10 IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

BETWEEN:

No. M 25 of 2013

CHAFIC ISSA (Appellant)

20 and

THE QUEEN (First Respondent)

and

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (Second Respondent)

No. M 29 of 2013

GEORGE ELIAS (Appellant)

and

THE QUEEN (First Respondent)

and

30 **ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (Second Respondent)**

APPELLANTS' JOINT REPLY (ANNOTATED)

*The appellant Bassillios Pantazis (No. M 28 of 2013) is deceased and his appeal is to be discontinued.

1. The appellants certify that this submission is in a form suitable for publication on the internet.

40 2. ***Section 43 was a viable charge***: An offence under section 43 of the *Crimes Act*, 1914 (Cth.) could have been charged even though the conduct charged occurred after sentence: cf *First Respondent's Submissions* ("FRS") at [6.23] – [6.27].

Solicitor for Appellant
Chafic Issa

C. Marshall & Associates
238 Hampshire Road
Sunshine, Vic., 3020
Tel: (03) 9311 8500
Fax: (03) 9311 8555

Solicitor for Appellant
George Elias

Emma Turnbull Criminal Law
Level 5, 250 Queen Street
Melbourne, Vic., 3000
Tel: (03) 9077 4834
Fax: (03) 8677 3341

3. In *The Queen v. Murphy*[1] this Court held that the words "in relation to the judicial power of the Commonwealth" give the section a wider operation than it would have had if the limitation had been expressed by the use of the words "in any judicial proceeding", and that "The words "in relation to" simply connote the existence of a connexion or association between the course of justice which is attempted to be perverted and the judicial power of the Commonwealth".[2]

4. In *Foord v. Whiddet*[3] Sheppard J also considered the significance of the words "in relation to the judicial power of the Commonwealth" in section 43. His Honour held they were words of wide import and could not be confined to the process of adjudication.

5. The conduct of the appellants was undoubtedly in relation to the course of justice. In *The Queen v. Rogerson* Brennan and Toohey JJ said that "....impeding the free exercise of its jurisdiction and powers including the powers of executing its decisions" was one of the ways the capacity of a court may be impaired.[4] The conduct of the appellants was an attempt to pervert the course of justice *"in relation to"* the judicial power of the Commonwealth because it tended to prevent the execution of a federal sentence passed by a Chapter III Court. In our submission, there was such a close association or relationship between "the course of justice" and the exercise of "the judicial power of the Commonwealth" that an offence under section 43 could be well justified.

6. ***Section 43 is a substantive offence*** : Contrary to the FRS at [6.28] – [6.29], section 43 is not an inchoate offence. In *R v. Vreones* Pollock B said that to pervert the course of justice involves "the doing of some act which has a tendency and is intended to pervert the administration of public justice".[5] Lord Coleridge CJ said "I think that an attempt to pervert the course of justice is in itself a punishable misdemeanour".[6] In a comprehensive analysis of the offence, Sheppard J in *Foord v Whiddet* observed that *Vreones* had been applied on many occasions.[7] The analysis of Sheppard J demonstrates that, save for the element of "in relation to the judicial power of the Commonwealth" there is no difference between the common law offence of attempting to pervert the course of justice and the offence under section 43.

7. It is submitted that section 43 (2), (3) and (4) add nothing to the elements of the offence. They do not show that an offence under section 43 is inchoate. The offence of attempting to pervert the course of justice, at common law and under section 43, is in both cases a substantive offence, an element of which is *a tendency* to pervert the course of justice.

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[1] (1985) 158 CLR 596.
[2] (1985) 158 CLR 596 at 611 (and authority cited).
[3] (1985) 6 FCR 475 (the unreported judgment is referred to in *The Queen v Murphy* at 610)
[4] (1992) 174 CLR 268 at 280.
[5] [1891] 1 QB 360 at 369.
[6] [1891] 1 QB 360 at 367.
[7] (1985) 6 FCR 475 at 480.

8. ***Section 325 Crimes Act (Vic.)***: The mere fact that a series of acts were relied upon did not prevent the Crown from charging the appellant with the offence of assisting an offender under section 325 of the *Crimes Act*, 1958 (Vic.): cf FRS at [6.37] – [6.39]. Indeed, the offence under this provision would have been more appropriate because it specifically provides for prosecution of a person who does "....*any act with the purpose of impeding the* apprehension, prosecution, conviction or *punishment* of the principal offender...." (our emphasis).

9. This was a plea of guilty. For reasons of public policy - in order to avoid burdening the indictment and easing the task of the sentencing judge - it would be proper for the Crown to lay a "rolled-up" charge alleging within it a series of acts to which the accused was prepared to plead guilty: *R v. Jones* [8].

10. ***The First Respondent's Notice of Contention***: Each of the First Respondent's challenges to the existence of the principle in *R v Liang and Li* are misguided. It is of note that the First Respondent does not seek to confine the principle in *R v Liang and Li* (assuming this Court confirms its existence) to intra-jurisdictional comparisons.

11. ***Abuse of Process***: It is not the case that unfairness in charge selection "...can only be remedied" by way of "abuse of process": cf FRS at [6.45]. The selection of which charge should be laid against an offender is entirely a matter for prosecution discretion which is generally not susceptible to judicial review. We have been unable to find an authority where abuse of process has been made out because of unfairness in charge selection[9]. This tends to suggest that cases invoking the *Liang and Li* principle are not generally amenable to the application of the rules relating to an abuse of process. So said, to allow for a case of abuse of process because the prosecution acted unfairly in laying a charge that carried a higher maximum penalty is not to deny the application of the principle articulated by Winneke P in *Liang and Li.* The principle is designed to ensure that the prosecutorial decision does not constrain the Court's sentencing discretion "in the sense of compelling the Court to impose a heavier sentence than it would regard as appropriate."[10] But the principle does not affect the actual prosecutorial decision.

12. ***Statutory construction - generalia specialibus non derogant:*** It is respectfully submitted that the First Respondent's emphasis on this maxim is a distraction from the issues of principle raised by the ground on which special leave has been granted[11]: cf FRS at [6.45], [6.55], [6.60], [6.73], [6.91].

13. This maxim was not referred to by any of the judges who decided the cases which concern the *Liang and Li* principle. Nor was it argued before or considered by the Court of Appeal in the present case.

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[8] [2004] VSCA 68.

[9] Cf. *Williamson v Trainor* [1992] 2 Qd R 572 where the prosecution undertook not to proceed on assault charges. In return the defendant signed an indemnity and did not ask for costs. Fresh assault charges were subsequently laid. By that time the defendant's witnesses were unavailable. The Court of Criminal Appeal set aside the conviction because the fresh charges were an abuse of process.

[10] *R v. Whitnall* (1993) 42 FCR 512, 520 per Drummond J.

[11] Special leave was not granted on the proposed grounds set out in the *Appellant's Joint Submissions* at [30].

14. ***Other criticisms of Liang & Li are flawed:*** First, the fact that pursuant to section 5 (2) (a) of the *Sentencing Act 1991 (Vic)* a sentencer must have regard to the maximum penalty for the offence does not prevent a judge having regard to the maximum penalty for other offences: cf FRS at [6.84]. Section 5 (2) of the *Sentencing Act* is not exhaustive of the factors that can be considered in sentencing.[12] In any event, the maximum penalty for other offences is a "relevant circumstance" pursuant to section 5 (2) (g) of the *Sentencing Act*: see Appellant's Joint Submissions ("AJS") at [39].

15. Second, as the grounds of appeal make clear (**AB 1227 and 1231**), the contention is that the sentencing judge erred by *"failing to have regard to"* the lesser maximum penalties. The appellants do not contend that the judges were required to pass a sentence not greater than the maximum prescribed for the alternative offences: cf FRS at [6.85].

16. Third, the *Liang and Li* principle does not subvert the independence of the prosecutorial discretion. The prosecutor determines the charge. The Court determines a just and appropriate sentence. The principle is distinct from abuse of process: see paragraph 11 above: cf FRS at [6.86].

17. Fourth, the principle does not "...traverse the doctrine of separation of powers": cf FRS at [6.87]. Rather, it promotes fairness, consistency and equality in sentencing: see AJS at [32] – [33].

18. Fifth, there is no tension between the *Liang and Li* principle and the prohibition on aggravating sentence by reference to uncharged acts: cf FRS at [6.88]. Consistent with the principle of parsimony in sentencing, the rationale of the *Liang and Li* principle is consistent with assisting a Court to determine a sentence that is "not more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed."[13]

19. Sixth, the potential wide application of the principle is no reason to deny its existence. Courts have, and can continue, to apply the principle: cf FRS at [6.89].

20. Seventh, the First Respondent wrongly contends that the principle "...is not justifiable on the basis that it promotes consistency in sentencing": FRS at [6.90]. Although uniformity in sentencing is impossible, consistency in the punishment of offences is a fundamental objective of the criminal justice system. This objective is served by the *Liang and Li* principle: see AJS at [36] – [37].

21. ***The principle in R v. Liang and Li should be upheld:*** What is at stake in this appeal is a little used, but none the less significant sentencing principle of mitigation which comes into play where a court is of the view that a less punitive offence was as or more appropriate than that offence with which the offender is charged. The principle is consistent with notions of fairness and parity in sentencing. The *Liang and Li*

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[12] *Stalio v R* [2012] VSCA 120 at [42].
[13] *Sentencing Act*, 1991 (Vic.), section 5 (3).

principle has been applied many times by intermediate Courts in Australia.[14] It is submitted that this Court should uphold the principle.

22. ***Miscarriage of justice/ different sentencing order should be made:*** The sentences of eight years were extremely severe for the reasons set out in the AJS at [44] and [46]. Error is demonstrated in the exercise of the sentencing discretion and lesser sentences should be imposed: cf FRS at [6.40] and [6.95]; see *Criminal Procedure Act* 2009 (Vic), s 281 (1).

Dated: this 23rd day of May 2013.

Counsel for the appellant Chafic Issa:

Lachlan C. Carter
Tel: (03) 9225 6539
Fax: (03) 9078 2670
Email: lcarter@vicbar.com.au

Richard F. Edney
Tel: (03) 9225 7777
Fax: (03) 92258480
Email: redney17@yahoo.com

Counsel for the appellant George Elias:

Patrick F. Tehan
Tel: (03) 9225 7071
Fax: (03) 9225 6464
Email: ptehan@vicbar.com.au

Daniel D. Gurvich
Tel: (03) 9225 6946
Fax: (03) 9225 8480
Email: ddgurvich@vicbar.com.au

[14] Disparity in penalties between like offences has also been considered in England: *R v Quayle* (1992) Cr App R (S) 726.