

IN THE SUPREME COURT OF NEW ZEALAND

**SC 80/2007
[2008] NZSC 114**

REBECCA KATSI LI

v

THE QUEEN

Hearing: 14 August 2008

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

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

Judgment: 19 December 2008

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

| | Para No |
|---|----------------|
| Elias CJ | [1] |
| Blanchard, Tipping, McGrath and Wilson JJ | [45] |

ELIAS CJ

[1] The appeal turns on the meaning of s 256 of the Crimes Act 1961. It was enacted in 2003 to replace the former s 264.¹ The new section differs from the old provision by splitting what had been a single offence of forgery, punishable by ten years imprisonment, into two offences:

256 Forgery

- (1) Every one is liable to imprisonment for a term not exceeding 10 years who makes a false document with the intention of using it to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration.
- (2) Every one is liable to imprisonment for a term not exceeding 3 years who makes a false document, knowing it to be false, with the intent that it in any way be used or acted upon, whether in New Zealand or elsewhere, as genuine.
- (3) Forgery is complete as soon as the document is made with the intent described in subsection (1) or with the knowledge and intent described in subsection (2).
- (4) Forgery is complete even though 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 upon as genuine.

The more serious offence, punishable by ten years imprisonment, is confined by the terms of subs (1) to those cases where a false document is made with the intention of its use to obtain “any property, privilege, service, pecuniary advantage, benefit, or valuable consideration”. The offence described by subs (2) is in terms which follow more closely the language of the old provision and does not require intent to obtain property etc, but the penalty prescribed for it is three years imprisonment. The new s 256 was enacted as part of a restructuring of similar offences under the general

¹ Section 264 had 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.

Under s 265, everyone who committed forgery was “liable to imprisonment for a term not exceeding ten years”.

heading “*Forgery and counterfeiting*” introduced into the Crimes Act by the Crimes Amendment Act 2003.

[2] The appellant, who operated a printing business, was convicted under s 256(1) on evidence that she had forged to order a variety of documents, for which she was paid. The documents included degree certificates and similar evidence of qualification. Those who paid for these documents knew that they were not genuine and so were not themselves intended to be deceived by the appellant. The question on the appeal is whether intended sale of a document in these circumstances constitutes the intention of “using it to obtain” property etc, as described by s 256(1), or whether the intended use must entail the deception that the document is genuine. I am of the view that the meaning of s 256(1), construed purposively and in context, is that the intent described by s 256(1) is an intent to use a false document for its purported and false representation. A forgery must be made with intent to use deceptively. On the basis that the trial Judge did not treat this as an essential element of the offence in his instructions to the jury and the Court of Appeal² did not disagree with that approach, I would allow the appeal. Nor do I think it necessary under s 256(1) for the intended deceptive use to obtain property etc to be by the forger, as the Court of Appeal thought to be the case. It is enough that the false document is made with the intention that it be used deceptively by the forger or someone else, as if genuine, to obtain “any property, privilege, service, pecuniary advantage, benefit, or valuable consideration”.

[3] The difference between the approach I take and that taken by the majority is that I consider the relevant use to obtain property etc which must be intended by a forger is deceptive use. Any fee intended to be obtained by the maker of a false document from an undeceived purchaser is not itself property or pecuniary advantage obtained by deceptive use. Treating it as the obtaining of property etc for the purposes of the offence in s 256(1) seems to me to introduce an unnecessary complication which requires a distinction to be drawn between intended deceptive

² *R v Li* [2008] 1 NZLR 554 (Chambers, Randerson and John Hansen JJ).

use by the forger himself or by another. On the view I take the intention required is the same because it is irrelevant whether the maker of the false document intends to use the document deceptively to obtain property etc himself or intends that such deceptive use will be undertaken by another. It is the obtaining property etc through deceptive use that must be intended.

[4] The inference that the documents were made by the appellant with the intention that they be used as genuine to obtain property etc for those who commissioned them was clearly available to the jury, if it had been properly instructed as to the law. And, if accepted by the jury, that intention was sufficient to convict the appellant as the maker of the false documents of the offence of forgery under s 256(1). The trial Judge instructed the jury however that it could convict if satisfied of proof of the appellant's intent to obtain valuable consideration through sale of the false documents to purchasers undeceived by the falsity and without identifying as a necessary element of the offence any intent that the documents would be used deceptively to obtain property etc. This treatment of s 256(1) was upheld by the Court of Appeal. I consider it to have been in error, although it has to be said that the statute is inconsistently expressed and I have found its construction particularly difficult.

History of the appeal

[5] The appellant was convicted by a jury on a total of 49 charges, including 27 counts of forgery laid under s 256(1) and two counts laid in respect of offending before October 2003 under the former s 264.³ Five of the forgery convictions laid under s 256(1) were later quashed by the Court of Appeal, on the basis that the false documents made by the appellant were so obviously defective that it would be unsafe to infer the criminal intent required by s 256(1). The appeal is concerned with the 22 convictions under s 256(1) upheld by the Court of Appeal.

³ The other charges were of possession of materials for the purposes of forgery, counterfeiting and using counterfeited corporate seals and stamps, and counterfeiting public stamps. The appellant was sentenced to an effective term of imprisonment of four years. A minimum period of imprisonment of two years was imposed by the sentencing Judge in respect of the forgery provisions.

[6] At the trial in the District Court, Judge Joyce instructed the jury separately in respect of the forgery charges laid under the old s 264 and those under the new s 256(1). He provided the jury with a sheet of paper setting out the “essential elements of charges”. In relation to the pre-2003 charges (under the old s 264) they were:

- (a) the accused made a false document; and
- (b) the accused knew the document was false; and
- (c) the accused intended that the document should be used or acted upon as genuine.

In relation to the forgery counts under s 256(1), the “essential elements” were identified as:

- (a) the accused made a false document; and
- (b) the accused intended to use the document to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration.

In his oral direction, the Judge instructed the jury to the same effect. In respect of the pre-2003 charges, he told the jury that the Crown was required to prove three essential elements: that the accused made a false document; that the accused knew the document was false; and that “the accused intended that the document should be used or acted upon as genuine”. In relation to the charges under s 256(1) two essential elements only were identified by the Judge in his directions to the jury: “first, the accused [knowingly]⁴ made false documents; and secondly, the accused intended to use the documents to obtain any property, privilege, service, pecuniary advantage, benefit or valuable consideration”. In relation to the requirement of intention to use the documents to obtain a benefit of the type envisaged, the Judge repeated and adopted the position of counsel for the Crown that, if the jury accepted

⁴ The Judge further explained that, although the new provision did not repeat the earlier requirement of knowledge of falsity, contained in the former s 264, such knowledge was essential “in terms of general criminal law principles”.

that “each ... of the items in question was made with the intention of making money from it (by selling it)”, then the element would be satisfied.

[7] On appeal to the Court of Appeal the appellant argued that the trial Judge had erred in not leaving the jury with the alternative of convicting under s 256(2) rather than s 256(1). As an alternative argument she contended that the elements of forgery under s 256(1) were not satisfied and that it was only in respect of a charge under s 256(2) that a conviction could properly have been entered. The argument heard by the Court of Appeal seems to have been somewhat unfocussed. The main contention for the appellant appears to have been that she should have been charged under s 256(2) rather than under s 256(1). The judgment of the Court of Appeal indicates that it was in response to questions from the Court during argument that counsel (not counsel who appeared in this Court) addressed two issues: the mental element required to be proved under s 256(1); and whether an intention to “use” a false document under s 256(1) includes an intention to sell the document to another person. These questions both bear on the critical issue whether use as if genuine of the false documents had to be intended by the maker to constitute the offence of forgery. The Court’s separate treatment of them, and the assumption underlying the argument of counsel that the charges were appropriately laid only under s 256(2), seems to have overshadowed the question of deceptive intent required by s 256(1).

[8] The Court of Appeal took the view that no element of dishonesty beyond the “making of the false document with the specified intention and knowledge” was required by s 256.⁵ In itself, this statement is correct, but it begs the critical question whether an intention to use must be an intention to use deceptively under s 256(1). Deceptive use requires an intention not to use the document as a thing in itself but to use the lie which is its purport. It seems that the Court of Appeal proceeded on the basis that any intended use of the document itself for gain to its maker was sufficient under s 256(1). That emerges less clearly in its consideration of what it treated as the first issue (the mental element required to be proved under s 256(1)), although it is consistent with the emphasis it placed on absence of textual references to dishonesty or deception. But it is clearly the basis upon which the Court determined

⁵ At para [19].

what it treated as the second issue (“does an intention to use a false document include an intention to sell it to another person?”).⁶

[9] In addressing the mental element under s 256(1), the Court was influenced by the Act’s omission of references to dishonesty and deception which had been proposed in the 1989 Crimes Bill but not proceeded with. It also thought it significant that in the 2003 amendments which introduced a new Part 10 to the Crimes Act (within which the forgery and dishonesty provisions are included) Parliament had used references to “dishonesty” and “deception” in describing other “crimes against rights of property”. The Court considered that the history of the 1989 Bill and the current Act’s distinct treatment of offences explicitly requiring dishonesty and deception suggested that “the legislature turned its mind to those provisions requiring proof of dishonesty and those which do not”.⁷

All of this makes it clear that the essential ingredients required to be proved under both s 256(1) and (2) are confined to those specified in those provisions.

[10] The Court stated the “second main argument” to be:⁸

whether the ‘intention of using’ the false documents under s 256(1) includes an intention to sell them or whether the forgery charges should have been brought under s 256(2).

This statement of the question treated the material difference between the two subsections as turning on the intended obtaining of “any property, privilege, service, pecuniary advantage, benefit, or valuable consideration”. Whether such property etc was intended to have been obtained deceptively (so that the two subsections were consistent as to deceptive intention) was not further considered. It seems simply to have been accepted in the argument of counsel and by the Court that an intended sale, if not within the meaning of s 256(1) because the forger did not himself intend to obtain “any property, privilege, service, pecuniary advantage, benefit, or valuable consideration”, would fall within the wider ambit of “an intent that it in any way be used or acted upon” under s 256(2).

⁶ At para [12].

⁷ At para [19].

⁸ At para [20].

[11] The Court of Appeal considered that sale entailed the appellant's obtaining "a pecuniary advantage" or "valuable consideration" within the words of s 256(1). The language used was, it held, "sufficiently wide to include a case such as the present where the appellant's intention was to sell the false documents":

[23] While we accept there are some potential inconsistencies in the language of s 256(1) and s 257(1)(b) and (c) (which refer to using, dealing with or acting upon a document), we consider that the expression "with the intention of using" the false documents in s 256(1) is sufficiently wide to include a case such as the present where the appellant's intention was to sell the false documents. This amounts to an intention to use the false documents to gain a pecuniary advantage or valuable consideration within the meaning of the section. It does not matter that the purchaser may well have known the documents were false.

[24] If the appellant's argument were correct, it would mean that she, as the maker of the false document for gain, would be liable for only three years imprisonment under s 256(2), whereas the user of the same document would be liable for 10 years imprisonment under s 257(1)(a). That would be illogical and cannot have been intended.

[12] The real difficulty raised by the appeal turns on the last sentence in para [23]. If the intention required by s 256(1) includes an intention to sell to a purchaser who knows the documents to be false, then the intention in that use is not use of the falsity of the document. It is not a deceptive intention. That was the view taken by the trial Judge in omitting reference to deception in the two elements identified as essential to the crime under s 256(1). It is to be contrasted with his explanation of the former s 264 (which is materially the same as s 256(2) in this respect) in terms which required deceptive intention.

[13] The view that it is irrelevant under subs (1) whether the forger intends to deceive in obtaining valuable consideration for a false document is not further explained in this part of the judgment of the Court of Appeal. It builds on the view it had earlier expressed more ambiguously in relation to the meaning of the intention in s 256(1) that intention to use deceptively is not an element of the offence. The interpretation given to s 256(1) by the Court of Appeal turned in part on the view that:⁹

⁹ At para [21].

subs (2) embraces use of the false document either by the maker of the false document or by anyone else, while subs (1) contemplates the maker using it himself or herself.

The element of gain it considered to be the principal difference between the two subsections was on this view required to be a gain the forger procures through his own use; it is not enough that the forger intends that another will obtain benefit through deceptive use. If use by another is intended, on the reasoning of the Court of Appeal the only appropriate charge is under s 256(2), for which the maximum penalty is three years imprisonment rather than the ten years available under s 256(1).

[14] As discussed further below, this result leads to inconsistency with the penalties provided for comparable offending under the Crimes Act. It also results in a substantial reduction in the former penalty of ten years imprisonment provided for those who forge documents for others to use. The Court of Appeal acknowledged that the interpretation it preferred led to some “potential inconsistencies” between s 256 and the equivalent offence of using a forged document under s 257,¹⁰ but did not elaborate on those inconsistencies. Nor did it remark on the significant change to the penalty under the former law entailed in its interpretation. The Court seems to have been influenced by the incongruity of a forger who does not himself use deceptively but who obtains a fee from someone who will use the document to deceive being liable for only three years imprisonment, while the user is liable for ten years. But if the gravamen of the offence is making with the intent that property etc be obtained by the deceptive use of the forger or another, there is no incongruity because the forger will properly be convicted under s 256(1). It seems to me that the Court was misled into accepting a false antithesis. The more natural meaning is that the threshold intention (to use deceptively) remains constant in the offences under both subsections, but that to it in s 256(1) is added the intent that property etc will be obtained through the deception. I am of the view that this is the more natural and convenient meaning if the subsection is read in its wider statutory context. The structure of the provisions is that the maker is rightly convicted under s 256(1) if he

¹⁰ At para [23].

intends gain of the sort identified to result from deceptive use of the document he makes. I develop my reasons for this view below.

The forgery and counterfeiting offences substituted by the Crimes Amendment Act 2003

[15] The meaning of s 256(1) must be ascertained from its text and in the light of its purpose, both read in the statutory context, including the indications provided by the organisation of the legislation.¹¹ Section 256 was introduced into the Crimes Act by the 2003 Amendment Act which inserted a new Part 10 of the Act under the heading “Crimes against rights of property”. Part 10 is further subdivided by headings, and s 256 is placed under the heading “*Forgery and counterfeiting*”. The other provisions included under the same heading, and the general provisions applicable to Part 10, are pointers to the meaning of s 256(1). Relevantly, s 217 provides a definition of “obtain” for the purposes of Part 10 which makes it clear in relation to s 256(1) that an intention by the maker of a false document to obtain or retain a benefit for “any other person” is sufficient intent. Direct personal benefit to the maker of the false document is not necessary.

[16] The section of the Act contained under the heading “*Forgery and counterfeiting*” starts with its own interpretation section, s 255. By it “false document” is defined for the purposes of s 256 by reference to “purport”:

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 by a fictitious person; or
- (b) of which the whole or any material part purports to be made by or on behalf of any person who did not authorise its making, or on behalf of a fictitious person; or
- (c) of which the whole or any material part has been altered, whether by addition, insertion, deletion, obliteration, erasure, removal, or otherwise, and that purports to have been altered by or on behalf of a person who did not alter it or authorise its alteration, or by or on behalf of a fictitious person; or

¹¹ Section 5 Interpretation Act 1999.

- (d) that is, in whole or in part, a reproduction of any other document, and that purports to have been made by or on behalf of a person who did not make it or authorise its making, or by or on behalf of a fictitious person; or
- (e) that is made in the name of a person, either by that person or by that person's authority, with the intention that it should pass as being made by some other person who did not make it, or by a fictitious person.

[17] The references to purport continue the approach in the pre-2003 definition.¹² They evoke the common law that a forged document must “tell a lie about itself”:¹³ the essence of the mental element in forgery is the intention to induce another to accept the forged instrument as genuine. As foreshadowed and for reasons further developed below, I take the view that a forged document is not “used” as a thing in itself, but for its purported and false representation.

[18] Included in the restructured Part 10 under the new general heading “*Forgery and counterfeiting*” are the offences of “forgery” (s 256), “using forged documents” (as the old offence of “uttering” is renamed in s 257), “altering, concealing, destroying, or reproducing documents with intent to deceive” (s 258), “using altered or reproduced document with intent to deceive” (s 259), “false accounting” (s 260), “counterfeiting public seals” (s 261), “counterfeiting corporate seals” (s 262), “possessing forged bank notes” (s 263), “paper or implements for forgery” (s 264), and “imitating authorised or customary marks” (s 265). There is some symmetry between the provisions relating to forgery and using forged documents and the provisions dealing with altering or reproducing documents and using such altered documents with intent to deceive. In the case of using forged documents and altering and using altered documents, the maximum penalty is imprisonment for ten years. In the case of altering or using altered documents (where the documents need not themselves amount to false documents within the meaning of s 255) the alteration must be made with the intention of obtaining “by deception” benefits of the kind mentioned in s 256(1) or causing loss.

¹² The repealed s 263.

¹³ Smith and Hogan attributes this aphorism to Kenny, *Outlines of Criminal Law* (19th ed, 1966), para [387]; Ormerod (ed), *Smith and Hogan, Criminal Law* (12th ed, 2008), p 961. And Kenny was cited for the proposition, which was adopted by the Court of Appeal in *R v Reardon* [1965] NZLR 473 at p 476 per Turner J.

[19] Subsections (3) and (4) of s 256 identify the point at which forgery is complete. Section 256(4) makes it clear that the offence of forgery is complete upon making a false document with the necessary intent, even if the document itself is incomplete or legally ineffective, if the document which purports to be something it is not “is so made and is such as to indicate that it was intended to be acted upon as genuine”. This provision applies equally to s 256(1) as well as s 256(2) and suggests an intention that the false document “be acted upon as genuine” is an underlying assumption of both. That is to say, the section read as a whole assumes deceptive intent, as is consistent with the prior understanding of the offence of forgery under earlier provisions, and as is consistent with the comparable provisions under the general heading “*Forgery and counterfeiting*”.

[20] The terms of s 257 (which makes it an offence to use forged documents) are an important part of the context in which s 256 is to be construed, because forgery and use (or “uttering”) are parallel provisions in which the intent required for the making of a false document in forgery is carried into effect in the use:

257 Using 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 the document to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration; or
 - (b) uses, deals with, or acts upon the document as if it were genuine; or
 - (c) causes any other 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 is to be regarded as a forged document.

[21] The introductory words of s 257(1) require the user to know that the document is “forged”. Although the definition of “false document” is not expressed in s 255 to apply to s 257 and there is no reference in s 257 to “false document”, the structure of the Act is that forgery is defined by s 256. These provisions necessarily read together. The meaning of “false document” is carried into s 257 with the

reference to “forged documents” in s 257. A false document is one that in itself “purports” to be something it is not. It is inherently deceptive on its face.

[22] Section 257(1)(a) expresses the intent with which the document is used in comparable terms to the use intended in the making under s 256(1). Similarly, the uses described in paras (b) and (c) of s 257(1) correspond to the intended uses described in s 256(2). The uses described in s 257(1)(b) and (c) are expressed as deceptive uses (“as if it were genuine”). I am of the view that s 257(1)(a), like s 256(1), is also properly construed as entailing deceptive use. The use of a false document to obtain the benefits described in s 257(1) is necessarily use of the falsity. I explain further below why I think the statutory context makes this the natural meaning of the provisions. The contrary view would mean that someone who sells for a small sum an acknowledged false document as a work in itself with no intent that it be used to deceive the purchaser or anyone else would have committed the offence of using a forged document.

[23] The offences described in s 256(2) and in s 257(1)(b) and (c) differ from s 256(1) and s 257(1)(a) in not requiring an element of intended or actual benefit through obtaining “any property, privilege, service, pecuniary advantage, benefit, or valuable consideration”. Difference in penalty between the offence contained in s 256(2) and those contained in s 257(1)(b) and (c) in circumstances where equivalent penalties are maintained for s 256(1) and s 257(1)(a) is not satisfactorily explained by the statutory history.

[24] The pair of offences dealing with altering documents with intent to deceive and using them, contained in ss 258 and 259, are confined to the cases, comparable to those in respect of forgery in s 256(1) and using forged documents in s 257(1)(a), where “any property, privilege, service, pecuniary advantage, benefit, or valuable consideration” is intended to be obtained or any loss is intended to be caused. Without that element, altering or using an altered document are offences only if they come within the forgery provisions. In that case they will have to be false documents in themselves and used on that basis. Similarly, the offence of false accounting in s 260 makes it an offence to make a false entry in any book of account with both deceptive intent and an intent to obtain by that deception “any property

etc” or to “deceive or cause loss” and is punishable, similarly, by imprisonment for ten years.

[25] In addition to the offences already mentioned for which penalties of imprisonment for ten years are provided, ten years imprisonment is also the penalty for possessing anything “capable of being used to forge any document with intent to use it for such a purpose” (s 264), and counterfeiting a coin “with the intention that it be acted upon as genuine” (s 266).

Section 256(1) requires the use intended to be a deceptive use

[26] I do not disagree with the Court of Appeal that the ingredients of both s 256(1) and (2) are to be found in those provisions, at least as they are read in their statutory context. But I come to the different conclusion that s 256(1), properly construed, requires the use intended to be deceptive use. I reach that view on the basis of a number of considerations, which overlap. First, I consider that the use of false documents to obtain benefits is inherently a deceptive use and that words indicating intended deceit are not required because they would be superfluous. That opinion is borne out by the underlying theme expressed in s 256(4): that the circumstances of making must indicate that the false document was “intended to be acted upon as genuine”. Secondly, the two offences described by s 256 reconcile more satisfactorily if both require deceptive intent at the time of making and differ only in the additional element of benefit in one of the ways specified in s 256(1). That additional element is the apparent justification for the higher penalty. Thirdly, the interpretation is consistent with the statutory scheme and avoids s 256 being anomalous in that scheme as to deceptive intent and penalty. Finally, construing both offences under s 256 to require deceptive intent accords with general principles of culpability and prevents trivial or harmless activity being the subject of significant penalty.

[27] In construing the legislation, the history of the Crimes Amendment Act 2003 sheds no illumination. It may be that the references to dishonesty or deception in the 1989 reform proposals, which weighed with the Court of Appeal because they were not carried through into the 2003 amendment, were dropped in recognition that they

were unnecessary, as I think to be the case. It is difficult to know because, as the majority judgment in this Court suggests, the legislative history of the 2003 amendment is too confused to be of assistance.¹⁴ The provisions cited by the Court of Appeal to indicate that the legislature had turned its mind to expressing dishonesty where it meant to do so are not in point, being provisions relating to theft and other dishonesty not intrinsic in the nature of use of a document that tells a lie about itself, and so requiring explicit recognition of deceit to describe the offence.

[28] I summarise my reasons for the conclusion that s 256(1) requires deceptive intent. As they have been largely foreshadowed and as they overlap to some extent, some repetition is inevitable.

(i) Deception is inherent in using a false document to obtain benefit

[29] A *false* document (one that tells a lie about itself) is not used to obtain benefit unless the lie is used. An intention to deceive is inherent in the very concept of using a false document, which is defined by s 255 by reference to its false “purport”. Intended use according to that false purport is necessarily a deceptive use. In the earlier forgery legislation, such deceptive intent was expressed through reference to the use “as genuine”, in language that is maintained without amendment in s 256(2). The continued explicit reference in s 256(2) may well itself be unnecessary. But in any event, it seems to me that a false document cannot be used in order to obtain benefit of value unless it is used in its own terms, as a lie. The meaning that the intended use of a false document (one that purports to be something it is not) must be deceptive is borne out by subs (4) of s 256, which assumes that the offence is complete as soon as the document itself indicates that “it was intended to be acted upon as genuine”. That is a provision equally applicable to subs (1) and (2).

[30] The offence under s 264 of possessing instruments or paper with intent to use them to “forge any document”, which itself carries a term of imprisonment of ten

¹⁴ At para [6].

years, clearly adopts the elements of forgery which are essential to s 256.¹⁵ If non-deceptive intent is available under s 256(1), s 264 would require intent to make a false document either with deceptive intent or to obtain, non-deceptively, some benefit. Again, this second meaning strikes me as leading to a result wholly disproportionate to the criminal culpability. The dissonance resolves itself if the intended use is deceptive.

(ii) Section 256 as a whole is coherent if s 256(1) is read as requiring deceptive intention

[31] As already mentioned, s 256(1) does not reconcile with s 256(4) if it does not require an intention to use deceptively. In addition, I consider that the offences described in subs (1) and (2) work together sensibly only if subs (1) also requires an intention to use deceptively. On this approach, and consistently with the lesser penalty in subs (2), the section as a whole describes a descent in culpability according only to whether the intended use is to obtain material benefit as described by subs (1). An interpretation that does not make deceptive intent essential means that in some cases under s 256(1) deceptive intention will be present and in other cases it will not be. That result does not accord with usual notions of culpability. The two cases are very different. If deceptive intention is not required under s 256(1) there is danger of over-inclusion in circumstances where there may be no intention to gain through deception at all and the circumstances are quite innocuous. Where deceptive intention is present there is an overlap on this view between the two subsections which makes it a question of prosecutorial discretion, as the Court of Appeal acknowledged, whether an accused faces liability of ten years imprisonment or three.

[32] There are a number of differences in the expression of the offences in subs (1) and (2). Standardisation of language would seem to be highly desirable. In the meantime, some of the other differences between subs (1) and (2) (and between subs (1) and the former forgery offence in the repealed s 264) are either not material or do not bear on the issue of non-deceptive intention. The Court of Appeal was

¹⁵ See above, para [25].

right, in my view, to treat the absence in subs (1) of a requirement that the maker “knows” the document is false to be neutral on the critical matter of interpretation. The maker of a false document knows its falsity. It is not necessary to provide for such knowledge in the text because it follows inevitably from the making. A further difference between the two subsections is more significant, although I do not think it ultimately bears on the critical issue of whether s 256(1) requires an intention to use the false document in the deceptive sense which makes it false. While s 256(1) does not contain reference to an intent that the document “be *acted upon* ... as genuine”, the manner of gain elaborated on in subs (1) necessarily entails an intent that the victim “act upon” the purported and false representation. It would have been much more satisfactory, if gradation of the seriousness of the offending according to material gain is meant (as the Court of Appeal thought was the case), if the language used had been consistent and subs (2) had been re-expressed instead of being a re-enactment of the former provision. But I do not think the different expression of these provisions would themselves have suggested a very different meaning for the two provisions according to whether the use intended entailed deception. Such additional difference is a substantial departure from the pre-existing law and would not have been needed to ensure a heavier penalty for those who intend that gain will be obtained from deceptive use.

[33] The interpretation preferred by the Court of Appeal does not result in any coherent division between subss (1) and (2), as the Court acknowledges. It does not set up a hierarchy of charges but two different charges which overlap (with significantly adverse consequences for an accused who comes within the overlap if the provision with the more severe penalty is invoked). It is not consistent with s 256(4).

(iii) It would be anomalous in statutory scheme if deceptive intention is not required by s 256(1)

[34] I have referred in paras [15] – [25] to the comparable provisions contained within Part 10 of the Act, and in particular those under the heading “*Forgery and counterfeiting*”. If the intention described by s 256(1) may be non-deceptive use, then s 257(1)(a), which is expressed in materially identical terms and is clearly the

other side of the coin, will similarly not require deceptive intention. On that view, the resale of an acknowledged false document would constitute the seller a user, and make him liable to a term of imprisonment of ten years even though there is no gain from the falsity and no loss to the person providing consideration. Again, it is difficult to think of any adequate explanation why the culpability between non-deceptive use in s 257(1)(a), as reflected in the penalties provided, would be the same as the deceptive use provided for in paras (b) and (c). Nor is it clear why there should be such a different view of culpability taken between the deceptive use in s 257(1)(b) and (c) and the deceptive use envisaged by the forger in s 256(2). In neither case does the explanation of additional intention to obtain value apply.

[35] As the review of the comparable offences created by Part 10 indicates, there is a general symmetry in penalty between making with intention to deceive and using in the knowledge of falsity. Apart from the forgery provisions, this symmetry is seen in the related offences of altering with intent to deceive and using an altered document (ss 258 and 259).

[36] Counterfeiting public seals is unlawful, and punishable by ten years imprisonment, without proof of intent to deceive (s 261). That clearly reflects the inherent danger in such production. On the other hand, the counterfeiting of coinage is punishable by ten years imprisonment if made “with the intention that it be acted upon as genuine” (s 266). Of significance for present purposes is that using counterfeited public seals and coinage are offences without any explicit requirement of intention to deceive if they are used in the knowledge that they are counterfeit. That is I think explicable on the basis that the relevant use must be deceptive and, accordingly, is consistent with the view I take that the intended use of a false document to obtain a benefit under s 256(1) is inevitably a false use entailing deception.

[37] In summary, the view that s 256(1) does not entail deceptive use would make it anomalous within the statutory scheme. It would also be a substantial and inexplicable departure from the earlier law.

(iv) Requirement of deceptive intention is consistent with general principles of culpability

[38] It is at odds with general notions of culpability that, on the interpretation accepted by the Court of Appeal, deceptive intention would not be required for an offence carrying a term of imprisonment of ten years but would be necessary for an offence carrying half that maximum penalty. The pecuniary advantage or other described benefit intended to be obtained from use of the document without deceit may be trivial or in circumstances which are innocuous. The interpretation is overly inclusive. The better view is that deceptive use is an essential element of both offences of forgery. The more serious offence on this view simply has added to it the additional intention that the false document will be used deceptively to obtain property or other value.

(v) Effect of interpreting s 256 to require deceptive intention

[39] If, as I would hold, s 256(1) requires a forger to make with the intention that the false document will be used to deceive, then the directions given to the jury by the trial Judge were wrong. They suggested that intention to sell the false document to someone who knew of the falsity and so was not deceived would be sufficient for the mental element required of the completed offence. The directions should instead have required the jury to be satisfied that the forger intended that the documents be used as if genuine to obtain property etc. On that basis, intending to obtain a fee for the sale of the documents without any intention that they be used to deceive is insufficient to constitute the offence.

The intention required includes the obtaining of benefit by another

[40] I would allow the appeal and grant a retrial because, as already indicated and as was accepted by counsel, there was evidence of intent upon which the jury could have convicted. It was simply not required to consider that element. Since it was an essential ingredient equally of the offence under s 256(2), it is not possible, as counsel suggested to the Court of Appeal, to substitute a conviction under that

provision. Whether a retrial should be ordered under s 256(1) however depends on whether the Court of Appeal was right to conclude that it applies only if the forger intends himself to use the false document to obtain benefit. On the evidence that conclusion was not available. The forger who does not intend any material gain from his own use of the false document but who intends the dishonest use of the false document to obtain property etc by another is not on this view within subs (1) but is liable only under s 256(2).

[41] The effect of the interpretation accepted by the Court of Appeal would mean a significant downgrading in the culpability formerly attaching to those who forge with the intention that someone else will use the false document to deceive. A distinction between cases where the ultimate deceptive use is intended to produce material gain (and its converse, material loss) and those where deceptive use has no such consequence (but may, for example, enhance the standing of the user) is understandable policy. But it is difficult to see that, in a crime which has always turned on intention to use deceptively, culpability should be so downgraded where actual deception, even if by another, is intended by a forger, and so amplified whenever a fee is obtained for a false document even if the forger has no intention that the document be used to deceive.

[42] The difficulty arises out of the change from the passive voice used in subs (2) and in the repealed s 264 (“with the intent that it shall in any way *be used* or acted upon as genuine”). Under that formulation, a forger who intends that someone (whether himself or another) will profit from deceptive use of the false document he has made is guilty once he makes or partially makes the document. If the use of the active voice in s 256(1) is construed to mean that a forger is guilty only if he intends to use the document himself then, in addition to the downgrading effect, there will also be inconsistency between s 256(2) and its penalty and the penalties and offences of altering etc under s 258, making false entries in accounts under s 260, possessing implements for forgery under s 264, and counterfeiting coinage under s 266. All these offences provide for terms of imprisonment of ten years and in all the person making the false entry, altering the document, possessing the implements for forgery, or counterfeiting coinage need not be shown to have intended to use personally. If the change from the passive makes intended use by the forger an essential element of

the offence under s 256(1), a forger who provides forgeries for another to use deceptively could be liable only under s 256(2) to a term of imprisonment of three years, even if substantial benefit in the deceptive use is expected, in which the forger may well share. It may be the incongruity of this result that persuaded the Court of Appeal that deceptive intention was not required in the use under s 256(1). The terms of s 256(1) are not well drafted. As indicated already, however, I do not think the difficulties in interpretation are properly met by reading down the fundamental deceptive intent required. Instead it seems to me that it is the active voice of the drafting that fails to capture the purpose of the provision, construed in its statutory context.

[43] Modern legislative drafting prefers use of the active rather than the passive voice. Thus use of the active voice is directed under the guidelines produced by the Legislation Advisory Committee.¹⁶ Some concepts are not however easily translated from one voice to the other. The use of the active is a flimsy basis on which to assume such significant reconstruction of the former meaning of forgery. It is in my view consistent with the scheme and purpose of the statute and not inconsistent with the language used for the words “with the intention of using it” to be read as meaning “with the intention of *its use*” (to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration). Such interpretation is consistent with the language used in subs (2). Importantly, it is consistent with the use of the passive in s 256(4) (“if it is so made and is such as to indicate that it was intended to be acted upon as genuine”). It avoids the undesirable consequence of drawing a distinction between the mental element required by subs (1) and (2) of s 256 on no sound conceptual basis. By contrast the difference in the mental elements required by the subsections is much more readily seen as turning simply on the intention to obtain property etc, through the deceptive use that must be intended under both subsections. On that basis the underlying intention to deceive remains constant and it is immaterial that the obtaining is achieved through another user. Such interpretation also avoids the much more substantial reform, which would be entailed in the Court of Appeal’s interpretation. It ensures consistency with s 258 where the intent is more simply expressed as “with intent to obtain by deception any

¹⁶ Legislation Advisory Committee, *Guidelines on Process and Content of Legislation* (Wellington, 2001), para [2.4.3].

property” etc. And it is consistent with the expansive definition of obtain, which makes it immaterial whether the benefit is derived by the forger or someone else, and therefore removes the ground of personal benefit on which enhanced culpability might perhaps have been based. On this interpretation, which I would adopt as indicated by a purposive construction, it is immaterial whether the benefit looked to in the deceptive use is achieved through use by the forger or is expected to be obtained through the use by another.

Disposition

[44] Because deceptive intent in the obtaining of property etc was not identified by the trial Judge as an essential element in the crime, as it should have been, the direction given was not adequate for the purposes of s 256(2). It is not possible to substitute for the convictions under s 256(1) convictions under s 256(2), as counsel suggested, because s 256(2) also requires intent to use deceptively, and the jury were not so instructed. Nor is the case a suitable one for application of the proviso in relation to the charges under s 256(1) because the jury was not asked to consider an element essential to constitute the crime under that provision. The appeal in my view should be allowed, the convictions set aside and a retrial ordered.

BLANCHARD, TIPPING, McGRATH and WILSON JJ

(Given by Tipping and Wilson JJ)

Introduction

[45] This appeal raises the single and narrow issue of whether an offence is committed under s 256(1) of the Crimes Act 1961 by forging a document with the intention only of selling it to a purchaser who knows it to be forged, and who therefore is not deceived.

[46] Section 256 reads, in material part:

- (1) Every one is liable to imprisonment for a term not exceeding 10 years who makes a false document with the intention of using it to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration.

- (2) Every one is liable to imprisonment for a term not exceeding 3 years who makes a false document, knowing it to be false, with the intent that it in any way be used or acted upon, whether in New Zealand or elsewhere, as genuine.

[47] The appellant contends that, although she forged documents with the intention of selling them, the purchasers were well aware that the documents were forged, and there was therefore no intention on her part to deceive them into thinking that the documents were genuine. Accordingly, it is submitted, an offence was committed under s 256(2) but not under s 256(1). The maximum penalty would then be three years' imprisonment. The effective term to which the appellant was sentenced was four years' imprisonment. The Crown submits in response that she was rightly convicted under s 256(1).¹⁷

The facts

[48] It was alleged that the appellant, while sole director and shareholder of a printing company, produced a range of forged documents and certificates for sale to third parties. The offending came to light when a former employee of the company contacted the police, and provided electronic copies of numerous false documents. A search warrant then uncovered further evidence, including the equipment used to make the forgeries.

[49] The Crown case depended largely on inferences to be drawn from the evidence, although there was direct evidence from one witness who said he had paid \$5,000 for a forged certificate. The appellant's defence was that she had been deceived by the real forger, who was one of her employees. She was convicted on 27 counts of forgery under s 256(1), and on other charges. The Court of Appeal allowed an appeal against conviction in relation to five of the 27 counts on the ground that the documents which were the subject of those counts were so defective that a reasonable jury could not have concluded that they were intended to be for gain in terms of s 256(1).¹⁸ As in this Court, the appellant contended in the Court of Appeal that she should not have been convicted at all under s 256(1) because

¹⁷ The approved ground, when leave to appeal was granted, was whether the appellant was rightly convicted of an offence against s 256(1) as opposed to s 256(2).

¹⁸ *R v Li* [2008] 1 NZLR 554 at para [31] (Chambers, Randerson and John Hansen JJ).

convictions under that subsection, properly construed, were not open to the jury in the absence of deception of those who purchased the documents. The Court of Appeal rejected that argument.¹⁹ Accordingly, the appellant now seeks an order quashing the convictions on the remaining 22 counts and substituting convictions under s 256(2).

The text of s 256

[50] Section 256 provides that two different types of forgery each constitute an offence.²⁰ Section 256(1) requires that there be an intention to use a document “to obtain ... pecuniary advantage ...”. In contrast, s 256(2) requires only an intention that the document “be used or acted upon ... as genuine”. On the ordinary meaning of the word “use”, a document is to be “used” when (as here) it is created with the intention of selling it to a purchaser who knows it to be false. The wording of s 256(1) is clear and provides no basis for reading in the additional and unstated element that the party providing the pecuniary advantage must not have been aware the document was false.

[51] There is no obvious reason for reading that additional element into the section. On the contrary, a number of serious forgeries will involve a party who provides the forger with a pecuniary advantage in return for the acquisition of a document which that party knows to be forged. To take the example advanced by Mr Horsley in oral argument, payment might be made for bank notes forged to order. It seems most unlikely that this kind of forger was not meant to be liable to the higher penalty.

[52] Those who make a false document for gain are likely to adopt one of two methods to achieve that gain. First, they may use the false document themselves to deceive another person into parting with something of value. Alternatively, they may make their gain by selling the false document to someone who knows it is false and who intends to use it to deceive a third person. Common to both methods is the fact that the maker of the false document intends, at the time of its making, that the

¹⁹ At para [27].

²⁰ As set out at para [46] above.

document be used to deceive. The difference is that in the first case the deception is to be practised by the makers themselves; in the second the deception is to be practised by someone other than the makers.

[53] It is difficult to discern any basis for distinguishing the culpability of the makers in the two categories to such an extent that Parliament would wish to render the makers liable in the first case to ten years' imprisonment and in the second to only three years' imprisonment. That, however, would be the result of accepting the appellant's argument and departing from the plain language of s 256(1). The appellant's argument requires the reading in of the words "as genuine" which are not present in s 256(1), viz "... with the intention of using it *as genuine* to obtain ...". We consider the provision was meant to be read as it was written, without any such interpolation. That in itself is a purposive interpretation; text and purpose coincide.

[54] The ultimate question is what is meant by the concept of "use" of a false document. We accept that in the context of an individual case it is the falsity of the document of which use must be made or intended to be made. But the makers of a false document make use of its falsity as much when they sell it to someone who they expect will use it to deceive as when they intend to use it themselves to deceive. In each case it is the falsity of the document that matters, and in each the maker intends to make use of that falsity.

[55] In contrast, someone who paints a copy of a famous picture with the intention of selling it as a copy to a person who wants it only as a copy does not make use of any falsity. A document made in such circumstances would not be a false document. In the context it tells no lie about itself.²¹

Sections 257 and 258

[56] Sections 256, 257 and 258 were all enacted in their present form at the same time,²² and therefore form part of a legislative "package".

²¹ See *R v Walsh* [2007] 2 NZLR 109 (SC) at paras [8] – [9] and [34].

²² By s 15 of the Crimes Amendment Act 2003.

[57] Section 257(1) provides strong support for the proposition that there should not be read into s 256(1) a requirement that a purchaser is deceived. Section 257(1) divides into three categories the offence of “using forged documents”.²³ Paragraph (a) is directed to using a document to obtain advantage, para (b) to using the document as if it were genuine and para (c) to causing another to use the document as if it were genuine. For each of these offences, the maximum penalty is ten years’ imprisonment. Paragraph (a) follows the form of s 256(1), and on its plain wording applies where the purchaser knows that the document is false. In contrast, paras (b) and (c) both require that the document be acted upon “as if it were genuine”. There is therefore no reason to read such a requirement into either s 256(1) or s 257(1)(a). Where the legislature intended that acting upon a document as genuine was to be an element of an offence, it made this clear.

[58] Similarly, s 258 makes it an offence, punishable by up to ten years’ imprisonment, to alter, conceal, destroy or reproduce a document with intent to obtain “by deception” some advantage. If Parliament had intended that s 256(1) should apply only if there were an intention to deceive, it would have said so – just as it did in s 258.

Parliamentary materials

[59] Section 256 replaced s 264, which had defined forgery so as to require that a false document be used or acted upon as genuine. The change was originally to be effected by cl 203 of the Crimes Bill 1989, which required that a false document be used “dishonestly”. In its April 1991 report on the Crimes Bill, the Crimes Consultative Committee recommended however that the reference to “dishonesty” be deleted and, in substitution, proposed the inclusion in the new section of an intention to “obtain by deception”.²⁴

²³ In contrast to s 256, which is directed to the making of the false document.

²⁴ At p 77.

[60] In the event, the Crimes Bill did not proceed. Replacement of s 264 was however effected by clause 305ZH of the Crimes Amendment Bill (No 6) 1999. Clause 305ZH(1), now s 256(1), required neither the use of a false document “dishonestly” nor an element of deception. The Explanatory Note to the Bill gave no reason for this.²⁵ Nor does the *Hansard* record of the Parliamentary debates. Clause 305ZH was, without modification, enacted as s 256 by the Crimes Amendment Act 2003.

[61] The convoluted history of s 256(1) thus provides no assistance to the argument for the appellant. The plain words of the section accurately reflect the purpose of Parliament; it is not necessary to establish that a purchaser was deceived into thinking that a document was genuine. The exclusion of any requirement of dishonesty of use or of deception, after both had previously been in contemplation, is explicable only on the basis that an offence is committed under s 256(1) without there being dishonesty of use or deception. In effect, the appellant is asking the Court to read back into s 256(1) the requirement that the document be used as genuine, after that requirement had been removed by Parliament.

Forgery and uttering

[62] It is helpful, when considering the terms of ss 256 and 257, to bear in mind the historical difference between forgery and uttering. The two sections substantially maintain that distinction; albeit there are significant changes to the way the law of forgery, in particular, is now defined. Put simply, the crime of forgery was committed historically by making a false document with intent that it be acted on as genuine. The crime of uttering was committed by using or causing another to act on as genuine a document known to be false. Hence it was possible to be a forger without being an utterer and vice versa.

[63] In the present case, the appellant clearly made false documents with intent that they be acted on as genuine. She physically created the false documents and

²⁵ At p viii.

obviously intended that their several purchasers should proffer them and cause them to be acted on as genuine. To be guilty of forgery at common law and under the previous statutory law,²⁶ she did not have to intend to use the document herself as a genuine document. It was enough that her making was accompanied by an intent that the false document be used by someone as genuine. The ambit of the common law and the previous sections is more fully dealt with in Sir Francis Adams' commentary to the second edition of his *Adams on Criminal Law* published in 1971.

[64] Section 256 of the Act, as it now stands, is drafted rather differently. Both subs (1) and (2) require the making of a false document. They differ, however, as regards the necessary accompanying intent. In subs (1), which attracts a maximum penalty of ten years' imprisonment, the intent of the maker must be to use the false document to obtain some valuable pecuniary or other advantage. In subs (2), with its three year maximum, the intent of the maker must be that the document be used or acted upon as genuine. There are two material differences between these intents. The first is that subs (1) requires that the maker of the false document intend to use it herself to obtain for herself, or for another person,²⁷ any of the listed advantages. Subsection (2), however, envisages that the maker's intent be that anyone use or act upon the document as genuine, this being the scope of the previous forgery section. The second difference is that for the higher penalty the intended use must be for financial or other gain. The lower penalty applies when there is no such element involved but the maker still intends that the document be used by someone to mislead. Subsection (1) thus involves making a false document with intent to obtain financial or other specified advantage. Subsection (2) encompasses the lesser intent that someone use the false document in circumstances where the maker of the false document does not necessarily intend anyone to get any financial or other specified advantage from the forgery.

²⁶ What was s 264.

²⁷ See the definition of obtain in s 217: "obtain, in relation to any person, means obtain or reclaim for himself or herself or for any other person". The problems apparent in that part of the definition which reads "or for any other person" are discussed in Roberston (ed), *Adams on Criminal Law* (looseleaf, Crimes Act, 1992), para [CA 217.08] (last updated 28 October 2008). The word "for" must in this context at least denote that the maker of the false document is acting on behalf of the other person in obtaining the advantage for that person. But the extended connotation of the concept of 'obtain' does not affect the issues with which these reasons are concerned.

[65] Ms Li would undoubtedly have committed forgery and been liable to ten years' imprisonment under the previous law. She would have made the false documents with intent that they be acted on as genuine. The purchasers, when making their purchases, would not have been acting on the document as genuine but Ms Li's intent obviously was that the purchaser would utter the document and cause the person to whom the document was uttered to act upon it as genuine. That was a qualifying intent under the old law. It would not have been a defence under the old law that the purchasers were not deceived. It would be surprising if the new law meant to downgrade this type of conduct to the lesser offence comprised in subs (2). We can see no proper basis for coming to that conclusion. Ms Li made false documents. Her intent when doing so was to sell them to the several purchasers. Selling must amount to a species of using for present purposes, and that use was obviously designed to obtain valuable consideration.

Result

[66] The history of the law in this area and the plain words of s 256(1) both support Ms Li's convictions under that subsection. So too does the fact that, whereas subs (2) of s 256 and paras (b) and (c) of s 257(1) refer to use or acting on the false document "as genuine", subs (1) of s 256 and para (a) of s 257(1) do not. This must have been a deliberate distinction drawn by Parliament and gives further support to the view that for the purposes of s 256(1) Ms Li did not have to use the false documents as genuine; that is, she did not have to use them to deceive. She simply had to use them, as she undoubtedly did.

[67] There is nothing surprising or illogical about this conclusion. A forger such as the appellant who falsifies numerous documents for financial gain should not be subject to a much lesser penalty²⁸ than the user of a single forged document,²⁹ which on the appellant's argument would be the position.

²⁸ Up to three years' imprisonment under s 256(2).

²⁹ Up to ten years' imprisonment under s 257(1).

[68] The appellant was therefore correctly convicted of offending under s 256(1). Her appeal is dismissed.

[69] The Chief Justice has raised the issue of the trial Judge's directions to the jury. Technically they may have been incomplete. But as Ms Li's appeal was directed to achieving the substitution of verdicts of guilty under s 256(2), it is clear she acknowledges that all the elements of that subsection were satisfied. That being so, the failure of the Judge to direct that for the purposes of subs (1) the jury had to be satisfied that Ms Li intended the false documents to be used deceptively by their purchasers is immaterial. To be guilty under subs (2), Ms Li's making of the false documents had to be accompanied by an intent that they be used as genuine. She acknowledges, by her acceptance of guilt under subs (2), that she intended that the documents be used by the purchasers as genuine, that is deceptively. Understandably, therefore, Ms Li did not rely on any failure by the trial Judge to direct in these terms for the purposes of subs (1). If she had done so, it would have been a clear case for invoking the proviso to s 385(1) of the Crimes Act.

Comment

[70] It is doubtful whether s 256 is an improvement on the previous s 264, which covered globally the circumstances now covered distinctly in subs (1) and (2) of s 256. Because of the way s 256(1) is expressed, the maker of a false document who does not intend to use it for personal gain can only be convicted under subs (2) even though their intention may well be that someone else use the document for personal gain. The possibility of charging such a person as a party to use under s 257 and invoking the ten year penalty in that way is oblique and inherently problematical. The drafters of s 256, in subdividing the offence of forgery as they have, may have created more problems than they have solved. The different degrees of culpability which subs (1) and (2) of s 256 attempt to capture were more than adequately captured by a fairly-exercised sentencing discretion within the ten year maximum provided by the old unsubdivided s 264. This matter would benefit from legislative attention.

[71] We record our appreciation of the assistance we received from Mr Lawry, counsel for the appellant. Having been briefed on the afternoon before the hearing, when counsel previously acting (Mr Hart) became unavailable, Mr Lawry had very little time in which to prepare. Counsel nevertheless said everything that could possibly be said in support of the appeal, and said it very well.

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