[2015 Gib LR 137]

R. v. MAHTANI and MARIN

SUPREME COURT (Jack, J.): September 30th, 2014

Criminal Law—perverting course of justice—constituent elements—merely taking initial steps towards act perverting course of justice insufficient for prosecution—but making offer to withdraw allegations of crime perverts course of justice by tainting prosecution of that crime

The first defendant was charged with conspiracy to pervert the course of justice and doing an act tending and intended to pervert the course of justice.

The first defendant was a solicitor acting for the second defendant. The second defendant complained to the police that another man, Mr. Behan, had assaulted him occasioning actual bodily harm. In response, Mr. Behan's father provided the police with video recordings showing the second defendant snorting white powder.

The first defendant made an offer to Mr. Behan whereby the second defendant would withdraw his allegations of assault occasioning actual bodily harm if Mr. Behan would suppress the recordings of the second defendant snorting white powder. Mr. Behan did not take up this offer and the second defendant ultimately did not withdraw his allegations, but the defendants were nonetheless charged with conspiracy to pervert the course of justice.

The first defendant applied for the charges to be dismissed pursuant to s.201 of the Criminal Procedure and Evidence Act 2011. He submitted that there was no agreement, and therefore no conspiracy, between him and the second defendant: (a) a solicitor, out of court, could not be presumed to act with actual authority from his client; and (b) the jury would be entitled to conclude that he was acting on his own initiative in starting negotiations with Mr. Behan. He further submitted that making the offer to Mr. Behan did not amount to a perversion the course of justice.

The Crown submitted that there was an agreement between the defendants which amounted to a conspiracy to pervert the course of justice. The court indicated its provisional view that the evidence suggested only a limited agreement whereby the first defendant would make an offer to Mr. Behan that the second defendant would withdraw his allegations if Mr. Behan suppressed the recordings, rather than an agreement that the second defendant would withdraw his allegations in any event.

The Crown made two alternative submissions to establish that this agreement was a conspiracy to pervert the course of justice: (a) that, by

making the offer, the first defendant had set in motion a process which could have led to the second defendant perverting the course of justice by falsely withdrawing his allegations. If Mr. Behan had accepted the offer, the second defendant would have withdrawn his allegations, and the fact he did not do so because Mr. Behan did not accept the offer was irrelevant; (b) that the mere fact that the first defendant made the offer was a perversion of the course of justice in that, as soon as he indicated that the second defendant would withdraw his allegations if Mr. Behan agreed to suppress the recordings, the second defendant's evidence against Mr. Behan and his status as a witness was undermined. The first defendant submitted in reply that it was for the Crown to show that the second defendant's withdrawal of his allegations would have been false.

Held, refusing the application:

(1) The test for dismissing charges under s.201 was whether a reasonable jury properly directed could convict the defendant. This test was satisfied and both charges against the first defendant would therefore proceed to trial (para. 4; para. 26).

(2) For the charges to proceed to trial, the Crown was not required to prove that the second defendant's withdrawal of his allegations would have been false but, even if this were required, the jury would be entitled on the evidence to decide that the withdrawal would have been false (para. 25).

(3) There was evidence on which a jury could properly find that the defendants entered into a conspiracy. The Crown could rely on overt acts by any party to an alleged conspiracy to prove the existence of that conspiracy and the first defendant making the offer to Mr. Behan was such an overt act. The first defendant's submission that a solicitor, out of court, could not be presumed to act with actual authority from his client would be rejected because he was trying to arrange a settlement and this was part of the ordinary business of a solicitor, despite the illegality of the proposed deal. The jury would be entitled to conclude that he was acting with the second defendant's authority unless either defendant gave evidence that he was acting on his own initiative (paras. 9–14).

(4) The evidence suggested that the defendants' conspiracy was limited to an agreement whereby the first defendant would make an offer to Mr. Behan that the second defendant would withdraw his allegations only if he agreed to suppress the recordings. The defendants did not agree that the second defendant would definitely withdraw his allegations. The critical issue was whether the Crown could prove that the first defendant's offer was, without more, likely to lead to injustice (para. 17).

(5) The Crown's primary submission, that this limited agreement constituted a conspiracy to pervert the course of justice because the first defendant had set in motion a process which could have led to the second defendant falsely withdrawing his allegations, would be rejected. If

Mr. Behan had accepted the offer, the first defendant would have needed to do at least two further acts before the second defendant would have withdrawn his allegations: he would have had to communicate Mr. Behan's acceptance to the second defendant and persuade him to accept the deal. The gravamen of the charge of perverting the course of justice was the second defendant actually withdrawing his allegations and what happened at the first defendant's meeting with Mr. Behan was a long way away from that (paras. 21–22).

(6) The Crown's alternative submission, that the mere fact that the first defendant made the offer was sufficient to taint the prosecution process, would be accepted and the charges would therefore be permitted to proceed to trial. The fact that the first defendant made the offer would raise major difficulties as regards the truth of the second defendant's evidence against Mr. Behan during his trial for assault occasioning actual bodily harm and this was sufficient to constitute a perversion of the course of justice (paras. 23–24).

Cases cited:

(1) *Michel* v. *Att. Gen.*, 2011 JLR 634, applied.

(2) *R.* v. *Andrews*, [1973] Q.B. 422; [1973] 2 W.L.R. 116; [1973] 1 All E.R. 857; (1972), 57 Cr. App. R. 254; [1973] Crim. L.R. 117, considered.

(3) *R.* v. *Brown*, [2004] Crim. L.R. 665; [2004] EWCA Crim 744, considered.

(4) *R.* v. *Cotter*, [2003] Q.B. 951; [2003] 2 W.L.R. 115; [2002] 2 Cr. App. R. 29; [2002] Crim. L.R. 824; [2002] EWCA Crim 1033, referred to.

(5) *R.* v. *Devonport*, [1996] 1 Cr. App. R. 221; [1996] Crim. L.R. 255, referred to.

(6) *R.* v. *Evans*, [1981] Crim. L.R. 699, distinguished.

(7) *R.* v. *Galbraith*, [1981] 1 W.L.R. 1039; [1981] 2 All E.R. 1060; (1981), 73 Cr. App. R. 124; [1981] Crim. L.R. 648, applied.

(8) *R.* v. *Meyrick* (1929), 21 Cr. App. R. 94, considered.

Legislation construed:

Crimes Act 2011, s.27(1): The relevant terms of this sub-section are set out at para. 7.

Criminal Procedure and Evidence Act 2011, s.201: The relevant terms of this section are set out at para. 3.

R.R. Rhoda, Q.C., Attorney-General, and *C. Ramagge* for the Crown;

E. Fitzgerald, Q.C., Sir Peter Caruana, Q.C., C. Finch and *A. Ladislaus* for the first defendant.

1 **JACK, J.:** This is an application for dismissal of the charges against Mr. Mahtani pursuant to s.201 of the Criminal Procedure and Evidence Act 2011.

2 Mr. Mahtani and another man, Steven Marin, face two charges. The first is one of conspiracy to pervert the course of public justice contrary to s.27 of the Crimes Act 2011, the particulars being that Suresh Mahtani and Steven Marin, on a date unknown between January 13th, 2012 and March 14th, 2012 in Gibraltar, conspired together to pervert the course of public justice. The second charge is one of doing an act tending and intended to pervert the course of public justice. The particulars are that Suresh Mahtani, on February 20th, 2014 in Gibraltar, with intent to pervert the course of public justice, did an act which had a tendency to pervert the course of public justice in that he sought to persuade Edward Behan to destroy the copies of video recordings which he made of Steven Marin allegedly snorting cocaine, in return for which Steven Marin would withdraw his evidence against Edward Behan in regard of a matter with which Edward Behan had been charged.

3 Section 201 of the Criminal Procedure and Evidence Act, so far as material, says:

> "(1) A person who is committed or sent for trial under this Part on any charge or charges may, at any time—
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> (a) after he is served with copies of the documents containing the evidence on which the charge or charges are based; and
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> (b) before he is arraigned (and whether or not an indictment has been preferred against him),
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> apply orally or in writing to the Supreme Court for the charge, or any of the charges, in the case to be dismissed.
>
> (2) On an application under subsection (1) a judge must dismiss a charge (and accordingly quash a count relating to it in any indictment preferred against the applicant) if it appears to him that the evidence against the applicant would not be sufficient for a jury properly to convict him."

4 It is common ground that s.201 replaces the old procedure of making a submission of no case to answer at the end of an old-style committal before magistrates. The test is the same as a judge considering a submission of no case to answer at the conclusion of the prosecution in a trial on indictment, namely, whether a reasonable jury properly directed could convict the defendant. The test is given concrete form in *R.* v. *Galbraith* (7) which is set out in Archbold, *Criminal Pleading, Evidence & Practice*, at paras. 4–364 – 4–365 (2014 ed.), which says:

> "In *R.* v. *Galbraith*, 73 Cr. App. R. 124, CA, the earlier authorities were reviewed and guidance given as to the proper approach:
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> '(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty—the judge

> will stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury' (*per* Lord Lane, C.J. at p.127). [Emphasis in original.]
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> The Lord Chief Justice then observed that borderline cases could be left to the discretion of the judge . . .
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> In *R.* v. *Shippey* [1988] Crim. L.R. 767 . . . Turner, J. held that the requirement to take the prosecution evidence at its highest did not mean 'picking out all the plums and leaving the duff behind.' The judge should assess the evidence and if the evidence of the witness upon whom the prosecution case depended was self-contradictory and out of reason and all common sense then such evidence was tenuous and suffered from inherent weakness. His Lordship did not interpret *Galbraith* as meaning that if there are parts of the evidence which go to support the charge then that is enough to leave the matter to the jury, no matter what the state of the rest of the evidence is. It was, he said, necessary to make an assessment of the evidence as a whole and it was not simply a matter of the credibility of individual witnesses or of evidential inconsistencies between witnesses, although these matters may play a subordinate role."

5 In the current case, the outline facts are not substantially in dispute, although the inferences which should be drawn, and whether they disclose an offence known to law, are disputed. The outline facts are that in January 2014, there was an incident in which Steven Marin, the co-defendant, complained that Edward Behan had assaulted him, occasioning actual bodily harm. Mr. Behan was interviewed by police and was told that Mr. Marin alleged that he (Mr. Behan) had snorted cocaine on the occasion in question. As a result, Mr. Behan's father provided the police with video recordings taken by Mr. Behan using a video recording function on his wristwatch. These videos show Mr. Marin snorting a white powder, although whether it is cocaine obviously cannot be told from the video. A few days later, after the police had spoken to Mr. Marin about the recordings, Mr. Behan's lawyer, Nicholas Bottino, told him that

Mr. Mahtani had contacted him wishing to discuss a "sensitive topic." Mr. Bottino wanted to know if Mr. Behan consented to him (Mr. Bottino) seeing Mr. Mahtani. Mr. Behan decided that he did not want to incur the costs of instructing Mr. Bottino to do that and instead agreed to meet the defendant at a café just off Casemates.

6 Unbeknown to Mr. Mahtani, Mr. Behan recorded the discussions between the two men.

[The learned judge then set out several passages from the transcript of the discussions between Mr. Mahtani and Mr. Behan, in which Mr. Mahtani stated that Mr. Marin was prepared to withdraw his allegations of assault occasioning actual bodily harm against Mr. Behan, but he wanted a guarantee from Mr. Behan that the video recordings of him snorting white powder would be destroyed.

The learned judge continued:]

7 I turn now to the two counts, dealing first of all with the conspiracy. Section 27(1) of the Crimes Act 2011 provides:

> "Subject to the following provisions of this Part, a person who agrees with any other person or persons that a course of conduct is to be pursued which, if the agreement is carried out in accordance with their intentions, either—
>
> (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement . . .
>
> commits the offence of conspiracy to commit the offence or offences in question."

8 Sir Peter Caruana, Q.C. argued this aspect of the case on Mr. Mahtani's behalf. At the conclusion of his argument, I indicated that my provisional view was that there was evidence of a conspiracy, but that the prosecution would only be able to prove an agreement between Mr. Mahtani and Mr. Marin to do what Mr. Mahtani actually did. This was to negotiate with a view to a deal whereby Mr. Marin would make a negative statement and Mr. Behan would suppress the videos of Mr. Marin snorting the white powder, although negotiations were also to be made about money. In other words, the prosecution could not prove an agreement that Mr. Marin would definitely make a withdrawal statement in any event.

9 Despite further argument by the Attorney-General and Sir Peter, that remains my view. My reasons for that are these. It is well established that once a conspiracy is shown to exist, any overt act by any conspirator is evidence against the other parties to the conspiracy. It is also well established that the prosecution does not have to prove the agreement before it can rely on the overt acts.

10 On the contrary, the prosecution can rely on the overt acts to help prove the conspiracy: see *R.* v. *Meyrick* (8), where Lord Hewart, C.J. summarizes the law. He starts by saying (21 Cr. App. R. at 99):

> "It is, no doubt, a difficult branch of the law, difficult in itself, and sometimes even more difficult in its application to particular facts or allegations. There is no substantial contest between the appellants and the prosecution upon the question what the law is. The real contest is on the way in which it was applied and ought to be applied to matters such as are disclosed in this prosecution . . . In . . . *Mulcahy's Case*, reported in 3 English and Irish Appeals, p.306 at p.317, Mr. Justice Willes, delivering the opinion of the Judges to whom questions had been put, said this: 'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, is punishable if for a criminal object or for the use of criminal means. And so far as proof goes, conspiracy, as Grose, J., said in *R.* v. *Brissac*, is generally "matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them."' The other passage to which I wish to refer is in the well-known charge of Mr. Justice FitzGerald in the case of *R.* v. *Parnell* reported in 14 Cox, Criminal Cases at p.515. Mr. Justice FitzGerald, having cited the words of Mr. Justice Grose which I have just read, said: 'It may be that the alleged conspirators have never seen each other, and have never corresponded. One may have never heard the name of the other, and yet by the law they may be parties to the same common criminal agreement. Thus, in some of the Fenian cases tried in this country, it frequently happened that one of the conspirators was in America, the other in this country; that they had never seen each other, but that there were acts on both sides which led the jury to the inference, and they drew it, that they were engaged in accomplishing the same common object, and when they had arrived at this conclusion, the acts of one became evidence against the other'; and the learned Judge proceeded further to illustrate that proposition."

11 Once an overt act is shown, only a small amount of additional evidence of the conspiracy beyond the overt act is required: see *R.* v. *Devonport* (5). Sir Peter put particular weight on *R.* v. *Evans* (6). This was a case where the defendant was convicted of two counts of handling stolen goods; he had earlier been acquitted of a count of theft. Between the two trials, the defendant's brother-in-law made a statement to the police, in

which he said that the managing clerk of the defendant's then solicitors had asked him to appear as a witness for the defendant in the first trial and that a conversation had taken place at court in which the clerk had said "the defendant has asked me to ask you to say that he brought the ring off you." The recorder ruled that the evidence of the conversation was admissible, the witness gave evidence in accordance with his statement, and the defendant was convicted. He appealed against the conviction. The headnote to the case in the *Criminal Law Review* said ([1981] Crim. L.R. at 699–670):

> "*Held*, allowing the appeal, that the evidence of the conversation made in the absence of the defendant could only be admissible against the defendant if it could be shown that the clerk had the defendant's authority to act; the authority was established by evidence that the clerk and the defendant were jointly involved in a common enterprise and that the clerk in speaking to the witness was action in pursuance of the common purpose. It was not enough that the clerk thought that he was so authorised or that he had said that he was. As the common purpose had not been established the evidence of the conversation was inadmissible."

12 Sir Peter said that this was authority for the proposition that a solicitor, out of court, cannot be presumed to act in accordance with any actual authority from his client. There are two answers to this, in my judgment. First, what the managing clerk did in *Evans* was well outside the ordinary authority of a lawyer from his client. Solicitors are not generally given instructions to obtain perjured evidence. Here, by contrast, the defendant was trying to arrange a settlement with Mr. Behan. That is part of the ordinary business of a solicitor, even if the fact that the proposed deal was potentially illegal is unusual. However, it does not change the position that a solicitor has authority to negotiate.

13 Secondly, the managing clerk in *Evans* (6) was not a defendant. No issue of a conspiracy charge against him arose, thus anything the clerk said was not admissible against the defendant Evans in that matter, except insofar as external evidence—that is to say external to what the clerk said—showed agency. Here, the defendant is in the position of the clerk and the defendant himself is on trial, thus whatever Mr. Mahtani said is evidence against him. Sir Peter and Mr. Fitzgerald both argued that the transcript showed that the defendant was acting without authority. The high point of this submission is the passage where Mr. Mahtani says: "No, it's me who has put the suggestion, otherwise he would be here with me. It's me who told him that it would be a better idea just to make this go away." However, read overall, a jury, in my judgment, would be perfectly entitled to treat these passages as a standard negotiating tactic, where a negotiator says (falsely) that he does not have instructions from his

principal, but makes a proposal to tease out a counter-offer from the other side.

14 The same goes for the submission that the jury would be entitled to conclude that the defendant was on a frolic of his own in starting negotiations with Mr. Behan. Now, of course, if the defendant or Mr. Marin gives evidence to that effect, the jury would have to consider that evidence. But without such evidence, the suggestion that the defendant was on a frolic of his own is, in my judgment, pure speculation. Thus, on the current application I am entitled to disregard it.

15 For completeness, I should add that after his arrest, Mr. Marin spoke to the custody sergeant, not in the presence of Mr. Mahtani, and said in translation: "You get a lawyer to get rid of the problem, not to get you into shit." That is not evidence against Mr. Mahtani, but it is evidence against Mr. Marin that the defendant was acting as his solicitor in negotiating on his behalf with Mr. Behan. I mention that evidence because it is relevant to a point made by Sir Peter as to whether a jury could convict only one of Mr. Mahtani or Mr. Marin of conspiracy whist acquitting the other, or whether this was a case where the jury would be obliged either to convict both or to acquit both.

16 Without disrespect to Sir Peter's erudition, I shall not go through the cases he cites because this question depends on the evidence given at the trial. If important evidence is not admissible against one defendant, then a split verdict may be possible, whereas if the evidence against both is substantially the same, it is a case of both or neither being convicted. However, this cannot be known until the conclusion of the evidence.

17 Accordingly, in my judgment, there is evidence on which the jury could properly find that there was a conspiracy. The question then becomes conspiracy to do what? Here the prosecution, in my judgment, is limited to what appears in the transcript. What the transcript shows is that Mr. Mahtani and Mr. Marin wanted to negotiate and that they were prepared to offer, as a *douceur*, the making of a retraction statement, but there was not a fixed determination to make such a retraction statement come what may. Accordingly, it is necessary to consider whether what is recited in the transcript, namely the offering of a *douceur*, amounts to the substantive offence of attempting to pervert the course of justice. If it does then the conspiracy count is good; if it does not, then the conspiracy count is bad.

18 I turn therefore to this substantive offence. Mr. Edward Fitzgerald, Q.C. argued this aspect of the case on Mr. Mahtani's behalf. The law is conveniently summarized in the Jersey case of *Michel* v. *Att. Gen.* (1). The Court of Appeal of Jersey there said (2011 JLR 634, at paras. 26–28):

"26 The offence . . . has been given vigorous new life as exemplified by the wealth of English (and Commonwealth) authority produced for our edification. The essential ingredients, as described in *Weston*, remain, however, unchanged. [The then current edition of] Archbold . . . states [at what is now para. 28–1]: 'The offence is committed where a person or persons (a) acts or embarks upon a course of conduct, (b) which has a tendency to, and (c) is intended to, pervert (d) the course of public justice . . .'

27 Each of the four elements is necessary: none by itself is sufficient. In particular (on the premise of satisfaction of the other two elements), both intent and tendency are required. Intent without tendency is no crime: nor is tendency without intent.

28 We would derive these principles from the further learning:

(i) The *locus classicus* of the ingredients of an attempt to pervert the course of public justice remains that provided by Pollock, B. in *R.* v. *Vreones* ([1891] 1 Q.B. at 369) . . .

(ii) While, at first blush, it may seem that where no perversion of justice has occurred the offence should strictly be categorized as an attempt, it is now established that the concept of 'attempt' is inappropriate in connection with the substantive offence. In *Machin* . . . Eveleigh, L.J. adopted the *dictum* of Ormerod, L.J. in *R.* v. *Rowell* . . . that the use of the word 'attempt' could mislead ([1980] 1 W.L.R. at 767): 'The word is convenient for use in a case where it cannot be proved that the course of justice was actually perverted but it does no more than describe a substantive offence which consists of conduct which has tendency and is intended to pervert the course of justice.' . . .

(iii) The risk must be more than *de minimis*, *i.e.* must be of real significance. In *T* v. *R.*, Stanley Burnton, L.J. said ([2011] EWCA Crim 729, at paras. 19–20):

'19 The offence in question is not committed by an act that can have no effect on the course of justice. Conversely, however, the offence may be committed even if in the result the act does not affect the course of justice. The offence is complete when the act is done with the requisite intent, and does not cease to be criminal because it does not have the intended effect of perverting the course of justice. It is sufficient if the act creates a significant risk that the course of justice will be affected.

20 In a criminal case, the course of justice includes the police investigation of a possible crime. An act that makes that

investigation more difficult, or which may mislead the police in their investigation, may tend to pervert the course of justice.'

(iv) There is no need for the risk to have materialized for the offence to be completed . . .

(v) There is indeed no need for it to be probable or likely that the risk will materialize. It is enough if it is possible that it will . . . In *Brown*, Buxton, L.J. spoke of it ([2004] EWCA Crim 744, at para. 14):

'. . . [A]lways having been the law . . . that the mere fact that no actual perversion of the course of justice could take place as a result of false allegations is not in itself either a ground for saying that the offence of attempting to pervert [the] course of justice has not taken place or a ground in itself for not prosecuting with that offence the person who makes the allegations.'

(vi) The act of the defendant without more *by him* must have such a tendency:

'An act done with the intention of perverting the course of justice is not enough: the act must also have that tendency . . . To establish a tendency or a possibility, the prosecution does not have to prove that the tendency or possibility in fact materialised . . . there must be a possibility that what the accused has done "*without more*" might lead to injustice.'

In *R.* v. *Stewart (D.)*, Smellie, C.J. said (2003 CILR 443, at para. 28):

'Even if the prosecution had established the requisite intention . . . an act done with the intention of perverting the course of justice is not enough, the act must also have that tendency. And to establish that a tendency or a possibility had in fact materialized, there must be a possibility that what the accused . . . had done "*without more* might lead to injustice."'

(vii) The 'without more' here refers to further action by the defendant . . . The fact that further action by others may be necessary before injustice can occur is irrelevant.

. . .

(xii) A course of justice must have been embarked upon (*R.* v. *Stewart (D.)* (2003 CILR 443, at para. 27)):

'As to the specific allegation of a conspiracy to pervert the course of justice, it was incumbent upon the prosecution to show that a course of justice had been embarked upon such as could have been perverted. This is in the sense that proceedings

> of some kind were in being or were imminent, or that investigations which could or might bring about proceedings were in progress, and that Dr. Shapiro's conduct (in cahoots with his father) was in anticipation of and preparatory to misleading the Florida court in such proceedings . . .'

(xiii) Investigations are themselves part of the course of justice . . . In *Brown*, Buxton, L.J. stated ([2004] EWCA Crim 744, at para. 12):

> 'That, in our judgment, is amply underlined by this Court in the case of Cotter [*R.* v. *Cotter* (4) ([2003] Q.B. 951, at para. 33)] . . .
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> > "If an allegation is made which is capable of being taken seriously by the police so as to institute a criminal investigation with the possible consequences to which we are referred with intent it should be taken seriously by the police, we consider that is properly described as an act perverting the course of justice."'

(xiv) The examples of attempts to pervert the course of justice in the reported case books are exemplary, not exhaustive. In *R.* v. *Lalani* ([1999] 1 Cr. App. R. at 489), Brooke, L.J. referred to the 'very wide scope of the offence.' In *Clark*, Tuckey, L.J. said ([2003] 2 Cr. App. R. 23, at para. 10):

> 'Perverting the course of justice is a common law offence which covers a wide variety of situations . . . There is no closed list of acts which may give rise to the offence and it would be wrong to confine it to the specific instances or categories which have so far appeared in the reported cases.'

(xv) The court, while entitled to classify new facts as constituting the offence where within the scope of the established elements, must not recognize as an offence something outwith those elements." [Emphases in original.]

And then there is reference to Tuckey, L.J. saying that the common law has always developed incrementally, and if the ambit of these common law offences is to be enlarged, it must be done step-by-step on a case-by-case basis and not with one large leap. The court continued (2011 JLR 634, at para. 28):

> "Tuckey, L.J. therefore continued ([2003] 2 Cr. App. R. 23, at para. 13):
>
> > '. . . The need for caution is underlined by Article 7 of the European Convention on Human Rights which requires any criminal offence to be clearly defined by law.'

. . .

(xvi) However '. . . provided that any development is consistent with the essence of the offence and could reasonably be foreseen, the court may interpret and develop it to meet new circumstances' (*H.M. Advocate* v. *Harris* (2011 J.C. 125, at para. 29))."

19 It was agreed by the parties that the facts of the current case are novel. The nearest reported case to which the current case has similarities is *R.* v. *Andrews* (2). Reading from the headnote to the case in the *Law Reports* ([1973] Q.B. at 422):

"The defendant witnessed a traffic accident between a motor car and a moped, as a result of which criminal proceedings against the car driver were contemplated. The car driver was invited by the defendant to pay him to give false evidence at the prospective prosecution, and the driver offered a sum but no bargain was struck. The defendant was convicted on a count of inciting the motorist to pervert the course of public justice.

On appeal against conviction on the ground that no substantive offence of perverting the course of public justice existed so that its incitement was a charge unknown to law:—

Held, dismissing the appeal, that to produce false evidence in order to mislead the court and to pervert the course of public justice was a substantive offence; that incitement so to act could properly be charged in appropriate circumstances; and that, there being a sufficient nexus between the defendant's incitement and the contemplated perversion of justice, the conviction was justified."

20 The main issue between the Crown and Mr. Mahtani was whether the prosecution could prove that what Mr. Mahtani had done was, "without more," likely to lead to injustice. The Attorney-General's primary submission was that, by making the offer that Mr. Marin would give a retraction statement, Mr. Mahtani had set in motion a process which could lead to Mr. Marin giving a false retraction statement. The Attorney-General argued that if Mr. Behan had accepted the deal then Mr. Marin would have signed the retraction statement. The fact that Mr. Behan refused to agree the deal proposed meant that no retraction statement was forthcoming, but that was irrelevant—see proposition (vii) in *Michel* (1).

21 Mr. Fitzgerald, by contrast, argued that the defendant needed to do at least two further acts after the meeting with Mr. Behan before Mr. Marin made a retraction statement. On the assumption that Mr. Behan agreed to the deal proposed, Mr. Mahtani would first have to communicate the acceptance of that offer to Mr. Marin and, secondly, he would have to persuade Mr. Marin to accept the deal. And indeed there were probably other steps such as the reformatting of the draft agreement which needed

to be done as well. It was only, Mr. Fitzgerald argued, when Mr. Marin accepted the deal and executed the retraction statement that no further action by Mr. Mahtani was required.

22 In my judgment, Mr. Fitzgerald is right about that. If the gravamen of the charge is the making of an actual retraction statement, then the discussions with Mr. Behan were quite a long way from the making of that retraction statement. There were indeed, as argued by Mr. Fitzgerald, further steps which Mr. Mahtani needed to do before that occurred.

23 This led to the Attorney-General's secondary submission. This fall-back submission was that the mere making of the offer to Mr. Behan tended to taint the prosecution process. As soon as Mr. Marin indicated through Mr. Mahtani that he was willing in principle to make a retraction statement if Mr. Behan agreed to suppress the video recordings, Mr. Marin's evidence and his status as witness of truth would be undermined. A clearer case of pollution of the clear waters of justice could, the Attorney-General suggests, scarcely be imagined.

24 On this analysis, no further step was needed by the defendant. What would happen is what indeed did happen. Mr. Behan went to the police with the tape of the discussions and the prosecution of Mr. Behan faced a major difficulty as regards the truth of Mr. Marin's evidence.

25 Mr. Fitzgerald's answer to this point was that it was incumbent on the prosecution to show that any retraction statement would be false. I am not sure that that is right as a matter of law: see the extract from *Brown* (3) that I have already quoted. But, as a matter of fact in the current case, it fails on the facts. The jury would be perfectly entitled to decide that any retraction statement would be false when the defendant said to Mr. Behan that his client was prepared to make a retraction statement. It is perfectly open, in my judgment, to the jury to conclude that he was saying that the retraction statement would be false.

26 In those circumstances, in my judgment, the Attorney-General succeeds on his secondary submission and accordingly I refuse the application to dismiss the substantive charge. It follows that I also refuse to dismiss the count of conspiracy.

Orders accordingly.