

IN THE MATTER of a Criminal Appeal

BETWEEN PATRICIA LENINE MABEL
WALSH

Appellant

AND THE QUEEN

Respondent

Hearing 8 November 2006

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel J Bioletti for Appellant
MD Downs and M A Treleaven for Respondent

CRIMINAL APPEAL

10.04am

Bioletti May it please Your Honours, Bioletti for the appellant.

Elias CJ Thank you Mr Bioletti.

Downs May it please the Court, Downs and Treleaven from the Serious Fraud Office for the respondent.

Elias CJ Thank you Mr Treleaven, Mr Downs. Yes Mr Bioletti.

- Bioletti Just in terms of trying to distil my argument down to the most basic way in which I can put it, I think what I'm really saying is that the issue of the document being made is the issue of it physically being made and when I try and get to the core of my submission it's really that issue and relating that to the issue of a false document, although the words of the statute don't say physically made, I think it as a matter of common-sense would be that the making relates the physical process and that's really where I've
- Tipping J Are you talking about the definition of forgery or the definition of false documents at the moment?
- Bioletti I'm starting off with the definition of document, any paper, parchment etc coming through to false document.
- Tipping J False document?
- Bioletti Yes. So that what I'm submitting here is that the machine in New Zealand which was activated printed out a physical entity which was the document that was relied on as being the forgery and obviously when that occurred that was a marking of paper with material as it came out of the fax machine. Now the issue then being whether that document which was physically made by the appellant purported to be made by somebody else and my submission is that by virtue of the process of faxing the document that there can only be one person who has purported to make that document which printed and that is the appellant herself, because she sent it. And from there in relation to the issue of material part again I'm saying that the material part issue is a physical part of that document being the combination of the print onto the paper. So what I'm submitting is that there's no difference really between the whole of the document or the material part of the document, it still relates to the physical process of someone placing matter on paper which is what she did. So in terms of the sort of digital issues I'm submitting that it's not a digital situation, it's purely a pen and ink situation because of the fact that the paper itself is marked essentially with ink.
- Anderson J It depends on what type of fax machine it is. Some are electrostatic bonding of powder.
- Bioletti Yes, well if it's plain paper, I think it's the same, it will be the same process
- Anderson J What you mean is that the physical
- Bioletti It's matter going on to something.
- Anderson J You're concerned with the physical component rather than the data as information?

Bioletti Yes, the data issue

Blanchard J It's not an electronic document, that's what you're trying to say isn't it.

Elias CJ Yes.

Bioletti It's not an electronic document in the computer sense. It may be a type of electronic document in the facsimile sense but I don't actually know the technological way in which data that's transmitted down a telephone line, which effectively is what a facsimile line is, from one machine to another, I don't know how to

Anderson J It probably doesn't matter because in terms of *Misic* there would be a document comprised of the whole of the electronic impulses but that's not visible and that's not what the case is about. It's about the document that came out of the machine.

Bioletti That's right.

Tipping J Is your argument essentially this, that this document admittedly made by the appellant didn't purport to be made by anyone other than the appellant?

Bioletti In a nutshell, yes, and I find it very difficult to dress up that particular argument other than what it is.

Tipping J Well you can't. It's either right or wrong isn't it?

Bioletti That's right, that's right.

Tipping J But that's the essence of your argument. It didn't purport to be made by anyone other than the person by whom it was made.

Bioletti That's right and can I just perhaps illustrate that point. If someone used a facsimile machine and reprogrammed it so that it showed someone else's fax number on it and then sent a fax through that looked like it was coming from another source then that would be a forgery because that is purporting to have been produced by somebody else who didn't actually make it

Anderson J Some of the documents here, I'm sorry I thought you'd finished. Some of the documents here are analogise to that situation because they purport to be copies authorised to have been sent by the original maker. The *McGrath*-type situation.

Bioletti The *McGrath* situation involved a document being photocopied that purported to have actually been physically made by somebody else and my submission is that here we're still left with the issue, the fundamental underlying issue of the making of it, so I submit that this situation is different from that *McGrath* situation because the document

there actually purported to be physically made by somebody else whereas here we still have to come back to that basic underlying issue that everything that went through and came out of the fax machine was made by the appellant and purported to be made by her, by virtue of her sending it.

Elias CJ I have wondered whether this is not over-complicating things to talk about what purported and who purported, and isn't it really, or I might be over simplifying, isn't it really that the facsimile is a conveyance not a creation and that it's really no different from post?

Bioletti It's different from post

Elias CJ It's instantaneous almost. The physical document comes out

Bioletti The difference that I see with the post situation is that if you put a, which is that *McGrath* situation, if you put in the post a document itself which purports to be made by somebody, physically made by somebody but wasn't, that's different from here where the making process has been carried out by the one person.

Tipping J But the document that comes out at the end is a different document from that that went in at the beginning. Is that the

Bioletti Yes, there's only one document that's relevant and that's the one that comes out of the fax machine.

Elias CJ But it's not created by printing. I mean I had thought your argument, your oral argument just then was to emphasise the making

McGrath J Mr Bioletti if you look at the document that's at page 7 of the respondent's submissions, the document that was apparently signed by Mr Salisbury from TSS Law to Mr G, I'd like you to help me with why that document's not in the same category as in the *McGrath* case, because to me it appears to be a document that purports to come from Mr Salisbury, he purports to be the maker and obviously he wasn't?

Bioletti Well with respect it doesn't purport to come from him.

McGrath J Because?

Bioletti It purports to be a copy of some other document that came from him.

Blanchard J Doesn't it when it pops out of the machine purport to have been, doesn't the copy purport to have been made by a person who did not authorise its making?

Bioletti Well all I can say in relation to that issue is that in terms of the dissenting judgment in the Court of Appeal, if that issue itself fitted then there would have been absolutely no need to go into the issue of

the making of the document which effectively was what that dissenting judgment was about.

Blanchard J Well what's being put to you is that maybe we have here two classes of document. Those which simply look to the recipient as though they have originated, no, a class where, it's quite hard to express it, the recipient would think on receiving them that the person who sent it, Mrs Walsh, had been authorised to send them on, in other words that Mrs Walsh was acting as an agent and those where they're not addressed to the recipient so there's no such purported authorisation.

Bioletti Well the difficulty I have with that is that there was a document sent by the relevant bank or legal person but that document was altered so you're not talking about authorisation to send on what was sent

Blanchard J No it's the appearance of an authorisation, that's the point. When Mr G received this letter surely he must have said to himself that the person who transmitted it to him, transmitted it to New Zealand was doing so as agent of David Salisbury. Why else would it have gone by that means to him? If there was no agency Salisbury would have just sent it directly, that's what he would have thought, and it's the same it seems to me as McGrath.

Anderson J It's focusing on para.(b) of the definition of false document which is conveniently set out at Roman 16 on the case on appeal, volume 1.

Blanchard J The received copy purported to be made on behalf of Salisbury who didn't in fact authorise its making.

Anderson J In fact there only has to be a material part of it which purports to be so authorised.

Bioletti You say it purported to be made on behalf of him?

Blanchard J Yes, he wrote a letter, on the face of it he has written a letter to Mr G. Somebody transmitted that letter to him, that's how he sees it.

Bioletti Yes.

Blanchard J He would automatically assume that Mrs Walsh had been authorised by Salisbury to send the letter on. Why else would she be sending it?

Bioletti The difficulty that I have, I understand the proposition that you are putting to me but the difficulty I have is that in terms of the way the process worked there was an original document from the bank, the relevant person, that came through, that was a distinct document. Now we then come to the concocted version incorporating parts of that first document plus what's added in

Elias CJ Well why do you need to go back to that stage, why don't you just start with the document that comes through?

Blanchard J It's what it purports to be which is the question.

Elias CJ Yes.

Blanchard J And it purports to be a document from Mr Salisbury which implication Mrs Walsh was authorised to send on, and we know that wasn't the case.

Tipping J It was a copy made on behalf of Mr Salisbury.

Blanchard J Yes.

Tipping J Who didn't authorise the making of that copy.

Bioletti But it was not a copy of his document.

Anderson J It doesn't matter, it purports to be.

Elias CJ Well it purports to be made by him of course. I mean that might be

Blanchard J It's *McGrath* without a final sentence saying 'I am authorising Mrs Walsh to send this on to you'. But that's the implication. Millions of documents get transmitted every week on that kind of basis where there's an agent involved.

Bioletti The *McGrath* photocopy itself was itself purported to be physically made by another person.

Blanchard J A document of which the whole or any material part purports to be made on behalf of any person who did not authorise its making. How can it be said that this document did not purport to be made, in other words transmitted, on behalf of Mr Salisbury who didn't authorise its making?

Bioletti Because it's an entirely separate document.

Blanchard J That doesn't matter, you focus as your argument demands that we do, on what comes out of the machine.

Bioletti Yes.

Blanchard J It doesn't matter that that's a different document, it's what that document is saying about itself and it's telling a lie about itself because by implication it is telling the recipient that Mr Salisbury has authorised it to be sent on, in other words, has authorised it to be made by being transmitted through a facsimile process.

- Bioletti I don't think I can get around that
- Tipping J I think you've got bother here, the more difficult the issue is in relation to those documents which don't fall into this category which I have to say I think there is force in your proposition that they at least at first blush, that they have been made by the same person as that who purports to have made them, therefore you're ahead on points with me at the moment on relation to the other category but I think this category is almost impossible to get out of.
- Bioletti Right. That's the impression that I was getting.
- Tipping J Well I mean I've been struggling with this frankly, I've found this really rather difficult but I can't see how linguistically you can get out of para.(b) of the definition of false document for the *G*-type letters.
- Blanchard J Your main proposition, the one that you started off with and which would apply to the rest of the facsimile transmissions seems to have a lot of support for it. In some New Zealand case law before 1972 and in the report of the Criminal Law Reform Committee at that time and then there's an English Law Commission report saying much the same thing and the English, quite independently of us, seemed to have amended their law in the same way, but we both introduced the additional sections which in our case are 266(a) and 266(b).
- Anderson J In the difficulty that you face, and I'll be interested in your submissions on it, is why shouldn't we substitute 266(a)?
- Bioletti Because it has an element of intent to defraud in it.
- Anderson J What was the intent behind the production of these documents?
- Bioletti Well my understanding of the substitution power is that it can only operate if either the count with an alternative on the indictment at trial or the offence is included within the offence which was charged, i.e., murder, manslaughter-type situation.
- Tipping J Necessarily included I think is the classic phrase isn't it? In other words if the jury finds you guilty of 'X', which for some reason or another is not sound, they must necessarily on the same facts, have found you guilty of 'Y'.
- Bioletti Yes but my understanding is that from a procedural point of view that the count that you're looking to substitute must have effectively been on the indictment either as an alternative or as an offence, say assault with intent to injure.
- Tipping J You mean semantically included rather than substantively included, is that what you're saying?

Bioletti I mean that the elements are a reduced version of what was alleged. So with that issue of substitution there's an element there that falls outside the

Tipping J You mean intent to defraud is not necessarily included in the elements of forgery?

Bioletti That's right.

Anderson J Forgery is making a false document, knowing it to be false with the intent that it shall in anyway, etc etc. Acted on as genuine, well that's a fraudulent intent isn't it?

Bioletti It's a deceptive intent. It's intent to deceive, but I don't necessarily know that it's an intent to defraud. Certainly an intent to defraud in the way in which intent to defraud would be interpreted within 266(a).

Blanchard J So you have to be intending to cause someone to part with property, including money, or in some other way to lose something.

Bioletti Yes, or there's that public official where it relates to a public official there's that other branch of that intent to defraud

Tipping J Acting on something as genuine is not necessarily the same as acting in such a way that you've been defrauded.

Bioletti That's right, you don't have to be induced to do anything in forgery.

Tipping J Well you have to act on it with intent that the person shall be used or acted upon as genuine.

Anderson J Which is not necessarily a fraudulent

Blanchard J So you could be guilty of forgery if you doctored a letter to make it appear that somebody's wife was committing adultery. You're deceiving them about that.

Bioletti That's right, there's that decision *Wellum*

Blanchard J *Wellum*?

Bioletti Yes.

Blanchard J *Wellum* and the *DPB*.

Bioletti Yes and that goes into the sort of

Blanchard J [1961] AC 103.

Bioletti Yes, that goes into the differences between those types of intents but that's a wee way back.

Tipping J I think that we're going to have to look at this pretty carefully Mr Bioletti aren't we because there's that discussion too in, is it the case known as *Gosh*, where there's a careful discussion between intent to defraud and dishonesty and intent to defraud isn't necessarily, well intent to defraud must encompass dishonesty but I'm not sure that you can as it were translate necessarily across those sort of concepts that apply in that situation when you're extracting property from someone else. It's getting something of value out of someone is defrauding isn't it, whereas here you're using the document not necessarily for that purpose.

Bioletti You're just deceiving somebody to think something which may have a certain consequence.

Tipping J Normally it will be accompanied by an intent to defraud but does it necessarily have to be, that's the crunch isn't it?

Anderson J What about uttering.

Elias CJ Is this (**inaudible**)

Tipping J This is a sort of oral exam on the ..

Bioletti Uttering, which document?

Anderson J Uttering, the one that is created.

Elias CJ Admittedly falsely.

Bioletti Ah the one overseas.

Anderson J The one here.

Blanchard J Not a false document.

Tipping J You can't utter something unless it's a forgery and we've already established that it's not a forgery for the purposes of this argument would be your answer I dare say Mr Bioletti?

Bioletti It would have been if I had had time to think about it, though I guess I can only make one final submission and that is that in terms of clarity when you start looking into these types of issues, although I've been sort of accused of being anachronistic in my submission, the issue where the documents don't purport to be made by someone else is a simple issue and in my submission it's a clear one.

Tipping J Well let's assume we're with you on that and you can knock-out the possibility of a substitution of bartering and you can knock-out the possibility of 266(a), I suppose you'd say you're ahead unless the Crown can think of some other method of progressing.

Bioletti Yes, I would say that I've got difficulty with the authorisation issue

Blanchard J How many of the charges were of that kind?

Bioletti I would have to go back and sieve out which are in which category.

Tipping J It's only if they are addressed directly to the victim isn't it? Take the next one in the Crown's submissions on page 8, that's not addressed directly to the victim, it's addressed to Mrs Walsh, and that as I understand the distinction my brother Blanchard has astutely put to your attention, it's that distinction isn't it, whether it's addressed directly to the victim or whether it's addressed to Mrs Walsh? Am I right in that? Yes, I think I am right.

Bioletti Yes, I'd need to go through each individual document to see which category they fall into. I think that's probably as far as I can take in terms of my submissions.

Elias CJ Thank you Mr Bioletti. Yes Mr Treleaven.

Downs It's Downs.

Elias CJ I'm sorry Mr Downs.

Tipping J You gave Mr Treleaven a fright.

Elias CJ Yes, I did.

Downs Yes may it please the Court, in times gone by it would have been easy to distinguish between the making of a document and the copying of a document because those processes were so very distinct, but the submission is that in our modern times it is difficult at least at the boundaries to determine we're making ends and using commences. Hence the Crown's primary submission is that the transmission of a facsimile document when that causes a document to be received at the receiving end is the final act, or can be at least, the final act in the making process and with that introduction it's the respectful submission that there are really two distinct issues in this part of the argument. The first is what constitutes the making of a document and lying behind that particular question, although it hasn't assumed explicit significance, is the question of jurisdiction of course, vis a vis the facsimiles sent from Holland, but the second and distinct question is what constitutes a false document, and in the Crown's respectful submission those two things are distinct and indeed of significance here.

- Tipping J I don't think the appellant denies making, but the question is, is your question 'what did the appellant make'? She says she made the document that came out of the New Zealand end.
- Downs Yes.
- Tipping J Do you say that she relevantly made the document, well she obviously did, but that was overseas?
- Downs All I'm saying is that the process of making is obviously that of process and it results at some point in a document that is false, but where that finishes and where that becomes the use of a document is not necessarily clear. So for example
- Elias CJ Suppose she'd physically transported this to New Zealand and photocopied it here, I don't really see the, it's got to be the copy you focus on not the antecedent collation.
- Downs Yes it must in the Crown's submission be the document that was created with the intent that it, because that's the phrase obviously employed by the section, that is created with the requisite intent, so it in this particular circumstance, must be it's suggested the document emanating from the receiving facsimile machine.
- Tipping J Well that's not in dispute, nor is it in dispute that she made it. The only issue surely is whether it's a false document.
- Downs Indeed, indeed and perhaps if I can turn to that. The primary submission here is that in relation to all of the counts that the maker of the document was the appellant and that the purported maker was the person referred to in the relevant document. So to use the document at page 7 of the submissions, it's Mr Salisbury of TSS
- Tipping J The purported maker was the purported author?
- Downs Yes, yes
- Blanchard J Is that the submission?
- Downs Yes that's the submission that the purported maker is the purported author. Now as I understand it the appellant says, 'in fact I was the purported maker because I was the person who was transmitting the document', but linguistically that is strained it's suggested. We would normally say of a person sending or transmitting a facsimile that they were the sender or the transmitter. We wouldn't normally refer to that person as being the purported maker of a document and in a modern age where a party may never see an original document (with inverted commas) it is assumed by everyone concerned that the document, be it

facsimile or electronic or whatever, has in fact been made by the person who is named in the document as the author.

Blanchard J Would you say the same about a photocopy?

Downs Yes, yes, in a technological age the submission is, or necessarily is, that there isn't a distinction.

Blanchard J Well that's not the position that the Courts tentatively came to when photocopying first arrived on the scene.

Downs Yes, I'm bound to acknowledge as the Crown has in its submissions that a number of cases are against us but one wonders with respect whether that was simply a function of dealing with what was then a reasonably novel process.

Blanchard J Well it wasn't a novel process for example by 1981 when the British amended their law in the same way as we did to recognise the distinction and create essentially a different crime to cover the situation.

Downs That's true, that's true. I suppose though in one sense that still begs the important question is the language of the provision sufficiently broad so as to capture the proposition that a photocopy or a facsimile duplicate can nonetheless be a forgery itself by being a false document?

Elias CJ Just a moment ago you yourself used the language of sending. I'm still bogged down in the question why this simply isn't a conveyance of a document.

Downs That seems to have been the view of Her Honour Justice Glazebrook in the Court of Appeal that there is in fact one document and that there are simply different media associated with that document.

Blanchard J Would that distinguish it from a photocopying process, where I stand by the photocopier and put one in and I get that back and I also get another one out?

Downs Well it's the same in a facsimile setting though too, because of course there's a different document at the sender's end and time and space from that at the receiving end.

Blanchard J But isn't it a little hard to say that in the photocopying case, where it's perhaps more obvious, that it's the same document, because you've got one in each hand? They're clearly physically different.

Downs Although albeit separated by some distance in this case the same is true of the facsimile situation.

Blanchard J By the hands.

Downs Yes.

Elias CJ But a photocopy won't be itself a false document unless the document being copied is, well it won't be a false document right? This is very conceptually difficult.

Downs Yes, which brings us back to I suppose the central issue in this case, what is and what is not a false document and the submission is that part of the problem here is that with the ease in which documents can be manufactured, created either electronically or copied or however one wants to put it and because of the fact that reliance is routinely placed upon those documents and that little distinction if any is drawn between a copy (with inverted commas) and the document that was the original (again with inverted commas). The submission is that if the original was false there is no reason in principle on the language of this in a particular section why the copy cannot be false, because the purported maker remains the same.

Tipping J Am I right in thinking that what you're saying is that if my associate is asked to prepare a document, and forget all questions of forgery for the moment, but it is a question of copies and originals, and I say I'd like three copies of that please, they'll each come to me in a form that I wouldn't know which was the original. It's not really germane any more to talk about originals.

Downs Indeed, indeed, and Courts routinely receive documents which are in fact copies but are treated as being equivalent to an original document.

Tipping J But which of my three would you say was an original and which would you say was a copy?

Downs Indeed, it can in some senses be an impossible question to answer and one must therefore look to the material part of a document which includes in my submission the contents to determine the purported maker and the purported maker of the document to use the same example at page 7 of the respondent's submissions, is Mr Salisbury of TSS Law. We wouldn't ordinarily linguistically say that the maker of that document is the person who has either photocopied it or transmitted it.

Tipping J So you've got a different maker within the definition of forgery as in the definition of false document?

Downs The distinction is between the maker and the purported maker.

Tipping J Yes.

- Downs So yes Your Honour's right with respect. So that in the case of this particular document at page 7, the maker is the appellant but the purported maker is Mr Salisbury of the relevant law firm.
- Tipping J I'm attracted to that argument. I think other members of the Bench may not be but how do you get by if you instead of looking at the two disjunctively and say well forgery as making a false document is one concept and then quite separately what is a false document, another concept, what if you substitute within the forgery section the definition of false document, para.(a), 'forgery is making a document of which the whole or any material purports to be made by any person who did not make it or authorise its making'. It makes it more difficult to read it your way if you do that in corporation exercise.
- Downs Except that again to use this example, the entirety of the document purports, well at least the contents purport to be made by Mr Salisbury.
- Tipping J I think the concept of material part may be quite significant in this debate mightn't it?
- Downs Yes, that was something that His Honour Justice Heron touched upon in the *Harbott and Odell* case. The Court will recall that in that particular case, it's at tab 1 of the respondent's authorities. The learned Judge
- Tipping J It's a bit difficult to sever the concept of material part from the contents of the document.
- Downs Yes.
- Tipping J In fact it's meaningless almost.
- Downs Indeed, indeed. Justice Heron said 'I think that what is contemplated to make a photostat false', this is at page 4.
- Elias CJ What page?
- Downs Page 4 of *Harbott and Odell*, at tab 1. 'I think that what is contemplated to make a photostat false', at the second half of the page, 'is not simply a truly copied false document, but material so arranged for copying that in its reproduced state it purports to be something different from what it really is. For example a document which purports to be one coherent, cohesive document, when it is really a compilation of a number of documents or objects capable of being copied and to that extent tells a lie about itself'. And that seems apposite with respect because in this particular case all of these documents were of course composite in the sense that they were made up of a number of other parts and manufactured so that in the case of the Salisbury letter at page 7 it is purporting to be a single and

coherent, cohesive document, to use Justice Heron's phrase, when in fact it is not.

Tipping J The falsity lies in the subscription by David Salisbury to something he never subscribed to.

Downs Yes.

Tipping J That would be a common law approach but of course we've got the definitions to wrestle with.

Downs Well the contents of a document in the case of a letter is a material part of a document the Crown submits.

Elias CJ What if any material part if played by the electronically generated origin header?

Tipping J What, the Jupiter Hotel?

Elias CJ Yes. Is that a representation that this is being communicated from that source on behalf of David Salisbury?

Downs I'm not sure that the header, the electronic header, is necessarily germane there, rather the rest of the document and the fact that it is being sent or conveyed in some way implies that it has been authorised by Mr Salisbury, where in fact it wasn't.

Tipping J You will of course say it's under para.(b) but I think you're saying that it's also under para.(a) or at least the other ones are.

Downs Yes, that's right, that's right.

Tipping J I just have difficulty, where I really think this case turns, at least speaking for myself, is in the conjunction if you like of material part, the importance of that and the connotations of that, coupled by whether you can have a different maker for false document para.(a) purposes as against the maker for the definition of forgery purposes, and if you read the definition with the forgery section 1 of the section I think it becomes more difficult to have a different concept of maker, in other words the concept of maker shifting within a single composite idea.

Downs The submission is that in each case the maker remains the appellant but the purported maker is the person named in the document as being the document's author, so that in every case there will be a necessary distinction between those two ideas.

Anderson J If the Crown had framed the indictment in terms of s.266(a) you wouldn't be in the present difficulty would you because the conduct in the particular case would clearly have satisfied the ingredients of that offence?

- Downs That is not disputed.
- Anderson J So we're struggling with difficult concepts for a one-off case, especially now that the section has been repealed.
- Downs Well it's not free from doubt that the section as amended would capture the conduct in question, because as I understand the appellant's argument, whenever there is some reproduction of a document, be it electronic, by means of photocopier or whatever, that the person who is said to be the maker on the appellant's argument is that person involved in the manual process, never the original author, and if that is correct then that would seem to continue to pose a difficulty in terms of the amended section.
- Anderson J The issue perhaps that it raises is whether in view of modern technology one should regard material part as incorporating the data which is physically represented rather than the physical representation itself.
- Downs Yes, and the submission as it should, it should capture that.
- Anderson J Then when documents are created simultaneously electronically for example or created in one electronic set of components, extra-territorially and transmitted electronically and reproduced identically.
- Downs That's right.
- Anderson J It's not like replicating documents in the old days by writing it out and looking the same on another bit of parchment.
- Downs That's right, and in circumstances where the parties may never see or expect to see what was understood in times passed to be an original.
- Anderson J Just moving on and it may not be expedient for you to deal with this at this stage of your argument but it's something that I think needs to be flagged for Mr Bioletti's sake. Is there anything to prevent this Court amending the indictment to alleged counts under 266(a) and quashing the convictions and ordering a new trial on the amended indictment?
- Downs Well the Crown saw as an alternative argument this being an appropriate case for a substituted conviction in conformity with the proof and I may have, and I should accept responsibility for this, wrong-footed as it were, by referring to s.386, subsection 2 of the Crimes Act. My reliance upon that may have been misplaced, at least given the High Court decision of the *Queen and Spies* that's referred to in the Crown's casebook. The clearer path it's respectfully submitted in light of the *Queen and Thompson*, a case which of course came to this Court at least by way of leave application, would be for this Court to exercise its power pursuant to s.335 of the Crimes Act. Now in

Thompson the Court was of the view that it didn't matter that there hadn't been an application of the trial to amend the indictment and it's submitted that this power is available to the Court because of course in terms of s.25 of the Supreme Court Act, the Court has all the powers that the Court of Appeal has and the Court of Appeal is expressly provided with the power under s.335 to amend a conviction in conformity with the proof. That raises it's acknowledged the question of intent on the part of the appellant but it's not without some significance in this case that the false pretences counts encompassed the time periods within which all of the forgeries, or alleged forgeries were committed and in circumstances where there was significant overlap, because the Crown case was, at least in part, that these documents were deployed to obtain monies.

Anderson J But it didn't have to prove that.

Downs But a jury has already found that the handing over of monies on the part of the victims, some 2 million dollars or thereabouts was done with on the part of the appellant an intention to defraud and the forgeries were deployed at least in part with the aim of obtaining monies. Now it's true that they were used in other ways as well to stave off creditors, to ensure the persons concerned that this process was legitimate and so on. But looked at in its entirety the submission is that that inference could safely be drawn.

Tipping J I understand that but can there be, and again this may be more for Mr Bioletti, but subsection 6 of 335 referring to the position in the Court of Appeal which we have the same powers as you say, it says 'where an amendment of indictment or count is made under this section by the Court of Appeal, that is on appeal. The Appeal Court may in its discretion either affirm the sentence or direct a new trial and it may be that the appropriate course would be as my brother Anderson said, to direct a new trial if we felt that there was any possible prejudice if you like in the substitution. I'm not saying that that would necessarily be my view but I mean that course would undoubtedly on the face of it be open.

Downs Indeed. The submission is that the forgeries in this case augmented the criminality that underlay the false pretences charges, that underlay the obtaining of monies with an intention to defraud, so although of course they were substantive counts, they weren't an entirely separate feature of the Crown's case. They were the modus operandi rather than they were a distinct feature.

Blanchard J Do we have the indictment anywhere?

Downs It's in volume 1 in the case on appeal I believe.

Anderson J Was she sentenced to the same amount on each of the counts?

Downs The term of seven years in prison was imposed on the first three counts from memory which was the Broomfields Road series of transactions

Anderson J That's three counts in the indictment? They're not under appeal.

Downs Yes, they're not under appeal and which didn't involve a charge of forgery. It was counts four through 51 that alleged the Nigerian fraud perpetration of which the forgeries were an adjunct.

Anderson J And was the concurrent sentence the same amount on each of the forgery counts.

Downs Four years imprisonment from memory in relation to the Nigerian frauds.

Anderson J So if for example some of the counts come anyway within the scope of *McGrath* it's not going to make any difference to her sentence.

Downs Well indeed the submission is that if all of the forgery convictions were quashed it ought not to make a difference to sentence.

Tipping J The head sentences were passed on counts where there's no appeal.

Downs Yes.

Tipping J We've had that situation, well I'm not saying it necessarily rises here, but we've had that situation as I vaguely recall in another case in the Court of Appeal. Does anyone

Blanchard J Yes, I think there is an ability to adjust the sentence notwithstanding that there hasn't been an appeal on the other matter. I can't off the top of my head cite an authority but I've got a clear recollection

Tipping J I have a clear recollection too that we had to do it, or we said we could do it.

Downs Well it would seem unworkable if the Court didn't have that power with respect.

Blanchard J Off the top of your head are you able to give us any indication of how many of these counts are what we've been loosely describing today as a *McGrath* situation?

Downs Only a handful, only a handful. The majority involve facsimiles that weren't addressed to the victim but to a third party.

Anderson J I'd find it useful if the Crown and the defence could provide us with the numbers of the counts which are *McGrath* counts.

Downs Indeed, of course.

Tipping J Can I just seek some help from you Mr Downs on the point that we're not really construing the definition of false document on a clean slate? We have, and I have some sympathy for your submission that this distinction you draw between the maker and the purported maker and in the way you've put all that, but it does seem that for whatever reason the legislature has taken the view at least in earlier times that that view was not sound to do with this business of copies, therefore they've brought in this new section and it seems, and I haven't looked into as closely as other members of the Bench have, but it seems to have been much the same process in England. Now, sorry if you wanted to interpose something.

Downs No, no, please go ahead.

Tipping J What's troubling me is that if we now come up with your, or adopt your suggestion as to the correct approach, thus validating all the forgery convictions, it's in effect saying isn't it that you can charge alternatively under two different sections for the same crime and it's in a sense making the new section somewhat redundant, although I'm not sufficiently versed on the intricacies of it to see whether it might still have some work to do, but while I might have some sympathy for your argument if you like if this was de nova, I have to say that the weight of that history just troubles me a bit.

Downs The submission is that although that history is seemingly present, very few of the cases in a sense actually upon this issue. If we go back for example in relation to *Tait*, it was assumed in *Tait* that a copy could not itself be a forgery, could not itself be a false document on the basis of *Sorich* but the point in *Tait* was that it didn't matter, so that was the expression of obiter dictum and from that there seems to have been something of a with respect snowball effect, but the only case that is directly on point in a sense is *Sorich*

Tipping J That's that quite early decision of Justice Fair?

Downs Yes that's the 45 case in the Gazette Law Reports, and the difficulty with *Sorich* as appears from the decision in the Court of Appeal, it's not clear from at least the reported version of the decision that the pamphlet in question purported to be an identical replication of the letter sent by the relevant official from, I think from memory, the Agriculture Department as it was then, because this was a pamphlet that was being used as a sales pitch and it was essentially purporting to attribute remarks from an Officer from the Department of Agriculture that the product in question was a good one. But it's not clear from the report that the document in issue in fact was an identical replication of the Officer's report and so it may well have been a case where it was a document that merely recorded in writing a lie rather than the document itself being false, and that with respect seems a rather

tenuous basis on which to assume that the words of the provision don't encompass the Acts in question.

Tipping J And you're making this distinction between a written lie and a false document.

Downs Yes.

Blanchard J But it's not just the New Zealand antecedence, the English, guided by Professor Glandville Williams, among others, seem to have come to the same conclusion about their equivalent defence of forgery and took steps to enact sections which have similar effect to our 266(a) and 266(b).

Downs Indeed, and the Law Commission expressly said because of the problem posed by the *Harris* situation that it would be better to put the matter beyond doubt.

Tipping J What is the *Harris* situation?

Downs In *Harris* a document

Tipping J It's an English case is it?

Downs Yes an English case. In *Harris* a document was copied and the defendant instructed his solicitors to send the copy to the third party, the victim, and the English Court of Appeal, or Criminal Court of Appeal, I forget which, said in that particular case that the use of the copy was uttering a forgery in circumstances where it said the uttering in fact concerned the original. In other words the making of a copy and the use of that was deemed to be the use of the original and hence false document.

Blanchard J Was that because he fooled the solicitors as well?

Downs Yes, he duped the solicitors from memory.

Blanchard J So by using the original he caused the solicitors to act as his agent?

Downs That's right, that's right.

Blanchard J So there was uttering in relation to them as well as to the ultimate recipient?

Downs May well have been, although the Court seems to have regarded the latter step, vis a vis the victim as being the important point.

Tipping J I'm not familiar with this case, I should be, but I'm not. Making the copy and use of it was found to be the offensive uttering

Downs Uttering or using the

Tipping J The original.

Downs Yes.

Tipping J That seems a bit strange.

Blanchard J Well it's because the solicitors had the original.

Anderson J The difficulty with uttering in this case is that the use is extra-territorial.

Downs That's right and that's the jurisdictional point that lies behind the case. But can I perhaps answer Justice Tipping's question finally in this way, that the common law and various enactments resonate with the question mark, if I can put it that way, as to whether a copy or a facsimile can itself be a forgery, but simply because of the existence of that question, doesn't mean to say on the language available that the activity in question was not in itself a creation of a false document, or to put it this way President Young in the Court of Appeal assumed that this would be judicial legislation as the Judge put it. But in one sense that begs the question, because the very question is, is the language sufficiently broad to encompass what has occurred in light of the fact that enactment should apply to circumstances as they arise? If it is with respect it's a complete answer to the proposition that it's judicial legislation, because it's no more than the application of a concept to changing times.

Tipping J Yes well I understand the force of that. I mean we've got to be realistic in the commercial world of today that the idea of copies is really sort of a bit ho-hum I would have thought.

Downs Yes.

Tipping J You just don't really sort of think in those terms any more.

Downs Well we think of settlement for example, it's often done electronically, there's never an original settlement statement.

Anderson J The difficulty with this very compelling statement of Chief Justice Cockburn though isn't it in *Queen and Windsor*, may be the *King and Windsor*, 'telling a lie does not amount to forgery because it is reduced to writing'.

Downs Indeed.

Tipping J But it's not a lie in this document, it is a document purporting to be made by someone who didn't make it.

- Downs On the letterhead of a firm of solicitors in London for example on page 7.
- Anderson J It also purports that there was an original document in the same form which is a slightly different idea.
- Tipping J Well I for myself this is really what you're sort of inviting us to sort of try and get away from this idea of copies and rather this document as an entity in itself without reference to concepts of copying.
- Downs Indeed.
- Tipping J That I think is the thrust of your proposal.
- Downs That is the argument, because in today's time little distinction is drawn between what we would have once thought of as a copy and an original. Indeed in many cases as Your Honour remarks, it's not clear which is what.
- Anderson J Are there any difficulties about the extra-territoriality of the mens rea?
- Tipping J You should have an instant answer to that.
- Downs Section 264, subsection 1 appears to deal with that in my submission and appears to encompass that very point.
- Elias CJ Sorry, section?
- Downs 264, subsection 1. With the intent it shall any way be used or acted upon as genuine whether within New Zealand or not.
- Anderson J That's the use.
- Tipping J That's the other way around.
- Downs Yes but in terms of s.7, 'if making includes the final act of transmission then a component of the offence occurred here when the document emanated from the receiver's machine.
- Anderson J I don't have any difficulty with that, I mean I can envisage a document coming down the wire in a particular form and arriving within the jurisdiction, but the mens rea in respect of the making is if it can have a locus extra-territorial because her mind is in Amsterdam.
- Elias CJ No her mind was in New Zealand.
- Anderson J No sent from Amsterdam.

- Blanchard J This is s.264(1) is contemplating a situation in which the guilty mind is in Amsterdam, making the document, but it can still be a forgery if it's used in New Zealand.
- Downs And the other point in my submission is under s.266, ss.2. A document made or altered outside New Zealand in a manner that would have amounted to forgery shall be deemed to be a forged document. It would seem to be in the intent of the legislature
- Anderson J Well that's to cover people who forge it overseas and utter it in New Zealand.
- Downs And that comes back to the Crown's alternative argument.
- Anderson J But then where is the mochas of the mens rea at the point of uttering?
- Downs Well in an electronic age that question I'm afraid to say is difficult to answer.
- Anderson J But it may have to be adapted to answer the needs of the modern age.
- Downs Yes.
- Anderson J It may have to impute mens rea in a different location when its existing route should be simultaneously in connection with the creation.
- Downs Well that brings us into the *Queen and Smith* in terms of the English authorities that seem to have suggested a real and substantial connection for the particular jurisdiction is sufficient to found it and so on.
- Blanchard J I didn't think that the guilty mind had to be within New Zealand, I thought it was sufficient that the actus reas had the necessary connection with New Zealand, otherwise somebody who from outside our territorial zone fired a cannon which killed off a number of people in Auckland wouldn't be guilty of murder.
- Tipping J I think it's covered by s.7 where the focus is on the actus reas.
- Downs That's right, in terms either of act or omission or an event necessary for completion of the offence, yes.
- Tipping J It doesn't matter where. We're in the actual remission-forming part of any offence or any event necessary for the completion of any offence that occurs in New Zealand, in other words where the actus reas occurs in New Zealand the offence shall be deemed to be committed in New Zealand.
- Anderson J It doesn't say you cover importing whether the offender sent if from Thailand to himself or herself in New Zealand.

Downs Well if it pleases the Court unless I can assist with other matters those are the submissions on behalf of the respondent.

Elias CJ No thank you Mr Downs. Do you want to be heard in reply Mr Bioletti, particularly on I think the points raised.

Bioletti 335. My submission in relation to s.335 is that now in terms of natural justice the ability to substitute offences under s.386 hinges effectively on a person being on notice as to what they're being tried for, either by having the count as an alternative count or one included within the count that's charged and my basic submission is that in 2006 for there to be a distinction between that power and the power of amendment under s.335 so that under s.335 an offence which was not faced at trial on the indictment can effectively be substituted and my submission is old-fashioned because the underlying, I, with respect, cannot see the justification for a distinction between the two abilities under s.335 and s.386.

Blanchard J Are you saying that 335 should be read so that it's consistent with 386?

Bioletti I am and I accept that I've made the submission before and it hasn't been accepted.

Blanchard J Was that in the *Thompson* case.

Bioletti Yes, but when you get down to code level of situation that a person faces at trial that that distinction out of the English case, the English 386, the spies case, how can it be that person has some measure of protection in relation to that situation by effectively knowing what they're being tried for but not have the same protection under s.335.

Tipping J Would your point be met, I know not absolutely fully but by a re-trial on those counts, then you'd know full well what you're up for.

Bioletti I think if I was to accept that

Tipping J I'm not asking you to accept it, that's why I said

Bioletti No, sorry Sir, the concept that you're raising

Tipping J I mean if the question is natural justice, lack of notice, lack of preparation, a retrial would cure that but it may still be unfair in the general scheme of things to put the client up for retrial.

Blanchard J It's hard to see why.

Tipping J Well I'm just trying to help Mr Bioletti.

- Bioletti In effect what I'm submitting, and I know it's contrary to all the previous authority, but in effect what I'm submitting is that having had a close look at s.386 and how that actually operates, that the principle that operates there must operate under s.335 and unless a person has been in that position of either having the count as an alternative, or included within the indictment, that there is no power to amend.
- Blanchard J Maybe the point of 335 and why it is wider than 386 in its wording is to enable the Court of Appeal in its discretion to do what is being suggested. In other words to say well there is an element here that isn't encompassed within the original charge but nevertheless overall justice to both the state and the person who's been convicted is appropriately served by amending the indictment and then starting again with a new trial.
- Tipping J To the extent necessary.
- Blanchard J Whereas 386 is blunter, but it merely deals with substituting and confirming a sentence.
- Tipping J I agree I think that's why the new trial power is in there to deal with this very issue.
- Anderson J And not in 386?
- Tipping J Yes, because in 386 it's so clearly incorporated that you're at risk of it, whereas if you weren't truly at risk of it before it's fair that you get another go.
- Bioletti So there could be two levels. There could be a situation where the person did not face the count at trial in which case you don't need to look at the issue of prejudice because it's implicit that if someone is not aware of what they're being tried for
- Tipping J Well as my brother Blanchard said, you can have a situation under 386 where you simply say we'll substitute - no injustice in that at all. Under the wider section you say well it looks as if we should substitute but that's a bit tough because the accused either actually or as a matter of perception won't feel they've had the opportunity to address it so we'll order a new trial.
- Bioletti Under 335?
- Tipping J Yes.
- Bioletti I'd have to accept that, but in accepting that I think it undermines its original argument I made that there's no jurisdiction to amend unless it's been on the face of the indictment.

Tipping J Well you're not really going backwards because the authorities are clearly not with you on that.

Blanchard J If the Court did go down that route there would be the question of what should happen to the sentence and here I'm afraid I don't have any overall picture of levels of criminality involved in each of the convictions but perhaps that could be cured by the Court seeking assistance through memoranda from counsel, if we reach that point. And it may be that in any event it would be better for that kind of issue if the Court feels that some alteration in sentence may be necessary, pending any retrial and reconviction, that it go back to the Court of Appeal for adjustment.

Bioletti Just for the benefit of the Court can I indicate that Mrs Walsh in fact has been released on home detention so she's no longer serving her sentence.

Elias CJ Well she is serving her sentence of course.

Bioletti She's serving it at home.

Elias CJ Yes.

Bioletti So that's her position at the moment.

Tipping J Assuming this course were followed would she want any interim adjustment to the sentence? You may not be able to say that because it may make little practical difference.

Anderson J It may affect the home detention.

Tipping J It may affect

Anderson J And it may have to be reconsidered

Elias CJ It is a matter that we would have to, if we get to that point, we would have to seek further submissions and assistance from counsel on.

Tipping J You could then take her instructions in this.

Bioletti I think depending on where it gets to that my instructions would certainly be coming from a practical point of view.

Elias CJ Yes. Thank you Mr Bioletti. Thank you counsel for a very interesting and difficult point and we've been assisted by you.

11.30am Court adjourned