H. C. OF A. 1906.

MARKELL v. WOLLASTON.

O'Connor J.

be disregarded, and therefore there is no necessity for any further declaration as to the rights of the plaintiffs.

I agree that judgment should be entered for the plaintiffs for the amount of duty paid with interest.

Judgment for the plaintiffs for £78 15s. 4d. with interest at 5 per cent. and the costs of the action.

Langer Owen K.C., for the plaintiffs, asked for a direction that the costs be taxed upon the highest scale in force in the Supreme Court.

GRIFFITH C.J. The costs will be taxed in accordance with the practice in the Supreme Court. They should be allowed on the highest scale, as more than £100 is involved in the case.

Solicitors, for the plaintiffs, *MacLachlan & Murray.*

Cons *Varley v A-G (NSW)* (1987) 8 NSWLR 30

Solicitors, for defendants, *Macnamara & Smith* for *The Crown Solicitor for the Commonwealth.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

HENRY WHITE . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1906.

SYDNEY, *Aug.* 28, 29, 31.

Griffith C.J., Barton and O'Connor JJ.

Criminal law—Misdemeanour at common law—Fraudulent attempt to have conviction set aside—Attempt to pervert course of justice—Uttering forged documents—Sending false petition to Governor—Attempt to procure inquiry under Crimes Act (N.S.W.), (No. 40 of 1900), sec. 475 — Demurrer—Several counts — Information bad in part.

A solicitor, who had been struck off the rolls after conviction and sentence for stealing, was charged, after his release from imprisonment at the expiration of his sentence, upon an indictment containing three counts, which

alleged (1) that he afterwards unlawfully attempted, by the use of false declarations, known by him to be false, to make it appear to the Chief Justice of the State that he was innocent, and had been wrongfully convicted and removed from the rolls, with intent to pervert the course of law and justice; (2) that he endeavoured by a false petition to the Governor to have his conviction set aside or reversed; and (3) that by means of the false declarations mentioned in the first count, which were alleged to be forged, he endeavoured to deceive the Chief Justice in the manner stated in the first count and with the like intent.

The prisoner was convicted on all counts and sentenced to a term of imprisonment upon each, the jury having found specially that the declarations mentioned in the first and third counts were forged by the prisoner.

Held, on demurrer, that the first count sufficiently disclosed an attempt to pervert the course of justice by sending to the Chief Justice a false petition on which he might have ordered a judicial inquiry into the question of the prisoner's guilt, under sec. 475 of the *Crimes Act* 1900;

That the second count was bad as it disclosed no offence; and

That the third count was good, not only as disclosing an attempt to pervert the course of justice in the same manner as charged in the first count, but also as disclosing the uttering of a forgery.

Semble, that even if the first count did not sufficiently disclose an attempt to pervert the course of justice, the High Court, in view of the special finding of the jury, would not have allowed an appeal from the conviction on that count.

The convictions on the first and third counts were therefore affirmed, and that on the second count quashed.

Decision of the Supreme Court: *Rex* v. *White*, (1906) 6 S.R. (N.S.W.), 398, varied, and affirmed as varied.

APPEAL from a decision of the Supreme Court of New South Wales upon a Crown case reserved under the *Crimes Act* 1900.

The appellant was tried at the Central Criminal Court before Mr. Acting-Justice *Rogers* on an information containing three counts, the substance of which is stated in the judgment of *Griffith* C.J.

Counsel for the prisoner, before plea, demurred to the information on the ground that no criminal offence was disclosed in any of the counts. The demurrer was overruled, and the prisoner pleaded not guilty. Evidence was given in support of all the allegations of fact in the information, and the jury found the

H. C. OF A. 1906.

WHITE v. THE KING.

prisoner guilty on all counts, and specially found that the declarations mentioned in the first and third counts were forged by the accused. His Honor sentenced the prisoner to two years imprisonment with hard labour on the first count, and on the second and third counts to imprisonment for one year with hard labour on each count concurrent, but cumulative on the first, making three years in all. The following questions were reserved: (1) Whether His Honor was wrong in overruling the demurrer; and, (2) whether he was wrong in holding that there was evidence in support of each count.

The Supreme Court (consisting of *Darley* C.J., *Owen* J. and *Cohen* J.), held that each count of the indictment disclosed an offence and that there was evidence to support it, and affirmed the conviction: *Rex* v. *White* (1).

From this decision the present appeal was brought by special leave.

Moriarty and *Coyle*, for the prisoner. The first count does not disclose any offence. It does not allege an attempt to mislead a Court of Justice: *Omealey* v. *Newell* (2); *Reg.* v. *Mawbey* (3). The attempt must be directed to a tribunal, *i.e.* either to a Court or to some body substituted by the parties for the Court, such as an arbitrator: *Reg.* v. *Vreones* (4); *Reg.* v. *Hall* (5). It does not amount to a charge of uttering a forgery, because there is no allegation of intent to defraud, and as this is a demurrer, the defect cannot be cured by verdict.

The second count does not allege that the prisoner knew that the petition was false. To constitute an offence at common law that is a necessary ingredient: *Rex* v. *Perrott* (6); *Rex* v. *Mason* (7); *Rex* v. *Rushworth* (8). Moreover there is no allegation of intent to defraud. That is necessary at common law: *In re London and Globe Finance Corporation Ltd.* (9). To merely present a false petition is no offence. It is not alleged to be a forgery. All cases of public fraud have been founded

(1) (1906) 6 S.R. (N.S.W.), 398.
(2) 8 East., 364, at p. 372.
(3) 6 T.R., 619.
(4) (1891) 1 Q.B., 360.
(5) (1891) 1 Q.B., 747, at p. 771.
(6) 2 M. & S., 379; 15 R.R., 380.
(7) 2 T.R., 581; 1 R.R., 545.
(8) Russ. & R., 317.
(9) (1903) 1 Ch., 728, at p. 732.

upon a forgery or perjury, something affecting procedure in a Court. This is merely an attempt to obtain the clemency of the Governor. The means are improper, but not criminal. The indictment must be looked at as it stands: *Reg.* v. *Laird* (1).

[GRIFFITH C.J.—You may always reject surplusage; *utile per inutile non vitiatur*, especially after verdict, and where the appeal is only by special leave. I read the information without any preconceived idea of what was intended by the person who framed the count.]

An accused person should not be dealt with after trial as if he had been charged with something that does not clearly appear in the indictment. The charge was interfering with the course of justice.

[GRIFFITH C.J.—It is a rule of this Court not to grant special leave to appeal in criminal cases unless matters of great public importance are involved, and matters of substance. Objections to the form are not matters of substance. This is a point which might possibly have been considered by the Supreme Court, but on an appeal from their decision we should take no notice of it.]

The 3rd count alleges what has been made a felony by sec. 292 of the *Crimes Act* 1900. The same act is charged as a misdemeanour in the 1st count, and counts for misdemeanour may not be joined with counts for felony. [They referred to *Bishop, Commentaries on Criminal Law*, pp. 101, 551; *Rex* v. *Evans* (2); *Rex* v. *Anderson* (3); *Reg.* v. *Button* (4).]

[BARTON J. referred to *Reg.* v. *Goldsmith* (5).]

There is no allegation of any attempt to obtain any advantage by the acts alleged, even if the acts amount to an uttering of a forgery. The Chief Justice could only have told the prisoner to move the Court. To constitute an offence the person to whom the forgeries are uttered must be able to confer the advantage, and they must be presented to him for the purpose of fraudulently obtaining that advantage: *Reg.* v. *Hodgson* (6); *Reg.* v. *Moah* (7).

[GRIFFITH C.J.—Under sec. 475 of the *Crimes Act* 1900 the

(1) 14 N.S.W. L.R., 354, at p. 359.
(2) 5 C. & P., 553.
(3) 2 Moo. & R., 469.
(4) 11 Q.B., 929, at p. 946.
(5) L.R. 2, C.C.R., 74.
(6) Dears. & B., 3.
(7) Dears. & B., 550.

H. C. OF A. 1906.

WHITE v. THE KING.

Chief Justice could have directed an inquiry into the question of the prisoner's guilt.]

That section applies only to the case of a prisoner actually serving a sentence; the words are "on the petition of a prisoner." The appellant was not a prisoner when these documents were sent.

Garland, for the Crown. To constitute the crime of forgery or uttering a forgery, there is no need for an intent to defraud any particular person in any particular manner. It is quite sufficient if there is an intent to deceive. Making a false instrument or a false signature with intent to deceive is the definition of forgery in II. *East.* P.C., p. 853. Intent to defraud is only one kind of intent to deceive. It is sufficient if there is an intent to prejudice the person deceived or to advantage the person committing the offence: *Reg.* v. *Sharman* (1); *Reg.* v. *Moah* (2). The first count sets out the offence sufficiently. It alleges in effect an attempt to secure a pardon or a rehearing of the case by means of an instrument which the appellant knew to be false. There is no necessity that the attempt should be directed immediately to a tribunal; it is sufficient that there was a fraudulent attempt to bring about a miscarriage of justice: *Russell on Crimes*, 5th ed., vol. II., p. 511; II. *East.* P.C., pp. 512, 862, 952; *Rex* v. *Brailsford* (3). There was an attempt to set the law in motion for the purpose of reversing the conviction by an inquiry under sec. 475 of the *Crimes Act*, and to secure the re-instatement of the prisoner on the roll of solicitors. That was an attempt to pervert the course of justice, and a public cheat, not a mere attempt to produce a false impression. There was evidence of such an intent, and the jury have found the prisoner guilty.

The second count also discloses an offence. It is an offence to present a false petition for the purpose of obtaining a pardon. That is a false pretence for the purpose of perverting the course of justice, an attempt to deceive the King.

[GRIFFITH C.J.—Does that count amount to more than an

(1) Dears. C.C., 285; 6 Cox. C.C., 312.
(2) Dears. & B., 550.
(3) (1905) 2 K.B., 730.

allegation that a man made false statements in a bill in Equity, for instance? Every false statement in a legal proceeding is in one sense an attempt to pervert the course of justice. But a mere lie is not an offence.]

It is if there is also an attempt to obtain an advantage by means of the lie.

Omealey v. *Newell* (1) is an authority in favour of the Crown. Lord *Ellenborough* says that any person using a false instrument in order to pervert the course of justice commits a misdemeanour at common law. *Rex* v. *Treeves* (2) treats as a public cheat a man who wilfully and deceitfully supplies unwholesome food. There is also reference to the case of a married woman pretending to be a widow and executing a bail bond, as a fraud upon a public officer. The form of the information may be inaccurate, but the prisoner is not prejudiced; it clearly appeared what was charged against him. [He referred to *Reg.* v. *Perrott* (3); *Reg.* v. *Aspinall* (4).]

Moriarty, in reply, referred to *Hamilton & Addison, Crimes Act* 1900, p. 267; *Reg.* v. *Booty* (5); *Reg.* v. *Marcus* (6); *Reg.* v. *Riley* (7); *Chitty's Criminal Law*, vol. III., 1039.

Cur. adv. vult.

August 31.

GRIFFITH C.J. This is an appeal by special leave from a decision by the Supreme Court of New South Wales affirming a conviction of the appellant upon an indictment charging him with three separate common law misdemeanours. At the trial the defendant demurred to the indictment as disclosing no offence. The demurrer was overruled and he was convicted, and certain questions were reserved by the learned Judge who presided at the trial, those questions being: Whether he was wrong in overruling the demurrer, and whether he was wrong in holding that there was evidence in support of each count of the indictment. The learned Judges of the Supreme Court affirmed the conviction.

(1) 8 East., 364, at p. 365.
(2) 2 East., P.C., 821.
(3) 2 M. & S., 379; 15 R.R., 380.
(4) 2 Q.B.D., 48.
(5) 3 N.S.W. W.N., 48.
(6) 2 C. & K., 356.
(7) 18 Cox C.C., 285, at p. 297.

H. C. OF A. 1906.

WHITE v. THE KING.

Griffith C.J.

It was contended, amongst other things, that, the objection to the indictment having been taken by demurrer, the defect, if any, cannot be cured by verdict. That is no doubt so in a Court of error, but this Court does not sit as a Court of error in criminal cases, and we are loth to give effect to merely formal objections, if the substance of the case shows that the prisoner has been justly convicted. Allowing an appeal at all in such cases is in the discretion of the Court, and if there are no more than technical objections or defects in procedure, we are not inclined to give effect to them.

No point was taken before us as to the sufficiency of the evidence to support the charges. The first count in the information, after averring by way of preface that the prisoner had been a solicitor of the Supreme Court, and had been convicted on an indictment charging him with having stolen certain valuable securities and other documents, and sentenced for that offence, and that afterwards, in consequence of the conviction his name had been removed from the roll of solicitors of the Supreme Court, and that he had served his sentence, went on to allege that the prisoner did "afterwards unlawfully attempt and endeavour by false, fraudulent, deceitful, and unlawful means, by the use of two false declarations purporting to have been declared by one Morsen, together with certain annexures and documents, which were known by the prisoner to be false, to make it appear to the Right Honourable *Sir Frederick Matthew Darley*, Chief Justice of the Supreme Court, that the offences of which the prisoner had been convicted had in truth and in fact been committed by Morsen and not by the prisoner, and that the prisoner had been wrongfully convicted and that his name had been wrongfully removed from the roll of solicitors." It then concluded with this statement:—"with intent thereby to pervert the course of law and justice to the evil example of all others in the like case offending, and against the peace of our Sovereign Lord the King, his Crown and dignity."

The objection taken to that count is that it does not disclose any attempt to pervert the course of law and justice. It was contended before the Supreme Court that a statement supported by false declarations, or the sending of those false declarations to

the Chief Justice, was an attempt to influence him in this respect, that the prisoner desired by that means to put the Court in motion so that he might be restored to the roll of solicitors, and that view appears to have commended itself to some extent to the learned Judges of the Supreme Court. *Darley* C.J. said (1):— "When I received the documents from the prisoner it became my duty as Chief Justice, to send them on to the head of the Crown Law Department, and it was for that officer to take such steps as he thought fit." With the greatest respect, I cannot help thinking that that was a duty of imperfect obligation, not a legal duty. It is true that the Chief Justice was entitled to take that course, but I do not think that in so doing he would have been exercising any judicial function. So far as that argument is concerned, therefore, the Crown fails to show that there was an attempt to pervert the course of law and justice. But there is another matter arising on the face of the count which puts a different complexion upon the case. By sec. 475 of the *Crimes Act* 1900 of New South Wales it is provided that: "Whenever, after the conviction of a prisoner, any doubt or question arises as to his guilt, or any mitigating circumstance in the case, or any portion of the evidence therein, the Governor on the petition of the prisoner, or some person on his behalf, representing such doubt or question, or a Judge of the Supreme Court of his own motion, may direct any Justice to, and such Justice may, summon and examine on oath all persons likely to give material information on the matter suggested."

These documents were sent to the Chief Justice. I do not think the word petition in sec. 475 is a technical word, meaning that the request must be in the form of a petition; if it can be shown that the prisoner has made an application in writing, upon which the Chief Justice might of his own motion have put the law in motion by directing a Justice to hold an inquiry, it is sufficient. The section goes on to provide, sub-sec. (2):— "The attendance of every person so summoned may be enforced, and his examination compelled, and any false statement wilfully made by him shall be punishable, in like manner as if he had been summoned by, or had been duly sworn and examined

(1) (1906) 6 S.R. (N.S.W.), 398, at p. 405.

H. C. OF A. 1906.

WHITE v. THE KING.

Griffith C.J.

before, the same Justice, in a case lawfully pending before him:" and, sub-sec. (3):—"Where on such inquiry the character of any person who was a witness on the trial is affected thereby, the Justice shall allow such person to be present, and to examine any witness produced before such Justice." So that it appears to me that in sending these documents to a Judge of the Supreme Court, supported by declarations purporting to be made by Morsen, and false to the knowledge of the prisoner, the prisoner was attempting to pervert the course of law and justice. Even if he were not, I think, for reasons which I will state when dealing with the third count, that if the count had alleged that the documents were forgeries, there would have been a charge of uttering a forgery at common law sufficiently alleged. The information does not contain that allegation, but it appears on the facts that the same document is stated in the third count to be a forgery, and upon the verdict of the jury it must be taken to have been found by them to have been forged. For the reasons given, therefore, I think that the first count discloses an offence, though perhaps defective in form.

The second count alleged,—the inducement may be taken to have been repeated, though it was not in fact—that the prisoner attempted by a false petition to his Excellency the Governor of the State, to make it appear that the offences of which the prisoner had been convicted had in truth and in fact been committed by Morsen and not by the prisoner, and that he had been wrongfully convicted, in order that his conviction should be reversed, vacated, and set aside, with intent thereby to pervert the course of law and justice, and so on, as in the first count. It is not alleged that the petition was supported by anything more than the prisoner's own false statement. I cannot distinguish that in principle from the case of a person filing a bill in equity containing false statements. So that that count as it stands appears to me to be defective. If it had been alleged that the petition was supported by false or forged documents, then I think there would have been disclosed an unlawful attempt to put the law in motion through the Governor in the same way as was alleged in the first count to have been attempted in the case of the Chief Justice. But to merely present a false petition

praying for his release is surely not an offence at common law. I suspect that a great many of the petitions presented by convicted persons to the Governor for release are in part, at least, untrue, but I have never heard of a prosecution for presenting one.

The third count alleged that the prisoner unlawfully, subtly, knowingly, and deceitfully did pronounce and publish as true certain false, forged, and counterfeit writings forged in form and in the likeness of statutory declarations under the *Oaths Act* 1900, well knowing the same to be falsely forged and counterfeited, and unlawfully, subtly, knowingly, and deceitfully caused them to be delivered to the Chief Justice, with intent to cause him to believe that the prisoner had wrongfully been convicted of the crime of stealing, and had also wrongfully been removed from the roll of solicitors, with intent as in the first and second counts. For the reasons that I have given with regard to the first count I think that is a good count for attempting to pervert the course of law and justice. I think also that it is good at common law as a charge of uttering a forgery. The common law definition of forgery, as given in *Blackstone*, 18th ed., vol. IV., p. 247, is "the fraudulent making or alteration of a writing to the prejudice of another man's right." Those words are perhaps somewhat vague. Usually in an indictment for forgery at common law it was necessary to add the phrase "with intent to defraud," though from some of the older authorities it might appear that the words "with intent to deceive" are sufficient. I have no doubt that according to this indictment the appellant was charged with uttering a forged document; and uttering a document which is a forgery at common law is itself a misdemeanour at common law: *Reg.* v. *Toshack* (1). That was a case in which a man forged a certificate of service, sobriety, and good conduct at sea. The 7th count alleged that the prisoner forged a writing as a certificate of one W.N., with intent to deceive and defraud certain persons, who were examiners of ship-masters. The point was reserved and the Court held that the count was good. In *Reg.* v. *Sharman* (2), it was held that uttering a document which was a forgery at common law was itself a misdemeanour. So that it appears from

(1) 1 Den., 492; 4 Cox C.C., 38.

(2) Dears C.C., 285; 6 Cox C.C., 312.

H. C. OF A. 1906.

WHITE v. THE KING.

Griffith C.J.

these authorities that uttering a forged document is a misdemeanor if there is an intent to defraud, and that is all that it is necessary to prove. The argument was addressed to us that that must be limited to an attempt to obtain some pecuniary advantage from, or to cause some pecuniary loss to, some other person. In my opinion the intent to defraud is established if it is shown that there has been an attempt to obtain some dishonest advantage, or to injure some person, whether the immediate result is to cause pecuniary loss to that person or not. I do not know whether the law has been laid down exactly in that form in the English authorities. But I take the liberty to read from the Statute law of Queensland. Sec. 643 of the Queensland *Criminal Code* provides that:—"On the trial of a person charged with any offence of which an intent to injure or deceive or defraud or an intent to enable another person to deceive or defraud is an element, it is not necessary to prove an intent to injure or deceive or defraud any particular person or an intent to enable any particular person to deceive any particular person." That section is founded upon the report of Commissioners appointed in 1878, who, unless my memory deceives me, expressed the opinion that that was a statement of the common law.

I am of opinion, therefore, that the third count discloses the uttering of a forgery as well as an attempt to pervert the course of law and justice. The result is that the conviction on the first and third counts is good, and on the second count, bad. That makes no difference, however, to the appellant. He was sentenced on the first count to two years' imprisonment, and on the second and third counts to one year's imprisonment, with hard labour in each case, the two last sentences being concurrent, but cumulative upon the first. The result, therefore, is that the whole sentence of three years remains.

It is right to point out, however, that the offence of which the appellant was convicted under the third count is the same act as alleged in the first count, so that he really has received two sentences for the same act. I have no doubt that proper weight will be given by the Crown to this expression of opinion if the matter is brought to its notice. It is not a matter in which this Court should interfere.

BARTON J. This appeal must, in my opinion, be limited to the question whether as to the three counts severally the indictment is good in substance. It is clear that the second count cannot be supported, on the authority of the case of *The King* v. *Perrott* (1). The charge must be specific so as to apprise the defendant of that which he has to answer, and as to the petition, there is not a specific allegation of the falsehood of any one of its allegations, and on that ground I think that the second count must fail.

As to the first and third counts, I am of opinion that the demurrer fails. The first ground on which these counts are impeached is, in substance, that before an indictment for an attempt to pervert the course of law and justice can be held to be good it must appear, as in the case of *The Queen* v. *Vreones* (2), that, whether by law or by agreement of the parties, for instance in an arbitration, there is in existence or is to be constituted a tribunal competent to deal with the matter in respect of which the defendant is alleged to have made the attempt. It was argued that there was not, and could not be, such a tribunal in this case. I do not agree with that contention, because in the *Crimes Act* 1900 we find sec. 475, which provides; [His Honor read the section, which has already been set out in the judgment of *Griffith* C.J., and continued]. That section in all its parts clearly points to a judicial inquiry, both as to the manner of conducting it, and as to forming a foundation for subsequent determination by the Executive, and clearly the Chief Justice, on receipt of the documents referred to in the indictment, whether they were afterwards shown in evidence to be false declarations or to be forgeries or not, could of his own motion have directed an inquiry under the section. But it is said that the section only applies where there is a sentence not yet expired, of which the defendant may get rid if his attempt succeeds. In my opinion that is not so. True, it appears on the face of the first count that the defendant had served the requisite term of imprisonment in accordance with the sentence therein alleged. But it is impossible to avoid the conclusion that the object of the defendant's scheme could only be to obtain a pardon. That

(1) 2 M. & S., 379; 15 R.R., 280. (2) (1891) 1 Q.B., 360.

H. C. OF A. 1906.

WHITE v. THE KING.

Barton J.

pardon, whether granted before or after the expiration of his term of imprisonment, would have enabled him to approach the Supreme Court with an application to have his name reinstated on the roll of solicitors, as a person acknowledged by the Crown to have been innocent of the crime of which he had been convicted, and whose name, therefore, should never have been removed from the roll.

In my judgment the first and third counts—whether the allegation of the completion of the sentence for larceny forms part of the third count or not—disclose attempts to pervert the course of law and justice, a misdemeanour indictable at common law; the means disclosed in the first count being the presentation to the Chief Justice of false declarations, and in the third count the putting off to His Honor of forgeries purporting to be statutory declarations. The object of the use of them is sufficiently stated to have been the inducement of the Chief Justice, who is a "Judge of the Supreme Court," to believe that the defendant had been wrongfully convicted. Sec. 475 of the *Crimes Act* shows how the means adopted tended to pervert the course of law and justice.

I deem it unnecessary to deal further with any of the other points raised, as I agree with what has been said by my learned brother the Chief Justice on them. In my opinion the demurrer was rightly overruled by Mr. Justice *Rogers* at the trial, their Honors of the Full Court rightly sustained him in that course, and accordingly this appeal should be dismissed.

O'CONNOR J. I am of the same opinion. The second count of the information is, I think, bad for the reasons stated by my learned brothers which I need not repeat. The first and third are founded upon the same transaction, that is, the endeavour to deceive *Sir Frederick Matthew Darley*, Chief Justice, by means of two documents, namely, false affidavits exonerating the prisoner and inculpating somebody else as the author of the crime to which they refer. In the first count it is alleged that the attempt was made to deceive the Chief Justice, by means of these false documents. In the third count it is alleged that the documents were forged, and that they were uttered by the defendant knowing them to be forged, for the same purpose as stated in the first

count. In both counts it is alleged that the object of the accused was to pervert the course of law and justice. Unless it appears on the face of the indictment that there was an attempt to pervert the course of law and justice, neither count can stand. But, in my opinion, there is an allegation on the face of both counts that there was an attempt to pervert the course of law and justice, namely, an attempt to initiate an inquiry under sec. 475 of the *Crimes Act* 1900. It is clear that the proceeding under that section is a judicial proceeding. It is said that it cannot be applied except in the case of a prisoner actually serving a sentence or released during or before the expiration of the sentence. The section cannot be restricted in that way. On the face of it it applies "whenever, after the conviction of a prisoner, any doubt or question arises as to his guilt, or any mitigating circumstance in the case, or any portion of the evidence therein." That is a repetition of the provisions in the *Criminal Law Amendment Act* 1883. Before that law was enacted, it was impossible, except by way of special case, to have a public inquiry upon oath into the circumstances attending a conviction. It was the custom, as is well known, for the Crown to obtain information by means of ministerial inquiries. But these were not on oath, and were not public. The object of the new provision was to enable the case to be re-opened where no point had been reserved at the trial, but some facts had come to the notice of the Government indicating that the prisoner might have been improperly convicted, and also to enable the Crown, where the prisoner's sentence had been served, and he appeared to have been unjustly convicted, to give him the opportunity of having his character cleared by a public proceeding. Those, undoubtedly, were the objects of the law, and it would be restricting it within limits which would fall short of the mischief to be remedied, if we were to hold that the Act could only be taken advantage of by a prisoner actually serving a sentence in gaol, or who had before the expiration of his sentence been released under the provisions of the *Crimes Act* relating to first offenders. In my opinion it applies to every case of a conviction of a prisoner who is desirous of having an inquiry of the kind instituted. Sub-sec. 4 of sec. 475 pro-

H. C. OF A. 1906.

WHITE v. THE KING.

O'Connor J.

vides that the evidence taken in such an inquiry shall be forwarded by the Justice before whom the inquiry was held to the Governor, or to the Judge who directed the inquiry, to be disposed of "as to the Governor on the report of such Judge, or otherwise, shall appear to be just." The prisoner is thereby enabled to get a finding of the magistrate in his favor, and upon that to induce the Crown to exercise its right of pardon. It seems to me that the attempt to initiate such an inquiry comes within the principle of all the cases, and that an attempt to pervert the course of law and justice was committed when the prisoner endeavoured, by producing false evidence to the Chief Justice, to bring about that inquiry. It is very like the case of *Omealy* v. *Newell* (1). These false affidavits of death were made in order to initiate a proceeding to hold a prisoner to bail. Lord *Ellenborough* C.J., at the conclusion of the argument, said (2), "that he had not the least doubt, that any person making use of a false instrument in order to pervert the course of justice was guilty of an offence punishable by indictment." The perverting of the course of justice in that case was initiating a proceeding to hold to special bail. Here the perverting of the course of justice is the initiation of a proceeding on which an inquiry may take place which may result in a pardon for the prisoner. Under these circumstances I think the first and third counts are good on demurrer, and therefore as to both those counts the appeal should be dismissed.

Appeal dismissed. Conviction on first and third counts affirmed.

Solicitor, for the appellant, *H. E. McIntosh.*

Solicitor, for the respondent, *The Crown Solicitor for New South Wales.*

C. A. W.

(1) 8 East., 364.

(2) 8 East., 364, at p. 365.