

IN THE MATTER of a Criminal Appeal

BETWEEN **REBECCA KATSI LI**

Appellant

AND **THE QUEEN**

Respondent

Hearing 14 August 2008

Court Elias CJ
Blanchard J
Tipping J
McGrath J
Wilson J

Counsel H D M Lawry for Appellant
B J Horsley for Crown

CRIMINAL APPEAL

10.00am

Elias CJ Thank you.

Lawry May it please the Court, Lawry for the appellant. Firstly an apology from Mr Hart who had expected to be here until early yesterday afternoon, at which time he gave me a call. His trial he's been involved in has run over, so I will do what I can.

Elias CJ Yes thank you Mr Lawry.

Horsley May it please the Court, Horsley for the respondent.

Elias CJ Yes Mr Horsley, thank you. Yes Mr Lawry.

Lawry May it please the Court, the heart of the appeal.

Tipping J A very good start.

Lawry Must be that there would need to be a dishonest element within the new provision for forgery for a number of reasons and that's the reason why the annexures are there to show the background that has led to the section as it is presently. The section still remains one of the most serious of the dishonest offences, and it is within that section it's related to being dishonest offences. So the submission is that the section must have intended – that's the creating of a document – would be that would be used as a false document. Now although the document on the face of it may appear to be false, and it's clear that these are if you like replica degrees, are they purporting to be false documents when

Tipping J Does this submission really suggest that the words 'as genuine' be inserted as to the word 'using'? Is that the effect of it anyway?

Lawry Yes, yes. The thrust of it is the person who is purchasing them knows they are getting not the genuine article. They are not being deceived at all. What that person may subsequently do with it may or may not render that second person liable for criminal offending, but I suppose to illustrate my answer to that is that if we were not talking about a document, if for example a very clever mechanic built a replica motor vehicle – let's say an expensive replica Porsche or Lotus or something like that, and sold it to somebody on the basis that this is a replica, it's not the genuine article, the person is getting what they expected to get. What that person subsequently does with that is over to them, and here the appellant, although she has created the document, has not passed it over to the purchaser as a false document but she passed it over for being exactly what it is.

Elias CJ A false document.

Tipping J It's sold as a false document, but what troubles me with this point Mr Lawry is that if one compares what we have now with the old 264, which is in para.18 of Mr Horsley's submission

- Lawry Yes.
- Tipping J You will see that both limbs of the then definition of forgery – it's on page 4 of Mr Horsley's submission – both limbs of the old definition incorporated the concept of 'as genuine'.
- Lawry Yes.
- Tipping J Used the way acted upon as genuine. Now here only the second limb has carried forward the 'as genuine', the subsection 2 limb
- Lawry Yes.
- Tipping J Now that must have been deliberate.
- Lawry It may have been because the legislature considered that by reference to the words 'false document' was including that same provision, because otherwise we end up with the unusual position we have at the moment, that what would be the more criminally culpable act as in subsection 2 because there is an intention to deceive which when we're looking at an offence that carries ten years imprisonment, so that's as serious a dishonesty offence that there is, it can't with respect have been the intention of the legislature that if somebody is not intending to deceive that they should be liable to the much more serious penalty in ss.1, but if somebody who is intending to deceive is only liable to the much lesser penalty – the only difference being whether there is property or money that changes hands as a result.
- Tipping J But ss.1 of 256 says short of use. It's the creation whether such specified intent use, actual use, is dealt with in 257 where again you've got this clear dichotomy between (a) – 257(1)(a) where 'as genuine' is not there, and (b) and (c) where it is.
- Lawry You're right, I know
- Tipping J This is what you have to overcome but there seems to be a clear legislative pattern that for the making concept the intention is wider.
- Lawry I'll go back to s.203 as it is. It's the making with the intention

Tipping J See forgery classically is making; using is uttering; but that's all been re-arranged. Well no not re-arranged, but it's been redefined if you like or re-presented.

Lawry It has been, that's right, but if the section is read so that the intended use is when it says using it, is using a false document so

Tipping J Well that unfortunately is the point.

Lawry But

Tipping J Why do we read in 'as genuine' - that's really the challenge I lay down to you?

Lawry It has been removed, I accept that. What I'm saying is that why you would read in those words is that the document is exactly what the maker purports it to be. It is a replica certificate for example, and the person who is buying it knows what it is being held out to be.

Wilson J I suggest that's begging the question rather than answering Justice Tipping's question.

Lawry I suppose it really comes back to the words 'a false document'. Is it a false document then when it is exactly what it purports to be.

Tipping J It is from the making point of view.

Lawry Yes.

McGrath J Or does it come back to the word 'use'?

Lawry Well that's what I was suggesting, if you're using, I think it says using it, but it must be using a false document. She is not using a false document, she's using a document that is exactly what she purports it to be. It is if you like a replica certificate which is different from somebody who is holding out that to be a genuine article and I know that comes back to what Justice Tipping was talking about, but is genuine so far as both the maker and the purchaser are concerned. It's genuine in that it's a genuine replica.

Tipping J It's a genuine fake.

- Lawry That's right, but can it have been the intention of the legislature when you go through the commentaries that have been there, can it have been the intention of the legislature to have the most serious penalty reserved for those who are not intending to deceive?
- Tipping J No, I think the dichotomy is between using or creating for gain and creating for some purpose not involving financial or other types of specified gain.
- Lawry In which case the gain intended in my submission must be gain by somebody who is duped into believing that it's not what it appears on its face to be because for example a transfer of lands that is a false transfer, the person who is acting on that and pays money as a result of that, the maker of the document gains as a result because of the inherent dishonest nature of the making of that document. But here she's making a document that as I say is exactly what she's holding it out to be and whether we call it a, I've referred to it as a replica rather than false, just to try to differentiate it from the wording within the section, but no one
- Tipping J Is there anything in the Parliamentary materials that supports directly or even indirectly this proposition?
- Lawry Well yes if I just go through them bit by bit. The difficulty I have is that the section kept changing as it went through the different readings and when we look at the first, I think it's under the fourth tab, the aims of the Bill – so that's under the fourth tab initially – and, oh sorry that's just the first commentary on it and I think its on the fourth page in, dealing with forgery and counterfeiting. It sets out what the aim was then and there it had subsection 1, so I'm looking at the fourth page under the fourth tab, sorry the third page under the fourth tab
- Elias CJ Sorry, fourth tab?
- Lawry Fourth tab. So that the heading is *Forgery and Counterfeiting*.
- Elias CJ I'm sorry I haven't found it. It's the fourth page.
- Wilson J It's got page 1 of 1 on the top.
- Lawry That's right, yes.

Elias CJ They're all 1 of 1.

Lawry Yes.

Blanchard J The third page.

Elias CJ Okay thank you, forgery and counterfeiting.

Lawry And the comment there first of all is that subsection 1 relates to making a false document with the intention of using it – and I interpose the words 'false document' – to obtain some sort of gain. And subsection 2 relates to making a false document with the intention that it be used or acted upon as genuine. So at the point the legislature is seeing the first section as much more serious than the second, but when we come back to first principles of culpability, where there is an intention that a document be acted upon as genuine, or used as genuine, must be of more culpable nature than where there isn't that intention. And so then on to the next tab. I'm just looking for the commentary on it. Perhaps if I can move quite a bit further ahead. There is 1, 2, 3, 4, 5, 6, 7th tab, at page 77. Now this is before we've come to the final draft admittedly.

Tipping J This is the report of the Committee is it?

Lawry Yes.

Tipping J Yes.

Lawry The Crimes Bill 1989 Report of the Crimes Consultative Committee. There on page 77 towards the bottom

Blanchard J Where's 77?

Lawry 77 is the number at the top, so it's the fourth page in.

Blanchard J Yes.

Lawry And there's the commentary there under clause 203, and even then their intention says 'in subclause 1 of our draft the reference to dishonesty has been dropped. Instead the subclause refers to an intention to obtain by deception' so that seems to be one of the first steps that's there. 'The use of the forged document for gain is in the same class of conduct covered by clause 192, though there is

the added factor that the integrity of the documents generally is affected'.

Tipping J Well if it had stopped there you would have been in better shape wouldn't you?

Lawry Yes I would, I accept that. Over the page it has 'the nature of the intended deception is apparent from the context. Deception relates to the intended use of a false document', and so it's with that that I'm suggesting, although they have taken out reference to deception, the commentary relates to the intended use of the false document, and this is why I come back to saying the document on its face may not be what it appears to be but with the added information that the purchaser has, that it in fact is not a real certificate, then suggest that it's not in fact a false document.

Wilson J Just going back to page 77 and the first sentence under the subheading clause 203, 'this provision proposes to distinguish for the purposes of penalty between persons who forge documents for gain' and stopping there

Lawry Yes.

Wilson J Isn't it the very situation we have here at forging a document for gain?

Lawry Yes but the section doesn't stop there because the intention that's there and my submission is that the gain would need to be a gain from the fact that it is a false document, but it becomes a bit of a circular argument I accept.

Wilson J Yes it does, yes.

Lawry But I accept that the legislature has intended to regard more seriously those people who are making profit out of making documents. And that's why I come back to the other argument

Elias CJ Isn't that a concession wholly against you in this?

Lawry It certainly makes it difficult I accept from a counsel point of view, and I can't shy away from that

Elias CJ No.

- Lawry But what I'm saying here is that the gain is not from the falsity of the document. The document is exactly what it purports to be.
- Blanchard J Well the gain is from the falsity of the document, because that's why they are buying them because they're false.
- Lawry But they are knowing they're false. Again I understand and it is a difficulty from the appellant's point of view, I accept that, but it's different from a situation where the person is buying a document believing it to be genuine. Now so far as certificates for degrees, it's difficult to see how that could be done because of the nature of that particular document, but there are many documents where there could be money changing hands; where there is a gain for the person who has made the document, and the person who has paid the money over has believed it was a genuine document, and it seems with respect that that must be the harm that the legislature was aiming at when they drafted this provision.
- Tipping J But if I paint a painting, in my deluded way, thinking I'll pass it off as a Picasso, I'm making a false document, assuming the painting's within the definition of a document and I'm intending to make use of it for gain because I'm going to sell it, now would you have that only under subsection 2?
- Lawry Well it depends on the intent that goes with it - if I can use that illustration - if I paint a painting that looks remarkably like a Picasso, and I then sell it to someone and I say this is not by Picasso, this is by me, it is not a false document if you like for the person who's purchasing it. They know exactly what they are buying, so my answer
- Blanchard J Well it's not a false document, period, because it wasn't created for the purpose of being false, it was created as a copy.
- Elias CJ But it might be created for the purpose of being false but without any expectation that it will be used deceptively, so that somebody wants to hang on their wall something that they're going to say is my Picasso.
- Lawry Exactly the same principle applies here that the person who has made the documents, the certificate, and has not held it out to be anything other than what it is to the purchaser, the purchaser may just want to have it on the wall, or here is my degree from Auckland University, or from whatever. It's only when that person

uses it for a false, or for a dishonest reason, that then it becomes liable.

McGrath J Can I just go back Mr Lawry. When you sort of point to the increased penalty under one as supporting your argument, does it really come down to this that you're saying the reason for the very substantially higher penalty is that if you're doing the making, and also doing the actual deceiving, you're going to face a higher penalty than if you're making it and providing it to someone else who will probably do the deceiving?

Lawry Yes, but I don't add the final gloss to it because this person is not to know what that person is going to be doing. For example I see the majority of people who have bought them have got names that appear to have come from where the Olympic Games are at the moment, and if in fact a student has not been attending classes and has been living it up in Auckland and then wants to send something back home for their parents to put on the wall, that's exactly the sort of use it may well be expected in this circumstance.

Elias CJ But is it the problem you face that a literal reading of the words of subsection 1 is against you and you really have to persuade us by reference to principles of construction perhaps the context and maybe the penalty in s.257 assists. Maybe it doesn't because that is about use, that providing a maximum penalty of ten years for the creator of a dangerous product in this way – a forged product capable of being used – is not from the scheme of the act thought to be liable for a term of imprisonment as high as ten years. I mean the penalty seems to be key and also I suppose key is the meaning of subsection 2 and whether it's substantially eroded if you part with a forgery to gain and come within subsection 1.

Lawry The - I had the start of my answer just on the tip of my tongue, but if we do come back to the two subsections, to answer Your Honour's question, subsection 2 if we take away the penalty appears to be much more culpable than subsection 1 on a literal reading because here is somebody using it for the purpose of deception, intending that the person who receives it, acts on it as genuine.

Elias CJ But not themselves having received any benefit from doing it. That's what's being put to you

Lawry Yes.

- Elias CJ That there is a difference in culpability because under subsection 1 they get some valuable consideration and under subsection 2 they don't.
- Tipping J They just get the pleasure of a malicious use of a document, like in the famous case of McGrath.
- Lawry Subsection 2 though had at the heart of it the deception that's there. Now subsection 1, I suppose it's implicit in
- Tipping J Both involve simply intent. You don't get to actual use until 257
- Lawry Yes, yes.
- Tipping J I think that's an ingredient that has to be borne in mind.
- Lawry But with 256 there is an intent to deceive because the intention is that it be used or acted upon as genuine.
- Tipping J You may get unusual cases where the ten year penalty under 1 may be grossly excessive, but if I may be forgiven for this sort of case, commercial manufacturer of forged degree and other certificates the ten years is absolutely appropriate. It's the forger who's attacked here, it's not the user per se, it's the forger who's attacked here, and the policy surely is to strike at forgers who are in it for the money as against forgers who are in it for some other motive.
- Lawry I can't disagree with Your Honour, that's exactly right, but the difference here is that when you have a forger where there isn't the intention to deceive because the forger is upfront with
- Tipping J There is an intention to deceive because you're making a false document which is capable of being used for deceptive purposes.
- Lawry I accept that.
- Tipping J And it's a sort of anticipatory – in other words you're pinged because you're putting in circulation for reward, a document capable of being used to deceive. That's what you're being pinged for, not the actual use of it, but the creation of it with that intent – in other words to get money out of it. That's how I read it against the history of forgery and what they were seemingly trying to do

from the legislative materials to distinguish between being in it for the money and being in it, that is the making for money, and the making for some other non-commercial purpose.

Lawry Again I understand what Your Honour is saying and I can't argue with that, but with respect there is a world of difference from somebody who makes a document that is not what it appears to be on its face, and somebody who is doing that for the purpose of obtaining a deceptive gain, and that's why I come back to for example the transfer of property.

Tipping J Well you see you are carrying the concept forward beyond the making. I think this section is directed very specifically to the act of making, and your state of mind when you make is what distinguishes the penalty.

Lawry But the state of mind does then relate to what is the intention in making that particular document.

Tipping J To make money out of it by one means or another.

Lawry And my response is that it is different to make money out of it if you are intending at the time you make it that the recipient belief is genuine.

Blanchard J You are reading back in the very words that were taken out. The words 'by deception for himself or herself or for any other person'.

Lawry That's the difficulty I face, and as we were going through the history before, it referred to dishonesty and then it's put in those other words and then they were taken out, and my only response to that can be did Parliament intend then that to simplify it so that

Blanchard J It doesn't simplify it, it makes it harder.

Elias CJ But I suppose Mr Lawry you could mount an argument that ss.256 and 257 have to be read together, and it's quite clear from 257 that using a forged document, which is what is referred to in subsection 1 is using that document to obtain any property etc.

Lawry Yes.

Elias CJ Knowing it to be forged.

Lawry Exactly

Elias CJ And you don't have to put in knowing it to be forged because the person who forged it knows.

Lawry Exactly.

Tipping J Well it's there, it's in the introductory, who knowing a document to be forged, uses the document

Elias CJ It does need to be in 256(1), knowing to be forged.

Tipping J Well if you're the maker

Elias CJ Yes, you know. That's exactly what I've just said.

Tipping J Sorry, yes quite.

Lawry And again I appreciate, what I'm saying is circular, but that is exactly what the maker knows, but it comes back to the words 'who makes a false document with the intention of using it, that is a false document, to obtain property. Now

Elias CJ I'm sorry, just pausing there. You really need to emphasise the word 'used' because it would have been perfectly possible for the legislature to have said in 256 to have avoided that by saying 'who obtains for it any property or valuable or valuable consideration'.

Lawry Exactly. That's why I've said the intention again is using, so if I come back to the second line of the section, who makes a false document, that's the first step of it, with the intention of using it, so of using a false document to obtain property, and so far as the use of that to the maker of the document has made of it, or the intended use of it, is not using it as a false document because although on the face of it it is not what it appears to be, the maker has made it plain this is simply a replica certificate, it's not a real one, so she's not using a false document.

Elias CJ On that basis the culpability is in the obtaining with it property privilege serves pecuniary advantage or valuable consideration which isn't necessary for subsection 2.

Lawry That's right, but that could vary enormously if for example it is the intention that if I create what looks like a certificate of degree or

something like that, and I sell it for a dollar, that covers my expenses for making it. Is that the harm that is aimed at by the legislature, and my submission is that it is the intention of using a false document, and here the evidence is different from that? The evidence is that she doesn't suggest it's anything other than it is.

Wilson J Wasn't the appellant's intention in making these documents to use them, i.e, sell them for pecuniary advantage?

Lawry Yes I accept that, but what I'm saying is that she is selling what she is purporting to sell. It's a replica certificate. She's not using it as a false document.

McGrath J I don't understand why you concede use. I would have thought your response to Justice Wilson especially would be that it is not use. Merely passing over the document in those circumstances is not use at all.

Lawry Well perhaps I should have done that.

Wilson J That has to be the argument I think.

Tipping J Yes.

Lawry Yes.

Blanchard J It is use but it's not use of a false document that would be the argument.

Elias CJ Well it's not use in the sense that it's used in

McGrath J I think having regard to the purpose of the section

Tipping J It's not used as genuine. As genuine is a bit of a term of art in the forgery field, and to me it's striking that it's not in 256(1) and it's not in 257(1)(a) and it is in the others, and that to me I have to say is striking, just without any reference to Parliamentary history, but just against the general background of forgery.

Lawry The only thing I can say is isn't it for the maker of the document, isn't the legislature saying what's implicit in it. If I'm making a false document

Tipping J Well why would they take it out? I mean to leave it to implication when it was there already in 264.

Elias CJ Well that's why I'm surprised you're not addressing to us arguments about

Lawry 257?

Elias CJ No, arguments about the proper approach to interpretation of a statute such as this.

Lawry I suppose I had thought I was doing it first of all by pointing to what is a much less serious offence under 2, even though there is the intention to deceive, and this is under that part of the Act which is referred to as the dishonesty offences, yet should 256(1) be read as not needing to have that element of deception and my submission there is when the legislature has put in the words 'makes a false document' they are assuming then that dishonest intent, that although I accept that the words have been removed.

Tipping J Well the dishonesty lies in the making of a false document for present purposes with the requisite intent. It doesn't involve using it because that's the next step - that's the old uttering step.

Lawry Yes, but it involves an intention to use it, that is use a false document, and I agree I'd be on much stronger ground if the words 'as if it were genuine' were included in there, but I'm not in that position unfortunately.

Tipping J Well that's why

McGrath J Are you relating to what's said at the second paragraph at page 78, are you saying that they just didn't think it was necessary? Because that what you've pointed to in the legislative history seemed to be the passage that assisted to you most so far.

Lawry Yes.

McGrath J But I'm not quite sure how it assists you.

Lawry I suppose we're part way through there and what they're effectively saying is that subsection 2 is the penalty that attracts three years, but if you add to that the intention to make a pecuniary advantage, or a pecuniary gain, then that really is much more serious. Again

arguing against myself on that I have to accept that they haven't specifically put in those words of deception, but that seems to be as we go through the commentary, what the purpose of the first subsection was.

McGrath J Well they seem to be saying you don't need to have them in because it's apparent from the context. Does that help you?

Lawry That's really why if we come back to the straight statutory interpretation for s.256, Parliament seems to be endeavouring to simplify this as part 10 of the Act, making it as straightforward as they possibly could, and it seems unlikely that they would have intended what on the face of it is a less culpable offence to have attracted a much larger penalty, and so then I accept that the appellant intended to obtain property or pecuniary advantage or valuable consideration. Clearly she intended that because she's made it for that purpose, but whether she has intended to use a false document really is as far as I can take it and so for statutory interpretation I come back. Everyone is liable who makes a false document with the intention of using the false document to obtain the advantage – and that I suppose coming back to statutory interpretation, that's as strong as I can really put it.

Elias CJ I suppose also that s.256 in terms of the benefit obtained is so wide that there would be very little scope for subsection 2 in the sense that if you were trying to obtain – it doesn't have to be measurable in money terms, it's just some benefit or service that you might obtain a favour you might be doing which may support your argument that it's just too loose if applied to any sort of non-false use of the document.

Lawry Hence my example if she was doing it for the purpose of receiving a dollar to cover the expenses. She would in theory if the interpretation was as the Court of Appeal has suggested, would make her liable for that. Now liable for what I come back to is the most serious, so far as penalty is concerned, offence, and when we look at similar provisions it's more serious than the most serious theft; it's as serious as a robbery where there is violence involved. It's a sort of culpability we're talking about, so that's why I say it must be the intention that it's to catch those who are making documents intending that the person who pays money or loses money for them isn't deceived by them.

Tipping J Mr Lawry under the old s.264, this would clearly have been caught and be liable to ten years. I think what they were trying to do was to let in what was perceived to be a much lesser generic forgery category and let them be only three years, but would you suggest there was any doubt that under the old section 264 your client would have been guilty of forgery?

Lawry My submission is she would not because 264(1); making the false document knowing to be false

Tipping J With the intent that some person shall be induced by the belief that it is genuine, that was clearly her intent. Some person, ie.,

Lawry Well I don't accept that.

Tipping J You don't accept that?

Lawry Because she is not holding it out to be

Tipping J But she's making it with the intent that somebody, never mind the purchaser, will be misled by thinking it's genuine, that's the whole point of forgery.

Elias CJ Knowing that it's capable of being used though is not necessarily intent.

Lawry No.

Tipping J Well it says 'with the intent'.

Elias CJ That it be acted upon is genuine.

Tipping J Or you make it with the intent that some person shall be induced by the belief that it is genuine to do something. With respect I would have thought that it was difficult to argue that wouldn't catch these facts.

McGrath J It catches the intermediaries doesn't it in that case? If there are intermediaries between the forger and the deceived person

Tipping J It catches the maker, the forger, provided they have one of the two intents they are stating. Now I don't want to make too much out of this but I have always understood that the point of bringing it down to three years in some cases was to catch the non-commercial

forgers, and it's not fair to have them as high as ten years. I'd have to go back and re-visit this, but that's what I've always understood was the purpose of as it were letting in a non-commercial category of forger, and letting them have the lower maximum, but I may be quite wrong Mr Lawry.

Lawry I think your reading of that is quite right, but the difference is that subsection 2 is there is the intention to deceive still, and so that's why I'm saying that needs to be read into the words 'false document' in subsection 1. But to come back to 264, where a person has made what on the face of it looks to be let's say a degree from Auckland University, but is selling it to somebody saying this is not what it is, this is a replica if you like, then where is there evidence that she is intending someone's going to believe that it is genuine. Again it could simply be I want to have something to put on my wall – rather than a poster, I want to have that to put on my wall. This is my degree from Auckland University that I paid \$10 dollars for or whatever.

Tipping J But do you not accept that the key conceptual distinction between the two subsections is the commercial one?

Lawry I accept that.

Tipping J You accept that?

Lawry Yes Sir clearly, but from the reading of it and although there have been words that have been put in and taken out, it seems that the legislature is wanting to have what is the offence of forgery divided so we're separating out those who are doing it commercially, or those who make money out of it from those who are not. If that is the case then do we not also have to read into subsection 1 the deceptive element, because otherwise we come back to where I started off. If you're doing it without the deceptive element then that's a very different consideration from subsection 2.

Tipping J But you call your client a commercial – I know this case is not going to turn on such a broad concept, but trying to derive the distinction that Parliament was seeking to draw here between the commercial and the non-commercial, your client has to be branded, I'm afraid, a commercial forger. She's in it for the money.

- Lawry She's making these for the money, that's right, but the issue is, is she making documents holding them out to be false documents, no she's not.
- Tipping J Not to the immediate purchaser she's not, but she's putting into circulation if you like a document that has all the ingredients of the old forgery, and I have difficulty seeing that they were trying to as it were take this sort of person out of the old ten year regime within which with respect I think she would have fitted.
- Lawry I understand your arguments. All I can say is that – perhaps I'll illustrate it a different way. Your Honour is saying because she has made a document that is not on the fact of it, it is, she's not going to be around for whoever else comes by to say well look when I made that, that was for the fun of making a document that's not what it purports to be. Is it different from the Gunsmith who sells a firearm? Can you assume that that firearm is going to be used in a violent offence, because that's a similar sort of argument?
- Tipping J I would respond with an archery metaphor.
- Lawry I suppose I'm covering similar ground, but I have to come back to saying well it must be inherent in 256 that there is that deceptive element there, otherwise why is it so much more serious than somebody who did have that deceptive element, apart from the fact that there is the gain there that could be as little as I spoke about with the Chief Justice.
- Tipping J Presumably your client wouldn't be too keen on the idea that we substituted the conviction under 257(a) on the basis that she was a party to that offence.
- Lawry But with respect she couldn't be a party to it if she is saying this is not
- Tipping J No, but she's a party to the subsequent use
- Blanchard J Well I don't know whether there would have been any proof
- Tipping J I agree, that was just a metaphorical. I mean we couldn't do it in this case, but clearly it would be extremely odd wouldn't it if the offences consummated by the use that she anticipates will be made of her forgery. She'd be liable as a party to that use and hence the

ten years, but she's not liable to ten years when she has the intention that that's

Lawry But to be a party she would still have to have the requisite intent there that she is intending, she knows that that person, or she

Tipping J Isn't she encouraging or procuring the purchaser to use it for whatever the criteria is. Anyway look I'm sorry, that's probably a little unfair.

Elias CJ I think we probably have the argument fully onboard. It's quite a tricky one, but really your argument is that use in 256(1) is use of the false document to obtain property privilege etc, and it's consistent with the reference to use in 257.

Lawry Yes, well that really is it

Elias CJ Because otherwise, otherwise on your argument, using is used in two senses in 256(1), and given its imprecision, the culpability could be wildly different.

Lawry Very much so. In fact the culpability could be significantly less than it ever could be under subsection 2.

Blanchard J Mr Lawry, this might be a complete red herring, I'm puzzled by the words 'knowing it to be false' appearing in subsection 2, but not appearing in subsection 1. Have you given any thought to that?

Lawry Yes, and isn't it inherent in subsection 1 that if you're making a document, you must know it to be false. If you're making

Blanchard J Well isn't it inherent in 2 as well?

Lawry Yes.

Blanchard J It's exactly the same Act.

Lawry Yes you're right, you're right.

Elias CJ It's very badly drafted isn't it?

Blanchard J It's appalling drafting.

Tipping J It was one of the classic oddities of the old section.

- Lawry Yes.
- Tipping J I mean they've just carried forward the oddity.
- Lawry But as I read through Hansard, their concern throughout with the amendments seem to be to catch computer crime. Although this is an offshoot of it, but that seems to be what the arguments were all about.
- Blanchard J Well that was because *Wilkinson* I think had come along. Was it *Wilkinson*?
- Tipping J Yes, *Wilkinson*. *Wilkinson* we said that he couldn't steal *chose in action*.
- Blanchard J Yes, and they were pretty upset by that.
- Lawry Yes.
- Elias CJ I suppose also it is sensible to have a referencing like that because given the definition of forgery, which might be by altering the document, it's possible to date it wrongly without knowing that that is false or something like that.
- Lawry Yes, no that certainly is possible, but
- Tipping J Well it's possible conceptually accidentally to make a false document, but I don't think that could really be, I mean knowing that the document is false has always been a puzzle I think as my brother pointed out, but I'm not sure where it might lead here.
- McGrath J The reason for not having it in the first subsection presumably is because the maker actually has an intention to use it. That's not so in the second subsection.
- Blanchard J Well, yes but it is still an intention that someone uses it as genuine.
- Elias CJ But that may be a pointer in favour of the argument that you're contending for, because clearly if the important part of subsection 1 is the use, it must be using it as a false document.
- Lawry Yes, that is what my argument is.

- Tipping J That still with respect begs the question of what's meant by using as a false document. It's the using it as if it were genuine that's the key dilemma. You say that should be implied, and you're using it as a false document if you sell on commission forged documents, because the whole point is to create – it's the representation of genuineness isn't it that's the heart of what you want to read in.
- Elias CJ That's necessary though to arguably achieve consistency with 2 that with the reference to knowing it to be false.
- Lawry Because the discussion as they went through the Bills and they went out and put them back in, throughout I can't find where they have moved away from that thought that we want to differentiate between those who have an intention that the documents be acted on as genuine and those who are making money from it, and so that's what I'm saying. One wasn't intended to take out an element, but to add in the element of commerciality.
- Tipping J Why would they have – I agree with the Chief Justice – this will be very tiresome for you Mr Lawry, but why would they have wanted to demote your client from ten years as it was under the old Act, to three years under the new Act. They tried to reduce it to seven, but Parliament would have nothing of it, or whoever was in control, because the recommendation was to reduce the penalty overall to seven years as I recall, but Parliament said no, we'll keep it at ten. But why would they want someone who was commercially forging in this sense, your client's sense, to be demoted to a three-year category?
- Lawry Because the harm that is aimed at is making documents so that persons are going to be at risk of losing, whether it's financially or some other way, because they believe that the document made is genuine. Here the appellant is not in that category. She is someone who is creating a document and that's why I've used the word 'replica' to show that she is not purporting to provide anything other than what she's provided. This is something that looks as if it's a degree or a certificate, but it's not, and so what I'm saying is that Parliament intended to catch those who are getting gain from those who may be taken in by false documents, whether it's the Picasso or
- Tipping J Yes, 'taken in', that's the 'as genuine' concept isn't it?

- Lawry I suppose that's right, and what I'm saying is isn't that implicit really in using it and then I'm implying that must be using a false document, when she's using a document which is exactly what she purports to hold it out to be.
- Tipping J I understand the course of the point, it's just we're being asked to sort of read something in and one's always hesitant in the criminal law to read things in, although of course the reading in is in favour of your client here.
- Blanchard J I am troubled by the idea that someone who paints a copy of the Picasso, intending only to be paid by the person who was going to have it in their home as a copy, might get caught by 256(1).
- Lawry And that illustration Sir is exactly what we have here. We have nothing more than purporting to be a copy if you like.
- McGrath J The certificates you say may be just for the purposes of keeping parents happy, not for the purposes of misleading employers or something of that kind.
- Blanchard J If it's good enough.
- Lawry She doesn't have the ability to control what the purchaser may later on do with it, just as the Gunsmith doesn't have any control over what a person might do with a gun. It would equally be to put on the wall for whatever fun reason that a student might have, but the legislature can't have intended that to be viewed in the same way as someone who is intending to dupe others through making false documents. Yes Ma'am.
- Elias C Is there also some bolster to your argument from the definition of 'obtain' which can be obtained for someone else, so that the intent is in the use of the false document to obtain property by someone else that the legislature has required you to have the perfected understanding of the ultimate use of the forged document before you're liable for the ten years penalty?
- Lawry That certainly is – I'm just re-reading it as we go. I can't argue against that that the proposition assists me, but there must be an intention of using a false document, and then there's obtaining, and I have just glossed over that largely, but because she's made a document thinking that she's going to get paid for whatever she's made, but if you look at it closely has she got the intention of using

a false document to, as Your Honour says, to obtain any of those items. I really can't take that argument any further than that.

Elias CJ Yes, thank you.

Lawry Thank you.

Elias CJ Thank you Mr Lawry. Yes Mr Horsley.

Horsley Thank you Your Honour. Your Honours, the Crown's submission is effectively a simple one and that is that the plain words of the statute must be given effect in this case. Those plain words do not have the additional words that my learned friend seeks to read into the s.256 and those words have varied as we've been discussing it this morning, but initially, and I think this must be my learned friend's submission, the words had to be 'to obtain by deception', because that is my learned friend's critical point, and that is that he submits that in a situation of somebody who has created a false document, there is no offence under 256(1) if the person whom they have created the document for is actually aware that it is a false document, irrespective of whether they pay for it or not, and my learned friend suggests that the reason why somebody who creates such a false document is not liable under s.256(1), is because you must read into the section the words that they have the intention of using it to obtain by deceit any property, privilege, pecuniary advantage, etc. So my learned friend seeks to read back into the section the very words that were in fact removed by the legislature when s.256 was finally introduced in 2003. The anomaly that that gives rise to is one that I don't think my learned friend has adequately addressed, and that is that on that basis somebody who is for instance creating a false document such as a bank note for a criminal enterprise. So we have a gang situation where one person is the forger, and he is creating those bank notes and he is paid for his services, in fact doesn't commit an offence under 256(1) because he is paid by people who know that the bank notes are in fact false. So according to my learned friend

Elias CJ Well he does if he knows that they are going to be used to obtain valuable consideration, so that's the other additional element the intent would have to be as to use.

Horsley Well my learned friend would say no that's not an offence because he's not using it to obtain any pecuniary advantage. The use, and more to the point, he has to read in 'obtain by deception'. Now he

hasn't deceived anyone in that situation. When he created it, the person for whom was going to buy it was in fact not going to be deceived. They know it's a false document according to my learned friend, therefore he comes under s.256(2), and that is that he's created a document which other people may rely upon as if it was genuine.

Tipping J All forgers to order under this argument would be immune from 1 and fall under 2?

Horsley That's right Sir.

Elias CJ Well that's an extreme construction though of 1, because it is capable of requiring an intention that you know another person is going to obtain property privilege service etc.

Horsley Your Honour with respect according to the analysis in the Court of Appeal which I respectfully would agree with, subsection 1 is really about the use for which you put the document, the maker of the document themselves. Subsection 2 covers the situation where other people may be using that document, so here you are using that document, you use it to obtain one of those gains shall we say, and the gain doesn't have to be for yourself, because of the definition of obtain, but certainly you have to be using it, so it is the use for which you put the document.

McGrath J Could you just give me a paragraph reference to the Court of Appeal passage where they say that? You don't have to go to it.

Horsley I can

McGrath J It starts at XLVI.

Horsley It actually brings into play Your Honour Justice Blanchard's discussion also of the use of the words 'knowing it to be false'. It's at para.21 of the judgment Your Honour, in the third bullet point under that paragraph.

McGrath J Thank you.

Tipping J You agree do you that 1 is the forger's use and 2 is anyone's use? The intention in 1 is the use that the forger is going to put the document to. The intention in 2 is that it be used or acted on by anyone.

Horsley Yes, yes Your Honour.

Tipping J Yes.

Horsley Which is

Tipping J Because that's the way the language it seems to me to be deliberately framed to achieve that outcome.

Horsley Yes Sir, and that's why I say that I agree with the Court of Appeal's analysis of that in para.21. So my learned friend, to come back to the original submission Your Honour, my learned friend must as appears in his written submissions be saying that after the word 'obtain' must be read in some words and it's not crystal clear from the submissions which words exactly one should read in, but presumably they will be 'by deception' or 'dishonestly' as appeared in the earlier drafts from as early as 1989.

Tipping J I would have thought with respect that if they had been intending to carry a deceptive use into one they'd have either put 'by deception' or more likely frankly in view of the language of forgery, they'd have used the words 'as genuine'.

Blanchard J Well they certainly wouldn't have taken out the reference to deception.

Horsley And that is really the Crown's submission in terms of the statutory interpretation argument Your Honour, is that, and perhaps I should deal with that right now too. The 2003 amendments to the Crimes Act were a wholesale large-scale amendment to part 10 of the Crimes Act. I've mentioned in my submissions that they had a very long gestation period; they went through from 1989, the original Bill that was drafted, through to Crimes Consultative Committee, and finally in 2003 were passed in the form that they are. The reforms, whilst they had some focus with the computer crimes and the use of the perhaps somewhat lacking in terms of modern terms definition of document and the need to cope with e-commerce and cyber crime formed part of it. But equally there was a distinct revisiting of all crimes of dishonesty to the extent that we saw a specific definition of the word 'dishonest' placed under s.217 and redrafting of many of the provisions. I think we saw in *Queen v Sizemore* which was a Court of Appeal decision dealing with s.222 of the Crimes Act, an acknowledgement that in fact that section

which was the reformed version of using a document for pecuniary advantage, the notion and acknowledgement that in fact that legislature had taken out the words 'dishonest' in that section quite deliberately so that the elements of the previous section were in fact different from the elements of the new section, and that is exactly what has happened here. We've had a lengthy consultation and unlike words that may have been inserted into a section where there's been no discussion, this has been a deliberate removal of words and on that basis, given that this was such a large-term project, one can't argue that it was accidental that this happened, or an error or omission. It has split the previous offence of forgery into two types of forgery, and the commentary has remained consistent from 1989 right through that the purpose behind that was to focus on an additional criminality that was forgery that was creating false documents made for pecuniary gain, and other forgeries, i.e., creating false documents where you simply wanted people to rely upon them as genuine. And that is the real criminality here. Deception, or using a document by deception is not the criminality that was targeted as being the differentiation between subsections 1 and 2, and you might think Your Honours that the real reason why those words 'obtaining by deception' were deleted from the final version of s.256, was to cover the exact situation that we have here, and that is it would have created this anomalous situation of having forgers who didn't deceive their initial purchasers, not being liable, despite being involved in a very much commercial enterprise.

McGrath J So forgers who didn't?

Horsley Who didn't deceive their initial purchasers

McGrath J Thank you.

Tipping J Well they're one of the worse forms of forgers, the people who do it if you like on commission for reward.

Horsley Absolutely Your Honour, and it would be incredibly surprising to think that they were subject to the lesser maximum of three years when in fact the explanatory notes to the Bills all make it clear that the distinction between the two offences was the pecuniary gain.

McGrath J You said we might think that and that is partly your theory, but I'm interested to know how you relate that in particular to the Crimes Consultative Committee report, clause 203 – that's pages 77 to 78

– or anything else in the legislative history that can sort of give it some Parliamentary status beyond what I understand at the moment to be your suggestion as to how we should read it.

Horsley I probably can't assist you much on that Your Honour except to say why it is anomalous to actually retain that definition. Certainly it was looked at by the Crimes Consultative Committee and they considered that there should be a change in how it was worded.

Elias CJ What is the Crimes Consultative Committee? I'm just wondering what its status is before us.

Horsley In terms of status Your Honour, I understood that it had been set up with a specific view to reviewing the Crimes Act per se, so it was under Justice Casey

Tipping J It's a kind of Select Committee wasn't it.

Elias CJ It's not a Parliamentary Committee.

Blanchard J Well this is Sir Maurice Casey, and we have in *Walsh* I think referred to it. It's like a Law Commission. It's sort of status of a Law Commission.

Horsley And certainly

McGrath J It was a Committee when the Crimes Bill became very controversial and Sir Maurice Casey was appointed as I recall basically to look at the whole of the Bill.

Tipping J It was an expert committee. I mean without wishing to make invidious comparisons between different types of committee, this was a high-powered Criminal Law Committee.

Horsley Yes it was Your Honour, and certainly in a similar way to the fact that we use for assistance the Law Commission reports now that have eventually resulted in becoming Bills and then subsequent legislation, this was the equivalent to a Law Commission report on the Crimes Act, and

Tipping J I would have thought with respect that the distinction that you're seeking to draw, although it doesn't expressly refer to the commercial bank note type forger is apparent on page 77 in the first three and a half lines that what they're trying to do is to

distinguish those who forged documents for gain even though they put it in the language of the Bill, and those who don't forge for gain but for some other purpose.

Horsley Absolutely Your Honour, and that of course is the state of intent even with the explanatory note to the Act and the deletion in my submission of the obtaining by deception, whilst I can't find any commentary on it, in my submission, must have been because of recognition of the fact that it would lead to these sort of situations if it was not deleted.

Tipping J And the comment at the end of that section of the report on page 78, where they talk about the nature of the intended deception is apparent from the context, 'deception, etc', was a comment on the premise that the words obtained by deception were there

Horsley Yes.

Tipping J Not that they were going to be removed.

Horsley Yes, so

McGrath J It does follow though a clause which is saying that the reference to dishonesty is dishonesty. So deception came out later did it?

Blanchard J Yes, it came out before the Bill was introduced.

McGrath J Thank you.

Horsley So the Crown's submission then Your Honours is simply that given the, as I said before, the lengthy gestation period of this, the fact that it has been brought to everybody's attention that this phrase was there, then the deliberate deletion of that phrase in the Crown's submission leaves no scope for it to be read back in. And following on from that the anomalous situation that it would create by reading that back into the section in the Crown's submission again supports the fact that the Court of Appeal got it right when they said that the plain words of the statute should apply. There is nothing that needs to be read into this. And perhaps just to add a little bit to that, the entire part 10 has not shied away from using dishonestly; using phrases such as obtained by deception, where they have considered it appropriate, so it's not as if the phrase 'obtained by deception' has just disappeared, it has been used quite specifically in certain sections throughout part 10, just as the

phrase 'dishonestly' has been. And in my submission that again supports the fact that this was no accident, that it was deleted.

Elias CJ It's not used however, oh I see, yes

Horsley Certainly it's used Your Honour in the example that you raised earlier on about an alteration or deletion to a document and that would be s.258 which does say that you are liable with intent

Elias CJ It's not used is it in s.257 however.

Tipping J No, but it's very used in 258 if you like. It rather supports the view that it was deliberately not used in the other two.

Horsley Yes Sir, certainly I would agree with that. As I said before Your Honours the Crown's argument is simple. It's just a pure statutory reading of the section. My learned friends raised a number of other points and in particular I think has referenced in the latest in the case book s.2 of the Crimes Act that must be where under the definition section – I just want to address this because I think it could become a little bit confusing. Under s.2, and this appears in my learned friend's casebook under tab 1. It's the first page there. There's the definition of crime involving dishonesty and it's defined as meaning 'any crime described in part 10, except the crimes in sections 267 to 272. I understood that my learned friend may have been suggesting that because forgery is defined as a crime involving dishonesty, that that might have assisted the interpretation that he would like to give to that section of reading in a word of 'dishonestly' or 'deceptive' into subsection 1, and I'd just like to point out to the Court that that section appears as a means of defining quite generically a category of dishonest offences which are redefined in and reused in various other statutes as qualifying offences which – well qualifying – I should have actually used the word disqualifying offences for things such as whether you can in fact practice as a lawyer; a real estate agent; a trustee; a company director, etc. So people who have convictions of a crime involving dishonesty, to use that phrase, are immediately disqualified or at least they can cause disqualifications from acting in those various capacities. It doesn't have any interpretative effect on the sections themselves and in fact that section was always within the Crimes Act, just by way of explanation Your Honours. I'm not sure if there's any further assistance I can provide to the Court, but if there are any specific matters.

Elias CJ No thank you Mr Horsley.

Horsley Well those are my submissions Your Honours.

Elias CJ Mr Lawry, do you want to be heard in reply?

Lawry There are one or two matters I wish to raise. My friend spoke of the new sections splitting the old forgery into two types and he used the words with the additional criminality where the false documents were for pecuniary gain. There is support for that submission in where we were going before, so if we go back to the third to last tab we have the

Elias CJ Sorry, what number?

Lawry The tabs I have

Elias CJ Seven is it?

Lawry I'll go from the top. Eight. The eighth tab refers to the Bills Explanatory Notes

Elias CJ Yes.

Lawry And if we go over to Roman 25 there are the notes for clause 203 and very similar words used. So it says 'in effect two offences are created. Where a false document is made for the purpose of obtaining some advantage whether for the perpetrator or another, a maximum sentence of ten years is prescribed. Where no such purpose is alleged, the maximum penalty is imprisonment for three years'. Now what I want to pick up is from my friend's comment. Nowhere in the commentary can I see anything that says the first section was intended to not involve part of the criminality of the second subsection. So here they're saying where there is the purpose of obtaining some advantage you've got 1, where there is none then you've got 2, but my friend is interpreting those, he's saying you can't then assume that the deception which is part of subsection 2 is part of subsection 1, and what I'm saying is that it's an additional element in subsection 1 and my friend is suggesting that subsection is one that doesn't have that element, and I can't see that in the discussion leading up to the passing of the Bill.

Elias CJ This note that the quaint term 'uttering' is replaced by 'using', is that of some significance?

Lawry Sorry?

Elias CJ The quaint term 'uttering' is replaced by 'using' - is there some significance?

Blanchard J It's the same isn't it?

Elias CJ Sorry, what?

Blanchard J Isn't 'uttering' 'using'?

Elias CJ Yes, but I don't know that if you put the word 'uttering' in there it would necessarily have the meaning that is being argued for by the respondent here.

Blanchard J But that's in relation to s.266 of the draft.

Elias CJ I know but one would think that this is the sort of common theme that they've got to use 'use' instead of 'utter'.

Tipping J But the forger who sells the document to the gang in Mr Horsley's analogy, I think, I'm not sure, but I think would be uttering it wouldn't they?

Lawry Sir it's not something that I was specifically turning my mind to in the hours leading up to hearing, so

Elias CJ Alright.

Lawry My friend has talked about the forger who didn't intend to deceive and spoke about the forger of bank notes, but the flip side of that is that he is saying this section intended to catch the person who painted a Picasso, or several Picasso, and then sold them for exactly what they were. It's simply the flip side of the same argument.

Tipping J Wouldn't you cope with that in the penalty Mr Lawry?

Lawry Sorry Your Honour?

Tipping J Wouldn't you cope with that if it were technically to catch such a person, you'd cope with that in the penalty.

Lawry But then would it be intended that that in fact be a criminal act where the person is going to end up with a conviction for forgery?

Tipping J Well you'd have to examine whether it was a false document and all that sort of thing before you got to this point of the exercise.

Lawry Yes, I understand what you're saying. All I'm saying is that's the flip side of it

Tipping J I'm far more worried about Mr Horsley's bank note forger than I am about your Picasso merchant, or my Picasso merchant.

Lawry But the criminal law will then still catch any of those who intend to use the false bank notes. I was just trying to give the flip side of his argument that was all.

Tipping J Yes.

Lawry So the only other passage he talked about was the definition of section and pointed to that part of the submissions where it showed that the sections we are concerned with include those described as crimes involving dishonesty. It may be appropriate that I also turn to the definition of a false document, and that's under the same tab.

Elias CJ What is it, 2 is it?

Lawry It's 255 so it's the third page on under thumb tab 2.

Elias CJ Yes.

Lawry So that there are a number of definitions of false documents there and if I look at (a) for example some of the certificates we have or degrees are degrees that bear no signatures so that they can't be interpreted as being documents where a whole material part is made by a person who did not make it or by a fictitious person, so what I'm saying here is coming back to my argument about what a false document is. Here we have these definitions of it but where the person is holding out the document to be nothing other than what it is, do we still have a false document? I don't know whether they've been made available, but I have brought in the different photographs of the certificates if that would be of use to the Court. I don't know whether they would be.

Elias CJ I don't think it could be Mr Lawry, thank you.

Lawry Some of them if I could just show that are more for value. This for example is one where they put the crest at the bottom rather than the top.

Elias CJ They're bad forgeries.

McGrath J And upside down.

Lawry That's right Sir, and so the ones that I'm talking about just briefly are for the Bachelor of Commerce degree in count 6 where in fact there is no signature around the registrar.

Tipping J Are you looking for a sort of discount are you Mr Lawry?

Lawry No

McGrath J Well the Court of Appeal knocked out a number of convictions

Lawry They knocked out some of them, yes I agree.

McGrath J For that sort of reason didn't they?

Lawry The ones with the crests upside down and where there was no crest at all.

Elias CJ On what basis did they do that?

Tipping J They were so bad.

McGrath J Incapable of deception.

Tipping J Intrinsically not false documents because they are so obviously forgery.

Lawry Not only was it upside down but it was over the top of some of the writing where the date was supposed to be so it was a bit unfortunate. I don't know that there's much else I can add to that and unless there are any questions.

Elias CJ No thank you Mr Lawry and thank you for picking this matter up at short notice. Thank you both counsel for your submissions. We'll consider our decision and reserve it thank you.

Lawry As Your Honours please.

Horsley As Your Honours please.

11.36am Court Adjourned