

IN THE SUPREME COURT OF NEW ZEALAND

**SC 54/2006
[2006] NZSC 111**

PATRICIA LENINE MABEL WALSH

v

THE QUEEN

Hearing: 8 November 2006
Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ
Counsel: J N Bioletti for Appellant
M D Downs and M A Treleaven for Crown
Judgment: 19 December 2006

JUDGMENT OF THE COURT

- A The 34 counts of forgery are amended, pursuant to s 335 of the Crimes Act 1961, to counts of uttering.**
- B The sentences on those counts are affirmed.**
- C The appeal is dismissed.**

REASONS

	Para No
Elias CJ, McGrath and Anderson JJ	[1]
Blanchard J	[33]
Tipping J	[34]

ELIAS CJ, McGRATH AND ANDERSON JJ

(Given by Anderson J)

Introduction

[1] Is the dishonest making of a copy of a forged document itself an act of forgery? That is the central issue in this appeal, where forged documents created overseas were recreated by facsimile machines in New Zealand.

[2] Between April 2002 and February 2003 Mrs Walsh defrauded a number of people of large sums of money totalling several million dollars. With the intention of stalling or diverting inquiries which would bring her to account for her frauds, she forged many documents and faxed them from Amsterdam to victims in New Zealand. Her chosen method of forgery was to cut and paste combinations of false information and excerpts from genuine correspondence to create letters purporting, by reason of letterheads, other institutional data and signatures, to have been written by solicitors or banks. It is not known whether those creations were then photocopied to render a less obvious fake for faxing, or faxed without that intermediate step. Whatever the case, Mrs Walsh intended that the recipient of each faxed reproduction would take it to be a copy of a genuine letter.

Background to the forgery convictions

[3] At all relevant times, forgery was, pursuant to s 264 of the Crimes Act 1961, the deliberate making of a false document with the intent that it should in any way be used or acted upon as genuine, or that some person should be induced by the belief that it is genuine to do or refrain from doing anything.¹ Section 264 specifically provides that the place where a forger intends the forgery to be treated as genuine need not be within New Zealand. However, forgery is complete upon the making of the forged document. This means that the creation of a false document overseas

¹ Section 15 of the Crimes Amendment Act 2003 substituted a new Part 10, including forgery and analogous offences. Forgery is now dealt with in s 256.

would not be a crime within the New Zealand jurisdiction.² It is that extra-territorial element in this case which has led to difficulty.

[4] In view of this difficulty, the Crown case was that the documents recreated in the New Zealand-based fax machines were themselves forgeries, and the trial Judge directed the jury that:

If a false document was made up, the fact that it was faxed into New Zealand to be reproduced as a fax in New Zealand can constitute the making of a false document in New Zealand.

[5] In respect of 34 counts of forgery relating to faxes sent from Amsterdam upon which, with other counts of dishonesty, she was convicted, Mrs Walsh appealed unsuccessfully to the Court of Appeal³ and then to this Court. On each appeal her counsel, Mr Bioletti, has argued that the trial Judge's direction to which we have referred is erroneous. The essence of forgery, he has submitted, is not that a document is deceptive but that it or a material part of it purports to be made by a person who did not physically make it or authorise its making. In this case the faxes purported to be made by the person who in fact physically made them, Mrs Walsh, and so were not "false documents" within para (a) of the definition then provided by s 263(1) of the Crimes Act:⁴

False document means a document—

- (a) Of which the whole or any material part purports to be made by any person who did not make it or authorise its making; or
- (b) Of which the whole or any material part purports to be made on behalf of any person who did not authorise its making; or
- (c) In which, though it purports to be made by the person who did in fact make it or authorise its making, or purports to be made on behalf of the person who did in fact authorise its making, the time or place of its making, where either is material, or any number or distinguishing mark identifying the document, where either is material, is falsely stated; or
- (d) Of which the whole or some material part purports to be made by a fictitious or deceased person, or purports to be made on behalf of any such person; or

² Sections 6 and 7 of the Crimes Act 1961.

³ CA 208/05, 26 June 2006.

⁴ Now see s 255.

- (e) Which is made in the name of an existing person, either by him or by his authority, with the intention that it should pass as being made by some person, real or fictitious, other than the person who makes or authorises it:

[6] A majority of the Court of Appeal⁵ were of the view that the conduct in all the 34 counts in issue amounted to forgery. Glazebrook J considered that it was impossible in this digital age to sustain an interpretation of the definition of false document that sees each physical manifestation of a document as a different document, and that if a document fed into a fax machine was a forgery then the other physical manifestation of that document, the one received, was a forgery also. O'Regan J was of the view that the copies were forgeries because, in terms of para (a) of the s 263(1) definition, a material part of the facsimile message purported to be made by the signatory of the concocted letter when that person did not in fact make it.

[7] Both Judges considered that a wider than conventional concept of forgery was necessary in this case in order to meet mischief facilitated by modern technology. The need for expanding definitions in such situations was acknowledged, for example, in *R v Misic*⁶ where the Court of Appeal held, even before legislative amendments to the same effect, that electronic means of recording and providing information were “documents” in terms of the definition in s 263. But we do not think this case raises a necessity to depart from orthodox conceptual views about the crime of forgery. In some respects the challenges posed by Mrs Walsh’s conduct have been met by the legislative introduction of analogous offences, and in other respects by judicial alignment of the common law with modern developments.

Were the fax copies forgeries?

[8] It has been said that a document will be a forgery only if it does more than contain false information. The Court of Appeal has often approved and applied⁷ the following statement in *Kenny’s Outlines of the Criminal Law*:⁸

⁵ Glazebrook and O'Regan JJ.

⁶ [2001] 3 NZLR 1.

⁷ For example, *R v Reardon* [1965] NZLR 473 at p 476; *R v Haskett* [1975] 1 NZLR 30 at p 32; *R v McGrath* [1987] 1 NZLR 748 at p 750.

⁸ Turner, *Kenny’s Outlines of the Criminal Law* (17th ed, 1958), pp 354 – 355.

A writing is not a forgery when it merely contains statements which are false, but only when it falsely purports to be itself that which it is not. The simplest and most effective phrase by which to express this rule is to state that for the purposes of a law of forgery the writing must tell a lie about itself.

[9] This statement is an oversimplification. As William Young P pointed out in the Court of Appeal judgment in the present case, the lie must be of one or more of the types specified in the s 263(1) definition, which is concerned with falsity of authorship, not falsity of content. With that significant caveat borne in mind the expression may assist in an understanding of the distinction between false representations, or fraudulent use of documents, and forgery.

[10] The Court of Appeal decisions referred to in footnote 7 above illustrate the concept. In *Reardon*, the appellant settled a hotel bill with a cheque which he had prepared and signed with the names assumed for the purposes of the accommodation of himself and a young female companion. He wrote on the cheque a code number purporting to be that of the bank account of his companion. The Court quashed the forgery conviction, holding that the document purported to be made by the person who in fact made it or authorised its making, and that the addition of the fictional code number amounted to no more than a representation to the hotel proprietor that the signatories had a bank account in current operation in the particular name under the particular number.

[11] *Haskett* concerned the presentation to a bank of a stolen cheque which had been drawn by Mr J G Clark in favour of his mother, Mrs Clara Alice Clark. The cheque had been crossed and made payable to “C A Clark or bearer”. In order to have the cheque processed, Ms Haskett, at the request of a bank clerk, signed a blank ledger card with a specimen signature. Having presented this to the clerk, along with the cheque and a deposit slip, she was issued with a savings bank book. Some weeks later she presented the savings book along with a withdrawal slip with the signature C A Clark and was paid a sum of money. The Court of Appeal held that Ms Haskett could be guilty of forgery in relation to the ledger card if, in the circumstances, the signature purported to be that of the person mentioned in the cheque, that is the real Mrs Clark. However, the withdrawal slip was not a forgery because the clerk to whom it was presented was not the same as the one to whom the cheque and ledger

card had been presented, and there was nothing in the circumstances surrounding the signing of the withdrawal slip which could support a finding that the signature on the slip purported to be that of any person other than the owner of the account against which the withdrawal was to be debited.

[12] In *McGrath* the Court of Appeal upheld a conviction for forgery where the offender made and sent to the president of a golf club which employed the victim a photostat copy of a spurious letter purporting to be from a Mr McManaway to the New Zealand Golf Association. The letter concluded with the advice that the writer was sending a copy to the president for his information. The Court of Appeal held that the copy was itself a forgery because the concluding passage was a representation that the copy had been made either by Mr McManaway himself or by someone acting on his authority.

[13] In *Reardon* the document told lies about the names of the persons who signed or authorised the cheque, and about the existence of a bank account. But these were not lies about the document itself. In *Haskett* the deposit slip told a lie about itself, this being that it was a document signed by the person in whose favour the accompanying cheque had been drawn; the withdrawal slip, by contrast, lied only about the name of the person who had signed it and not about whether that person was the owner of the relevant account. In *McGrath* the photostat copy lied about itself. It, that is the copy itself rather than the original forgery, purported to be actually made by Mr McManaway or else authorised by him to be made.

[14] The relevance of contextual circumstances was acknowledged in *McGrath* in these terms:⁹

In determining whether a document or a material part of a document purports to be made by a person who did not make it reference must be made to the document itself. Paragraph (a)¹⁰ says just that. *R v Haskett* [1975] 1 NZLR 30, 32, and 2 *Russell on Crime* (12th ed, 1964) p 1228, to the same effect, were concerned to emphasise a further matter, namely that reference may be made not only to the document itself but to surrounding matters.

⁹ At p 751.

¹⁰ That is, of the definition in s 263(1).

[15] The discussion in *Haskett* itself is helpful:¹¹

There is, however, no authority of which we are aware which requires the question whether a material part of a document purports to be made by a person who did not make it to be judged solely by reference to the document itself without regard to the surrounding circumstances at the time when it was made. In *Reardon* there was nothing in the surrounding circumstances which would convey to the hotel staff that the cheque was other than the document of the appellant who signed it. But if the surrounding circumstances are not merely indicative of a collateral dishonesty or deception but make the document appear to be the document of a person who is in fact different from the person actually signing it, then, providing the necessary intent to mislead is present, the door is in our view open to a conviction for forgery. It was no doubt with such a thought in mind that in *Reardon* the Court took care to point out that the names of Jean Alexander and Jason Alexander were not used to mislead the proprietor of the hotel to the belief that the appellant and his companion were in fact other persons of a different identity. The nine Judges in the very important old case of *R v Dunn* (1765) 1 Leach 57; 168 ER 131, plainly took surrounding circumstances into account.

[16] The distinction drawn in that passage between circumstances merely indicative of a collateral dishonesty or deception and those which make the document appear to be the work of a person different from the actual author has significance in the present case. Except in respect of six particular counts,¹² the documents created by fax machines in New Zealand purported to have been transmitted by Mrs Walsh on her own initiative, which was in fact the case. By her conduct in making each copy she represented only that the copy exactly replicated a document in her possession. Her forgery was complete before the copy was created; the copy itself did not purport to be made or authorised by anyone other than Mrs Walsh, and thus was not a “false document” within the s 263(1) definition.

[17] The six particular counts referred to in para [16] could be seen to involve conduct similar in nature to that in *McGrath*. In each of those cases the forged letter, of which the fax was a copy, was addressed directly to one of the victims. It is arguable that in those circumstances the copy purported to have been made by Mrs Walsh with the authority of the sender. The position is not as clear as in *McGrath*, where the copy, on its face, purported to have been authorised by Mr McManaway. However, it is difficult to find another plausible explanation for

¹¹ At p 32.

¹² 33, 35, 38, 39, 40, and 41.

the delivery by fax transmission from Amsterdam of a letter, to take one example,¹³ apparently addressed from a firm of solicitors in London directly to a victim in Auckland. In the event, for reasons expressed later, this question does not have to be decided.

The companion offences to forgery

[18] It is unarguable that at some stage before creating the fax copies Mrs Walsh committed what would have been the crime of forgery if done within New Zealand. The difficulty in this case arises not from technology but from geography.

[19] In the light of the modern concept of a “document”,¹⁴ a false document may be made in a computer and still be a forgery. Similarly, reproducing a forged document electronically may constitute the crime of uttering a forgery, which at the relevant time was defined in s 266 as follows:¹⁵

266 Uttering forged documents

- (1) Every one is liable to imprisonment for a term not exceeding 10 years who, knowing a document to be forged,—
 - (a) Uses, deals with, or acts upon it as if it were genuine; or
 - (b) Causes any person to use, deal with, or act upon it as if it were genuine.
- (2) For the purposes of this section, a document made or altered outside New Zealand in a manner that would have amounted to forgery if the making or alteration had been done in New Zealand shall be deemed to be a forged document.

[20] The documents Mrs Walsh made or altered in Amsterdam or elsewhere overseas are, for the purpose of the crime of uttering, deemed to be forged documents by virtue of s 266(2). She used those forgeries or dealt with them as if they were genuine when she undertook the process of causing copies to be made by fax machine. But did she either make use of the forgeries herself or cause any other person to do so within the New Zealand jurisdiction?

¹³ Count 35.

¹⁴ Exemplified for example in s 217.

¹⁵ Now see s 257.

[21] Section 7 of the Crimes Act provides as follows:

7 Place of commission of offence

For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand.

[22] In *Tipple v Pain*¹⁶ and in *Collector of Customs v Kozanic*¹⁷ the High Court has held that “any act or omission forming part of any offence” means any act or omission amounting to an actus reus of an offence.

[23] There is no doubt that Mrs Walsh created the fax copies in New Zealand, even though she was abroad at the time. In *R v Governor of Brixton Prison, ex p Levin*,¹⁸ a Russian national had operated a computer in St Petersburg, Russia, to create fraudulent transactions in a bank’s computer in Parsipenny, New Jersey, USA. An English Divisional Court held that the appropriation of funds had occurred in the USA. The Court said:¹⁹

The fact that the applicant was physically in St Petersburg is of far less significance than the fact that he was looking at and operating on magnetic disks located in Parsipenny. The essence of what he was doing was done there. ...

In the case of a virtually instantaneous instruction intended to take effect where the computer is situated it seems to us artificial to regard the intention of an instruction onto the disk as having been done only at the remote place where the keyboard is operated.

[24] Similarly, in *R v Winfield and Lipohan*²⁰ it was held that a fax sent from Thailand to South Australia was an act performed in South Australia. Another interesting case of cross-border repercussions is *Ward v R*.²¹ Mr Ward shot and killed a man. At the time he fired he was on a bank of the Murray River. His victim was fishing by the river’s edge, some 30 feet away. The top of the bank was within

¹⁶ [1983] NZLR 257.

¹⁷ (1983) 1 CRNZ 135.

¹⁸ [1997] QB 65.

¹⁹ At pp 81 – 82.

²⁰ (1997) 70 SASR 300.

²¹ (1980) 142 CLR 308.

the state of Victoria and the river's edge was within the state of New South Wales. The locus of the crime determined which state had jurisdiction to try Mr Ward. The High Court of Australia was principally concerned with the legal issue of how the state boundary was determined. However the judgment records²² that the Solicitor-General for Victoria accepted that for the purpose of the case it was not where the physical act by Mr Ward was done but where that act took effect upon the victim which determined the locus of the crime. The Solicitor-General had accepted in argument that the preponderance of authority was to that effect.

[25] In *R v Forsyth*,²³ one of the issues was whether stolen property had been disposed of in England when the appellant had given a bank in Geneva an order to pay £307,000 to a bank account in London. The Court of Appeal held that the disposal and realisation could properly be regarded as having continued until the money arrived in the account in England. The Court thought the situation analogous to *Governor of Brixton Prison*.

[26] In our opinion, what Mrs Walsh did in reproducing in New Zealand what she represented was a genuine document must be regarded as uttering a forgery in New Zealand. Her intent was to lead the victims to act upon the forged letters as if they were genuine. In causing them to act on the copies she was causing them to act on the underlying forgeries. The actus reus under s 266(1)(b) therefore occurred in New Zealand. Any other view would overlook the realities of modern communication technologies, which enable the simultaneous reproduction of spurious documents, on an immense scale, to any part of the world from any part of the world. The mischief is done, intentionally, where the receiver acts upon the reproduction believing it to replicate the terms or qualities of a genuine document.

[27] Similar considerations would apply if Mrs Walsh had been charged under s 266B(1)(b),²⁴ another of the companion offences to forgery. The view that a person may be caused to use, deal with or act upon a document in one country in

²² At p 315.

²³ [1997] 2 Cr App R 299.

²⁴ Now see s 259.

consequence of conduct in another country would still be apt. Indeed, if Mrs Walsh had an “intent to defraud” the recipients of the faxes, there would have been no difficulty about territoriality. She could have been charged under s 266A,²⁵ which stands in the same relationship to s 266B as the forgery provision does to uttering. Sections 266A and 266B appeared, at the relevant time, in the following terms:

266A Altering or reproducing document with intent to defraud

- (1) Every one is liable to imprisonment for a term not exceeding 10 years who, with intent to defraud,—
 - (a) Makes any alteration in any document, whether by addition, insertion, deletion, obliteration, erasure, removal, or otherwise; or
 - (b) By any means, makes a document that is a reproduction of the whole or any part or parts of another document, or of the whole or any parts of 2 or more documents, or of any combination of any of those things.
- (2) An offence against subsection (1) of this section is complete as soon as the alteration or document is made with such intent as aforesaid, although the offender may not have intended that any particular person should use or act upon the document so altered or made, or should be induced by it to do or refrain from doing anything.

266B Using altered or reproduced document with intent to defraud

- (1) Every one is liable to imprisonment for a term not exceeding 10 years who with intent to defraud, knowing a document to have been altered or made in a manner, and with the intent, referred to in subsection (1) of section 266A of this Act,—
 - (a) Uses, deals with, or acts upon it; or
 - (b) Causes any person to use, deal with, or act upon it.
- (2) For the purposes of this section, it is immaterial that the document was altered or made outside New Zealand.

It seems clear that, in terms of s 266A(1)(b), Mrs Walsh made documents (the fax copies) that were reproductions of other documents (the Amsterdam originals), and did so in New Zealand; no further question of *use* of those documents would arise.

²⁵ Now see s 258.

Amendment of the forgery counts

[28] As appears from the reasons so far, Mrs Walsh ought not to have been convicted of forgery on the 34 counts under consideration²⁶ but could have been convicted of related offences if she had been appropriately charged. This Court, having all the powers of the Court of Appeal,²⁷ can deal appropriately with that situation under section 335(1) and (2) of the Crimes Act which provide as follows:²⁸

335 Variance and amendment

(1) If on the trial of an indictment there appears to be a variance between the proof and the charge in any count of the indictment either as filed or as amended, or as it would have been if amended in conformity with any such further particulars, the Court before which the case is tried, or the Court of Appeal, may amend the indictment, or any count in it, so as to make it conformable with the proof.

(2) If the Court is of opinion that the accused has not been misled or prejudiced in his defence by such variance it shall make the amendment.

[29] There is no difficulty with holding the physical elements of those broadly drafted provisions to be satisfied in light of the evidence and on the jury's findings in the present case. The impediment to amending the forgery convictions to reflect charges under s 266A or s 266B is that the jury was not directed to consider whether Mrs Walsh acted with fraudulent intent in making the fax copies, but whether she intended that the recipients would act as if the copied letters were genuine. It cannot be said that Mrs Walsh could not have been prejudiced in her defence by this variance between proof and charge.

[30] No such difficulty arises in relation to uttering. All the facts necessary to prove charges under s 266(1)(b) were before the trial Court and formed part of the Crown case in relation to the provenance of the faxed copies and Mrs Walsh's intent in relation to them. Crucially, it is plain that the jury must have been satisfied

²⁶ We make this assumption in respect of the specific instances that may have been forgeries in terms of *McGrath*.

²⁷ Section 25 of the Supreme Court Act 2003.

²⁸ As the related offences were not open on the indictment, recourse cannot be had to s 386(2) of the Crimes Act: see *Spies v R* (2000) 74 ALJR 1263 at pp 1267 – 1269 (HCA); also *R v Thompson* [2005] 3 NZLR 577 at pp 588 – 589 (SC).

beyond reasonable doubt that Mrs Walsh forged documents and then caused reproductions to be made, by fax, in New Zealand, with the intent that the recipients would act as if the forged documents were genuine. The evidence to prove all the elements of the crime of uttering was necessarily comprehended by the Crown case.

Result

[31] We are satisfied that Mrs Walsh could not have been misled or prejudiced in her defence if the 34 counts were amended to counts of uttering. They are amended accordingly.

[32] On those counts Mrs Walsh was sentenced to four years' imprisonment. But she also received concurrent sentences of four years' imprisonment for the frauds she was trying to cover up with the forgeries, and seven years' imprisonment for a different course of fraudulent conduct. Uttering carried the same penalty as forgery and Mrs Walsh's conduct was equally culpable however it was characterised. In those circumstances it is appropriate to confirm the sentences imposed. The appeal is dismissed.

BLANCHARD J

[33] I am in agreement with the reasons given by Anderson J and Tipping J for dismissing the appeal and confirming the sentences. I desire to add only that, if it had been necessary, I would have found that Mrs Walsh was guilty of forgery on the six counts which relate to documents in which the victim was the addressee. In those instances, anyone in the position of the victim receiving a faxed copy from Mrs Walsh would necessarily have been led to believe by the copy itself that Mrs Walsh was acting as an intermediary and had been requested or authorised by the ostensible signatory to send the copy to the victim. In the context in which it was received, it told that lie about itself, just as much as the purported copy in *R v McGrath*.²⁹

²⁹ [1987] 1 NZLR 748 (CA).

TIPPING J

[34] I agree that this appeal should be dismissed with the consequences proposed in the reasons for judgment given by Anderson J. Forgery at common law involved deceiving others as to the authorship or provenance of a document; it involved deceiving them as to the genuineness of the document in that sense, rather than deceiving them more widely by means of the document's contents. This is what Professor J W Turner meant by his statement that to be a forgery the document must tell a lie about itself.³⁰ This same focus on authorship was contained in the various subparagraphs of s 263 of the Crimes Act 1961, which at the relevant time defined the term "false document". The concept of forgery, in terms of s 264, the section then in force, was of making a false document with the necessary knowledge and intent. Section 264 provided:

264 Forgery

- (1) Forgery is making a false document, knowing it to be false, with the intent that it shall in any way be used or acted upon as genuine, whether within New Zealand or not, or that some person shall be induced by the belief that it is genuine to do or refrain from doing anything, whether within New Zealand or not.
- (2) For the purposes of this section, the expression "making a false document" includes making any material alteration in a genuine document, whether by addition, insertion, obliteration, erasure, removal, or otherwise.
- (3) Forgery is complete as soon as the document is made with such knowledge and intent as aforesaid, although the offender may not have intended that any particular person should use or act upon it as genuine, or should be induced by the belief that it is genuine to do or refrain from doing anything.
- (4) Forgery is complete although the false document may be incomplete, or may not purport to be such a document as would be binding or sufficient in law, if it is so made and is such as to indicate that it was intended to be acted on as genuine.

³⁰ See Anderson J's reasons at para [8].

[35] Section 263(1) defined false document in this way:

False document means a document—

- (a) Of which the whole or any material part purports to be made by any person who did not make it or authorise its making; or
- (b) Of which the whole or any material part purports to be made on behalf of any person who did not authorise its making; or
- (c) In which, though it purports to be made by the person who did in fact make it or authorise its making, or purports to be made on behalf of the person who did in fact authorise its making, the time or place of its making, where either is material, or any number or distinguishing mark identifying the document, where either is material, is falsely stated; or
- (d) Of which the whole or some material part purports to be made by a fictitious or deceased person, or purports to be made on behalf of any such person; or
- (e) Which is made in the name of an existing person, either by him or by his authority, with the intention that it should pass as being made by some person, real or fictitious, other than the person who makes or authorises it:

Speaking generally, to be a forgery the document, as a document, must profess to have been made by someone other than its actual maker.

[36] In the present case the document which emerged from the receiving fax machine, while deceptive in its content, purported to be made by the person who fed its counterpart into the sending machine. That person was Mrs Walsh. The fact that the counterpart which was fed into the machine by Mrs Walsh in Amsterdam was a forgery does not mean that the document which was made in New Zealand, namely the facsimile copy, was also a forgery. There was nothing about the facsimile copy which gave rise to any representation that it had been made, that is physically created, by anyone other than Mrs Walsh. This approach, which may appear rather technical and out of date, was recognised by Parliament nearly 30 years ago as needing legislative attention, so as to keep the law abreast of modern developments.

[37] In *R v Tait*³¹ the Court of Appeal, in an obiter dictum, suggested that a photostat copy of a forged document might well not itself be a false document within

³¹ [1968] NZLR 126.

the meaning of s 263. The Court made reference to the decision of Fair J in *R v Sorich*³² in support of that dictum. The decision in *Sorich* had already led Richmond J, with the concurrence of counsel for the Crown, to the view that a photostat copy of a forgery was not itself a forgery: see *Re Askew-Scott's Application*.³³ Whether those views were correct is not now a matter which needs discussion. They were certainly consistent with the traditional common law approach to forgery.

[38] The reason why the point is no longer a live one is that following consideration of the subject by the Criminal Law Reform Committee, ultimately sparked by the decision in *De La Rue v R*,³⁴ Parliament was advised to legislate and did so on the basis that a photographic reproduction of a forgery should not itself be regarded as a forgery. Section 7 of the Crimes Amendment Act 1973 introduced a new s 266A into the principal Act from 1 January 1974. The new section made it a crime to reproduce a document with intent to defraud. This new crime carried the same penalty as forgery. It covered the reproduction of parts of different documents so as to make a composite whole out of those parts. Anyone who reproduced a forged document with the necessary intent was guilty not of forgery but of a crime against s 266A. If the reproducer knew that the source or sources on which the reproduction was based were themselves forgeries, intent to defraud would, in ordinary circumstances, be a natural inference.

[39] Mrs Walsh was not charged under s 266A. Substituting convictions under that section would involve consideration of whether she must necessarily have had an intent to defraud, as that expression ought properly to be understood. When s 266A was introduced to cover the kind of situation we have in this case, it is not apparent whether consideration was given to the possibility that a reproduction of a forged document could be viewed as uttering that forged document. There is no mention of that possibility in the Law Reform Committee's report. In spite of the history of the law of forgery as regards copies of forged documents, it seems to me that if Parliament had not intervened as it did, the law might have been capable of

³² [1945] GLR 267 (SC).

³³ [1967] NZLR 673 (SC).

³⁴ [1971] NZLR 532 (CA).

modernisation by the courts on the basis which commended itself to O'Regan J in the Court of Appeal. It is not, however, necessary to explore that question further in view of the existence of s 266A.

[40] Furthermore, the law in this area has recently been substantially recast by the introduction from 1 October 2003 of a new set of sections concerning forgery and counterfeiting.³⁵ These new sections comprise the present sections 255 – 265 of the Crimes Act. The new section 258, which deals, amongst other things, with reproducing documents with intent to deceive, would now cover the present circumstances.

[41] For these reasons I agree with Anderson J that Mrs Walsh was not properly convicted of forgery. I am, however, satisfied that convictions for uttering may properly be substituted, for the reasons which Anderson J gives. Had Mrs Walsh been charged with uttering, the evidence which the jury must have accepted to convict her of forgery can only have led them to the view that she was guilty of uttering. By means of the facsimile copy Mrs Walsh caused her victims to act on the forged original as if it, the original, was genuine, she knowing that it was not.

[42] That this amounts to uttering is supported by *R v Harris*.³⁶ In that case the appellant had made use of a copy of a forged receipt. The Court of Criminal Appeal was satisfied that he was guilty of uttering the original forgery by means of using the copy. The Court observed:³⁷

It appears to this Court that one can hardly make a more potent use of a forgery than to have such a copy prepared and send that copy away with a view to deceiving or defrauding the recipient.

[43] It is for these reasons that I agree with the orders proposed by Anderson J.

³⁵ See s 15 of the Crimes Amendment Act 2003.

³⁶ [1966] 1 QB 184.

³⁷ At p 196.

Solicitors:
Crown Law Office, Wellington