HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, KEANE AND NETTLE JJ

THE QUEEN APPELLANT

AND

BARBARA BECKETT RESPONDENT

The Queen v Beckett
[2015] HCA 38
23 October 2015
S94/2015

ORDER

1. *Appeal allowed.*

2. *Set aside orders 2 and 3 of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 12 December 2014 and, in lieu thereof, dismiss the appeal to that Court.*

On appeal from the Supreme Court of New South Wales

Representation

L A Babb SC with S C Dowling SC for the appellant (instructed by Solicitor for Public Prosecutions (NSW))

G O'L Reynolds SC with D P Hume for the respondent (instructed by Hammond Nguyen Turnbull)

CATCHWORDS

The Queen v Beckett

Criminal law – Attempt to pervert the course of justice – Where respondent questioned in compelled interview about property transfer she stamped for which no duty paid – Where respondent allegedly altered photocopies of cheques – Where respondent allegedly gave false evidence under oath – Where respondent charged with perverting the course of justice under s 319 of *Crimes Act* 1900 (NSW) – Whether offence of perverting the course of justice only applies to conduct committed after judicial proceedings commence – Whether "course of justice" within meaning of s 319 requires jurisdiction of court or competent judicial tribunal to have been invoked.

Words and phrases – "contemplated proceedings", "course of justice", "intention", "judicial proceedings", "pervert the course of justice", "tendency".

Crimes Act 1900 (NSW), s 319.
Taxation Administration Act 1996 (NSW), Pt 6, Div 2, s 72.

1 FRENCH CJ, KIEFEL, BELL AND KEANE JJ. Section 319 of the *Crimes Act* 1900 (NSW) ("the Crimes Act") makes it an offence for a person to do any act, or make any omission, intending in any way to pervert the course of justice. The course of justice begins with the filing or issue of process invoking the jurisdiction of a court or judicial tribunal or the taking of a step that marks the commencement of criminal proceedings[1]. The issue in the appeal is whether liability for the s 319 offence is confined to acts or omissions carried out with the intention of perverting an *existing* course of justice.

Procedural history

2 The respondent was arraigned in the District Court of New South Wales (Sweeney DCJ) on an indictment which charged her with an offence under s 319 ("count one") and, in the alternative, with making a false statement on oath under s 330 of the Crimes Act ("count two"). The conduct giving rise to each offence is alleged to have taken place during the course of a compelled interview conducted under the *Taxation Administration Act* 1996 (NSW) ("the TA Act") between the respondent and investigators from the Office of State Revenue ("the OSR") ("the interview"). It is alleged that, during the interview, the respondent produced photocopies of two forged bank cheques and made false statements to the investigators, with a view to concealing the true facts and thereby preventing her prosecution for one or more offences under taxation law ("the impugned conduct").

3 By notice of motion dated 4 December 2013, the respondent demurred and moved to quash the indictment or to permanently stay proceedings on it as an abuse of the process of the court. The notice of motion was listed for hearing on 9 December 2013. On that date, the respondent was arraigned and entered pleas of not guilty to each count in the indictment. Her counsel then moved for the relief claimed in the motion. The regularity of the procedure is not in issue[2].

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1 *R v Rogerson* (1992) 174 CLR 268 at 276 per Mason CJ, 283 per Brennan and Toohey JJ, 303-304 per McHugh J; [1992] HCA 25.

2 The demurrer is an antiquated plea that has been largely overtaken by the mechanism of the motion to quash. The demurrer is an allegation in writing identifying an error on the face of the indictment. It is made before the accused is arraigned. The motion to quash should also be taken before arraignment. See *Criminal Procedure Act* 1986 (NSW), s 17(1); *R v Chapple and Bolingbroke* (1892) 17 Cox CC 455 at 457 per Hawkins J; *R v Inner London Quarter Sessions, Ex parte Metropolitan Police Commissioner* [1970] 2 QB 80 at 83-84 per

(Footnote continues on next page)

Relevantly, the respondent's complaint was with count one. She contended that the prosecution is "foredoomed to fail" because, at the time of the impugned conduct, no "course of justice" was in existence. If the prosecution of the offence charged in count one was inevitably destined to fail, the claim for a permanent stay of proceedings on that count would be good.

4 Sweeney DCJ dismissed the motion. Her Honour held that a prosecution for an offence under s 319 could be maintained notwithstanding that no judicial proceedings had been commenced at the time of the impugned conduct. In this respect, her Honour relied on *R v OM*[3]. Her Honour also said that the impugned conduct was "capable of establishing that a course of justice existed".

5 The respondent applied for leave to appeal to the Court of Criminal Appeal of the Supreme Court of New South Wales (Beazley P, R A Hulme and Bellew JJ) under s 5F of the *Criminal Appeal Act* 1912 (NSW). She contended, inter alia, that Sweeney DCJ erred in finding both that there was a course of justice in existence at the date of the interview (ground three in the Court of Criminal Appeal) and that the prosecution was capable of establishing a prima facie case (ground 13 in the Court of Criminal Appeal).

6 The Court of Criminal Appeal said that Sweeney DCJ was wrong to find that at the time of the interview there was a "course of justice" in existence[4]. Their Honours held that the impugned conduct was incapable of constituting the s 319 offence because it occurred before the jurisdiction of a court or competent judicial tribunal was invoked[5]. The respondent was granted leave to appeal, count one on the indictment was permanently stayed and the appeal was otherwise dismissed.

7 On 15 May 2015, Kiefel and Bell JJ granted the Director of Public Prosecutions special leave to appeal. The appellant submits that an act done before the commencement of judicial proceedings may constitute an offence

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Cantley J; *R v Boston* (1923) 33 CLR 386 at 396 per Isaacs and Rich JJ; [1923] HCA 59.

3 (2011) 212 A Crim R 293.

4 *Beckett v The Queen* (2014) 315 ALR 295 at 319 [105] per Beazley P (R A Hulme J agreeing at 335 [189], Bellew J agreeing at 335 [190]).

5 *Beckett v The Queen* (2014) 315 ALR 295 at 320 [111] per Beazley P (R A Hulme J agreeing at 335 [189], Bellew J agreeing at 335 [190]).

contrary to s 319 where it is done with intent to frustrate or deflect the course of judicial proceedings that the accused contemplates may possibly be instituted. For the reasons to be given, that submission must be accepted. The orders of the Court of Criminal Appeal made on 12 December 2014 permanently staying the prosecution of the offence charged in count one must be set aside and, in lieu thereof, the appeal to that Court be dismissed.

The factual background

8 On the hearing of the motion before Sweeney DCJ the prosecution tendered the evidence on which it proposed to rely at the respondent's trial. This included the oral evidence of the two OSR officers who conducted the interview.

The EDR scheme

9 The respondent is a solicitor. As at June 2010, the respondent was an approved person under the Electronic Duties Returns ("EDR") scheme operated by the OSR under the TA Act[6]. The EDR scheme permits the Chief Commissioner of State Revenue ("the Commissioner"), by written notice, to give approval for a special arrangement for the lodging of returns and payment of tax to a specified agent on behalf of taxpayers of a specified class (an "approval")[7]. An approval may authorise the lodging of returns and payments of tax by electronic means[8]. An approval is subject to conditions specified by the Commissioner in the notice of approval or by subsequent written notice[9].

10 The respondent's approval was issued on or about 24 February 2003. She was approved to stamp transfers of real property upon receipt of a notice of assessment using accountable stamps issued by the OSR. The duty was to be paid by "return". The respondent's "return frequency period" was weekly, commencing on each Sunday. She was required to lodge payments of duty on or before the following Thursday of each week.

11 In April 2007, the OSR issued a document titled "Directions for Using Electronic Duties Return" ("the EDR Directions"). The respondent was sent a

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6 TA Act, Pt 6, Div 2.

7 TA Act, s 37(1)(b).

8 TA Act, s 37(2)(b).

9 TA Act, s 39(1).

copy of the EDR Directions and was asked to complete an "EDR – Application for Approval of Special Tax return Arrangements" form ("the application"). The respondent signed the application on 21 June 2007.

12 The EDR Directions contained a statement of the "Settlement Policy":

> "An approved person must have the duty payable available to them prior to processing transactions online. This is the case for all EDR transactions except those where the duty payable will be collected at settlement."

The Darling Point unit transaction

13 In July 2009, the respondent wrote to the OSR requesting that the transfer of a unit in Darling Point be assessed for nominal duty only. The property was being transferred by the trustee of a family trust to a beneficiary of the trust. It appears the respondent considered the transfer fell within an exemption under the *Duties Act* 1997 (NSW) ("the Duties Act")[10]. In March 2010, the respondent was informed that the transfer did not qualify for the exemption and was liable to payment of ad valorem duty.

14 On 11 June 2010, the respondent raised an online assessment of duty payable for the transfer of the Darling Point unit in the amount of $29,240 together with $17,416 by way of penalty interest. The respondent stamped the transfer. The duty and interest were payable to the OSR on or before 17 June 2010. Neither amount was paid.

15 On 10 September 2010, the respondent received a letter from the OSR notifying her of the suspension of her firm's approval by reason of her failure to remit the duty on the transfer of the Darling Point unit. The respondent was advised that her reinstatement as an approved user of the EDR scheme would only be considered once the outstanding payment had been made and she had confirmed her willingness to meet all conditions as an EDR-approved user in the future.

16 By letter dated 17 September 2010, the OSR informed the respondent it would be undertaking a "taxation investigation ('audit')" of her practice. She was advised that prosecution action may be considered should any breach of the TA Act or the Duties Act be detected.

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10 s 55(1)(b).

17 On 21 September 2010, David Morse, a Senior Prosecutions Officer at the OSR, had a telephone conversation with the respondent. According to Mr Morse, the respondent told him that the ANZ Bank had lost the bank cheque for the stamp duty on the Darling Point unit. Mr Morse told the respondent that the OSR wished to inspect her conveyancing files for the Darling Point unit transfer. He asked her to attend an interview on 28 September 2010.

18 On 21 September 2010, Mr Morse also issued a notice under s 72(1) of the TA Act requiring the respondent to provide the original vendor's file for the transaction involving the transfer of the Darling Point unit. On the same day, Mr Reid, a Senior Investigator at the OSR, issued a notice under s 72 of the TA Act requiring the respondent to attend and give evidence before him on 28 September 2010. That notice informed the reader that the purpose of the examination was to determine if there had been any breaches of provisions of the Duties Act and the TA Act.

19 On 28 September 2010, the respondent attended the interview. At its commencement she was advised that information or documents obtained during the course of the interview may be referred to the Crown Solicitor. She was informed that it is an offence to make a statement to a taxation officer knowing it to be false or misleading or to fail, without reasonable excuse, to answer questions relevant to an investigation. She was cautioned that she did not have to answer questions if her answers may tend to incriminate her.

20 The respondent produced her file for the transfer of the Darling Point unit at the interview. The file contained photocopies of two bank cheques in favour of the OSR bearing the date 26 September 2009. The respondent acknowledged her liability to pay the stamp duty and penalty interest on the transfer of the Darling Point unit. She made arrangements to pay the same in instalments.

21 It is the appellant's case that the dates on the bank cheques are forged and that each was issued on 26 September 2010. The appellant contends that the respondent made intentionally false statements in the interview conveying that, at the date she stamped the transfer for the Darling Point unit, she had the stamp duty available to her. She is alleged to have produced the photocopies of the cheques and made the false statements with the intention of preventing possible prosecution for offences under the TA Act.

Intent to pervert the course of justice

22 Section 319 is in Pt 7 of the Crimes Act and provides:

> "A person who does any act, or makes any omission, intending in any way to pervert the course of justice, is liable to imprisonment for 14 years."

23 Section 312, which is also in Pt 7, provides:

> "A reference in this Part to perverting the course of justice is a reference to obstructing, preventing, perverting or defeating the course of justice or the administration of the law."

24 The appellant submits that the offence created by s 319 is complete upon the doing of an act or the making of an omission intending in any way thereby to pervert the course of justice. In the appellant's submission, an act done or an omission made with the proscribed intention in contemplation of the institution of proceedings attracts liability in the same way as an act done with that intention respecting proceedings that are on foot.

25 The appellant acknowledges that the Court of Criminal Appeal was correct to hold that Sweeney DCJ erred in stating that "the Crown can establish a course of justice existed during the interviews with [the respondent] for the purpose of count one". Nonetheless, the appellant submits that Sweeney DCJ was right to reason that, if the prosecution can establish that curial proceedings were in the respondent's contemplation, and that she engaged in the impugned conduct with the intention of preventing a prosecution from being brought or concealing the true facts from the court, it would be open to a jury to convict.

The Court of Criminal Appeal

26 The Court of Criminal Appeal identified the question posed by the respondent's motion as "whether there was a 'course of justice' within the meaning of s 319, that [the respondent] intended to pervert by engaging in that conduct"[11]. The assumption that the offence may only be committed if the accused's conduct is directed to *existing* proceedings was based upon statements in *R v Rogerson*[12].

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11 *Beckett v The Queen* (2014) 315 ALR 295 at 311 [72] per Beazley P (R A Hulme J agreeing at 335 [189], Bellew J agreeing at 335 [190]).

12 (1992) 174 CLR 268.

27 *Rogerson* concerned the ingredients of the common law offence of conspiring to pervert the course of justice. It was acknowledged that a person may attempt or conspire to pervert the course of justice at a time when no curial proceedings are on foot. However, it was explained that this is not because police investigations form part of "the course of justice". Instead, it is because conduct may have the tendency, and be intended, to frustrate or deflect proceedings that the accused contemplates may possibly be instituted[13].

28 In *R v OM*, the Court of Criminal Appeal considered liability for the s 319 offence in a case in which, as here, the prosecution depended upon proof of the accused's acts done before the institution of proceedings[14]. Beazley P, giving the leading judgment in the respondent's appeal in this case, set out a passage from the Court's reasons in *OM*[15]:

> "[I]f the Crown … could establish that [the accused's] actions *were intended to deflect the police from prosecuting him for the criminal offence that he had allegedly committed, or from adducing evidence of the true facts relating to the alleged offence*, the prosecution was clearly capable of being maintained." (emphasis in Beazley P's reasons)

29 Her Honour observed that the language in this passage is taken from the joint reasons of Brennan and Toohey JJ in *Rogerson* and that their Honours were considering proof of the offence of *attempt* to pervert the course of justice[16]. Beazley P took from *Rogerson* that the substantive offence of perverting the course of justice is "not available" where the conduct occurs before the jurisdiction of a court or competent judicial authority is invoked[17]. *Rogerson* was

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13 *R v Rogerson* (1992) 174 CLR 268 at 277 per Mason CJ, 283 per Brennan and Toohey JJ, 304-305 per McHugh J.

14 (2011) 212 A Crim R 293.

15 *Beckett v The Queen* (2014) 315 ALR 295 at 317-318 [99] per Beazley P (R A Hulme J agreeing at 335 [189], Bellew J agreeing at 335 [190]) citing *R v OM* (2011) 212 A Crim R 293 at 306 [49] per Whealy JA (McCallum J agreeing at 308 [56], Schmidt J agreeing at 308 [57]).

16 *Beckett v The Queen* (2014) 315 ALR 295 at 318 [100] per Beazley P (R A Hulme J agreeing at 335 [189], Bellew J agreeing at 335 [190]).

17 *Beckett v The Queen* (2014) 315 ALR 295 at 318 [100] per Beazley P (R A Hulme J agreeing at 335 [189], Bellew J agreeing at 335 [190]) citing *R v Rogerson* (1992) 174 CLR 268 at 284 per Brennan and Toohey JJ.

said to be authority for the proposition that "[t]he 'course of justice' for the purposes of the substantive offence require[s] that the curial process [has] been commenced"[18]. Acts done before that time, having the requisite tendency and intent, amounted to the offence of attempt to pervert the course of justice[19]. On this analysis, Beazley P concluded that *OM* was wrongly decided and that Sweeney DCJ's reasoning replicated the error[20]. Her Honour held that the impugned conduct, if proved by admissible evidence, could not constitute the s 319 offence because it occurred before the invocation of the jurisdiction of a court or competent judicial tribunal[21].

The respondent's submission: "the universal principle"

30 The respondent supports Beazley P's analysis. The respondent relies on an additional argument for the conclusion that liability under s 319 requires that there is a course of justice in existence at the date of the accused's act or omission. Section 319 is in Pt 7 of the Crimes Act, which is headed "Public justice offences". Part 7 was inserted into the Crimes Act by the *Crimes (Public Justice) Amendment Act* 1990 (NSW). The respondent argues that Pt 7 codifies the law respecting offences against public justice, and that the words "the course of justice" in this connection are to be understood by reference to the technical meaning that the phrase had acquired under the common law[22]. This meaning is said to embody a "universal principle" adopted by this Court in *R v Murphy*[23]. That principle is that liability for the offences of perverting and attempting to

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18 *Beckett v The Queen* (2014) 315 ALR 295 at 318 [103] per Beazley P (R A Hulme J agreeing at 335 [189], Bellew J agreeing at 335 [190]).

19 *Beckett v The Queen* (2014) 315 ALR 295 at 318 [103] per Beazley P (R A Hulme J agreeing at 335 [189], Bellew J agreeing at 335 [190]).

20 *Beckett v The Queen* (2014) 315 ALR 295 at 319 [105] per Beazley P (R A Hulme J agreeing at 335 [189], Bellew J agreeing at 335 [190]).

21 *Beckett v The Queen* (2014) 315 ALR 295 at 320 [111] per Beazley P (R A Hulme J agreeing at 335 [189], Bellew J agreeing at 335 [190]).

22 *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1 at 22 per Mason J; [1975] HCA 6.

23 (1985) 158 CLR 596 at 610; [1985] HCA 50.

pervert the course of justice requires that "a course of justice must have been embarked upon"[24].

31 The respondent's argument is constructed on passages from the reasons of Watkins LJ in *R v Selvage* that are extracted in *Murphy*[25]: first, the statement "one of the vital tests or principles which helps to determine whether or not a charge of perverting the course of justice is properly laid" and secondly, the opening words of the next quotation, "[t]his we take to be that a course of justice must have been embarked upon".

32 The respondent acknowledges, as she must, that *Murphy* proceeded upon acceptance that interference with pre-curial investigations might constitute an attempt to pervert the course of justice. However, she submits that approval of this line of authority was unnecessary to the decision. In 1990, so the argument runs, the phrase "the course of justice" was understood consistently with the adoption of the "universal principle" as confined to a course of justice that has been embarked upon. Whatever may have been the understanding of the scope of activities coming within "the course of justice" at the date of the enactment of s 319, the respondent observes that *Rogerson* has since authoritatively determined that it does not extend to pre-curial investigations.

The "universal principle" considered

33 There is a jejune quality to the respondent's "universal principle" submission. The point that was being made in *Murphy* was that *Selvage* reaffirmed that a person may be guilty of attempting to pervert the course of justice notwithstanding that no legal proceedings have been instituted. The complete sentence in the passage that the Court extracted with apparent approval is[26]:

> "This we take to be that a course of justice must have been embarked upon in the sense that proceedings of some kind are in being *or are imminent or investigations which could or might bring proceedings about are in progress* in order that the act complained about can be said to be one which has a tendency to pervert the course of justice." (emphasis added)

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24 *R v Murphy* (1985) 158 CLR 596 at 610.

25 (1985) 158 CLR 596 at 610 quoting [1982] QB 372 at 381.

26 *R v Selvage* [1982] QB 372 at 381 per Watkins LJ.

34 *Murphy* was concerned with liability for the offence of attempting to pervert the course of justice under s 43 of the *Crimes Act* 1914 (Cth). The statutory offence mirrors the offence of attempting to pervert the course of justice under the common law[27]. Its gist was formulated by Pollock B in *R v Vreones* as "the doing of some act which has a tendency and is intended to pervert the administration of public justice"[28]. In common with cognate statutory provisions in Queensland, New Zealand and Canada, the offence can be committed at a time when no curial proceedings have been instituted[29]. Contrary to the respondent's submission, the Court in *Murphy* was not purporting to enunciate a "universal principle" with respect to the scope of liability for offences involving the perversion of the course of justice[30].

The s 319 offence

35 The focus of the respondent's submissions on the claimed common law understanding of the phrase "the course of justice" is, in any event, beside the point. The defined phrase for the purpose of liability under s 319 is "perverting the course of justice", the meaning of which includes "preventing ... the course of justice"[31]. The concept that a person may pervert a course of justice by "preventing it" is eloquent of a legislative intention that liability extend to acts done with the proscribed intention in relation to contemplated proceedings.

36 As the appellant correctly submits, liability for the offence created by s 319 hinges on the intention to pervert the course of justice and not upon the perversion of a course of justice. Once this is acknowledged, there is no reason to confine the provision's reach to conduct that is engaged in with the intention of perverting existing proceedings.

37 Part 7 abolishes a number of common law offences against public justice, including perverting the course of justice and attempting or conspiring to pervert the course of justice[32]. Perverting the course of justice and attempting to pervert

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27 *R v Murphy* (1985) 158 CLR 596 at 609.

28 *R v Vreones* [1891] 1 QB 360 at 369.

29 *R v Murphy* (1985) 158 CLR 596 at 609.

30 [2015] HCATrans 216 at 571-583.

31 Crimes Act, s 312.

32 Crimes Act, s 341.

the course of justice are each substantive offences[33]. Each has in common the doing of an act, or the making of an omission, with the intention of obstructing, preventing, perverting or defeating existing or contemplated curial proceedings. They are distinguished by result. There is nothing in the language of s 319 or the scheme of Pt 7 to suggest that the abolition of the common law offences, and the enactment of a single offence having as its elements the doing of an act or the making of an omission with the intention of obstructing, preventing, perverting or defeating the course of justice, had as its object confining liability to acts done or omissions made with the requisite intention in respect of *existing* proceedings.

38 It was an error to distinguish the offence created by s 319 from the common law offence of attempting to pervert the course of justice on the basis that s 319 creates a substantive offence[34]. Contrary to the Court of Criminal Appeal's reasoning, nothing in *Rogerson* supports a conclusion that the s 319 offence is confined to conduct that is intended to pervert an existing course of justice. The Court of Criminal Appeal erred in concluding that the prosecution case, if established by admissible evidence, is incapable of establishing liability for the offence charged in count one[35]. Sweeney DCJ was right to dismiss the respondent's notice of motion.

A tendency to pervert the course of justice?

39 There should be reference to a further question raised in the appellant's submissions, concerning the elements of the s 319 offence. The question is whether liability for the offence requires proof that the accused's act or omission possesses the tendency to pervert the course of justice.

40 The appellant acknowledges that the offence created by s 43 of the *Crimes Act* 1914 (Cth) requires proof of the tendency of the act to pervert the course of justice although that requirement is not stated in terms. As *Murphy* explains, s 43 is modelled on a provision of Sir James Stephen's draft criminal code, which

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33 *R v Rogerson* (1992) 174 CLR 268 at 279 per Brennan and Toohey JJ, 298 per McHugh J; *Meissner v The Queen* (1995) 184 CLR 132 at 141 per Brennan, Toohey and McHugh JJ, 156 per Dawson J; [1995] HCA 41.

34 *Beckett v The Queen* (2014) 315 ALR 295 at 313 [81] per Beazley P (R A Hulme J agreeing at 335 [189], Bellew J agreeing at 335 [190]).

35 *Beckett v The Queen* (2014) 315 ALR 295 at 320 [111] per Beazley P (R A Hulme J agreeing at 335 [189], Bellew J agreeing at 335 [190]).

was intended to reflect the common law offence[36]. The appellant points out that the New South Wales legislature chose not to adopt this model and instead framed the offence on the doing of an act or the making of an omission with the proscribed intention.

41 The appellant observes that courts in New South Wales have proceeded upon the assumption that liability for the s 319 offence incorporates a requirement for proof of the tendency of the act[37], notwithstanding that the provision does not, in terms, impose that requirement. In only one instance was the issued raised. This was in *Karageorge*[38], in which the issue was considered by two members of the Court of Criminal Appeal although it was ultimately unnecessary to the decision. Simpson J considered that the s 319 offence does not differ in any material way from the common law offence of attempting to pervert the course of justice[39]. By contrast Sully J agreed with Professor Gillies' analysis: the scope of s 319 is broader than the common law offence and any act that is intended to pervert the course of justice suffices for liability even if the act does not, on an objective view, possess the tendency to do so[40].

42 The appellant submits that if proof of tendency is a requirement, there is a further question of whether the nature of the tendency is an objective quality of the act or a tendency to fulfil the proscribed intention.

43 The latter view was favoured by the Court of Appeal and the Court of Criminal Appeal, constituted in each case by the same five judges, in *R v Murphy*[41]. In this context, involving a charge under s 43 of the *Crimes Act* 1914 (Cth), their Honours rejected the proposition that tendency is to be equated

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36 *R v Murphy* (1985) 158 CLR 596 at 609.

37 *R v Charles* unreported, New South Wales Court of Criminal Appeal, 23 March 1998 at 5 per Gleeson CJ, 19-20 per James J; *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [23] per Bathurst CJ, [195] per Ward JA.

38 (1998) 103 A Crim R 157.

39 *Karageorge* (1998) 103 A Crim R 157 at 183.

40 *Karageorge* (1998) 103 A Crim R 157 at 160 citing Gillies, *Criminal Law*, 3rd ed (1993) at 820-821.

41 (1985) 4 NSWLR 42.

with the likelihood of, or with creating a possibility or risk of, producing the result[42]. Their Honours concluded that it is sufficient if the accused's conduct has a tendency to "fulfil the guilty intention" in the sense that it is a step directed to or aimed at fulfilling that intention[43]. Whether, as the appellant submits, this analysis explains the drafting of s 319, it is clear that, on the trial of a count charging an attempt to pervert the course of justice under the common law or under those statutory provisions which mirror the common law, the prosecution must prove the objective tendency of the accused's conduct to pervert the course of justice[44].

44 It is also clear that whether the conduct is successful in this respect is irrelevant to criminal liability[45]. An act or omission may tend towards perverting the course of justice notwithstanding that, in the event, it would not have achieved that result. Fabricating evidence with a view to averting a contemplated prosecution, as alleged here, may possess the requisite objective tendency even though any prosecution for the predicate offence is doomed to fail for reasons that are unconnected with the accused's act.

45 Commonly, it is the tendency of the accused's conduct to obstruct, prevent or otherwise defeat proceedings, or contemplated proceedings, that is relied upon for the inference that the accused acted with the requisite intention. That is how the prosecution puts its case against the respondent here. For this reason, the appeal does not provide the occasion to consider the appellant's larger proposition, which is that liability under s 319 attaches to any act done or omission made with the proscribed intention even if the act or omission has no rational connection to obstructing, preventing, perverting or defeating proceedings or contemplated proceedings before a judicial tribunal. That issue is better left to an occasion when it is presented in a concrete factual setting.

46 On the trial of a count charging a s 319 offence it suffices for the judge to instruct the jury in the terms of the section: the prosecution must prove that the accused did the act, or made the omission, and that, at the time of so doing, it was

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42 *R v Murphy* (1985) 4 NSWLR 42 at 48.

43 *R v Murphy* (1985) 4 NSWLR 42 at 51.

44 *Meissner v The Queen* (1995) 184 CLR 132 at 142-143 per Brennan, Toohey and McHugh JJ.

45 *Meissner v The Queen* (1995) 184 CLR 132 at 142-143 per Brennan, Toohey and McHugh JJ.

the accused's intention in any way to obstruct, prevent, pervert, or defeat the course of justice.

Orders

47 For these reasons the following orders should be made:

1. Appeal allowed;

2. Set aside orders 2 and 3 of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 12 December 2014 and, in lieu thereof, dismiss the appeal to that Court.

48 NETTLE J. I have had the advantage of reading in draft the reasons for judgment of the plurality and I agree with their Honours, substantially for the reasons they give, that the appeal should be allowed.

49 My only substantive disagreement is as to the elements of the offence created by s 319 of the *Crimes Act* 1900 (NSW). Their Honours have concluded that the offence is comprised of but two elements, namely: (1) that the accused did the act or made the omission alleged; and (2) that, at the time of so acting or omitting to act, it was the accused's intention in any way to obstruct, prevent, pervert, or defeat the course of justice. In my view, there is a third element: (3) that the act or omission had a tendency to pervert the course of justice.

50 To explain why that is so, it is necessary to go back to the common law offences from which s 319 is derived.

The derivation of s 319

51 As Mason CJ explained in *R v Rogerson*, the course of justice "begins with the filing or issue of process invoking the jurisdiction of a court or judicial tribunal or the taking of a step that marks the commencement of criminal proceedings"[46]. Hence, it will certainly begin when a person is arrested and charged. But a police investigation undertaken before the jurisdiction of the court or tribunal is so invoked is not part of the course of justice. The administration of justice and the detection of crime are separate and different functions[47]. Consequently, an offence of perverting the course of justice cannot be committed before the jurisdiction of the court or tribunal is so invoked.

52 By contrast, an offence of attempting or conspiring to pervert the course of justice may be committed before the jurisdiction of the court or tribunal is invoked but only by conduct which has a tendency to frustrate or deflect a prosecution or disciplinary proceedings[48]:

> "because action taken before curial or tribunal proceedings commence may have a tendency and be intended to frustrate or deflect the course of curial or tribunal proceedings which are imminent, probable or even possible. *In other words, it is enough that an act has a tendency to frustrate or deflect a prosecution or disciplinary proceeding before a judicial tribunal which the accused contemplates may possibly be*

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46 (1992) 174 CLR 268 at 276; [1992] HCA 25.

47 (1992) 174 CLR 268 at 276-277.

48 (1992) 174 CLR 268 at 277 (emphasis added); see also at 283-284 per Brennan and Toohey JJ, 304-305 per McHugh J.

> *instituted*, even though the possibility ... has not been considered by the police or the relevant law enforcement agency".

53 Hitherto, the statutory offence created by s 319 has also been seen as requiring proof that conduct which is alleged to have comprised the offence had a tendency to frustrate or deflect a prosecution or disciplinary proceeding. Thus, in *R v Charles*[49], the New South Wales Court of Criminal Appeal (Gleeson CJ, James and Barr JJ) allowed an appeal against a conviction of an offence under s 319 because the trial judge did not leave to the jury the question of whether the alleged act did have that tendency. In that case, the Crown had alleged that the accused asked a prospective witness in a coronial inquiry, Mrs Marshall, to say that she had met the accused on only one occasion. As Gleeson CJ explained, therefore[50]:

> "It was necessary for the Crown to establish that the conduct ... was doing an act which had a tendency, and was intended, to pervert the administration of public justice. ...
>
> After the Crown had established beyond reasonable doubt the primary facts relied upon concerning the communication between the appellant and Mrs Marshall, there remained substantial room for argument about whether the appellant's conduct had the tendency, and was accompanied by the intention, which the Crown set out to establish."

54 In *Karageorge*[51], each of the members of the New South Wales Court of Criminal Appeal accepted that the statutory offence created by s 319 of the *Crimes Act* includes what would have amounted to the common law offences of perverting the course of justice and attempting to pervert the course of justice. Only Sully J went further in expressing agreement[52] with an argument advanced by Professor Gillies[53] that the offence created by s 319 was broader than the common law offences of perverting the course of justice and attempting to pervert the course of justice in that "[i]t does not in its literal terms require the intentional doing of an act which actually perverts justice, or one having this tendency". The other members of the Court did not agree with that proposition.

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49 Unreported, 23 March 1998.

50 Unreported, 23 March 1998 at 5.

51 (1998) 103 A Crim R 157.

52 (1998) 103 A Crim R 157 at 159-160.

53 Gillies, *Criminal Law*, 3rd ed (1993) at 820-821.

55 Levine J noted that the statutory offence created by s 319 had been enacted as part of an attempt to abolish and replace the common law relating to public justice offences and that two of the common law offences so dealt with were the offence of perverting the course of justice and the offence of attempting to pervert the course of justice[54]. His Honour stated that it was unnecessary to decide whether it was incumbent on the Crown to prove that the conduct had a tendency to pervert the course of justice – because, on any rational view of the alleged conduct, it could not be regarded as other than having a tendency to pervert the course of justice. But his Honour also observed that[55]:

> "In the light of what was said in the judgments in *Charles* it does seem to me arguable that any 'act' relied upon by the Crown for the purposes of the prosecution of an offence under s 319 will not only have to be established as 'intending in any way to pervert the course of justice' but also to have that requisite tendency."

56 Simpson J considered that the offence created by s 319 was not in any material way different from the common law offence of attempting to pervert the course of justice[56]. After referring to the elements of the common law offence identified in *Meissner v The Queen*[57], her Honour concluded[58]:

> "Precisely the same description can be applied to an offence against s 319. It is the tendency of the act (together with the intention of the actor) that is decisive."

57 Section 312 of the *Crimes Act* defines "perverting the course of justice" as "obstructing, preventing, perverting or defeating the course of justice *or the administration of the law*" (emphasis added). In *R v Einfeld*[59], a question arose as to whether the expression "administration of the law" for the purposes of s 319 should be given its literal meaning, as was also argued by Professor Gillies[60], and

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54 (1998) 103 A Crim R 157 at 172-173.

55 (1998) 103 A Crim R 157 at 173.

56 *Karageorge* (1998) 103 A Crim R 157 at 183.

57 (1995) 184 CLR 132 at 140-141 per Brennan, Toohey and McHugh JJ; [1995] HCA 41.

58 *Karageorge* (1998) 103 A Crim R 157 at 183.

59 (2008) 71 NSWLR 31.

60 *Einfeld* (2008) 71 NSWLR 31 at 49-50 [73], 54 [88] citing Gillies, *Criminal Law*, 3rd ed (1993) at 820-821.

so be read as including "the exercise by a government body of its functions in applying and enforcing the law of [New South Wales]"[61]. The Court of Criminal Appeal (Bell JA, Hulme and Latham JJ) held that it should not.

58 Although the meaning of "administration of the law" is not in issue in this case, the reasoning in *Einfeld* is pertinent in as much as their Honours eschewed attributing a literal meaning to the expression because to do so would have resulted in the criminalisation of conduct which had not previously been criminal and because such a consequence would have ill accorded with the evident statutory purpose of s 319 being among the most serious of the public justice offences[62]:

> "[The literal] meaning would result in a very wide range of conduct, including conduct that was not previously unlawful, being criminalised as a perversion of the course of justice. This result is a reason to consider that the literal meaning of the words may not be the ordinary meaning to be given to the expression in this statutory context.
>
> The literal meaning of the words in the definition does not fit harmoniously with the scheme of the *Crimes Act* and Pt 7, in particular. ... The offences in ss 321, 322, 323 and 333(1), which are subject to an increased maximum sentence in the event the conduct was intended to procure the conviction or acquittal of any person for a serious offence, may not be dealt with summarily if that feature of aggravation is alleged. The Parliament reserved the offence of perverting the course of justice in s 319 as among the most serious of the public justice offences. It is not an offence that in any circumstance may be dealt with summarily."

59 Their Honours noted that no argument had been addressed to a further submission by the Crown that the statutory offence under s 319 did not require proof that the alleged conduct possessed the tendency to pervert the course of justice. Nor did they decide the issue. But, in passing, they conjectured that[63]:

> "It may be that, as the Crown submitted, it does not. This would point to the correctness of the Crown's submission, that s 319 is not to be understood as simply restating the common law. It would also underline the protean nature of the offence if the definition is given its literal meaning."

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61 *Einfeld* (2008) 71 NSWLR 31 at 56-57 [97].

62 *Einfeld* (2008) 71 NSWLR 31 at 57 [97]-[98].

63 *Einfeld* (2008) 71 NSWLR 31 at 51 [75].

60 So far as appears, however, the issue has not since been reconsidered by either the Court of Criminal Appeal or the Court of Appeal, and recently, in *Cunneen v Independent Commission Against Corruption*[64], the Court of Appeal proceeded, consistently with *Charles*, on the basis that proof of tendency is required.

Section 319: the need for tendency to pervert the course of justice

61 Ultimately, of course, the issue of whether tendency to pervert the course of justice is a necessary element of the offence created by s 319 turns on the words of the section. As appears from the decisions referred to, they are susceptible to more than one possible construction. Nonetheless, as matters stand, s 319 has been interpreted by a powerfully constituted Court of Criminal Appeal in *Charles*, as part of the ratio of the decision, as requiring the Crown to establish that the alleged conduct have a tendency to pervert the administration of public justice. And, despite desultory obiter dicta in favour of the alternative view, *Charles* has stood for almost 20 years as determinative of the issue.

62 Moreover, to borrow from the reasoning in *Einfeld*[65], if s 319 were construed literally as excluding the necessity for the Crown to prove that the alleged conduct has a tendency to pervert the course of justice, the provision would potentially result in a very wide range of conduct, including conduct that was not previously unlawful, being criminalised as a perversion of the course of justice. Consistently with the principle of statutory construction that an ambiguous statutory provision which affects the liberty of the subject should not be read as so restricting liberty[66], there is not a little in principle in support of the prevailing view.

63 Possibly, as was conjectured in *Einfeld*, there may be convincing arguments to be made in favour of a more expansive interpretation of the section. But, if there are, they have not been made in this case. The most that the Crown offered was a submission in writing in which it was noticed that the Court of Appeal and the Court of Criminal Appeal, constituted by the same judges, in *R v*

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64 [2014] NSWCA 421 at [23] per Bathurst CJ, [85]-[88] per Basten JA, [195] per Ward JA.

65 (2008) 71 NSWLR 31 at 57 [97].

66 See, eg, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 12 per Mason CJ; [1992] HCA 64; *Coco v The Queen* (1994) 179 CLR 427 at 436-437 per Mason CJ, Brennan, Gaudron and McHugh JJ; [1994] HCA 15; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19] per Gleeson CJ; [2004] HCA 37; *Momcilovic v The Queen* (2011) 245 CLR 1 at 47 [44] per French CJ; [2011] HCA 34.

Murphy[67] interpreted tendency for the purposes of the offence created by s 43 of the *Crimes Act* 1914 (Cth) as a tendency to further or fulfil the purpose or intention of perverting the course of justice, as opposed to a tendency to achieve the end of perverting the course of justice; and a contention, as I understood it, that the offence created by s 319 is consistent with the approach in *Murphy* because s 319 is couched in terms of "any act". Quite how that conduces to a conclusion that s 319 requires no proof of tendency remains elusive.

Conclusion

64 In the result, until and unless this Court has had the benefit of full and convincing argument on the point in a case in which the issue truly arises, I should not be disposed to depart from *Charles*. I consider that, for the time being, trial judges should continue to charge juries, consistently with *Charles*, that proof of an offence under s 319 requires proof beyond reasonable doubt that the accused did the act or omission alleged, that the act or omission had a tendency to pervert the course of justice and that the act or omission was intended to pervert the course of justice.

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67 (1985) 4 NSWLR 42 at 50-51.