to police information. Section 16 of the Queensland Police Service Standard of Practice document, being exhibit 42, states:

> *In the performance of official duties, members of the Queensland Police Service are granted lawful access to many sources of information, confidential or otherwise. With this access comes a requisite level of accountability and*

trust that the information will only be used for official purposes. It is the view of the Queensland Police Service that there is no excuse for members to betray the public trust by making any unauthorised, improper or unlawful access or use of any official or confidential information available to them in the performance of their duties.

When dealing with official or confidential information of the Queensland Police Service, members are not to access, use or release information without an official purpose related to the performance of their duties.

As part of his training as a recruit, Mr Banks undertook a computer training course and a QPRIME fundamentals course. The evidence of this is contained within exhibit 47. Reference was also made to the provisions of other States with similar legislation, but which refer mostly to accessing data rather than "restricted computer". The Criminal Code of Western Australia has an expanded offence provision within subsection (2) of section 440A.

It is submitted that the consent attaches to the computer, rather than the data, and Mr Hunter goes on to give an example, whereby, if the computer was not password- or code-protected, and Mr Banks accessed it contrary to policy provisions, would it be a criminal offence? He submits not. However, perhaps this should be looked at another way, and that because this particular computer is restricted to code or password holders only, the use made of the information therein remains restricted. One might wonder for what other purpose the Queensland Police Service would bother having restricted computers.

In any event, the further submission is that Mr Banks accessed the computer in connection with his duties as a police officer. This seems to be that because his wife was the subject of domestic violence, for which an order was made, and that there were allegations of breaches of that order by the respondent, as well as other criminal offences alleged to have been committed by the respondent. Reference is made to the duties of a police officer, pursuant to section 100 subsection (1) of the Domestic Violence Family Protection Act, and that there is no reference in the policy documents about conflict of interest. Whilst that may be the case, there can be no more obvious situation of conflict of interest than a matter involving a relation or a friend.

Evidence was given by Superintendent Johnson about conflict of interest situations and the attitude of the Queensland Police Service to such situations. In those circumstances, an arms-length approach has to be adopted to avoid any suggestion of bias in relation to the investigation and/or prosecution of a criminal charge, or an application such as a domestic violence application.

The Court was also referred to the Police Service and Administration Act 1990, and in particular 2.3 thereof, which sets out the functions of the police service. However, section 3.2(1) of that Act provides that:

Subject to section 7.1 –

which is relating to the responsibility for command –

where that section applies, in performance of the duties of office, an officer is subject to the directions and orders of the Commissioner and to the orders of any superior officer.

Assuming that the directions referred to in this section given by the Commissioner include policy documents issued under the auspices of the Commissioner from time to time, then a police officer must comply therewith. In those circumstances, it would seem that in accessing the computer and applications thereon, a police officer must comply with the contents of those directions, and to do otherwise would be a use contrary to the permission of use.

It is accepted that there is no evidence that Mr Banks passed on information that he received as a result of his QPRIME searches, nor that he did anything other than communicate, in a proper fashion, with other police investigating the matter. However, it perhaps needs to be remembered that by accessing information on QPRIME, Mr Banks obtained information that is not available to members of the general public. That information might be available by a member of the public speaking with the investigating officer, which is what Mr Banks or his wife should have done. Bypassing that by the use of QPRIME effectively puts him in a better or more convenient position.

The argument that he was acting in his position as a police officer is not accepted. If that argument is followed through, would that mean that any officer whose family member or friend was the victim of a serious criminal offence would be entitled to access information about the offence? I would think not. It goes back again to the question of being at arms' length and not leaving any possible prosecution or police civil application being open to challenge as to the integrity of the investigation or procedure. For these reasons, I do not accept the submission that Mr Banks had authority to access QPRIME for the purposes alleged, and that he was acting beyond the scope of the consent given by the computer's controller.

The next matter for consideration is whether Mr Banks gained a benefit from his foray into QPRIME. As noted at the outset, the use raised by the Defence is whether mere knowledge is a benefit for the purposes of section 408E subsection (2). Mr Hunter submits, and it is accepted, that the particulars relied upon by the Crown do not allege any consequential benefit was received by Mr Banks as a result of the knowledge obtained, but only that knowledge by itself is the benefit. Subsection (5) of section 408E defines "benefit" as including:

...a benefit obtained by or delivered to any purpose.

The submission by the Defence is that if mere knowledge is a benefit pursuant to section 408E subsection (2), then there would be no need for section 408E subsection

(1). However, would it not be the case that whilst section 408E subsection (1) creates an offence for the use of the restricted computer without anything more, section 408E(2) creates the additional penalty if a benefit is received as a consequence of that use. Section 1 of the Code defines "benefit" in the following terms, that it:

> *includes property, advantage, service, entertainment, the use of or access to property or facilities, and anything of benefit to a person whether or not it has any inherent or tangible value, purpose or attribute.*

This definition appears to cast a wide net as to the meaning to be attributed to what constitutes a benefit. Indeed, the definition says that the benefit does not have to have "any inherent or tangible value, purpose or attribute." That definition is not limited by the definition of "benefit" within section 408E subsection (5). The fact that Mr Banks obtained knowledge can be said to be an advantage, or it could be said to be "anything of benefit to a person" which has no "inherent or tangible value, purpose or attribute."

The Crown submits that section 408E subsection (1) is concerned with the use of the restricted computer, and that the use to which any information thereby obtained is irrelevant. It is further submitted that section 408E subsection (2) relates to obtaining information from the use of the restricted computer, and the use to which that information is put is also irrelevant to the issue to be proven.

There is evidence from the telephone intercept that Mr Banks, in the course of the conversation with Michael Higgins, said:

> *I've looked people up at, like – like all the DV stuff was going on and, like, I looked up people I went to school with and that, but nothing – nothing dodgy like.*

Additionally, Sergeant Kira-Lee Conway gave evidence that during a conversation with Mr Banks in January of 2016 he told her he had accessed QPRIME over time to obtain information about his current partner's ex-partner so that it could be used in a domestic violence application. Unfortunately, Sergeant Conway kept no note of the conversation with Banks and the evidence she gave was, in effect, her best recollection of what was said. Whilst not unreliable, this evidence has to be viewed through that prism that no note was taken and that she was only asked to recall the conversation some time later.

I accept these statements amount to admissions that Mr Banks got information which, it would seem, must be a benefit even if nothing was done with it and even if the information obtained did not necessarily provide positive information, but merely meant that what was viewed was of no value or use or interest. It's accepted that there is no evidence that information [indistinct] by Mr Banks was ever passed on to anyone or used by him.

Reference was made to the decision in R v Saba [2013] QCA 275. Mr Saba was charged pursuant to section 408C subsection (1) paragraph D that he dishonestly gained a benefit, namely, control of Deeva Development Construction Proprietary Limited. The actions said to constitute the dishonest benefit were changes made by him to ASIC records to indicate that he was the sole director and shareholder of the company. There was no contention by the Crown that there was any particular transaction and view which the change would affect or any person in view who might be or who might make an assumption that could impact his or her dealings with the company. The Crown did not contend that there was any benefit or advantage in what had been done. The question of benefit was considered by the Court of Appeal and, at paragraph 49, his Honour Justice Jackson said:

> *In my view, the potential that some person might make the assumption in the future is not a benefit or advantage for the purpose of section 408C(1)(d).*

Later, at paragraph 50, his Honour said:

> *The scope of section 408C, and the potential for liability to criminal responsibility which it engages, where a person dishonestly gains a benefit or advantage pecuniary or otherwise, are undoubtedly wide. But they should not be extended by the tortured analysis advanced by the prosecution in this case. The submission of each electronic form 484 may have formed part of some scheme whereby the appellant planned to defraud each company. But it was not itself a benefit under section 408C. It did not confer an advantage on the appellant by itself. It was at most a step along the way towards gaining some unidentified advantage.*

The defence, therefore, submissions that the acquisition of knowledge will not, therefore, amount to a benefit if it is merely preparatory to the gaining of a benefit. I think that there is some distinction to be drawn here in that section 408C requires the dishonest gaining of a benefit and that it does not have the additional inclusion that is specified in section 408E, that is, the intention to gain a benefit. The result in Saba might well have been different had that been included in section 408C(1)(d).

Additionally and even although I note that the Crown does not rely upon the intention to gain a benefit, the benefit alleged in this matter here is knowledge, not some unidentified benefit in the future. There is a clear path here which, in my view, indicates that, to that extent, Saba was capable of being distinguished. It is also my view that, in this matter, Mr Banks has accessed information which was relevant to him. His searches have been in respect of his wife, who was, at the time, the aggrieved in a domestic violence application, she was also the complainant in respect of certain alleged breaches of a domestic violence order and, also, in respect of certain criminal charges alleged against her former partner, Mr Jones.

Mr Jones was also the respondent to the domestic violence application and was the defendant in relation to potential criminal charges. The searches also related to associates of Mr Jones and other persons who were associated, either as potential

witnesses or who were investigating police. Pursuing that information when the domestic violence application and criminal charges were either on foot or [indistinct] investigation can be reasonably inferred as seeking that information about those matters. As noted previously, if nothing was done with that information, it is, in my view, irrelevant.

The Crown has submitted that inferences can be drawn from the evidence of access, however, the drawing of an inference must have limitations. It can't be wide-ranging and just an assumption or a suspicion. The submission of the defence is that absent any evidence that Mr Banks did something with the knowledge gained from the page is there, in fact, any evidence that he even acquired knowledge? Mr Hunter submits that there might have been occasions in which Mr Banks opened a page, but did not read the contents thereof. In that case, can it be said that knowledge was acquired?

The evidence of Gayle Jeffries contained in the statement, dated the 4th of February 2016, and the further statement, dated the 3rd of March 2016, set out the times and dates on which Mr Banks accessed QPRIME and the searches conducted by him. The nature of the activities undertaken are specified in statement 1, that's the one dated the 4th of February 2016, between paragraphs 31 to 519 inclusive. Statement 2, dated the 3rd of March 2016, between paragraphs 4 to 59 inclusive and between paragraphs 63 to 84 inclusive sets out more activities undertaken by Mr Banks. Each of the activities described involve steps being taken within the QPRIME system to pursue information.

In respect of charges 9 to 15, inclusive, of the group of 19, the record shows that information from those screens has been printed. In respect of those offences, it is apparent that knowledge and, thereby, a benefit, was gained.

Of the remaining charges, no information appears to have been printed but it seems from Ms Jeffries' statements that each access to QPRIME was not merely a fleeting glance. It required the navigation through various aspects of the program involving various key strokes to move onto other search areas. That being the case, it can hardly be said that without evidence to what he did with the information, he might not even have gained any knowledge. It would seem that a reasonable inference can be drawn from movement through the screens that information was gained. It would seem irrelevant that he may or not have read everything on the screen. Having regard to all of those matters, in my view, the evidence clearly shows that he intended to gain a benefit and that the remaining charges are proved to the requisite standard. Accordingly, the defendant is found guilty in respect of these matters. Yes?

MR GENECH: Your Honour, I seek an application to adjourn matters for sentence. I understand, in discussing with my learned friend, that the week of the 23rd of October is suitable to both parties, and also Mr Hunter, if convenient to the Court.

BENCH: Sorry, week of?

MR GENECH: The 23rd of October.

BENCH: All right. My clerk tells me I am in a [indistinct] Court from that fortnight from the 23rd of October, so that is going to be out.

MR GENECH: Okay.

BENCH: Look, I know that this is a matter that is going to be appealed. Do you really need to – does the sentence have to be done at this point or do you want to await the outcome of the appeal? Does anybody have a view on that?

MR GENECH: Your Honour, perhaps, if, without confirming whether an appeal is going to be done or not, perhaps, it might just be prudent just to adjourn it for a mention for us to consider your Honour's decision - - -

BENCH: Yes.

MR GENECH: - - - and then that decision could be made.

BENCH: I will also put on the record – and, subject to any other submissions that are going to be made – I would have thought the highest at which penalty here would be a fine, and subject to any other information that might be put before me, I would not have thought that it was a matter that was necessarily going to require the recording of any conviction but I have heard no submissions in relation to sentence or anything of that nature so - - -

MR GENECH: Yeah.

BENCH: - - - I am just flagging that at this stage as to whether that makes any difference as to whether we just want to be running a sentence on that basis but, of course, the Crown might have a different view, I do not know.

MR GENECH: Yes, thank you, your Honour.

BENCH: I am happy to mention it, perhaps, on the 23rd of October in Court 1.

MR GENECH: Thank you, your Honour.

MS KELLY: Your Honour, may I just raise an issue. Just – as your Honour delivered your Honour's ruling – verdict – before your Honour stated that you found Mr Banks guilty, I noted that you had said that you were satisfied that he had intended to gain a benefit. I am just wondering whether I need to raise the fact that your Honour encompassing that intended to gain and gained a benefit.

BENCH: I am sorry. If I did not say that, I should have said it. That really would have been – yes, I would say that he – I will just amend that last part to say:

In my view, the evidence clearly shows that he intended to gain a benefit, namely, knowledge, and that the remaining charges are also proved to the requisite standard.

Because I made the comment in relation to those charges 9 to 15 where the printing out of information was a clear indication for the gaining of knowledge but that the remaining charges, in my view, also indicated an intention to gain a benefit, namely, knowledge, and that those charges were proved to the requisite standard.

MS KELLY: Thank you, your Honour.

BENCH: Thank you.

MR GENECH: Thank you, your Honour.

BENCH: Mr Genech, I will just say, too, that on the 23rd of October, your client is not required to attend. Bail is simply enlarged until that day.

MR GENECH: Thank you, your Honour.

BENCH: We will determine on that day what is – where it is going to go from there.

MR GENECH: Thank you, your Honour.

BENCH: All right. Thank you.

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TRANSCRIPT OF PROCEEDINGS

MAGISTRATES COURT

MACCALLUM, Magistrate

MAG-00003951/17

POLICE — **Complainant**

and

DANIEL DENIS BANKS — **Defendant**

IPSWICH

9.02 AM, TUESDAY, 7 NOVEMBER 2017

DAY 1

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

BENCH: Yes, thank you.

MR NEEDHAM: Yes, good morning, your Honour. If the court would take the matter of R v Daniel Denis Banks?

BENCH: Yes.

MR N.W. NEEDHAM: May it please the court, your Honour, my name is Needham, N-e-e-d-h-a-m, initials N.W. I appear on behalf of the Director of Public Prosecutions for the Crown.

BENCH: Yes, Mr Needham, yes.

MR C.R. GNECH: Thank you, your Honour. If the court pleases, my name is Gnech, spelt G-n-e-c-h, initials C.R., solicitor with the Queensland Police Union Legal Group. I appear of Mr Banks, your Honour.

BENCH: Yes, thank you, Mr Gnech. Yes, Mr Needham.

MR NEEDHAM: Yes, your Honour. The defendant, Mr Banks, as the court is aware, was convicted on the 15th of September 2017, following a trial in relation to 23 offences of computer hacking with a circumstance of aggravation, that is, to gain a benefit particularised as knowledge. For the record, your Honour, I'll tender the decision transcript.

BENCH: Yes, that'll be exhibit 1.

EXHIBIT #1 ADMITTED AND MARKED

MR NEEDHAM: Thank you, your Honour. Your Honour, his date of birth is the 27th of April 1985. He's 32 years of age. He has no criminal history, he's not spent time in custody in relation to this offence, your Honour. Or these offences, I ought to say. Your Honour, the offences – and I'll just briefly summarise them, because your Honour is well appraised of the facts, obviously – were committed over a approximately a two-year period, between October of 2013 and October of 2015. The maximum penalty for the offences is five years' imprisonment. The way that it proceeded through the courts, your Honour – it was subject of a section 590A hearing in February of 2017. There was a trial on the 20th of July 2017. The defendant, to his credit your Honour, made many admissions on the evidence and facilitated the way in which the trial was run and it was able to be completed within a day.

The basis upon which the evide – the Crown case was challenged, your Honour, can be discerned starting from about page 5 of the decision transcript, from about line 30.

It was noted that the essence of the defence were on several bases. The first of which was that, as a police officer, he was entitled to use the QPRIME System as part of his role, outlined at section 79(2) of the Police Powers and Responsibilities Act. Secondly, that as part of his obligations, that included the functions of section 2.3 of the Police Service Administration Act of 1990, which doesn't exclude him from accessing the records that he did. That his role allowed him consent with respect to access to the computer, but not the programs or the applications thereon. There's a difference between software and hardware. That knowledge was not a benefit and therefore there was no evidence that he obtained any advantage. That even if it was a benefit, that there was no evidence that he acquired such knowledge. And, finally, that the matter was best dealt with by way of Queensland Police Service protocols and was not a matter for criminal liability. Those arguments ultimately failed and he was convicted. He's been, on my instructions, with the Queensland Police Service since the 23rd of January 2012. He was working as a general duties officer at the Goodna Police Station during the relevant period.

To summarise the offences very briefly, there were 23 separate days between the offence dates where he accessed the Queensland Police Records and information management exchange computer system, known as QPRIME. He did so using his desktop computer at work or a police-issued iPad device, which is known as the QLiTE system. He conducted unauthorised searches for information relating to some eight people, including his wife, her ex-partner, other police officers and family members. He also searched the details of vehicles and an address. He sought – saw records in relation to himself. Those searches that were undertaken by him led to him gaining access to various records on QPRIME including, but not limited to [indistinct] and intelligence reports, Domestic and Family Violence applications and protection orders, details of police cautions or flags, Queensland Transport records, criminal and transport – excuse me – traffic history details, crim track records and vehicle registration details. As stipulated, the benefit the Crown alleged was that he gained knowledge – knowledge that was gained through unauthorised access to the system through those searches.

He was charged initially with 19 offences on the 14th of March 2016 and a further four offences on the 27th of June 2016. He's been on bail since that time and these offences have been hanging over his head for that period of time. Your Honour, in relation to the way in which the court ought to approach the sentence, it's tried to say that a serving police officer making private searches for information that was sought from the use of the QPS involves great degrees of general deterrence. There is a high level of trust placed on people who have access to such information by virtue of their positon, particularly within the Queensland Police Service. And as was proven throughout the course of the trial and relied upon by the Crown, numerous policies and warnings concerning the unauthorised access of information outside the scope of an officer's official duties. It is the kind of offence that is capable of eroding confidence in the Queensland Police Service and the sanctity of the information that is kept within that service. It cannot be said that this was a one-off or can be characterised on a weakness or a particular request to appease a person that was overbearing him. It extended over a long period of time, with the accesses and is

perhaps demonstrative of something of a cavalier attitude towards his responsibilities and those warnings that came within his position, having access to that information.

Now, your Honour, I've provided the court with some decisions that may be of general assistance. First and foremost, none of those decisions proceeded through the courts after the defendant had engaged in a trial and the defendant's not to be punished for exercising his right to have a trial, your Honour. But he does lose the benefit of that early plea of guilty. But tempered, as I said in my submission, by the various submissions he made for the facilitation of his trial. I'll speak first, your Honour, to the case of Boden [2002] QCA 164. It is an offence that was alleged in a similar vein, insomuch as using a restricted computer without the consent of the controller, though this was with an intention to cause detriment or damage, as opposed to gain a benefit. It is a more serious example of the conduct itself, though Mr Boden was a person who was not engaged by the police service. He was with a private contracting company. He sought to alter records of the city council's sewerage system after it seemed he was rejected from applying for a position for that council. Now, it must be said that, in terms of his conduct, there was a much greater degree - - -

BENCH: Sorry, which matter was this?

MR NEEDHAM: This is Boden [2002] QCA 164. I have a copy here of - - -

BENCH: No, I don't seem to have been provided with that.

MR NEEDHAM: I'm sorry, your Honour. I though that had been provided in advance. I have a copy here.

BENCH: Hold on. Sorry, my mistake. Sorry, yes, go on.

MR NEEDHAM: Now, your Honour, as I was saying, he was an engineer rather than a police officer - - -

BENCH: Yes.

MR NEEDHAM: - - - and he was not engaged by the council at the time.

BENCH: [indistinct] actually read this.

MR NEEDHAM: But, as it was alleged, this was to cause detriment, as opposed to gain a benefit, so his activity was far more nefarious in these circumstances. He did, in fact, cause environmental harm, though the sentence in court found in the Court of Appeal agreed that his intention was not to cause serious environmental harm, but that he was aware that his actions created that risk. That's at paragraph 52 of the decision. The offending period was shorter and it was alleged to have occurred over some weeks, as opposed to this this case. And it was noted from paragraph 53 that the acts caused considerable disruption, inconvenience and expense. As part of his

punishment, which was 18 months' imprisonment for an offence that carried a maximum penalty of five years, he also had to pay the sum of $13,000, or thereabouts, for the compensation, after causing the spillage.

BENCH: Yes.

MR NEEDHAM: Your Honour, I'll turn the court's attention to the case of Sharif. It's a District Court decision, your Honour, from Judge Bradley, dated the 1st of June 2011.

BENCH: Yes, thank you.

MR NEEDHAM: Thank you. Now, your Honour, this was an offence of misconduct in relation to public office under section 92A of the Criminal Code. It therefore had a maximum penalty of seven years' imprisonment. The defendant in that case, though he was described as having held the public office, he was in fact an IT person with the Queensland Police Service, as opposed to a serving police officer. His offending was particularised as eight unauthorised accesses to QPRIME. It was, contrary to this case, only to look up information on himself, but there was something of a serious intent in that, because he was looking up the information to see if his other activities had come to the knowledge of police and, therefore, the advantage for him was particularised that way. He was younger, being 23 to 24 at the time of the offending and, as I said, not actually a serving police officer. He cooperated with the police when he was detected and there was some delay, it was noted by her Honour, between the charge being laid and bringing the matter ultimately to the District Court.

Although her Honour found consistent with the facts that had been placed before her that no other person's privacy had been breached, it was accepted that general deterrence, even for him, loomed large. But, ultimately, his youth, his prior good character, his plea and his cooperation were factors together that persuaded the court to offer him community-based orders with no conviction recorded. Ultimately, it was 100 hours' community service. So there are some favourable factors in Sharif's case than those compared to this case, your Honour. Your Honour, I'll turn the court's attention to the matter of Higgins. It was a decision of your Honour's court on the 24th of April 2017.

BENCH: Yes.

MR NEEDHAM: Now, your Honour, the matter of Higgins, he was consistently, with this case, a serving police officer. He pleaded guilty to a slightly different offence under section 92(2) of the Criminal Code, which carried a maximum penalty of three years. Ultimately, his offending behaviour was characterised – was particularised – two ways. First of all, his failure to refuse a request from his father to seek information concerning a third person's licence. The second was accessing details of an address – an address where his child had been invited for a sleepover, as requested by his partner. There were only those two accesses and the – all he

received in that case, it was accepted, was knowledge, and it was also accepted that he had no way of knowing that the information he put – provided to his father – was passed on. He received the benefit of a fine with no conviction recorded. The fine being $3000. So a shorter period of access, two particularisations, a lower maximum penalty and a plea of guilty.

I'll turn the court's attention, your Honour, to the District Court decision sitting in its appellant jurisdiction of his Honour Judge Botting, now retired – the matter of O'Neil & Felingos, 13th of March 2015. Now, I note your Honour's been provided with the transcript at first instance of the hearing by my friend.

I'll just speak to the appeal at this point in time because it's relevant to note that the basis of the appeal really lay in parity as between co-offenders. His Honour commented that though he was of the view that the two co-offenders to Mr O'Neil may well have received favourable sentences, that that was an issue that needed to be taken into account to a greater degree in the sentence of O'Neil himself and that is where he found error.

And the usefulness of that decision is restricted, to some degree, by the fact that it was argued purely on that parity basis. But that is another example of a serving police officer accessing QPRIME records. He pleaded guilty to 21 various offences. And, ultimately, like I said, he was successful in his appeal to the District Court under section 222. His initial sentence, which was a wholly suspended term of imprisonment, was reduced to a fine of $2000 without a conviction being recorded.

I'm sorry. No, it was Mr Robinson who pleaded to 21 offences. So Mr O'Neil pleaded to seven offences. Sorry, your Honour. Thank you. Your Honour, I'll turn the court's attention to the case of Grantham. Now, Grantham is of less utility because of the circumstances of that case as opposed to seeking information for advantage. It was described by his Honour Judge Martin in the District Court on the 1st of December 2015 as an abuse of office for gain and a serious example of nepotism, so a different factual basis in that before your Honour today.

She would ultimately receive six months' imprisonment, albeit wholly suspended, and ordered to pay compensation to the tune of $17,000. She was a person who was very up in the government and created a position that wasn't properly advertised or justified and had her son appointed to that position. Now, ultimately, the position was reclassified, albeit for a lower pay rate, and he was successful in the proper application. But that's where the $17,000 compensation came in that she paid the difference between what she had allocated or allowed to be allocated and what the proper allocation was for that position.

His Honour noted that in the circumstances of her position, that, as is this case, that there is a real need for denunciation and deterrence and there is a need to uphold the faith that the Queensland tax payer has in government services, particularly people who hold such important positions.

Apart from having the conviction recorded against her for the wholly suspended term of imprisonment, Mrs Grantham was said to have suffered significantly financially for the loss of her position but did continue to participate with her community service even after she'd been charged with the offence which was very much to her credit.

And, finally, your Honour, I'll turn the court's attention to the cases – I say cases – of Doolan two thousand – I'll first speak to the Court of Appeal decisions – [2014] QCA 246. Now, I've provided that, your Honour, even though a re-trial was ordered because that gives your Honour some context to the factual background of that case which isn't necessarily apparent from the subsequent sentencing remarks of his Honour Judge Dorney on the 26th of October 2015. And that's the reason for my providing both of those decisions, your Honour.

But, again, there's a very serious case of interference with somebody using their position, in this case, as what was described as the high office of prosecutor to interfere with the business of the court. So that's a much greater degree, in my submission of culpability, moral culpability, in terms of what Ms Doolan was doing.

That being said, she was sentenced, ultimately, to two offences: plea to abuse of office and a plea for abuse of office for gain to have maximum penalties of two and three years, respectively. There were some other serious aspects in mitigation for her and they appear from page 5 in terms of her mental health which was taken very much into consideration by his Honour Judge Dorney QC. Ultimately, she received six months' imprisonment for the first count and 10 months' imprisonment for the second count. She had spent, by that stage, some four months' imprisonment and that time was declared as part of her sentence.

Your Honour, so, ultimately, those various factual bases or reasonably wide bases for sentencing, there's nothing precisely on point. I've had the benefit of receiving the materials from my friend for the cases that he relies upon. I've spoken about O'Neil and Higgins. There's some differences in relation, particularly, to the matter of Wright in that his mental health concerns were taken largely into consideration considering the fine in his circumstances to the point where it seemed to be, on my reading of the facts, even accepted that the most high profile search that resulted in the media attention was something that he claimed to not remember even doing and that was not necessarily inconsistent with the mental maladies that he was suffering at the time.

The decision of Peter Betts, your Honour: I'll turn the court's attention to that. That was a decision of Magistrate Shearer on the 14th of March 2016. Now, ultimately, it appears, on my reading of it, that he pleaded guilty to some 51 charges under section 408E(1) and (2), so not dissimilar to the circumstances of this case. He, again, was a serving police officer.

The summary of the facts, your Honour, appears from page 1-10. Again, he's accessed the QPRIME system and was found to have done so notwithstanding the warning screen, as is similar to this case, and he has passed on information, although

it appears that his Honour didn't take the fact of the text messages that were found into account, ultimately, when it came to sentence, but he accessed a variety of records about a variety of people over that short period of time.

His Honour, from the decision transcript, which has also been provided, dated the 14th of March 2017, he accepted, at the time, that he was suffering the residual effects of post-traumatic stress disorder – more likely to be involved in his marriage breakdown than anything else. He refused to have any regard to the contents of the text messages that arose. It was argued by the police prosecution at the time from his activity on those counts.

And his Honour indicated that it must've been blindingly obvious how inappropriate that sort of conduct is – similar. Using the police computer system to facilitate the purchase of drugs is also serious. So his access there was a more involved access than the access we have here. He had prior conviction in respect to dangerous drugs. He wished to go to South Australia. Ultimately, he was convicted and fined $8000 and convictions were recorded – so a deeper level of use of the information or benefit gained, I should probably say, but, again, proceeded by way of a plea as opposed to contested at trial, which is one distinguishing feature.

Now, ultimately, your Honour, the Crown says that the circumstances of this case are serious enough to warrant a term of imprisonment. I do acknowledge those other cases before your Honour, most of which are decisions of the Magistrates Court – not binding on your Honour – but many of them have resulted in fines with the real question mark being over whether a conviction ought to be recorded.

This is a lengthy period of time. It is a wide – wide dates that've been argued. There's over 20 offences. It is not one-off offending. General deterrence looms very large in these circumstances. If your Honour is against me on my submission of imprisonment, the Crown says that the fine ought to be significant and closer to the case of Betts than to the case of Higgins and that the circumstances of this case, it would be in the interest of justice under section 12 of the Penalties and Sentences Act that a conviction be recorded.

BENCH: All right. Thank you.

MR NEEDHAM: Thank you, your Honour.

BENCH: Yes, Mr Gnech.

MR GNECH: Thank you, your Honour. Your Honour, I did email through the cases I relied on yesterday but I do have a hard copy in a folder if your Honour requires that.

BENCH: No, I have them here, thank you.

MR GNECH: Thank you. Your Honour, I have two references that I've disclosed to my friend this morning that I seek to hand up in the outset.

BENCH: All right. I'll mark those as exhibit 2, collectively.

EXHIBIT #2 ADMITTED AND MARKED

MR GNECH: Your Honour, I'll just allow you to read those if - - -

BENCH: Thank you. Thank you.

MR GNECH: Thank you, your Honour. Your Honour, ultimately, my submission is your Honour should consider not recording a conviction and a fine considerably less than the case of Betts. If we first address my client's antecedents. He's now 32 years of age, graduated year 12 in Brisbane in 2002. When he completed year 12, he immediately undertook a diploma of community services. That allowed him to engage in employment in the childcare industry, which he did successfully for a period of 10 years thereafter.

He became a group leader at a leading childcare organisation and served with them for the remaining eight years prior to 2012 when he joined the Queensland Police Service. Upon graduating from the academy, he was appointed as a first year constable here at Ipswich. Upon successfully completing that program, he received a permanent allocation to Goodna general duties. He remains in that position today. Saying that, your Honour, he has been suspended from duties since March 2016. Your Honour [indistinct]

BENCH: Has that been on pay or has he been - - -

MR GNECH: Sorry, your Honour. That has been on pay.

BENCH: Okay.

MR GNECH: Your Honour, perhaps, if I address that point at this point in time. My friend has rightly made submissions in regards to the matter going to trial. Your Honour, this matter has been a test case, really, to be fair to my client. He agreed to have his matter proceed to trial to have a number of matters resolved. And the indication of that being accepted by the service, my submission is your Honour can accept that by the fact that he has been suspended on pay for this long period of time whilst it has gone to trial.

Ultimately, in my submission, any account that your Honour takes into account that he's not entitled to a discount for an early plea should be moderated given those circumstances.

Your Honour, the facts surrounding this matter, as much as there's a couple of difference in regards to what checks he was making, your Honour will recall the majority of them focussed around his wife and the DV situation with his ex-partner. To bring context to that, your Honour, my client married his wife in 2014. His wife at that time had two young children to a former relationship. That situation in regards to custody is that my client and his wife has the two – have the two children eight nights of every fortnight.

Soon after marrying, it is unfortunate that my client's wife was diagnosed with functional neurological disorder. It's not curable, your Honour. My client's wife is bound to a wheelchair. He's a fulltime carer for her. He – it's at a situation now where he must prepare all the meals for the day as much as she's left at home during the day while he goes to work. He must prepare all that.

He pretty much is a single parent during those eight nights in regards to the kids. The full responsibility is with him. He really is the white knight in the relationship with the children and his wife. And I make the submission that that give the situation context as to his deep concern as to what was going in – going on in that space involving the hostile position between his partner – his wife and his former – her former partner.

Your Honour, if I could address my learned friend's referral to the cases to commence with – I'll just go back a step, your Honour. Your Honour, the – as much as my client has been charged with the sub (2) offence, my learned friend rightly points out there is one difference with all of the other cases and that is in all of the other cases where the defendant has been charged under subsection (2), it's involved something of a disclosure of information, a use of information, something far more sinister than mere knowledge.

Your Honour may recall from the evidence there was a phone call between my client and, in fact, Mr Higgins, one the cases your Honour's been referred. And my summary recall of that phone call that was intercepted was that my client was suggesting to Mr Higgins that him being under investigation for misuse of the computer system was quite bizarre and unjust because he does checks himself on his wife. Your Honour, I make this submission: there's clearly some naivety, if I've got the word right, in regards to my client's attitude towards the use of the police computer system.

I make this very general submission that both my client's case and the case of Higgins has been a trigger, adopting my learned friend's word, to overcome a cavalier attitude that may have existed within the Queensland Police Service. There has been a – since these two cases, there has been a clear, largescale public awareness campaign by the Crime and Corruption Commission, the Queensland Police Service and the Queensland Police Union of Employees themselves to change a cultural attitude within the Queensland Police Service.

Now, that cultural attitude, your Honour, in my submission, related from a change from information security where it was trained, installed, made known that information security was paramount and that has been the case for some time. It has not been the case until, if I could identify the trigger of the appointment of Mr MacSporran as the CCC chairperson, that there has been a deliberate change from not just information security but information access itself.

And that's what ultimately my client's before the courts for, in my submission. He hasn't released the information. He hasn't used the information. He's accessed the information and your Honour's found that access has resulted in a benefit.

Your Honour, the case Boden, if I could just say that is, perhaps, one of the most serious examples. There is a significant detriment, both to the environment and financially to the council. It is a case that is far more serious than the one before.

Your Honour, Sheriffe is also a case that, in my submission, is far more serious than the one before you. In that case, he was, in fact, charge with section 92A, as my learned friend outlined, a seven years maximum penalty. But on the first page of that judgment, your Honour, it points out that Mr Sheriffe had previously pled guilty in the Magistrates Court to supplying dangerous drugs, namely, steroids, and the purpose of accessing the police computer system was to identify whether he was any danger or known by police.

Your Honour, the Higgins matter, as your Honour, yourself, judged in that case, it was a section 92 offence. Its maximum sentence is three years. But again in that case, you'll recall, Mr Higgins released the information. He accessed the police computer system and released the information.

In the case of O'Neil, which is the District Court decision that was heard on appeal, your Honour, the – just excuse me a second – it's at page 2 at about 35 that his Honour Judge Botting outlines his concerns about parity that my learned friend drew your attention to. Your Honour, in response to that I make this submission: his Honour still had to make a determination as to a just penalty, even if the parity was the sole position argued in that case.

It's certainly a matter your Honour needs to take into account, the comments of his Honour, but ultimately in that case you had seven counts of a police officer accessing a police computer system about third parties. I can't remember – I don't – I can't recall whether it's even in the facts whether there was seven different people of the seven checks, but there were certainly multiple different people and that information was being provided to Mr O'Neil's brother-in-law, who ran a private security – a private investigator firm.

So that information was being provided to further the opportunities and the investigations being conducted by a private investigator. In my submission, that is a very serious case and that, even though the appeal was run in regards to parity, his Honour still had to make an order that was just in those circumstances.

Your Honour, the Grantham matter, I think my learned friend conceded that it was a very serious matter, perhaps, of little utility for your Honour. I make a similar submission in regards to the Doolan matter, where she'd represented herself as a police prosecutor in court and made alterations to the case before the courts for the benefit of her partner.

Your Honour, the matter of Betts, the summary that my learned friend provided you in regards to the Betts case is quite accurate. Mr Betts was a detective. He was involved in the burning down of the – I shouldn't say involved in. He was inside the Palm Island Police Station when it was set alight and him along with six police officers only just escaped. There was some residual factors around his mental health surrounding that matter and the breakdown of his relationship, but ultimately he was accessing the police computer system to identify drug dealers to support his own drug habit. He was identifying females within the sex industry to rendezvous prostitutes. And within the decision, Magistrate Shearer rightly identified an instance where he provided information to a suspect about the status of an investigation where he was a suspect. It was a very serious case.

Your Honour, the matter of Wright, 50 counts of access, although it was only one charge before the courts. It was between dates. And again my learned friend quite correctly summarised that case. It was quite a bizarre case where it was just random names being searched. Mr Wright's offending conduct was picked up on an audit, not because of any release of information or anything like that. For the record, your Honour, that sentence is under appeal to the District Court and it is listed for hearing on the 7th of December.

Your Honour, and, finally, the matter of the Police v MacAnneny, that was heard by Magistrate Shepherd on the 24th of July in the Beaudesert Magistrates Court. Your Honour, that was a matter where he accessed the QPRIME system on two occasions. In short, the first occasion was to access a phone number for a female that he'd met at a coffee shop; the second check was in regards to checking potential tenants for a rental property that he owned.

Your Honour, the reference material that I've provided to you and the antecedents of my client, in my submission, should allow your Honour to make a conclusion my client is otherwise a man of good character. It is concerning that the conduct occurred over a period of two years. But again I make that submission that that comes back to a cultural aspect and the personal understandings of my client in regards to the difference between access and security.

In all of the circumstances, my submission, your Honour, is this is conduct that, perhaps, doesn't sit right at the bottom end of the scale, but is not – certainly not at the top end or midrange. It's my submission that, in all of the circumstances, your Honour could make a fine in the vicinity of $2000. That would be consistent with the matter of O'Neil, where my submission is it's a far more serious case. It is a matter that there were seven checks compared the 23 in this case.

And given my client has no prior history, he's otherwise a good character, it's my submission this is not a case that warrants the recording of a conviction. Your Honour would already be aware of the large contingent of media that have reported on this case so far. If anyone wants to know what's happened to my client, they just need to type his name into Google and they'll certainly know. Unless there's anything more specific, your Honour, they're my submissions.

BENCH: Thank you. Perhaps just tell me this, Mr Gnech. Tell me about your client's wife's medical condition. You say it's not going to get better. Is deterioration the future?

MR GNECH: Your Honour, I'm instructed – sorry, your Honour. I should have informed you.

BENCH: Or you don't know.

MR GNECH: It is – it's – I'm instructed it's not terminal, but there is no cure. It's not going to get better and the only expectation is it could get worse.

BENCH: All right.

MR GNECH: But it's not terminal. Sorry, your Honour. There is one aspect that I did fail to raise if I may. Your Honour, as you would appreciate, this isn't the end for the matter for my client. He's – he will face police discipline. It will be significant, I would suggest. It's going to be far more than any penalty your Honour considers today. We are confident that it won't result in his termination, but we don't know what the future holds in that regard.

BENCH: And at the time he accessed this information, was his wife's condition known?

MR GNECH: Yes, it was known. Yes, your Honour. Thank you.

TAKE IN DECISION

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TRANSCRIPT OF PROCEEDINGS

MAGISTRATES COURT

MACCALLUM, Magistrate

MAG-00003951/17

POLICE — **Complainant**

and

DANIEL DENIS BANKS — **Defendant**

IPSWICH

9.48 AM, TUESDAY, 7 NOVEMBER 2017

DECISION

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

BENCH: Yes, in this matter, Mr Banks has been found guilty of a number of offences pursuant to section 408(E) of the Criminal Code. These are, perhaps in common parlants, referred to as computer hacking. The offences occurred essentially over a two-year period, and occurred by Mr Banks accessing a police desktop computer, as well as a police issued QLiTE device. In the course of that, Mr Banks has accessed records in relation to a number of people, including at some point, members of his own family. But most particularly, it seems, in relation to the former partner of his now wife, and some of that person's associates.

There is before the Court no evidence to indicate that any of that information was ever passed on to any person, and the matter has to be viewed in that light. Of course, Mr Banks comes before the Court with no criminal history, and I am told that the maximum penalty for the offences for which he has now been found guilty is five years' imprisonment. The matters were dealt with summarily, and as Mr Needham has fairly pointed out at the outset of proceedings, a number of admissions were made by Mr Banks's counsel, and that this ultimately resulted in a much shorter version of the trial. It had originally been listened, I think, for at least two days, but ultimately resolved itself mostly within the first day.

I understand that Mr Banks became a police officer on the 23rd of January 2012, and that he has performed the functions of a general duties officer, most recently at the Goodna Station, I believe. It goes without saying that access to the QPRIME information, and all of the information that is contained thereon, which during the course of the proceedings was explained to be a significant level of information, ranging from information concerning a person's license and license status, registration details concerning any vehicles registered in the name of a person, clearly criminal history, clearly coronial matters, and a range of other matters that are – are available within that system.

It is, therefore, a very powerful information tool, and therefore it is imperative that the system be jealously guarded, because if access to that system is achieved for non-police purposes, that would clearly erode the faith of the public in the integrity of police information, and having the availability of such extensive information concerning the citizens of the state. Of course, it needs to be considered that Mr Banks did not plead guilty to the charge, and therefore des not have the benefit of an early plea. However, Mr Gnech says to me that whilst Mr Banks has been suspended from duties since March of last year, he has been suspended on pay. I'm assuming that's probably on the base rate of pay, although, there's been no information put before me about that. But in any event, he has still remained in pay.

It also seems that he had agreed to run this matter as a test case, as there were a number of issues that were of concern, and that it was suggested that the matter should proceed as a test case so that those issues could be considered by a court. And on that basis, Mr Gnech urges that he – that should be considered in considering any penalty that's ultimately to be imposed as a consequence of these proceedings. The Crown submits that Mr Banks's attitude has been somewhat cavalier; that this is

not a one-off offence, or a moment of a brain snap, for want of a better term. But it has occurred over a lengthy period, as I've said, some two years, and has involved some 23 separate incidences of accessing the information within the QPRIME system.

In the course of the hearing, it became evident that the QPRIME system is jealously guarded, in that there is significant training for officers when they first decide to join the police service, and that training is carried out at the police academy. And, there are also warning signs prior to entering into the QPRIME system, which make it quite clear that access to information for anything other than official purpose is not – is not permitted. There were, of course, arguments raised about that during the course of the trial, but ultimately those arguments were found not to be compelling enough to enable Mr Banks to be successful in these charges. I'm told that Mr Banks is now some 32 years of age, that he is married and has some care part of the time with the children of his wife's former relationship.

I'm also told that Mr Banks's wife suffers from a serious medical condition, which is referred to as functional neurological disorder, which now sees her in a wheelchair. And, whilst I'm told that that disorder is not going to be terminal, it is likely, or at least more than likely, to deteriorate into the future, and have consequences for both her and, of course, Mr Banks. I'm told that essentially Mr Banks does perform the role of his wife's fulltime carer, and that it is now necessary for him to do most of the household duties, as well as to care for the children of his wife when those children are in the care of himself and his wife.

That is, it seems, the background against which some of this access to this information was done, in that it was largely, as I said at the outset, inquiries in relation to the former partner of his wife, and also in relation to what was apparently some allegations of break-ins to the Banks' residence, which it was considered that perhaps this partner may have had some involvement in, as well as certain other issues related to domestic violence concerning Mr Banks's wife. And, as I've already indicated, there is no evidence that any of the information obtained by him was ever passed on to any other person. I have been referred by the parties to a number of comparatives; these include the matters of Biden, Sheriffe, Higgins, O'Neill, Grantham, Doolan, Wright, Betts and Mackinoney, and of course, a range of penalties has been imposed in relation to them.

Mr Biden's matter was of such a nature of this, and involved a local council action. But his – sorry, involved a significant disruption, inconvenience and expense to the relevant council involved, and ultimately a penalty was imposed which reflected that loss, and on that basis it seems as though the appeal against sentence was regarded as not being manifestly excessive, having regard to the question of public deterrence and the like, which thought to be a significant consideration by the appeal – by the court in that matter. Mr Sheriffe also involved a situation in which a person was able to access the police information, largely to ascertain, it would seem, a situation as to whether or not there was any police inquiry concerning that person, and on that occasion, he received a community based order with no conviction recorded.

Mr Higgins again was a – was a serving police officer. He did obtain information about an address of a place to which his children were going to be attending, as well as it seemed he was unable to refuse a request from his father in relation to a license check, and on that basis he was fined some $3000, and no conviction recorded. O'Neill was again another matter in which a wholly suspended term of imprisonment was reduced on appeal to a fine of $2000 with no conviction recorded. I should mention that Mr Higgins's matter was a matter in which I think there was minimal – it was effectively a matter that was done within the one access to QPRIME, even though two separate pieces of information were obtained, so it was, in some respects, a one-off event.

Of course, the case of Grantham is, in my view, significantly different, involving, as it does, a person who held a substantial office under the – under the Crown, and that she used that office for the purposes of financial benefit for others, albeit not necessarily for her, but that she did receive a suspended jail term, and that of course she had suffered some financial loss herself as a consequence of her actions, and of course would have suffered significantly in a social, as well as professional manner. And, of course again, Doolan is another matter in which – whilst it's – well, to some extent is – is a case which bears little relevance to case which I'm dealing with here, in that it was an action by a police officer who accessed information to obtain a benefit for her then partner, and which was in effect to have an affect on court proceedings, and thereby mislead a court.

Of course, it seems that she was sentenced to a term of imprisonment. The – the matters of Wright and Betts, again were matters which had other aspects to them, as do most – most matters. There's very things – very few cases that fall directly into – into line with a matter which has been sentenced before a court at any particular time, but that there were consequences with convictions being recorded, and significant fines being imposed. And, of course, in relation to Mackinoney again, I believe a fine was imposed in relation to that, and there were a significant number of acts on the part of Mr Mackinoney to obtain information.

I have had provided to me, which constitute exhibit 2, two references from Mr Alderson and Mr Hannan, both of whom speak very highly of Mr Banks, and both of whom have had a longstanding personal relationship with Mr Banks, and both of whom have indicated that Mr Banks has had significant concern and care for his family, and that he has put his family first in relation to various numbers of matters, as not only getting the children to and from school, but enabling them to attend extracurricular activities, as well as assisting in getting his – his wife to her various medical appointments. This is a situation, in which – I think it's been remarked by myself at the end of the proceedings in which the judgment was given, but which is a matter that, although serious, I think needs to be tempered with some aspect of mercy, for want of a better term. I am very mindful of the requirements for denunciation and deterrence, but those are not the overriding issues, and, of course, any penalty that is imposed against Mr Banks here, today, is going to have an effect upon him personally. It will, of course, be perhaps reported at large, so there is going to be some social consequences for him in having these matters aired in public,

and of course, to some lesser extent, he will be subject to police discipline, though that is not, of itself, an overwhelming consideration for the court.

I think it needs to be borne in mind that this was a fairly naive and a fairly pointless thing to have done, by him. This is information that his wife could have obtained, although I am not certain that her condition is such that she was able to make inquiries with the police about the advancement of the investigations in relation to the matter that Mr Banks was doing. But, as I have made the point, the information which he obtained is not information that is readily available to other members of the community, and other members of the community have to make inquiries with the various investigating officers. It is not easy for any other member of the community to simply hop onto a computer system, to ascertain the position concerning matters in which they are the victims of crime, or in respect of matters about which they require information.

I am told that, since a number of these cases have come to the attention of the courts, and it is fair to say that there have been some articles about these in the press, that a lot of work has been done by both the police service itself, the Police Union as well as the Crime and Corruption Commission, to ensure the integrity of information security, but also to ensure the integrity of information access, and Mr Gnech submits that this is largely a case about information access. If I have not already mentioned, and I do make the comment that it is the submission of the Crown that a period of imprisonment should be imposed, or, if the court considers that not to be an appropriate penalty, then a significant fine should be imposed and that a conviction should be recorded. In all of the circumstances, this is, as I said, somewhat difficult and somewhat different to some of the – certainly, the comparatives that have been put before me, and even in relation to the matter of Higgins, which I recall I sentenced earlier this year, where the purpose of obtaining the information was much more apparent, though I can only assume that the purpose in Mr Banks's case, here, is in relation to assisting or trying to ascertain what is happening in relation to the issues concerning his wife's domestic violence problems as well as the other issue of the possible break-in to the residence.

I also note, and I have made some mention of the fact that Mr Gnech has suggested that part of the delay in this matter has been because Mr Banks suggested, or had agreed, to this being run as a test case so that the various issues could be considered, and on that basis, he asks that the fact that there has been no plea at an early stage should be somewhat ameliorated by that situation. To some extent, that is, perhaps right; I mean, test cases do, from time to time, have to be run to ascertain a court's view of the matter, but ultimately, that is not a compelling or an overriding, or an overwhelming issue in relation to any penalty to be imposed. I had, earlier, indicated that I thought that this was a matter in respect of which a fine could be imposed, and I am still – I still remain of that view, that it is appropriate for the imposition of a fine, and that is what I propose to do. Because of the number of accesses to the system, and also because of the period of time over which that has occurred, I also take the view that that fine has to be significant enough to act as some sort of

deterrence, generally, as well as, of course, to appropriately impose a penalty for this action on the part of Mr Banks, who is now before the court.

In those circumstances, what I – as I said, I impose a fine. Mr Banks, if you would just stand. In the circumstances and for the reasons given, I propose that you be globally fined in relation to these matters, and that you be convicted and fined the sum of $4000. I do propose to refer that directly to SPER; I recognise you probably have some concerns in relation to income, particularly bearing in mind your wife's condition, as well as, I am not sure what the future is for you in terms of employment. I am also of the view that a conviction should not be recorded in this matter. As I have indicated, you come before the court with no prior history; that this matter is likely to impact upon your future with the police service, but, just as importantly, it is likely to impact, if you no longer remain in the police service, on future employment, and, to that extent, I think you are entitled to the same type of benefit in relation to the non-recording of the conviction as any other person who appears before this court in relation to any other type of charge. And so for that purpose, I do propose that a conviction not be recorded, and I exercise my discretion accordingly. In the circumstances, I am going to refer the fine to SPER, and you will need to make a separate arrangement with them in relation to the payment thereof. All right. Nothing further?

MR NEEDHAM: Nothing further. Thank you, your Honour.

MR GNECH: Nothing further. Thank you, your Honour.

MR NEEDHAM: If I may be excused?

BENCH: Yes, certainly. Thank you.

MR NEEDHAM: Thank you.

MAGISTRATES COURT AT IPSWICH

PARTIES:	DPP v Banks
COURT:	Magistrates Court
LOCATION:	Ipswich
FILE No's:	MAG-00146337/16(3) IPSW-MAG-00008644/16 MAG-00186941/16(1) IPSW-MAG-00011385/16
DECISION DATE:	14 March 2017
HEARING DATE:	21 February 2017
MAGISTRATE:	D Shepherd

CATCHWORDS:

CHARGE OF COMPUTER HACKING – WHERE PRIMARY OFFENCE IS A SIMPLE OFFENCE – WHETHER AGGRAVATED OFFENCE IS A SIMPLE OR INDICTABLE OFFENCE.

Criminal Code (Qld): sections 1, 2, 3, 408E, 565, 604 and Chapter 58A.

Justices Act 1886: s 4, s 52.

District Court of Queensland Act 1967: section 60.

R v Ross (1979) 141 CLR 432.

R v Taylor [2010] QCA 205.

The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd (1920) 28 CLR 129 at 161-162

The Australian Boot Trade Employees' Federation v Whybrow & Co (1910) 11 CLR 311 at 341-342.

REPRESENTATION:

Prosecution/respondent: Ms C Kelly – ODPP.

Defendant/applicant: Mr M Copley QC i/b QPULG.

1. The defendant is charged with a total of 23 charges alleging offences against section 408E of the Criminal Code (Qld) (the Code). Four of those are charged as breaches of subsection 1 (a simpliciter or primary version of the offence) and 19 are charged as breaches of subsections (1) and (2), an aggravated version of the offence. The prosecution have indicated that the primary or simpliciter charges will be amended to include a circumstance of aggravation however that proposal is not relevant to the arguments or my reasons.
2. The defendant seeks a ruling that the aggravated charges which allege a breach of section 408E (1) and (2) are simple offences for the purposes of the Code; or to put it in the negative, are not indictable offences. That is the only point in issue in this application.
3. That ruling is sought pursuant to section 83A of the Justices Act 1886. Neither party suggested that section did not allow me to give such a ruling. I am satisfied the procedure adopted in this case was appropriate and that section permits me to rule on the issue.
4. The relevant provisions of section 408E are as follows;

> ***408E Computer hacking and misuse***
> *(1) A person who uses a restricted computer without the consent of the computer's controller commits an offence.*
> *Maximum penalty—2 years imprisonment.*
>
> *(2) If the person causes or intends to cause detriment or damage, or gains or intends to gain a benefit, the person commits a crime and is liable to imprisonment for 5 years.*
>
> *(3) If the person causes a detriment or damage or obtains a benefit for any person to the value of more than $5000, or intends to commit an indictable offence, the person commits a crime and is liable to imprisonment for 10 years.*
>
> *(4) ……*

5. Section 1 of the Code defines a circumstance of aggravation as meaning any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance.
6. Sections 2 and 3 of the Code provide;

> ***2 Definition of offence***
> *An act or omission which renders the person doing the act or making the omission liable to punishment is called an offence.*
>
> ***3 Division of offences***
> *(1) Offences are of 2 kinds, namely, criminal offences and regulatory offences.*
> *(2) Criminal offences comprise crimes, misdemeanours and simple offences.*
> *(3) Crimes and misdemeanours are indictable offences; that is to say, the offenders can not, unless otherwise expressly stated, be prosecuted or convicted except upon indictment.*
> *(4) A person guilty of a regulatory offence or a simple offence may be summarily convicted by a Magistrates Court.*
> *(5) An offence not otherwise designated is a simple offence.*

7. The categorisation of the aggravated charge as a simple offence or an indictable offence within the meaning of section 3 of the Code is important because that determines whether any of the charges has been brought out of time[1] and where the matter may be heard and determined[2].
8. Each of the parties helpfully provided written outlines and presented oral argument in support of their respective positions.
9. Each agreed that irrespective of the categorisation the charges must be heard in the Magistrates Court, the difference being that if they are simple offences there is no capacity for them to be dealt with in the District Court (except pursuant to sections 651 & 652 of the Code) and if they are indictable offences they can, in certain circumstances, be heard and determined in the District Court[3]. Also, both agreed that if they are simple offences the prosecution had to commence within 12 months of the offence occurring[4] but if they are indictable that time limit did not apply[5]. Both agreed

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[1] Justices Act 1886 – section 52
[2] District Court of Queensland Act 1967 – section 60 and Chapter 58A of the Code.
[3] Chapter 58A of the Code.
[4] Justices Act 1886 – section 52.
[5] Code – section 552F.

that an offence under section 408E (1), that is without any circumstance of aggravation, is a simple offence.[6] I accept all of those propositions.

Defendants' argument

10. The defendant argues that the addition of a circumstance of aggravation to a simple offence cannot convert it into an indictable offence; the nature of the offence cannot be changed by the addition of a circumstance of aggravation.
11. Subsection 2 of s 408E, standing alone, creates no offence and merely adds a circumstance of aggravation to a simple offence. The definition of 'circumstance of aggravation' in section 1 of the Code merely refers to an increase in penalty for an "offence".
12. Subsection 2 must be read in conjunction with subsection 1. The drafting procedure seen in s 408E involves incorporation into subsection 2 of the words used in subsection 1. That process does not however change the nature of the underlying or primary offence and cannot therefore make an aggravated version of the offence into an offence of a different nature. What is a simple offence cannot be made into an indictable offence.
13. In oral argument, Senior Counsel for the defendant acknowledged the plain language in subsection 2 describing the aggravated offence as a "crime" but said this was a mistake; that it was not open to parliament to change the nature of the offence in this way. He specifically disavowed that incompetence being based on any constitutional limitation but said it was just a mistake.

Respondents' argument

14. The respondent argues that the aggravated offence charged is described in s 408E(2) as a crime and therefore because of the s 3 of the Code is an indictable offence. It is argued that one need look no further than that and that the plain, clear and unequivocal language of s 408E provides the answer to the question asked.

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[6] Within the meaning of section 3 of the Code and not within the definition of simple offence in the Justices Act 1886 which includes indictable offences which can be dealt with summarily. The reference to simple offence in these reasons is a reference to the definition in section 3 of the Code unless otherwise specifically identified.

15. The various subsections of s 408E create offences of different classifications, simple and indictable, and that parliament is not prohibited from doing so.

Discussion

16. Prior to the oral argument counsel for each party were referred to the decisions of *R v Ross* (1979) 141 CLR 432 and *R v Taylor* [2010] QCA 205. Each of those decisions broadly supports the proposition that the character of an offence is not altered by the addition of a circumstance of aggravation and that an offence charging a circumstance of aggravation is not a separate offence from the primary offence.
17. In *Ross* the High Court was dealing with the nature of the offence of aggravated assault contrary to s 344 of the Code.
18. Gibbs J stated at page 439 "*Neither the words of s. 2 of the Criminal Code, nor those of the definition of circumstance of aggravation in s. 1, appear to me to support the view that an offence committed with circumstances of aggravation is necessarily a different offence from the offence without those circumstances, although s. 575 contemplates that an element of an offence committed with circumstances of aggravation may itself constitute a different offence.*" *(underlining added)*
19. In the same case Barwick CJ noted "*The aggravation affects the possible penalty but does not alter the statutory nature of the offence*"[7]
20. An offence may be deemed to be a simple offence for one purpose and an indictable offence for another. Under the Justices Act 1886 an offence may be both a simple offence and an indictable offence for the purposes of that Act.[8] For the purposes of the Code the categorisation of an offence as an indictable offence may impact on the powers of arrest.[9]
21. In *Ross* the High Court determined the nature of the offence by reference to the provisions of the legislation in particular s 3 of the Code. The Court said that other procedural provisions did not alter the nature of the offence as provided for by that section. While that case did not deal directly with the issue being considered here, it is apparent that the current determination, as it was in *Ross,* has to be made by reference to the language used in the relevant legislation.

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[7] Page 433
[8] Section 4 Justices Act 1886. *Ross* at page 441 per Gibbs J
[9] For example see section 549 of the Code.

22. In *R v Taylor* [2010] QCA 205 the Court of Appeal was considering the question of whether an aggravated sexual assault was a separate offence from the primary offence for the purposes of a trial judge being able to take a verdict on the primary offence if the jury could not reach a verdict on the aggravated offence. The court held that it was not a separate offence as might be murder and manslaughter. The court adopted the reasoning in *Ross* when concluding that the addition of a circumstance of aggravation did not make the aggravated offence a 'separate' offence for the purposes of taking a verdict.
23. It is also to be noted that *Taylor* did not deal with the issue being considered here and that in the cases of *Ross* and *Taylor* both the primary offence and the aggravated offence were indictable offences.
24. The issue in this case is not whether the primary offence and the aggravated offence are separate offences for any particular purpose but whether the aggravated offence is or is not an indictable offence.
25. The intention of the legislature in this case is to be determined by reference to the language used in the statute and where that language is clear and unambiguous it must be given effect. The grammatical and ordinary sense of the words is to be adhered to unless that would result in some absurdity or inconsistency with the rest of the enactment in which case that literal approach may be modified to avoid that absurdity but no further.[10] The fact that some inconvenience or procedural difficulties may be encountered is not sufficient to avoid the application of the plain language of the legislation, in this case s 408E(2) where the offence is described as a crime.
26. It might be suggested that the outcome of the aggravated offence being an indictable offence would deprive the parties of the operation of s 575[11] of the Code which provides;

> ***"575 Offences involving circumstances of aggravation***
> *Except as hereinafter stated, upon an indictment charging a person with an offence committed with circumstances of aggravation, the person may be convicted of any offence which is established by the evidence, and which is*

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[10] *The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161-162 and *The Australian Boot Trade Employees' Federation v Whybrow & Co* (1910) 11 CLR 311 at 341-342.

[11] Combined with s 604 0f the Code which relevantly provides; ... *if the accused person pleads any plea or pleas other than the plea of guilty, a plea of autrefois acquit or autrefois convict ..., the person is by such plea, without any further form, deemed to have demanded that the issues raised by such plea or pleas shall be tried by a jury, and is entitled to have them tried accordingly.*

constituted by any act or omission which is an element of the offence charged, with or without any of the circumstances of aggravation charged in the indictment."

27. Given that the primary offence is a simple offence which the District Court could not ordinarily hear and determine the parties may not be able, in the event of a verdict of not guilty on the aggravated offence, to then seek a verdict on the primary offence. That would seem to be a procedural difficulty in an isolated instance which does not generally deprive the District Court of its usual jurisdiction. If the issue arose it would have to be dealt with by the District Court.
28. That potential difficulty does not provide sufficient basis to ignore the clear language of the provision under consideration.
29. The defendant argued that the use of the word 'crime' in that subsection was an error. If there was any error within section 408E no good reason was advanced as to why that error must exist in subsection (2) as opposed to subsection (1). If any problems exists because the primary offence is referred to as an "offence" and is not otherwise designated[12] and the aggravated offence is described as a crime,[13] why must the error lie in the prescription of the aggravated offence as a crime rather than the description of the primary as an "undesignated" offence?
30. It is not necessary to further consider or resolve these competing ideas. Both subsection (1) and subsection (2) of s 408E can properly co-exist. The clear language of s 408E(2) of the Code is that such an aggravated offence is a crime. Section 3 of the Code clearly states that a crime is an indictable offence.

Ruling

31. The offences charged against the defendant relying on s 408E (1) and (2) that is those including a circumstance of aggravation, are indictable offences.

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[12] and therefore pursuant to section 3 of the Code a simple offence.
[13] and therefore an indictable offence.