

**THE CRIME OF OBSTRUCTING THE COURSE OF JUSTICE:
IS LEGISLATIVE INTERVENTION AN IMPERATIVE?**

by

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DEDICATION

This is dedicated to my late father, Khoro Mnisi, and to my mother, Nonqaba ka Zulu Mnisi.

DECLARATION

I declare that *The crime of obstructing the course of justice: Is legislative intervention an imperative?* is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

ERIC MNISI (Mr)

15 JUNE 2009

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SUMMARY

In this thesis, the common law crime of obstructing or defeating the course of justice as currently applied in South African law, is considered critically. The purpose of the study is to determine whether the ambit of the crime should be extended to target all conduct which undermines the proper administration of justice in South Africa. The interests protected by the crime are investigated, and those important constitutional values which underpin the crime, are identified. These values are: (i) constitutional supremacy (ii) the rule of law (iii) the doctrine of separation of powers, and (iv) the independence of the courts. In a post-constitutional era, the question raised is whether the crime as developed in the common law adequately protects these important democratic values. The historical background and development of the offence are discussed. This is followed by a comparative legal study which considers the existence and ambit of the offence in certain foreign jurisdictions. The foreign legal systems considered are England, Australia, Canada and the United States of America. The study reveals that the crime has been codified in most of these jurisdictions. Codification was driven by the need for legal certainty and compliance with constitutional imperatives. The study concludes that similar reform is necessary in South African criminal law. It is recommended that the common law offence of obstructing or defeating the course of justice be repealed and replaced with a comprehensive statutory offence which criminalises all manifestations of conduct which are intended to defeat or obstruct the proper administration of justice. The proposals are based upon the identified constitutional imperatives which underpin the crime. It is argued that the legislature is the proper institution to initiate reform in this regard. Detailed recommendations are made, which include draft legislation.

Key words: *lex Cornelia de falsis; lex Remmia; lex Julia de vi Publica; calumnia;*
course of justice; due administration of justice; judicial proceedings; official proceeding
and *res judicata*.

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CHAPTER ONE

INTRODUCTION

1.1 GENERAL

The crime of defeating or obstructing the course of justice serves to protect the integrity of the administration of justice. The purpose of the crime is to intervene to prevent the malfunction of the administration of justice, rather than to punish those who have caused an injustice to be done.¹ In the broader context this crime serves to uphold the democratic values recognized as core values in the Constitution of South Africa.² These values are:

- (1) constitutional supremacy,
- (2) the rule of law,
- (3) the doctrine of separation of powers, and
- (4) the independence of the courts.

Despite the importance our constitutional state attaches to these values, the obstruction of the due administration of justice is a social phenomenon prevalent in South African society. Alleged interference in the exercise of the functions of the judiciary by various organs of state is reported on a regular basis in the newspapers. Manifestations of this crime are rife in various other contexts and both threaten and damage the democratic functioning of our society.

¹J Burchell and J Milton *Principles of Criminal Law* 3ed by J Burchell (2005) 939.

²The Constitution of the Republic of South Africa of 1996.

The purpose of this thesis is to analyse the common law offence of defeating or obstructing the course of justice as applied in South African law. The main focus is whether the current definition of the crime targets all the conduct which undermines the proper administration of justice in the South African society. The question raised is whether the values which underpin the offence, for example, the rule of law and the independence of the courts, are adequately protected in terms of the current application of the offence.

The hypotheses are the following:

- (1) The current definition of the crime is inadequate to protect the important constitutional values which it is intended to serve, and
- (2) In a post-constitutional era, the crime should be extended to target all conduct which undermines these values.

In order to critically evaluate the crime as applied in South African law, a comparative legal study was undertaken. The law of selected foreign jurisdictions relating to the obstruction of the administration of justice is considered and compared with the South African position. More particularly, the law of England, Canada, Australia and American federal law are considered. It is significant that in all these jurisdictions (with the exception of the United Kingdom) the crime of obstruction of the administration of justice has been codified in comprehensive legislation. Therefore, we have much to learn from how these jurisdictions have chosen to counter the phenomenon of obstruction of

justice. The application of the crime of obstruction of justice in the jurisdictions chosen for this study is compared with the South African approach for a number of reasons.

Firstly, South African common law is a hybrid system³ based on English law and Roman-Dutch law. The writer is mindful of the sentiments of the Supreme Court of Appeal in *Park-Ross v Director: Office for Serious Economic Offences*,⁴ where it cautioned that reference to foreign jurisprudence should be exercised with circumspection because of the different contexts within which the law in these countries developed. The court further warned of the danger of needlessly importing into the South African legal system doctrines associated with constitutions in foreign jurisdictions. However, constitutional jurisprudence since 1994 reveals that reference to the law of comparable foreign jurisdictions has been of significant value in developing South African law to meet the constitutional demands of a changing society.

Obstructing the course of justice is still a common law crime in English law. As in South African law, case law is the source of law in England through which the crime of obstruction of justice developed, and the courts in England play an important role in the protection of individual liberties as much as they do in South Africa.⁵

³See PHJ Thomas, CG van Der Merwe and BC Stoop *Historical Foundations of South African Private Law* 2ed (2000) 7.

⁴1995 (2) SA 148 (SCA) at 160G-H.

⁵RD and JEC Brierley *Major Legal Systems in the World Today* 2ed (1978) 346. English law is now also subject to the European Community law as a result of the Human Rights Act of 1998. For instance, section 6 of the Human Rights Act requires judges to interpret statutory provisions in such a way as is compatible with Convention rights. Section 2 obliges the judges to take account of the jurisprudence of the European Court of Human Rights. In the United Kingdom the judiciary is authorized to scrutinize the conformity of the legislation with the Human Rights Act of 1998. However, it is not empowered to strike down

Australia, too, belongs to the common law family. Initially, the crime of perverting the course of justice was recognised only in Australia's common law. Currently, Australia has comprehensive federal legislation which deals with the crime of perverting the course of justice. Therefore, South Africa can learn a lot from examining how the crime of obstructing the course of justice developed in Australian criminal law from a common law crime to a comprehensive statutory crime.

The criminal justice systems of Canada and the United States of America are subject to written Constitutions with Bills of Rights that limit state powers. Similarly to the South African position, the courts are the protectors of the civil rights and liberties of citizens. Both Canada and the United States of America have comprehensive legislation to deal with the crime of obstruction of justice. Courts in these jurisdictions have developed jurisprudence on the obstruction of justice which is of significant value to any critical analysis of the crime as applied in South African law.

The study indicates how the development of the crime of obstructing the proper administration of justice in these foreign legal systems is valuable to extending the scope of the crime of defeating or obstructing the course of justice in South African law. The findings of this study follow.

A consideration of foreign law reveals that while certain conduct that potentially undermines the due administration of justice is punishable as the criminal offence of

legislative enactments. See A Ashworth *Principles of Criminal Law* 5ed (2006) 7 and P Lenta "Democracy, rights and judicial review" (2004) *SAJHR* Vol 20 1 2.

obstruction of justice in other jurisdictions, it is not punishable in South African law. The conclusion reached is that, as currently applied, the common law crime of obstructing the proper administration of justice does not sufficiently protect the proper administration of justice in all spheres of society. It is recommended that the common law crime be repealed and replaced by legislation which criminalises all conduct intended to obstruct the due administration of justice. A broad offence of obstructing or defeating the course of justice (as currently defined) should continue to be included in the legislation, but specific conduct should also be criminalized as separate offences. It is recommended that the ambit of the crime of defeating or obstructing the course of justice be extended in legislation to include, *inter alia*, the following unlawful conduct intended to obstruct the due administration of justice:⁶

- a. Picketing and parading with intent to threaten or intimidate a member of the judiciary.
- b. Interfering with judicial officers, assessors, witnesses and legal practitioners.
- c. Concealing offences.
- d. Attempting to obstruct or to defeat the course of justice or the due administration of the law.
- e. Fabricating evidence or making use of fabricated evidence.
- f. Interfering with evidence.
- g. Deceiving witnesses.

⁶See the discussion of this conduct *infra* Chapter Nine under 9.4.

- h. Obstructing justice administered in quasi-judicial proceedings such as commissions of inquiry, boards of inquiry, an inquiry by the National Assembly, the National Council of Provinces or a Municipal Council.
- i. Conspiring to bring a false accusation.
- j. Conspiring to defeat justice.
- k. A general offence of defeating or obstructing the due administration of justice.
- l. Refusing to give or allow the taking of a blood sample required in terms of section 37(2)(a) of the Criminal Procedure Act 51 of 1977 and section 65(9) of the National Road Traffic Act 93 of 1996 in order to determine drunken driving.
- m. Persuading another person to plead guilty to a crime.
- n. Obtaining bail by improper means.
- o. Persuading a victim not to report a criminal incident to the relevant authorities or not to prosecute his assailant.
- p. Pleading guilty to a crime committed by another person.

Recommendations are accordingly made for law reform which will include draft legislation.⁷ It is also suggested that to waste police time and resources by making a false report that a crime has been committed should be punishable as a separate offence.

⁷See *infra* Chapter Nine under 9.4.

1.2 FIELD AND GENERAL SCHEME OF STUDY

This thesis is divided into nine chapters. Chapter 1 is the introduction. Chapter 2 deals with the historical background of the crime of defeating or obstructing the course of justice, and it exhaustively analyses the Roman, Roman-Dutch, early English and South African law. Chapter 3 deals with the application of the crime of perverting or preventing or attempting to pervert or prevent the course of justice in the English criminal justice system. Chapter 4 considers how the Australian criminal justice system deals with the crime of perverting the due administration of justice, and Chapter 5 deals with the treatment of the crime of obstruction of justice in Canadian law. Chapter 6 deals with the federal law of the United States of America, and South African law is dealt with in Chapter 7. In Chapter 8, the impact of the South African Constitution⁸ on the common law crime of defeating the course of justice is considered. The core values of our Constitution which the crime of obstruction of justice strives to protect are identified. Other aspects that are considered in this chapter are the interpretation of the Bill of Rights; whether certain rights in the Bill of Rights may be limited for the purposes of protecting the due administration of justice and whether the current definition of the crime infringes the constitutional principle of legality. Chapter 9 sets out the conclusions of this study. It considers whether the crime should be extended, and if so, whether that reform should be undertaken by the legislature or by the courts. Law reform is suggested and comprehensive proposals are made for codification of the crime.

⁸The Constitution of the Republic of South Africa of 1996.

CHAPTER TWO

HISTORICAL BACKGROUND

2.1 ROMAN LAW

2.1.1 General

The crime of obstructing the course of justice, as it is known today in South African law, originates from the provisions of the Roman *lex Cornelia de falsis* (the Cornelian Laws of Falsity).¹ The penalty of the *lex Cornelia* was imposed on somebody who altered, suppressed or counterfeited the truth committed with wrongful intent to harm and prejudice another.² There is authority to assert that the Romans did not pass any law for the crime of falsity before the Cornelian laws were enacted.³ This may be inferred from words of Cicero.⁴

It appears from Cicero's text that the two Cornelian Laws on falsity were enacted after 80 BC.⁵ The first law related to falsity committed in testaments and the second pertained to false coinage. Subsequently, other *senatusconsulti*⁶ were added to the law on testaments

¹A Berger *Encyclopedic Dictionary of Roman Law* (1953) 341.103.

²The Digest of Justinian Vol IV 48.10.1 (hereinafter referred to as D. Latin edited by T Mommsen and P Krueger and translated by A Watson).

³D48.10.1.

⁴In Verrem, II.i.42: “[A]nd in no (that is, law) is the deed of the past made subject to censure, except a deed of a kind which in its own nature is criminal and nefarious, so that it ought to have been totally avoided, even if no law existed. And in these very matters we notice much that was prohibited by law in such a way that deeds committed previously were not brought to prosecution. Take the Cornelian Law on testaments, and the Law on coinage, and a number of others; in these there is not some new legal precept which is laid down for the people, but it is enacted that what has always been an evil deed should as from a certain date be subject to trial before the people. Except that false witnesses were dealt with in the XII Tables, tab. 7, law 12 (see Funccius, ad leges XII Tabularum): Let him who has spoken false witness be thrown from the Tarpeian rock.” Citation from DG Van der Keessel *Praelectiones ad Jus Criminale* Vol III (Bk 48.10.1) translated by B Beinart and P van Warmelo (1973) 1299.

⁵Ibid.

⁶A *senatusconsultum* is that which the Senate commands and ordains; the Roman population eventually increased to such an extent that it was difficult to assemble them all for the purpose of enacting laws, so it seemed more practical to consult the Senate on behalf of the people. Cf RB Howes and RPB Davis *The Elements of Roman Law: Being Selections from the Institutes of Justinian, with explanatory notes, for the use of students* (1923) 17.

where the penalty of the Cornelian Law was extended to other types of falsity committed in respect of documents. For the purposes of this thesis, the relevant *senatusconsulti* are those which prohibited people from accepting money for arranging legal assistance and those which dealt with witnesses who accepted money to give, or not to give, evidence. The acts that constituted crimes under the *lex Cornelia de falsis* will now be discussed.

2.1.2 Punishable acts in terms of the *lex Cornelia de falsis*

Under Roman law the following acts fell foul of the *lex Cornelia*:⁷

- a. To knowingly, and with malicious intent, conspire to give false witness or to furnish, one after another, false evidence.⁸
- b. Where a person accepted money in order to furnish evidence.⁹ In this instance, the person would have contravened the *lex Cornelia de falsis* if he or she received money in order to renounce or withdraw evidence, or to give or to withhold evidence.¹⁰
- c. Where a person accepted money to provide advocacy or evidence, or made an agreement to, or conspired to, ensnare an innocent person.¹¹
- d. To corrupt, or to provide for the corruption of a judge.¹² Fraudulently preventing a judge from freely deciding, as he should, was also a contravention of the *lex Julia de*

⁷D 48.10.1-2; A Berger *Encyclopedic Dictionary of Roman Law* (2002) 467 and PMA Hunt *South African Criminal Law and Procedure: Common Law Crimes Vol II* 2ed by JRL Milton (1982) 137.

⁸D 48.10.1.

⁹D 48.10.1.2.

¹⁰Ibid.

¹¹D 48.10.1.1.

¹²D 48.10.1.2.

vi publica.¹³ This *lex* is discussed in detail in the ensuing pages.¹⁴

- e. Where a judge neglected the imperial constitutions, or pronounced a sentence that was contrary to the law which was cited to him.¹⁵
- f. Where a person made a false entry or removed an item from accounts, registers, wax tables, or any other such record, without affixing a seal.¹⁶ An Egyptian prefect, for example, was condemned for forgery under the *lex Cornelia*, because he made a false entry in his records while he was in charge of the province.¹⁷
- g. Where a person opened someone else's will while the latter was still alive¹⁸ and stole, hid, removed, destroyed, partially erased, substituted or unsealed a will, or, with malicious intent, wrote, sealed or recited a false will.¹⁹

2.1.3 Requirements for liability in terms of the *lex Cornelia*

To fall foul of the Cornelian law of falsity, the following requirements had to be met:²⁰

- a. The accused must have acted positively; he must have done something which distorted the truth. Examples included when someone forged accounts, testaments or

¹³See Hunt *op cit* (n 7) 137.

¹⁴For a discussion of the crime, see text at 2.1.6 *infra* at note 33.

¹⁵D 48.10.1.3.

¹⁶D 48.10.1.4. This is a crime of forgery, as opposed to defeating or obstructing the course of justice.

¹⁷*Ibid.*

¹⁸D 48.10.1.5.

¹⁹D 48.10.2.

²⁰D 48.10.1; D48.10.1.1 and D48.10.9.

any other matter,²¹ or added some impurity to gold.²²

- b. The act must probably have caused harm and prejudice to another person, for example, when the accused entered into an agreement with another person in order to falsely accuse an innocent person.²³
- c. The accused must have acted wrongfully.²⁴
- d. He or she must have acted intentionally.²⁵

2.1.4 The *lex Remmia*

There is authority to assert that a person who entered into an agreement, or who conspired with another person to ensnare an innocent person, was punished in terms of the *lex Cornelia de falsis*.²⁶ False accusations against another person (*calumnia*) were also punished in terms of the *lex Remmia*.²⁷ However, there was no rush to regard someone who failed to prove his case as a calumniator, because the investigation of that matter was entrusted to the discretion of the judge.²⁸ It is said that, after the acquittal of the accused, the judge would begin to look into the intention and state of mind of the accuser and that which led him or her to bring the accusation. If it was found that there was a reasonable

²¹D 48.10.1.4.

²²D 48.10.9.

²³D 48.10.1.1.

²⁴D 48.10.1.

²⁵*Ibid.*

²⁶*Ibid.*

²⁷D 48.16.1.2; Hunt *op cit* (n 7) 137. *Calumnia* is defined as a false charge, malicious accusation or prosecution (civil claim). For this definition, see HL Gonin and WJG Lubbe *Lexicon Institutionum Gai et Institutionum Justiniani: Latin – English* (1987) 41.

²⁸D 48.16.1.3.

mistake on the part of the accuser, he or she was cleared, but if the judge caught the accuser in a manifest act of calumny, the accuser was punished for *calumnia* in terms of the *lex Remmia*.²⁹ It is said that in private indictments, as in accusations *extra ordinem*, all persons guilty of calumny were punished *extra ordinem* according to the degree of their offences.³⁰

2.1.5 Requirements for liability in terms of the *lex Remmia*

For X to be convicted of *calumnia* in terms of the *lex Remmia* he or she should have acted *dolo malo*.³¹

2.1.6 The *lex Julia de vi Publica*

It has been said that to fraudulently prevent a judge from freely deciding as he should was a contravention of the *lex Cornelia de falsis*,³² but there is further authority to the effect that such an act was also punished under the *lex Julia de vi publica*.³³ The *lex Julia* on extortion applied to anyone holding positions of magistracy, power, administration, legateship, office, duty, public employment or while on the staff of any of these positions and who took monies. Anyone who, while holding any position of power, accepted money in return for giving or not giving a judgment or passing sentence was liable under this *lex*.³⁴

It is said that the *lex Julia* on extortion provided that no one should take anything for the

²⁹D 48.16.1.3. Whichever of the two verdicts the judge reached was made clear by the very words of his pronouncement. If he pronounced: “you have not proved [your case,]” he had acquitted the accuser of calumny; but if, on the other hand, he pronounced that “you have committed calumny,” he had condemned him. See D 48.16.1.4.

³⁰D 48.16.3.

³¹Hunt *op cit* (n 7) 137.

³²D 48.10.1.2 and Hunt *op cit* (n 7) 137. See text under 2.1.2 *supra*, at note 13.

³³Hunt *op cit* (n 7) 137. ‘Anyone who does something with malicious intent to hinder the safe exercise of justice or to hinder judges in the proper giving of judgment, or [to hinder] anyone holding office or power from giving decrees or orders or from acting as he has the right to do, contravened the *lex Julia de vi public*.’

³⁴D 48.11.3.

purpose of providing it to a judge or arbiter in order to change him or compel him to give a certain judgment; nor for not providing, not changing, or not ordering him to give judgment; nor for throwing a man into a public prison, binding him, ordering him to be bound, or releasing him from his chains; nor for condemning or acquitting any man; nor for assessing damages, giving or not giving judgment involving status or money.³⁵ This *lex* also punished those people who accepted money to give or withhold evidence.³⁶ It is also said that a person condemned under this law was prohibited from ever giving evidence publicly, from being a judge, or from bringing an accusation.³⁷

2.1.7 Summary of Roman law

In Roman law the crime of obstructing the course of justice came into being after the enactment of the *lex Cornelia de falsis* in 80 BC. In terms of this law a person could be punished for various acts, for example:

- a. procuring false witnesses;
- b. furnishing false evidence;
- c. suppressing witnesses;
- d. conspiring to lay false charges against an innocent person;
- e. using false or forged documents in court;
- f. corrupting or attempting to corrupt a judge;
- g. being a judge, neglecting the imperial constitutions; and
- h. accepting money in order to give evidence.

³⁵D 48.11.7.

³⁶D 48.11.6.

³⁷D 48.11.6.1.

Except for the acts listed above, which also fall under the ambit of the *lex Cornelia de falsis*, were perjury, fraud, counterfeiting and other similar conduct. *Dolo malo* was a requirement before a person could be convicted for contravening the *lex Cornelia de falsis*. Other important pieces of legislation concerning the crime of obstructing the course of justice were the *lex Julia de vi publica* and the *lex Remmia*. The former forbade anyone to fraudulently prevent a judge from deciding as he should. The latter law was infringed when someone accused an innocent person of a crime knowing very well that he or she was innocent.

2.2 ROMAN-DUTCH LAW

2.2.1 General

In Roman-Dutch law, the crime of falsity developed from the Roman law in general, and the Roman *lex Cornelia* in particular. This is confirmed in the writings of some old Roman-Dutch writers³⁸ whose approach to the study of the law was always by way of the Roman law set out by Justinian.³⁹ Similarly to the Roman law, certain acts which defeated or obstructed the course of justice were also punished under the Roman-Dutch law. Under Roman-Dutch law the crime of falsity was categorised in terms of:

- a. Documents,⁴⁰
- b. Proceedings and evidence,⁴¹ and
- c. Testimony.⁴²

³⁸A Matthaeus (1601-1654); J Voet (1647-1713) and DG Van der Keessel (1738-1816). See also AB Edwards *The History of South African Law: an outline* (1996) 53-63.

³⁹Edwards *op cit* (n 38) 53.

⁴⁰Van der Keessel *op cit* (n 4) 48.10.6.

⁴¹Van der Keessel *op cit* (n 4) 48.10.8.

⁴²*Ibid.*

All the categories of falsity will now be discussed in detail hereunder.

2.2.2 Categories of falsity

2.2.2.1 Falsity with regard to documents

This type of falsity was committed, *inter alia*, in the following ways:

a. When a person concealed something in order to hide the truth, and thus suppressed a genuine document which he or she was compelled to produce, or those who had unsealed such a document or who had substituted a document, that is to say, a false one;⁴³ to conceal the truth and to keep others ignorant of a fact which one knows and which it is in their interest to know, for one's own gain;⁴⁴ to keep silent about the truth or a fraudulently concealed truth which might lead others into mistake is referred to as the fraud of being silent.⁴⁵

b. When someone wrote false statements in his or her document to the prejudice of another person. When, for example, debtor X antedated the date of a pledge given for a debt by Y, a creditor. This act causes prejudice to creditor Y.⁴⁶ Van der Keessel provides the following fitting example: on a certain day, someone wrote in a chirograph a date anterior to that on which the pledge had, in actual fact, been effected.⁴⁷ Similarly, this type of falsity is committed by X, who, though he had been away, wrote in a chirograph or in a

⁴³Van der Keessel *op cit* (n 4) 48.10.6.

⁴⁴A Matthaëus *De Criminibus* Vol III (48.7.1.12), edited and translated by MC Hewett and BC Stoop at 418.

⁴⁵J Voet *Commentarius ad Pandectus* (48.10.4), translated by P Gane *The Selective Voet: Being the Commentary on the Pandects* Vol 7 (1957) 458.

⁴⁶Van der Keessel *op cit* (n 4) 48.10.6. These are not acts which obstruct or defeat the course of justice, but examples of fraud. They are only discussed here for the sake of completeness in order to show that under the *lex Cornelia de falsis* the crime of obstructing the course of justice sometimes overlapped with crimes like fraud and forgery. See Hunt *op cit* (n 7) 137.

⁴⁷Van der Keessel *op cit* (n 4) 48.10.6.

receipt that he had received his property in person, his purpose being to cause prejudice to another.⁴⁸ Although these acts were punishable as species of *crimen falsi*, they are rather examples of fraud and are not acts which infringe the free administration of justice.⁴⁹

2.2.2.2 Falsity with regard to judicial proceedings and evidence

The following acts with regard to judicial proceedings and evidence were punishable in terms of the *lex Cornelia de falsis* in Roman-Dutch law:

- a. Bribing a prosecutor, and if the prosecutor accepted money for refraining to prosecute, that is, to settle a criminal case, or for summoning or for not summoning a witness.⁵⁰ Thus, a prosecutor who had previously summoned witnesses to give evidence on behalf of the state then exempted such witnesses from continuing to give evidence in order to protect the accused from conviction would have violated the law. It was also a violation of the *lex Cornelia* for the prosecutor who had already started with prosecution, to accept money for summoning witnesses so that the accused might more readily be incriminated.⁵¹ Van der Keessel⁵² was of the opinion that it was immaterial whether the evidence led was true or false. Both the person who bribed the prosecutor for not summoning witnesses (the corruptor) and the prosecutor who connived with the accused, and his or her friends, committed this type of falsity.

- b. Bribing or causing bribery of a judge in order for him to pass or not to pass a certain

⁴⁸*Ibid.*

⁴⁹Hunt *op cit* (n 7) 137.

⁵⁰Van der Keessel *op cit* (n 4) 48.10.8.

⁵¹*Ibid.*

⁵²*Ibid.*

verdict.⁵³ This crime carried a very serious punishment, especially if the judge was bribed in order to give an unfair judgment.⁵⁴

c. A judge accepting a bribe.⁵⁵ Judges and their deputies were punished in various ways when bribed, but a heavy punishment was not always passed, except on the judge who was bribed to give an unfair judgment.

d. If a judge disregarded imperial constitutions or pronounced a sentence contrary to the law which was cited to him.⁵⁶ It is said that a judge who gave a judgment contrary to the imperial constitutions or contrary to the public law which was read out to him infringed the *lex Cornelia de falsis* and was deported to an island. This crime was not committed through negligence or lack of legal knowledge, because the law was read out to the judge; and it further appears that wrongful intent was a further requirement.⁵⁷

e. Selling the outcome of the court's judgment.⁵⁸ Persons who falsely claimed friendship or intimacy with a judge and sold the outcome of his judgments committed the crime. These people presented themselves as though they would easily obtain from a judge a judgment in favour of the person from whom they accepted money to that end. They sold the promise of victory in an action, and entered into such agreements on the understanding that they would give the money to the relevant judge. Such actions were probably punishable, because they tarnished the integrity of the judge and perverted the proper

⁵³Matthaeus *op cit* (n 44) 48.7.1.9. See also Van der Keessel *op cit* (n 4) 48.10.8.

⁵⁴Van der Keessel *op cit* (n 4) 48.10.8.

⁵⁵*Ibid.*

⁵⁶*Ibid*; Voet *op cit* (n 45) 48.10.3 and Matthaeus *op cit* (n 44) 48.7.1.9.

⁵⁷Van der Keessel *op cit* (n 4) 48.10.8.

⁵⁸*Ibid.*

administration of justice.

2.2.2.3 Falsity with regard to testimony

The following acts with regard to testimony were punishable in terms of the *lex Cornelia de falsis* and also in Roman-Dutch law:

a. **Where a person accepted money or agreed that money be paid to him or her for arranging legal assistance or testimony.**⁵⁹ Also, where a person accepted money for promoting a lawsuit by arranging legal assistance, or witnesses, for reward, to the detriment of an innocent person, he committed the crime of falsity. It was considered to be wrong and, therefore, a crime, to persuade an advocate or a witness to take up the case of a friend and to accept money for performing that service.⁶⁰

b. **Where a person accepted money for giving, or for not giving evidence.**⁶¹ According to Matthaëus,⁶² if someone accepted money in order to suppress evidence, he or she infringed the *lex Cornelia de falsis*. However, if he or she received no money, but refrained from attending judicial proceedings as a witness he or she was not liable. His reason was that a person could not be deemed to commit a falsity by altogether refraining from giving evidence, but those who presented themselves as witnesses and suppressed the truth were naturally liable for falsity.⁶³ Roman-Dutch authors⁶⁴ did not agree on the issue that people who did not receive money, but who still refrained from presenting themselves

⁵⁹Van der Keessel *op cit* (n 4) 48.10.8 and Matthaëus *op cit* (n 44) 48.7.1.14.

⁶⁰Since advocates were allowed to accept a fee, this should not be understood to refer to one who instructed an advocate in a normal way, but to he or she who accepted money to instruct an advocate to the detriment of an innocent person. See Matthaëus *op cit* (n 44) 48.7.14.

⁶¹Van der Keessel *op cit* (n 4) 48.10.8.

⁶²Matthaëus *op cit* (n 44) 48.7.1.12.

⁶³*Ibid.*

as witnesses did not fall foul of the *lex Cornelia*.

Another controversial issue was whether someone who accepts money to give evidence falls foul of the *lex Cornelia* when their evidence unexpectedly serves to assist, not the person who called the witness but his or her adversary.⁶⁵ Matthaëus⁶⁶ said that some commentators took the view that such a person did not fall foul of the *lex Cornelia*, but Matthaëus held the contrary view. He said the law was framed without distinction and that a person should be punished with the penalty for falsity if he or she received money in return for giving evidence. He wrote that if a person received money either to tell or not to tell the truth he was necessarily liable, because the legislature intended to prevent witnesses from receiving money as this prospect of a reward would encourage certain people to give false testimony.

c. **Giving false testimony.**⁶⁷ It is said that one who gave false testimony was liable in terms of the *lex Cornelia*. Voet⁶⁸ said that falsity took place when anyone with evil intent made statements which were false, or which varied and were mutually inconsistent, or gave differing evidence on behalf of two persons. Some commentators raised the question as to whether a person was liable in terms of the *lex Cornelia* if that person, in fact, did not give false testimony, but, however, suppressed the truth. It is said that some commentators made a distinction between whether he or she did or did not accept money for doing so. Matthaëus⁶⁹ was of the opinion that the distinction was not important. Giving false

⁶⁴Van der Keessel *op cit* (n 4) 48.10.8 and Matthaëus *op cit* (n 44) 48.7.1.12.

⁶⁵Matthaëus *op cit* (n 44) 48.7.1.13.

⁶⁶*Ibid.*

⁶⁷Van der Keessel *op cit* (n 4) 48.10.8.

⁶⁸Voet *op cit* (n 45) 48.10.3.

⁶⁹Matthaëus *op cit* (n 44) 48.10.12.

testimony was treated so seriously that those who gave false testimony that resulted in an innocent person being condemned in a capital offence received the maximum penalty.⁷⁰

d. **Where a witness disclosed his or her evidence to both parties in the matter before the court.**⁷¹ This happened when Y had called X as a witness in his case against Z, and X disclosed the evidence he or she would give on behalf of Y to Z so that Z could come prepared against the evidence.

e. **Where persons conspired to render innocent persons liable.**⁷² Persons who, with wrongful intent, entered into an agreement or conspired to burden an innocent person with some false prosecution were liable for falsity, or if they did so in order that the person who had been unjustly prosecuted should be unable to save himself or herself.

2.2.3 Ways of committing falsity

Having discussed the categories of falsity, this thesis will now look at the ways of committing the crime of falsity. In Roman-Dutch law the crime of falsity was committed in the following four ways:

a. **By speaking.**⁷³ This included reading out a false last will and maliciously making false statements; and when a judge, in passing judgement, maliciously disregarded the ordinances of the Emperors.

⁷⁰Matthaeus *op cit* (n 44) 48.7.2.1.

⁷¹Van der Keessel *op cit* (n 4) 48.10.8 and Voet *op cit* (n 45) 48.10.6.

⁷²Van der Keessel *op cit* (n 4) 48.10.8.

⁷³Voet *op cit* (n 45) 48.10.3.

b. **By silence.**⁷⁴ There were seven instances, including suppression of evidence. Among other things, this offence was committed when one remained silent about and concealed the truth so that others were led into mistakes.

c. **By writing.**⁷⁵ There were eleven instances, including forgery. Voet⁷⁶ noted that one became guilty of falsity by putting together fraudulently false written statements of evidence to be submitted, or false records of evidence to be inspected, that is to say, had reduced them to writing so that they might be used in a judicial proceeding.

d. **By act.**⁷⁷ This included corruption of judges, counterfeiting and adulteration and using of false weights and measures or false trademarks. It is also said that this way also applied to the person who opened the last will of a living person; or betrayed documents deposited with him or her to the opponents of the depositor; or had sold the same property in whole to two different persons by different contracts.⁷⁸

2.2.4 Requirements for liability in terms of Roman-Dutch law

Under Roman-Dutch law, for an accused's conduct to fall foul of the Cornelian law of falsity, the following requirements had to be met:

a. There should have been an alteration of the truth.⁷⁹ This happened, *inter alia*, when a person had given false testimony. When, for example, someone had committed forgery in

⁷⁴Voet *op cit* (n 45) 48.10.4.

⁷⁵Voet *op cit* (n 45) 48.10.5.

⁷⁶*Ibid.*

⁷⁷Voet *op cit* (n 45) 48.10.6.

⁷⁸Voet *op cit* (n 45) 48.10.6.1-3.

⁷⁹Van der Keessel *op cit* (n 4) 48.10.1.

accounts, testaments or any other matter or had added some impurity to gold. Secondly, suppression of the truth; for example, if someone had destroyed or stolen another person's testament; or had made away with accounts; or with wrongful intent ruined the edicts. Lastly, counterfeiting the truth constituted falsity, for example, if someone had forged another person's chirograph; or had given false testimony; or delivered false letters in the name of the praetor or used a false name. It is said that those who, with wrongful intent, opened letters addressed to others also committed falsity.⁸⁰

b. The act should have caused harm and prejudice to another person.⁸¹ Van der Keessel⁸² said that this requirement must be understood in the sense that harm is probably threatened by the act of falsity, even though possibly it had not been caused. He gives the example of a witness who had given false testimony. According to him, such witness was liable for falsity even if the court gave no credence to his or her testimony.⁸³ So, according to Van der Keessel, only potential prejudice was required.

c. The accused must have acted *dolo malo*.⁸⁴ The third requirement was that it should have been committed with wrongful intent. Although Van der Keessel acknowledged the fact that in some situations falsity could be committed through gross negligence, for example, where the law stipulated that falsity could be committed through negligence and had specifically provided for exceptions, he preferred to say that falsity was committed by wrongful intent only.⁸⁵ The exception mentioned in the Roman-Dutch law where

⁸⁰*Ibid.*

⁸¹*Ibid.*

⁸²*Ibid.*

⁸³*Ibid.*

⁸⁴*Ibid.*

⁸⁵*Ibid.*

negligence was said to constitute falsity was where persons failed to prevent falsity when they were able to do so.⁸⁶ It is said that this was a special law applicable solely to the crime of false coinage.⁸⁷ It is submitted that punishing people with falsity for failing to prevent falsity when they were able to do so, should be taken as authority that even an omission was punished as falsity under the *lex Cornelia de falsis* when there was a legal duty to act positively or when the legal conviction of the society demanded X to act positively.⁸⁸

2.2.5 Summary of Roman-Dutch law

The Roman-Dutch law developed from the Roman Cornelian law. Following Roman law and treating the various ways of defeating or obstructing the course of justice as punishable, as well as a variety of other fraudulent conduct that infringed upon the interests of the due administration of justice, the Roman-Dutch law widened the scope of the Cornelian law of falsity.

The following acts relating to the obstruction of the proper administration of justice were punishable in terms of the Roman-Dutch law:

- a. Bribing a prosecutor and if a prosecutor accepted a bribe in order to refrain from prosecuting.
- b. Bribing or causing bribery of a judge in order for him or her to pass or not to pass a verdict.
- c. A judge accepting a bribe.

⁸⁶*Ibid.*

⁸⁷*Ibid.*

⁸⁸See comment on the legal convictions of the society *infra* Chapter Seven under 7.1, text at note 18.

- d. If a judge disregarded imperial constitutions or pronounced a sentence contrary to the law which was cited to him.
- e. Selling the outcome of the court's judgment.
- f. Accepting money for arranging legal assistance or testimony.
- g. Accepting money for giving or not giving evidence.
- h. Giving false testimony.
- i. Where a witness disclosed his evidence to both parties to the matter before the court.
- j. The bringing of false accusations against another person (*calumnia*) was also an offence in Roman-Dutch law.
- k. There is Roman-Dutch authority which indicates that persons who through wrongful intent failed to prevent falsity when they were able to do so (omission) were punished with the penalty of falsity. It is said that this was a special law applicable solely to the crime of false coinage. Therefore, this shows that not only positive acts were punished in terms of the *lex Cornelia*, but failure to act positively was also punished.

In Roman-Dutch law the following fraudulent conduct which infringed upon interests other than the free administration of justice were also punishable as species of *crimen falsi*:

- a. Writing a false statement in a document to the prejudice of another person. For example:
 - i. when a debtor antedated the date of a pledge given for a debt by Y, a creditor, and
 - ii. X, who, though he had been away, wrote in a chirograph or in a receipt that he had received his property in person, its purpose being to cause prejudice to

another.

This leads us next to an historical overview of this crime in English law.

2.3 ENGLISH LAW

2.3.1 General

In English law a miscellany of specific offences was treated traditionally under the rubric of perverting the course of justice.⁸⁹ It is said that the offences of interfering with the course of justice were somewhat numerous.⁹⁰ In English law obstructing the course of justice was a common law crime that could be tried only on indictment and punishable at the discretion of the court.⁹¹ The crime had a more general application and it punished any conduct which had a tendency to wrongfully interfere with the initiation, progress or outcome of any court proceedings, including arbitration proceedings.⁹² There is English authority for asserting that attempts to commit this crime were also punishable.⁹³ It is said that the charge took the form of inchoate offences of incitement, conspiracy or attempt even though justice had been manifestly perverted.⁹⁴ Card⁹⁵ and Smith and Hogan⁹⁶ submit that the use of the word ‘attempt’ in the name of this offence is misleading because the attempt is *per se* the substantive offence. In the next paragraph we will look at types of conduct that constituted the crime of perverting the course of justice.

⁸⁹Hunt *op cit* (n 7) 138.

⁹⁰GL Williams *Criminal Law: The general part* 2ed (1961) 416.

⁹¹R Card *Cross, Jones and Card Criminal Law* 11ed (1988) 427.

⁹²Card *op cit* (n 91) 428.

⁹³*The Queen v Vreones* [1891] 1 QB 360 at 367; JC Smith and B Hogan *Criminal Law* 6ed (1988) 751 and Williams *op cit* (n 90) 416.

⁹⁴Smith and Hogan *op cit* (n 93) 751.

⁹⁵Card *op cit* (n 91) 427.

⁹⁶Smith and Hogan *op cit* (n 93) 751.

2.3.2 *Actus reus* of the crime of attempt to pervert the course of justice

Card⁹⁷ observes that the use of the word ‘attempt’ when referring to this offence is misleading because the attempt itself is the substantive offence. Williams⁹⁸ observes that there is authority for asserting the existence of a general common law misdemeanour to pervert, delay or defeat the course of justice. The following types of conduct constituted the offence of perverting the course of justice:

a. **Interfering with witnesses.**⁹⁹ It was a common law misdemeanour to attempt to dissuade or prevent a witness from appearing or giving evidence. In *R v Johnson*¹⁰⁰ it was held that agreeing to give another person a sum of money in order to testify and prove that a deed was forged for purposes of obtaining a verdict, was a criminal offence. The facts of this case were as follows: The case emanated from a civil trial where, among other things, the truthfulness of the deed which the plaintiff produced against the defendant was at issue. During the trial the plaintiff produced a deed against the defendant, Johnson, and her tenants. Allegedly, Johnson denied that the deed was true. It was further alleged that Johnson agreed to give Y a sum of money in order for him (Y) to prove that the deed was forged.¹⁰¹ She was convicted for subornation of perjury.¹⁰² She appealed. It was submitted on Johnson’s behalf that she was found guilty of no crime because the charge did not surmise or allege that the deed was true.¹⁰³

⁹⁷Card *op cit* (n 91) 427 and R Card *Cross and Jones Introduction to Criminal Law* 9ed (1980) 284.

⁹⁸Williams *op cit* (n 90) 416.

⁹⁹Williams *op cit* (n 90) 416.

¹⁰⁰(1678) 2 Shaw 1 753.

¹⁰¹At 754.

¹⁰²At 753-54.

¹⁰³At 754.

The court, per Justice Jones, held:¹⁰⁴ ‘I judge it an offence, for witnesses ought to come unbiased and not affected with money.’ The court found that an agreement to prove that a deed was forged was an indictable offence if done with a wrongful intent.¹⁰⁵ The court, in a majority judgement, confirmed the conviction.¹⁰⁶

The importance of this case is twofold. Firstly, the conviction was in line with the Roman *lex Cornelia de falsis*, namely, it punished witnesses for receiving money for, *inter alia*, giving or not giving evidence.¹⁰⁷ Johnson attempted to obstruct the course of justice by inducing someone to make a false report in return for money. This was a common law misdemeanour in English law. Secondly, the case shows that there was some overlapping between the crime of perverting the course of justice and the crime of perjury or subornation of perjury.

b. **Intimidation of witnesses.**¹⁰⁸ In the Nineteenth Century, threatening and intimidating witnesses with the intention of preventing them from giving evidence was punished as contempt of court and not as a misdemeanour to pervert the course of justice. Conspiracy to commit this offence was also punishable.¹⁰⁹ One of the earliest cases that dealt with the intimidation of witnesses was *Shaw v Shaw*.¹¹⁰

The facts of this case were as follows: The respondent (Mr Shaw) was petitioned by his

¹⁰⁴At 756.

¹⁰⁵At 753.

¹⁰⁶At 756.

¹⁰⁷Matthaeus *op cit* (n 44) 48.10.12 and Van der Keessel *op cit* (n 4) 48.10.8. See text under 2.1.2 *supra* at note 11.

¹⁰⁸*Shaw v Shaw* (1861) 6 LT 1096.

¹⁰⁹JWC Turner *Russell on Crimes* 12ed Vol 1 (1964) 313.

¹¹⁰*Shaw v Shaw supra* (n 108) at 1096.

wife to show cause why he should not be imprisoned or dealt with according to law for contempt of court for threatening and intimidating witnesses in a hearing against him. The witnesses referred to here were Mrs Downan and Mrs Stewart. The former had been working for the Shaws for three months in 1860. She alleged in her affidavit that she had witnessed the physical abuse of Mrs Shaw by the respondent on many occasions. It was alleged that he threatened and intimidated the witnesses for the purpose of preventing them from giving evidence against him.

The Judge observed that the respondent's actions were intended to intimidate the two witnesses so that they would not give evidence at the hearing and that, therefore, he was guilty of contempt of court.¹¹¹ In this case, intimidating and threatening witnesses in order to prevent them from giving evidence was punished as contempt of court as opposed to perverting the course of justice as the offence is known nowadays.

I concur with the learned writers, Smith and Hogan,¹¹² when they say the relationship between perverting the course of justice and other common law misdemeanours is obscure. There is, for instance, a very thin line between this offence, perjury and contempt of court.

c. **Making false allegations against another and making false statements to the police.**¹¹³ In English law, making false statements to the police or other officers of the peace with the view to pervert the course of justice was punishable as a misdemeanour.

d. **Fabrication of false evidence.**¹¹⁴ Like interference with witnesses, fabrication of

¹¹¹At 1098.

¹¹²Smith and Hogan *op cit* (n 93) 755.

¹¹³Smith and Hogan *op cit* (n 93) 752-53 and Card *op cit* (n 91) 428.

¹¹⁴Smith and Hogan *op cit* (n 93) 752.

evidence was a misdemeanour under English law. The Criminal Code Commission¹¹⁵ gave an illustration of the latter. In *The Queen v Vreones*¹¹⁶ it was held that fabrication of false evidence for the purpose of misleading a judicial tribunal was a misdemeanour under English law.

The facts of this case were as follows: The defendant (Vreones) was charged and convicted for attempting to pervert the course of justice by preparing false evidence to be used in an imminent arbitration. This matter arose from the terms of a contract for the purchase of a cargo of wheat where the sellers were to ship it to the buyer. One of the terms of the contract was that any dispute should be referred to two arbitrators, whose award would be final and conclusive and upon the application of either party, be made a rule of the court in England. Vreones was appointed by the sellers and charged with taking samples of the cargo upon the arrival of the ship at its destination. It was alleged that he, with intent to deceive the arbitrators (to be appointed in terms of the contract), with regard to the quality of the wheat in the cargo, so as to prevent the due course of justice, unlawfully tampered with the quality of wheat in the cargo. He put top quality wheat at the top and sub-quality wheat at the bottom. It was said that his actions had the potential to injure and prejudice the buyer and to prevent the due course of justice.¹¹⁷ The court found him guilty for attempting to pervert the course of justice.

In a persuasive judgement that was delivered by Lord Coleridge, CJ, the court observed:¹¹⁸

¹¹⁵*Criminal Code Commission Report (1879)* 21 as cited by Williams *op cit* (n 90) 416.

¹¹⁶*The Queen v Vreones supra* (n 93).

¹¹⁷At 360.

¹¹⁸At 366-67.

[I] cannot doubt that to manufacture false evidence for the purpose of misleading a judicial tribunal is a misdemeanour ... I think that, an attempt to pervert the course of justice is in itself a punishable misdemeanour.

The majority of the Court of Criminal Appeal confirmed the conviction.¹¹⁹ This decision confirmed that judicial proceedings did not necessarily need to be in process to successfully convict those guilty of the misdemeanour of fabricating evidence in order to pervert the course of justice. It was enough for such proceedings to be imminent.¹²⁰

e. **Aiding someone to evade lawful arrest.**¹²¹ Committing an act that will tend to assist, and with the intent to assist, another person to evade lawful arrest knowing that the police wanted that person constituted an attempt to pervert the course of justice.

f. **Disposal of a corpse with intent to prevent an inquest.**¹²² X was guilty of a common law misdemeanour if he or she destroyed or otherwise disposed of a dead body with intent to prevent a lawful inquest being held. In *The Queen v Stephenson*,¹²³ the accused were found guilty of a misdemeanour of obstruction of justice for burning a corpse in order to prevent an inquest. The facts of this case were as follows: The defendants were indicted for having burnt the corpse of an infant child with the intent of preventing the holding of an inquest upon it. It was alleged that one of the defendants (the mother of the child) left the child at the house of another woman. The child died. It was alleged that the defendants secretly took the corpse away and burnt it with the intent of preventing an inquest. It is said that when the coroner was appointed to hold an inquest the defendants knew about it. The inquest could not be held because the body was not forthcoming. The

¹¹⁹At 369.

¹²⁰Smith and Hogan *op cit* (n 93) 753 and Williams *op cit* (n 90) 416.

¹²¹Card *op cit* (n 91) 429.

¹²²Smith and Hogan *op cit* (n 93) 756.

¹²³(1884) QBD 331.

two defendants had taken it away from one of the defendants' houses and burnt it.

The defendants were indicted for burning the dead body with intent to prevent the holding of an inquest. During the trial, the indictment of the defendants was objected to on the following grounds:¹²⁴

- (1) that it did not sufficiently aver that the case was a proper one for an inquest; or
- (2) that the proposed inquest was one which ought to be held; or
- (3) that the information on which the Coroner acted should have been sent out and that it ought to have been shown that the case was of such a nature that the Coroner was bound to hold an inquest.

The *court a quo* convicted both defendants of the misdemeanour of perverting the course of justice. The Court of Criminal Appeal confirmed the convictions.¹²⁵

Although it was never pronounced in so many words that burning a corpse in order to prevent an inquest perverts the course of justice, this case shows how the common law misdemeanour of perverting the course of justice developed in English law to what it is today.

2.3.3 Offences akin to perversion of justice

The following offences, which are related to perversion of justice, were once treated as offences that interfered with the course of justice:¹²⁶

¹²⁴At 332.

¹²⁵At 339.

¹²⁶Williams *op cit* (n 90) 416; JC Smith and B Hogan *Criminal Law* (ed) (1965) 536-37; Card *op cit* (n 91) 429-30 and Card *op cit* (n 97) 285.

a. **Embracery.** This was a common law misdemeanour which consisted in any attempt to influence a juror in the giving of a verdict otherwise than by evidence and arguments in open court. In *R v Owen*¹²⁷ it was noted that the bribery of the juror or other attempts to influence him out of court may be charged as conspiracy to pervert the course of justice, or dealt with as contempt. The Court of Appeal observed that this offence is now obsolete.¹²⁸ The facts of this case were as follows: In 1974, D was tried for murdering his wife, the appellant's sister. The appellant and other members of his family were present during the trial. At the commencement of the trial the judge warned the jury against speaking to anyone, or allowing anyone to speak to them, about any matter related to the trial.¹²⁹ It is said that one day, when the case was still *sub judice*, one member of the jury (Mrs Owen) saw some of the deceased wife's family walking along the road ahead of her during the midday adjournment. She slowed down to avoid them, but the appellant, who was walking behind her, passed her. She then said 'Guilty. He's guilty, you know. He's already stabbed somebody before.'

Mrs Owen said at the trial that the appellant uttered these words to her in such a way that she doubted whether the family members walking ahead could have overheard them. As a result of what happened, Mrs Owen, it is said, was somewhat disturbed. She drew away from the appellant and went to the cafeteria.

The juror reported the incident to the police, who informed the judge. The judge discharged the jury and another one had to be empanelled and the trial had to start all over again.¹³⁰ The appellant was charged with embracery and was convicted. He appealed

¹²⁷[1976] 3 All ER 239 CA.

¹²⁸At 239.

¹²⁹At 241e.

¹³⁰At 242a.

against both the conviction and the sentence.¹³¹ The court allowed the appeal on sentence, but did not interfere with the conviction.¹³²

The court, per Lawton, LJ, noted that the reason why the offence of embracery was becoming obsolescent was that in modern times the kind of conduct envisaged by the offence of embracery had been dealt with in one of two ways. The court noted that if more than one person had been involved, the charge was likely to have been conspiracy to pervert the course of justice. If only one person was involved, the court said the charge was likely to have been contempt of court.¹³³

This case highlights the interrelationship between the crime of perverting the course of justice and contempt of court. The court confirmed this proposition when it made the observation that, if more than one person had been involved, the charge was likely to have been conspiracy to pervert the course of justice. If only one person was involved, the court said that the charge was likely to have been contempt of court.

b. **Prison-breaking, escape and rescue.** In *Williams*,¹³⁴ escape and assisting escape, breach of prison and rescue and the escape of juveniles and mentally disordered patients were all considered as common law misdemeanours which interfered with the course of justice.

c. **Maintenance, champerty and barratry.** Maintenance was committed when someone, without lawful excuse, gave assistance to a party to a civil action when he did not

¹³¹At 242e.

¹³²At 243c-d.

¹³³At 240g-h.

¹³⁴*Williams op cit* (n 90) 416.

have a legal standing in the matter.¹³⁵ Champerty was a species of maintenance where it was agreed that X was to receive part of the fruits of the action if it succeeded.¹³⁶ Barratry was the offence of one who habitually maintained suits in which he or she had no legal standing.¹³⁷

According to Smith and Hogan,¹³⁸ in some circumstances there might be lawful justification for conduct which was otherwise within the definition of maintenance as, for example, where a person assisted a poor man purely out of charitable motives or assisted a close relative or his or her house helper. Likewise a lawyer who provided his or her professional assistance for free was not guilty of any these offences. However, if it had been agreed that the lawyer would receive a proportion of the fruits of the action in the latter case, he or she was guilty of champerty and maintenance. These offences are now obsolete.

d. **Wasteful employment of police.** It was a misdemeanour to mail statements to the police falsely averring that a crime had been committed, for example, if X mails a statement to the police or telephones the police to claim falsely that she has been hijacked. Following these claims the police waste their time searching for her and her hijackers. It is said that the misdemeanour did not cover acts done by the accused person himself to evade punishment, such as trying to evade arrest or destroying the evidence against him or herself. Neither was an accused person guilty of an offence for refusing to admit to the police whether he or she is guilty of any suspected crime.¹³⁹ This fell under the protection against

¹³⁵Smith and Hogan *op cit* (n 126) 536.

¹³⁶*Ibid.*

¹³⁷*Ibid.*

¹³⁸Smith and Hogan *op cit* (n 126) 536-37.

¹³⁹Williams *op cit* (n 90) 417.

self-incrimination. For example, X has shot and killed Y. During police investigation, the police questioned X about the murder. X denied any involvement with the murder. Subsequently, X was charged with Y's murder. It was not an offence for X to tell the police that he or she did not commit the crime.

2.3.4 Legislation

The crimes of perverting the course of justice were mostly common law misdemeanours. The legislation that governed the crime of perverting the course of justice will now be dealt with. In the Nineteenth Century the English legislature passed laws which recognised the existence of an offence of conspiracy to obstruct, prevent, pervert, or defeat the course of the due administration of justice¹⁴⁰ and which protected witnesses.¹⁴¹

a. The Criminal Procedure Act of 1851

This legislation¹⁴² punished certain conduct that had a tendency to obstruct the course of justice. Section 29 of this Act provided:¹⁴³

Whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanour; that is to say, any cheat or fraud punishable at common law; any conspiracy to cheat or defraud, or to extort money or goods, or falsely accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice; any escape or rescue from lawful custody on a criminal charge; ... it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment.

A close scrutiny of this legislation reveals that the English legislature intended to punish various types of conduct including the false laying of a charge against an innocent person

¹⁴⁰Section 29 of the Criminal Procedure Act of 1851. See *Halsbury's Statutes of England* 2ed Vol 5 by R Burrows (1948) 717.

¹⁴¹Section 2 of the Witnesses Protection Act of 1892. See *Halsbury's Statutes of Wales* 4ed Vol 12 *Criminal Law* (1985) 177 and *Turner op cit* (n 109) 313.

¹⁴²Section 29 of the Criminal Procedure Act of 1851.

¹⁴³*Halsbury op cit* (n 140) 717.

and any conduct, which obstructed, prevented, perverted or defeated the course of justice. In this Act the legislature did not list any acts, which obstructed, prevented, perverted or defeated the course of justice. It was left for interpretation by the courts.

b. Section 2 of the Witnesses (Public Inquiries) Protection Act of 1892

In 1892 the English legislature promulgated the Witnesses (Public Inquiries) Protection Act which was intended to protect witnesses who had testified in an inquiry against retaliation. The words “for having given evidence” are used in section 2 of the Act. It is clear that section 2 of the Act was not intended to protect witnesses or potential witnesses who had not testified. Section 2 of the Act provided:¹⁴⁴

Every person who commits any of the following acts, that is to say, who threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure, any person for having given evidence upon any inquiry, or on account of evidence which he has given upon any of such inquiry, shall unless such evidence was given in bad faith, be guilty of a misdemeanour, ...

It is clear that the statutory offence of perverting the course of justice did not only coexist with the common law offence, but was similar to the Roman and Roman-Dutch crimes punishable in terms of the *lex Cornelia de falsis*.¹⁴⁵

2.3.5 Summary

Under English law the crime of attempting to pervert the course of justice was a common law crime triable only on indictment. The crime’s designation as “attempting” to pervert the course of justice is said to be misleading because the crime is not an inchoate offence, but a substantive offence. Under this crime a number of acts were punishable, e.g., interference with witnesses, fabrication of evidence, interfering with a juror and laying of a

¹⁴⁴The Witnesses (Public Inquiries) Protection Act 1892, *Criminal Law* Vol 39 (55 and 56 Vict C 64 (Revised on 1st June 1978)) 1.

¹⁴⁵See text under 2.1.2 *supra*, at note 11 and text under 2.1.4 *supra*, at note 27.

false charge, etc. It is said that the offence was not limited to matters directly concerned with proceedings already in being, but it was sufficient if the proceedings were imminent or the investigations that could or might lead to proceedings were in process.

Along with the common law crime of attempting to pervert the course of justice further pieces of legislation to protect witnesses existed. Section 29 of the Criminal Procedure Act of 1851 made it a statutory offence to obstruct, prevent, pervert or defeat the course of public justice. Section 2 of the Witness Protection Act of 1892 created a statutory offence of, *inter alia*, threatening witnesses who had testified in an inquiry. It is clear that section 2 of the Act was not intended to protect witnesses who had not testified or potential witnesses.

This leads us to the discussion of the evolution of this crime in South African law.

2.4 SOUTH AFRICAN LAW

2.4.1 General

The *lex Cornelia de falsis* accepted in Roman-Dutch law had a strong influence on the evolution of the crime of obstruction of justice in South Africa. Undoubtedly our courts derived their inspiration from Roman and Roman-Dutch authorities. English law played a lesser role in the development of this part of our law.¹⁴⁶ Similarly to Roman and Roman-Dutch law, this offence was committed only where judicial proceedings relating to the administration of justice were defeated or obstructed. Our courts restricted this offence to proceedings of a judicial nature and expressly held that proceedings of an administrative nature or quasi-judicial nature could not amount to the crime of defeating or obstructing the due administration of justice.¹⁴⁷

¹⁴⁶Hunt *op cit* (n 7) 140.

¹⁴⁷Hunt *op cit* (n 7) 141.

As opposed to the position in Roman and Roman-Dutch law where there were no organised police forces and where modern methods of investigation and prosecution of crime were unknown, the scope of the crime had been extended in our law to cover the pre-trial aspects of the administration of justice, which include police investigations of crimes or, indeed, police efforts to prevent the commission of crimes.¹⁴⁸ It has been reasoned that to hold that interference in these aspects of the administration of justice come within the ambit of the crime is within the spirit of the Roman and Roman-Dutch law and amounts to no more than an adaptation of the crime to modern circumstances.¹⁴⁹ This represents the extension of the crime beyond its Roman and Roman-Dutch origins, where its various manifestations related almost exclusively to the trial stage.¹⁵⁰ Therefore, the crime today covers a wider field than the original *lex*.¹⁵¹ Although Hunt¹⁵² supports the view which says that while it seems correct and necessary to regard police investigations as falling within the scope of the concept of the administration of justice, he submits that it is only those activities which relate to the investigation of crimes and the collection of evidence relating to such crimes that should come within the ambit of the concept. He further submits that routine police activities which are not connected with the investigation of crimes are of an essential administrative nature and do not fall within the ambit of the crime of defeating or obstructing the administration of justice.¹⁵³ This thesis shall now discuss the reception of this crime in our law.

¹⁴⁸*Ibid.* See also J Burchell and J Milton *Principles of Criminal Law* 3ed by J Burchell (2005) 940.

¹⁴⁹Hunt *op cit* (n 7) 141.

¹⁵⁰Hunt *op cit* (n 7) 149.

¹⁵¹CR Snyman *Criminal Law* 4ed (2002) 337.

¹⁵²Hunt *op cit* (n 7) 142).

¹⁵³*Ibid.*

2.4.2 The development of the crime in the Cape Colony

The question of whether or not the crime of defeating or obstructing the course of justice was part of our law presented itself, for the first time, in the Cape Colony. The first reported case dealing with the offence of conspiring to prevent and obstruct the due course of justice was *R v Braham*.¹⁵⁴ In this case the court set aside a conviction for conspiring to prevent and obstruct the due course of justice.

The facts of this case were as follows: The accused was charged with the offence of “conspiring to prevent and obstruct the due course of justice.”¹⁵⁵ It was alleged that he agreed with a material state witness, Hopper, in the case against a certain Osborne, that she would be removed in order not to have to give evidence in the case against the accused.¹⁵⁶ It was alleged that the accused promised to pay Hopper a sum of money if she left the court’s jurisdiction.

It was objected on behalf of the accused that, *inter alia*, the indictment did not charge a crime known in our law. The jury nevertheless convicted the accused of conspiring to prevent and obstruct the due course of justice.¹⁵⁷ The court allowed him to appeal to the Court of Appeal in Criminal Cases. It was contended on behalf of the appellant that “[Th]is was no offence known to the law.”¹⁵⁸ The court avoided this issue by holding that the indictment did not in any event sufficiently allege conspiracy.¹⁵⁹ The court said that it was difficult to understand from the wording of the indictment whether the state intended to

¹⁵⁴(1882) 1 Buch AC 147. It may be noted that between 1814 and 1825 a number of convictions were recorded in the Cape for ‘false accusations of crime’ and ‘laying false complaints.’ See Hunt *op cit* (n 7) 139.

¹⁵⁵*R v Braham supra* (n 154) at 147.

¹⁵⁶Hunt *op cit* (n 7) 139.

¹⁵⁷*R v Braham supra* (n 154) at 147.

¹⁵⁸At 151.

¹⁵⁹At 153.

charge the accused with conspiracy to commit the crime or with conspiring to induce the commission of the crime. The court further observed that if the state intended to charge the accused with conspiracy with a certain Hopper to commit a crime, then, there was no evidence of consent on her part. If the charge was that of conspiring to induce Hopper to commit a crime, then there was no person indicated with whom that conspiracy was made.¹⁶⁰ The conviction was set aside.¹⁶¹

A landmark decision in the evolution of the common law offence of obstructing the course of justice was delivered in 1886 in *Queen v Foye and Carlin*.¹⁶² In this case the court was faced with the question of whether or not to defeat or obstruct the course of justice was an offence known in our law.

The facts of the case were as follows: The accused were charged with murder and the crime of defeating and obstructing the due course of justice.¹⁶³ It was alleged that the accused enticed away and removed a material Crown witness in order to prevent and hinder him from appearing to give evidence in court against a certain Ann Eatwell who was an accused in another case. It was alleged that Foye and Carlin enticed away and removed Mr Jonas, a detective who was a material Crown witness in the case against the said Eatwell, in order not to testify against Eatwell. The Crown also alleged that Foye and Carlin murdered Jonas so that he could not testify in the case against Mrs Eatwell. The trial proceeded upon a not guilty plea. The jury found the accused not guilty on the charge of murder, but guilty of defeating and obstructing the due course of justice. The court reserved for the consideration of the Court of Criminal Appeal, *inter alia*, “[w]hether the

¹⁶⁰At 152.

¹⁶¹At 153.

¹⁶²(1886) 2 Buch AC 121.

¹⁶³At 122.

prisoner Foye was rightly convicted inasmuch as there was not sufficient evidence against him that he, in the Territory of Griqualand West, acted in concert with Carlin or the boy Jonas, so as to defeat the ends of justice.”¹⁶⁴

On appeal, counsel for the accused admitted that defeating and obstructing justice was an indictable offence but denied that it had been proved that any crime had been committed.¹⁶⁵ The court unanimously sustained the conviction of the accused of the crime of defeating and obstructing the due course of justice.¹⁶⁶

The *Queen v Foye and Carlin* case is an important decision in our law regarding the reception of the crime of obstruction of justice. Now the crime of obstructing the course of justice was recognised in common law.¹⁶⁷ This decision laid a strong legal foundation in our legal system insofar as the reception of the Roman and Roman-Dutch law relating to the obstruction of the administration of justice.

In 1893, barely seven years after the *Queen v Foye and Carlin*¹⁶⁸ case, the Cape Supreme Court, in *Queen v Kaplan*,¹⁶⁹ was faced with another matter related to obstructing or defeating the course of justice. In this instance the accused were facing the charge of “conspiracy to defeat the course of justice” as in the *R v Braham*¹⁷⁰ case.

¹⁶⁴At 124.

¹⁶⁵*Ibid.*

¹⁶⁶At 125-26.

¹⁶⁷FG Gardiner and CWH Lansdown *South African Criminal Law and Procedure: a Treatise upon the Law and Practice in Criminal Matters in the Union of South Africa* 2ed Vol II (1924) 818.

¹⁶⁸*Queen v Foye and Carlin supra* (n 162).

¹⁶⁹(1893) 10 SC 259.

¹⁷⁰*R v Braham supra* (n 154).

The facts of this case were as follows: The accused, A and M Kaplan, were indicted with two others on a charge of “conspiracy to defeat the course of justice.” Mr A Kaplan was first arrested on the charge of receiving stolen goods knowing them to be stolen. While he was out on bail, it was alleged that he and the other three persons had attempted to persuade two material witnesses, on the charge of receiving stolen goods knowing them to be stolen, to leave the country so that they could not testify at the trial. It was alleged that the two Kaplans set up a plan to try to get the two chief witnesses against A Kaplan to leave the country. It was said that money, a cart and a pair of horses were provided. It appeared under cross-examination that the two witnesses did not have any intention of going away. The arrangement was a plot to catch the two Kaplan brothers. It is not clear from the case whether it was a police trap or if the two gentlemen acted on their own accord.¹⁷¹

It was submitted on behalf of the accused that the crime of conspiracy was unknown in our legal system. The court nevertheless convicted both the accused of conspiring to defeat the course of justice. The court reserved to the Cape Supreme Court the question of “whether the charge as laid in the indictment disclosed any crime known to law.”¹⁷² Therefore, the Cape Supreme Court had to decide as to whether conspiracy to defeat the course of justice was a crime in our law. The court per De Villiers CJ held:¹⁷³

[I] have not been able to find any authority on Roman or Dutch or South African law which treats such a conspiracy as a substantive crime, or which treats every conspiracy to commit any crime, whatever its nature may be, as being itself an indictable offence.

The exception taken in the court *a quo* that the charge laid in the indictment was not an indictable offence was sustained and the conviction and sentence were set aside. Kaplan’s

¹⁷¹*Queen v Kaplan supra* (n 169) at 260.

¹⁷²*Ibid.*

¹⁷³At 265.

case accepted that obstruction of justice was an offence in our law; it held only that conspiracy was not a crime.¹⁷⁴

Subsequent to the *Queen v Kaplan*¹⁷⁵ decision, in 1902, in *R v Moss*,¹⁷⁶ the accused were charged and convicted with the offence of attempting to defeat the course of justice. The facts of the case were the following: It was alleged that the accused, X, a general dealer, and Y, a seaman, both of Cape Town, by the offer of bribes and other corrupt means, induced and persuaded a certain Greenhill to write and sign a document declaring that a charge he laid against (Z) was laid while he was under the influence of liquor and that he gave evidence before the Magistrate under the influence of a false impression and that the evidence was not true.¹⁷⁷ Maarsdorp J observed:¹⁷⁸

If a person attempts fraudulently to lead another person to make a statement which he knows to be untrue in order to prevent justice being done, that is an attempt to defeat the ends of justice.

2.4.3 The development of the crime in the Transvaal

The first important decision in the Transvaal was in 1897 in *S v Friedman and Sonn*.¹⁷⁹ The facts of this case were as follows: The accused were charged with attempting to bribe witnesses in order to induce them not to give true evidence. The accused were convicted and they appealed against their conviction, *inter alia*, upon the ground that attempting to bribe witnesses was not a crime according to our law. The conviction was confirmed and the appeal was dismissed.¹⁸⁰ The court did not advance any reasons for its decision.

¹⁷⁴Hunt *op cit* (n 7) 139.

¹⁷⁵*Queen v Kaplan supra* (n 169).

¹⁷⁶1902 12 CTR 810.

¹⁷⁷At 810.

¹⁷⁸At 811.

¹⁷⁹(1897) 4 Off Rep 183.

¹⁸⁰At 184.

The significance of this case is that, although the accused were not charged with defeating or obstructing the course of justice, the court decision laid a strong foundation for the development of this crime. Bribing witnesses so that they could not testify is indeed interfering with witnesses and such action obstructs the course of justice.¹⁸¹

Subsequently, in 1903, the Transvaal Supreme Court considered a case relating to attempt to defeat the ends of justice. In *R v Cowan and Davies*¹⁸² the court received the law as set out in the *lex Cornelia*. The court was largely inspired by the *Queen v Foye and Carlin*¹⁸³ decision in finding that the crime of “attempting to bribe a witness” was punishable.

The facts of this case were as follows: Cowan and Davies were employees of the Criminal Investigation Department. They had trapped and arrested a certain Solomon for illicit liquor dealing. They promised Mr Solomon, the accused in an illegal liquor dealing case, that they would leave the country so that they could not give evidence against him in the court of law if he would pay them a sum of money. Solomon informed the police who then laid a trap for them. The police made arrangements with Solomon for him to meet Cowan and Davies and pay them a portion of the money under the observation of the police. They were convicted for attempting to defeat the ends of justice. The court reserved for the consideration of the Supreme Court of ‘whether upon the finding of the jury the prisoners could be legally convicted of the crime in the indictment.’¹⁸⁴

The court referred to both Roman and Roman-Dutch law, especially Voet, where it was said that if a person corruptly removed himself so that he could not be compelled to give

¹⁸¹Emphasis added.

¹⁸²(1903) TS 798.

¹⁸³*Queen v Foye and Carlin supra* (n 162).

¹⁸⁴The crime referred to here was the crime of attempting to defeat the ends of justice, following accepting money for the giving or withholding of testimony.

evidence he contravened the *lex Cornelia de falsis*.¹⁸⁵ The question reserved was answered in favour of the state¹⁸⁶ and the conviction was upheld.

The Supreme Court made the following statement:¹⁸⁷

To my mind this branch of the crime, of attempting to defeat the ends of justice, coincides exactly with the branch of the *lex Cornelia de falsis*. In so far as the *lex Cornelia de falsis* deals with the corruption of testimony, and in so far as defeating the ends of justice is carried out by corrupting testimony, to that extent the two laws overlap; and it does not matter whether one calls the offence which the accused committed a breach of the *lex Cornelia* or an attempt to defeat the ends of justice: in substance the two crimes are the same. Just as forgery is the branch of the *crimen falsis*, so attempting to defeat the ends of justice by corrupting testimony is, in my opinion, a branch of the *lex Cornelia*.

The Roman and Roman-Dutch law prohibited procuring money for, *inter alia*, renouncing or withdrawing evidence or for giving or withholding evidence; anyone doing that was liable in terms of the Cornelian law.¹⁸⁸ It is clear in this case that Cowan and Davies procured money so that they could leave the country and by doing so they would renounce the giving of evidence as witnesses in a case against Solomon. Renouncing the giving of evidence in court obstructs the course of justice and it is a criminal offence in our law.

Almost six years after the Transvaal Supreme Court had observed in the *Cowan and Davies*¹⁸⁹ case that ‘attempting to defeat the ends of justice coincides exactly with the branch of the *lex Cornelia de falsis*,¹⁹⁰ the same court was faced with a similar matter in 1909. In *Duuring v R*,¹⁹¹ it was held that to constitute the crime of defeating or attempting

¹⁸⁵*R v Cowan and Davies supra* (n 182) at 801.

¹⁸⁶At 802.

¹⁸⁷At 801-02.

¹⁸⁸D 48.10.2. See text under 2.1.4, *supra* at note 11.

¹⁸⁹*R v Cowan and Davies supra* (n 182).

¹⁹⁰At 801-02.

¹⁹¹[1909] TS 933 at 935.

to defeat the ends of justice, it must be shown that the accused knowingly and wilfully committed or attempted to commit the acts, the necessary consequence of which would have been to defeat the ends of justice.

The facts of the *Duuring* case were as follows: The accused, a law agent, was charged with attempting to defeat the ends of justice, in that a warrant had been issued to search a bottle store belonging to one Salmenson and to seize the business books therein. It was alleged that the accused, knowing of the warrant, removed the books.

There were criminal proceedings contemplated against one Measroch following contravention of the Liquor Ordinance and those books were of vital importance to support the court proceedings. It was alleged that the accused went inside the bottle store and came out with the parcel, but it was not clear whether the parcel contained the said books or not. Nevertheless, he was charged with attempting to defeat the ends of justice.¹⁹² He was convicted and he appealed.

On appeal, the court found that there was great uncertainty regarding the contents of the parcel and that no proof was produced that any of the business books were actually missing. Therefore, the court set aside the conviction and allowed the appeal.¹⁹³

The importance of this case lies in the following observation made by the court:¹⁹⁴

Now it is a criminal offence to defeat, or attempt to defeat, the ends of justice. But, as was laid down in *Queen v Foye and Carlin* (2 Buch. App. Cas. 121), in order to establish such a crime it must be

¹⁹²At 934.

¹⁹³At 935.

¹⁹⁴*Ibid.*

shown that the accused knowingly and wilfully committed or attempted to commit acts the necessary consequence of which would have been to defeat the ends of justice.

In making such observation, the court further entrenched the crime of defeating or obstructing, or attempting to defeat or obstruct the course of justice in our law. This leads us to the evolution of this crime in Natal.

2.4.4 The Natal courts' approach to this crime

Following the developments in other jurisdictions, notably in the Cape and Transvaal, the Natal Supreme Court in 1908 in *R v Gabriel*,¹⁹⁵ followed the decision in *R v Cowan and Davies*¹⁹⁶ and rejected the contention by the appellant that there was no such a crime as “attempting to defeat the ends of justice.”

The facts of this case were as follows: The appellant, Gabriel, acted as counsel for the defence in a criminal case against Mr Solomon and Mr Roots. He was charged for wrongfully and unlawfully attempting to, *inter alia*, defeat the ends of justice. The state alleged that he attempted to:¹⁹⁷

- a. dissuade Mr Joseph a material state witness in the case against his clients, Solomon and Roots, from testifying;
- b. remove, or induce to remove, Joseph from the court's jurisdiction so that he should not be compelled to give evidence for the state in the case against the aforesaid; and
- c. approach the investigating officer in the case against the aforesaid, to work with him.

¹⁹⁵(1908) 29 NLR 750.

¹⁹⁶*R v Cowan and Davies supra* (n 182).

¹⁹⁷*R v Gabriel supra* (n 195) at 752.

The court convicted Gabriel, and he appealed on the ground, *inter alia*, that the summons did not disclose a crime known under the South African law.

In passing judgment, the court per Bale, CJ, relied heavily on *R v Cowan and Davies*.¹⁹⁸

The court found no reason to interrupt the verdict of the Magistrates' Court and the appeal was dismissed. This decision further entrenched the development of the crime of obstruction of the course of justice in our law. However, what was needed was the confirmation of the Appellate Division as to whether the crime of obstructing the course of justice was recognised in South African law. It is said that the practice of charging a specific offence of obstructing or defeating the course of justice became established in our law and soon received the Appellate Division's approval.¹⁹⁹

2.4.5 The Appellate Division decision

Following the developments in the Cape, Transvaal and Natal Supreme Courts, the Appellate Division ended the legal uncertainty in 1919 in *R v Zackon*.²⁰⁰

The facts of this case were as follows: X, the owner of a licensed bar, was charged with attempting to defeat the ends of justice. It was alleged that he allowed a child who was then under the age of sixteen years to be in the bar, in contravention of legislation governing the sale of liquor. After being charged for the contravention of the legislation governing the sale of liquor it was alleged that he attempted to induce the mother of the girl to state in evidence that the girl was indeed sixteen years of age. The *court a quo* found him guilty of attempting to defeat the ends of justice. He appealed to the Cape Provincial Division and his appeal was dismissed. He then applied for leave to appeal against the decision of the

¹⁹⁸*R v Cowan and Davies supra* (n 182).

¹⁹⁹Hunt *op cit* (n 7) 140.

²⁰⁰(1919) AD 175.

Cape Provincial Division on the following grounds:²⁰¹

- a. that there was no evidence that he, at the time of the offence, knew that the girl was under sixteen years of age;
- b. that at the time of the alleged offence no summons had been issued to the mother of the child;
- c. that the mother was not a material witness; and
- d. that there was no proof that the ends of justice would have been defeated.

The Cape Provincial Division decided that there was no probability of the applicant succeeding in the Appellate Division either upon the question of law or fact. The application was refused.²⁰² He then applied to the Appellate Division for leave to appeal and, in dismissing that application, De Villiers, AJA, held:²⁰³

I agree that the application should be refused, for it is clear the appeal cannot succeed. There is no dispute about the law. ... Although differently stated it all comes to this that any tampering with evidence which is to be used before a court of law is an interference with the course of justice, and therefore an attempt to pervert or obstruct or to defeat the ends of justice and as such punishable under the *lex Cornelia de falsis*.

The *R v Zackon* decision created legal certainty as to whether obstruction or defeating the end of justice was an offence recognized in our law. But what various acts constituted the crime of defeating or obstructing the course of justice?

2.4.6 Categories of acts which constituted the offence

In this paragraph the conduct which was regarded to constitute the crime will be discussed.

²⁰¹At 176.

²⁰²At 181-183.

²⁰³At 182.

It is said that the course of justice was obstructed or defeated in many ways and some of the acts were usually prosecuted under the name of some specific crime, which the crime of obstruction of justice might to a greater or lesser extent overlap. The offence overlapped with offences like contempt of court; perjury or subornation of perjury; bribery of public officers; fraud or forgery; extortion; assisting a prisoner to escape or obstructing the police in performing their official duties.²⁰⁴

After the ruling by the Appellate Division in *R v Zackon*²⁰⁵ the following acts, as in Roman, Roman-Dutch and English law, were punishable as obstruction of the course of justice:²⁰⁶

a. **Interference with witnesses.**²⁰⁷ It is said that this offence was committed when the accused approached a potential witness, even if he or she had not yet been subpoenaed, to give false evidence.²⁰⁸ It was not necessary that the accused approach the witness directly; persuading a third party to do so was sufficient. Another way of interfering with a witness was the removal of a witness or potential witness from the court's jurisdiction so that the witness could not be compelled to give evidence.²⁰⁹

b. **Tampering with documentary and other evidence.**²¹⁰ Any tampering with evidence which was to be used before a court of law was and is still punished as obstructing

²⁰⁴Hunt *op cit* (n 7) 155.

²⁰⁵*R v Zackon supra* (n 200).

²⁰⁶Hunt *op cit* (n 7) 155-161.

²⁰⁷Hunt *op cit* (n 7) 155.

²⁰⁸*R v Zackon supra* (n 200). The accused was charged and convicted with attempting to defeat the ends of justice after he attempted to persuade a witness to give false evidence.

²⁰⁹*R v Gabriel supra* (n 195).

²¹⁰Hunt *op cit* (n 7) 156.

the course of justice. This offence was committed when the accused destroyed documents that might be of help to the court or when the accused altered or concealed evidence.²¹¹

c. **Attempt to bribe or improperly influence the judge or investigating officer or prosecutor.**²¹² As with Roman and Roman-Dutch law, any attempt to influence a judge or prosecutor by means of a bribe or by any improper means was charged as an attempt to obstruct or defeat the course of justice or contempt of court.

d. **Procuring an escape of an awaiting trial prisoner.**²¹³ Procuring an escape of a prisoner was punished as obstructing or defeating the course of justice. This is not the situation anymore, as escaping from custody is now a separate offence regulated by common law and by statute.²¹⁴

e. **Obstructing the police.**²¹⁵ It has been mentioned²¹⁶ that our courts extended the ambit of the crime of obstructing or defeating the course of justice to include police investigations of crimes. The acts which impede or frustrate police activities and which constituted obstructing or defeating the course of justice are the following:

- i. **Laying false charges (*calumnia*).** As indicated, under Roman and Roman-Dutch law, the bringing of false accusations against another person was

²¹¹*Duuring v R supra* (n 191).

²¹²*Hunt op cit* (n 7) 161-62.

²¹³*Hunt op cit* (n 7) 162.

²¹⁴See *Snyman op cit* (n 151) 348.

²¹⁵*Hunt op cit* (n 7) 157.

²¹⁶*Burchell and Milton op cit* (n 148) 940.

punished in terms of both the *lex Cornelia*²¹⁷ and the *lex Remmia*.²¹⁸

According to the common law, conspiracy to obstruct the course of justice was not punishable.

2.4.7 Statutory provisions

In our law, the crime of obstructing the course of justice was and still is a common law offence. In South Africa, statutory intervention regarding the offence of defeating or obstructing the course of justice can be traced back to the Transkeian Penal Code.²¹⁹

The following acts were punishable in terms of the Act:

- a. to mislead any court of justice or any person holding any such judicial proceedings, to fabricate or to contrive evidence by any means²²⁰

- b. to conspire to prosecute an innocent person for an offence knowing very well that he or she is innocent²²¹

- c. to conspire with another person to obstruct, prevent or defeat the course of justice or to wilfully attempt in any way, not otherwise criminal, to obstruct, prevent,

²¹⁷D 48.10.1. See text under 2.1.4 *supra*, at note 27.

²¹⁸Matthaeus *op cit* (n 44) 48.7.1.9 and Van der Keessel *op cit* (n 4) 48.10.8. See text under 2.1.4 *supra*, at note 28.

²¹⁹Act 24 of 1886. See Gardiner and Lansdown *op cit* (n 147) 819. This Act has been repealed and replaced by sections 40, 36-39 of Act 9 of 1983 (Tk). See Hunt *op cit* (n 7) 162.

²²⁰Section 110.

²²¹Section 111.

pervert or defeat the course of justice or the administration of law²²²

- d. to dissuade or attempt to dissuade any person by threats, bribes, or other corrupt means, from giving evidence in any court of law. To influence or attempt to influence by threats or bribes or other corrupt means any jury, assessor, or interpreter. To accept a bribe or other corrupt consideration in order to abstain from giving evidence or on account of his or her conduct as a juryman, assessor or interpreter.²²³

Some conduct in sections 110-113 of this Act overlaps with the common law crime of obstructing the course of justice.²²⁴ Only the conduct which involves conspiracy does not overlap with the common law crime.

2.4.8 Legislated obstruction of justice

What has been discussed above are the acts that constituted the crime of defeating or obstructing the course of justice. What about the legislation which authorises the State President to halt judicial proceedings? Is the due administration of justice not supposed to proceed freely without being impeded, not even by the State President? In our statute books we find a provision which authorised the State President to halt judicial proceedings if he or she felt that it would be in the national interest that the proceedings were discontinued.²²⁵

²²²Section 112.

²²³Section 113 (a)-(c).

²²⁴Hunt *op cit* (n 7) 155-157.

²²⁵The Defence Act 44 of 1957. This Act has been repealed and replaced by the Defence Act 42 of 2002. This Act does not have any provision similar to, or resembling, section 103 *ter* (4) of its predecessor.

Section 103 *ter* (4) of the Defence Act provided:²²⁶

If any proceedings have been instituted in a court of law against the State, the State President, the Minister, a member of the South African Defence Force or any other person in the service of the State and the President is of the opinion –

- (a) that the proceedings were instituted by reason of an act advised, commanded, ordered, directed or done in good faith by the State President, the Minister or a member of the South African Defence Force for the purposes of or in connection with the prevention or suppression of terrorism in an operational area; and
- (b) that it is in the national interest that the proceedings shall not be continued, he shall authorize the Minister of Justice to issue a certificate directing that the proceedings shall not be continued.

Carpenter²²⁷ said that the State President’s power to halt legal proceedings against the member of the Defence Force was a purely statutory provision which had no roots at any common law rule, but that did not mean it enjoyed superior status to any common law rule. She maintained that when the courts were barred from performing their normal function of establishing the facts and merits of the case, the inference was only too often drawn that “the dark deeds and skulduggery were the order of the day,” an inference which was most unfair to the members of the Defence Force who were unable to defend themselves against such rumours and accusations.²²⁸

The State President’s order to halt the judicial process against a member of the Defence Force who was accused of having committed a certain crime had a tendency to defeat or obstruct the due administration of justice. This thesis agrees with Carpenter’s view that the entire principle underlying section 103 *ter* was unsound.²²⁹ This section is not part of our law anymore.

²²⁶The Defence Act 44 of 1957 and Rules, compiled by *Lex Patria* Publishers at 56 and G Carpenter “Interference with the judicial process: a case of conceptual confusion?” (1988) *SAPL* Vol 3 No 2 244.

²²⁷Carpenter *op cit* (n 226) 245.

²²⁸Carpenter *op cit* (n 226) 247.

²²⁹Carpenter *op cit* (n 226) 247.

2.4.9 Summary of early South African law

The common law offence of obstructing the course of justice originates from the Roman *lex Cornelia de falsis*. The development of this crime in our law cannot be viewed in isolation from the political and historical developments in the country in the Seventeenth Century, especially the arrival of Jan van Riebeeck in the Cape in 1652.

It was these developments that led, *inter alia*, to the reception of the Roman *lex Cornelia de falsis* in South African Criminal Law. The practice of charging the accused with the crime of obstructing or defeating the course of justice thus became established in South African law, and soon received the Appellate Division's approval. However, before the decision of the Appellate Division, there were some statutory developments in the Transkei where certain acts were punished as defeating the course of justice. This part of our criminal law developed from Roman and Roman-Dutch authorities. English law did not play any role or played only a small role, if any. Just as in the *lex Cornelia de falsis*, the following acts were considered to obstruct the course of justice:

- a. Interfering with witnesses.
- b. Tampering with documentary or other evidence.
- c. Obstructing the police.

The Roman *lex Cornelia de falsis* was only limited to actions with regard to judicial proceedings but our courts have broadened the ambit of the crime to include pre-trial aspects of the administration of justice. There was some overlap between the crime of obstructing the course of justice and offences like perjury, fraud, forgery, etc.

The following acts were punishable in terms of the Transkeian Penal Code of 1886:

- a. to mislead any court of justice or any person holding any such judicial proceedings, to fabricate or to contrive evidence by any means;
- b. to conspire to prosecute an innocent person for an offence, knowing full well that he or she is innocent;
- c. to conspire with another person to obstruct, prevent or defeat the course of justice or to wilfully attempt in any way, not otherwise criminal, to obstruct, prevent, pervert or defeat the course of justice or the administration of law;
- d. to dissuade or attempt to dissuade any person by threats, bribes, or other corrupt means, from giving evidence in any court of law. To influence or attempt to influence by threats or bribes or other corrupt means any jury, assessor, or interpreter. To accept a bribe or other corrupt consideration in order to abstain from giving evidence or on account of his or her conduct as a juryman, assessor or interpreter.

In the Defence Act 44 of 1957 there was a provision which authorized the State President to halt judicial proceedings if he or she felt that it would be in the national interest to do so. The State President's order to halt the judicial process against a member of the Defence Force who was accused of having committed a certain crime had a tendency to defeat or obstruct the due administration of justice. The entire principle underlying this provision was unsound. This provision is not part of our law anymore.

CHAPTER THREE**ENGLISH LAW****3.1 GENERAL**

The common law crime of perverting the course of justice is defined as doing an act or series of acts which have a tendency to, and are intended to, pervert the course of justice (including proceedings before tribunals).¹ At common law it is an indictable offence to pervert the course of justice and the offence is punishable at the discretion of the court.² Contrary to Halsbury's³ views that the offence consists of an act, a series of acts or conduct which has the tendency to, and is intended to pervert the course of justice, it is said that the offence cannot be committed by an omission, hence the requirement of an act or series of acts.⁴ Ashworth⁵ says that the common law has always been wary of imposing liability for omissions. English criminal law has tended to restrict criminal liability for omissions by limiting the range of situations in which a duty to do something can be said to arise.⁶ However, a defendant can be criminally liable for an omission where there is a duty to act in a particular way.⁷ In *R v Headley*⁸ it was held that X had not committed the offence if he or she had failed to act positively.⁹ In this case the Court of Appeal was called to consider whether or not the offence of perverting the course of justice could be committed by acquiescence or by omission.

¹R Card, *Card, Cross and Jones Criminal Law* 16ed (2004) 536; P Murphy *Blackstone's Criminal Practice* (2006) 731; Halsbury's *Laws of England* 4ed Vol 11(1) *Criminal Law* (1990) 249 and Smith and Hogan *op cit* Chapter Two (n 93) 751.

²Card *op cit* (n 1) 536.

³Halsbury *op cit* (n 1) 249.

⁴Cf Card *op cit* (n 1) 536.

⁵Ashworth *op cit* Chapter One (n 5) 44.

⁶Ashworth *op cit* Chapter One (n 5) 45. In English law, a parent's duty to ensure the health and welfare of his or her child is recognised by statute; a duty to care for another can be assumed by contract, or by undertaking the care of a relative, or even by undertaking the care of a stranger; the owner of property may have a duty to prevent the commission of offences on or with the property and a person who creates a dangerous situation, even accidentally, has a duty to take steps to avert or minimize the danger. Beyond these situations, there appears to be no general duties imposed on citizens.

⁷J Herring *Criminal Law: Text cases and materials* 2ed (2006) 87.

⁸(1995) 160 JP 25.

⁹At 25.

The facts of this case were as follows: The appellant, Headley, had a brother Y. The police stopped Y whilst he was driving Headley's car. He was ordered to produce, *inter alia*, his driving licence. He produced Headley's Army driving permit which he had found in the car. He was told that a traffic ticket was issued and, therefore, he should produce the documents at a police station. He did not do that. A summons issued in Headley's name was heard in his absence and he was convicted of driving without a licence and insurance. The mistaken identity was uncovered and Headley was charged with perverting the course of justice by allowing the information to be dealt with by the court.¹⁰ He pleaded guilty and was found guilty of perverting the course of justice.¹¹ He applied for leave to appeal against the conviction. His application was based on a question of law. In allowing the appeal the court held:¹²

(1) The offence of perverting the course of justice is committed where a person acts or embarks upon a course of conduct which has a tendency to and is intended to pervert the course of justice ("the *actus reus*").

(2) The appellant did not act and did not pursue any course of conduct which could amount to the *actus reus* of this offence. He simply did nothing, and therefore committed no offence.

This case confirms that it is established law in England that X must have acted positively before he or she could be convicted of the crime of perverting the course of justice. Mere omission does not amount to the *actus reus* of this offence.¹³ English law commentators are of the view that X cannot commit this offence by failing to do something (omission).¹⁴

It is said that, like contempt of court but unlike perjury, the offence of perverting the course

¹⁰At 25D-E and at 28-G.

¹¹At 25H.

¹²At 25E-F.

¹³Card *op cit* (n 1) 536.

¹⁴*Ibid.*

of justice has a more general application.¹⁵ Card¹⁶ submits that the crime of perverting the course of justice penalises any conduct which has a tendency to wrongly interfere, directly or indirectly, with a criminal investigation, or with the initiation, progress or outcome of any criminal or civil proceedings, including arbitration proceedings and which is intended so to interfere. According to Card,¹⁷ the defendant's conduct will have the tendency to pervert the course of justice if he or she has done enough for there to be a possibility without further action on his or her part that a perversion of the course of justice may result. It is irrelevant that that possibility does not materialise. For X to be convicted of this offence it is required that a direct intention to interfere with the course of justice be proved. The accused has the necessary intent to pervert the course of justice if he or she intended to bring about a state of affairs, which regarded objectively, amounts to such a perversion, whether or not he realised that the state of affairs would have the effect of perverting the course of justice.¹⁸ English law distinguishes between the course of justice and the ends of justice. It is said that if X's conduct tends, and is intended, to pervert the course of justice, it is irrelevant that he or she acts with the motive of promoting the ends of justice.¹⁹ So, for example, a person who presents false evidence in order to secure the conviction of someone he or she believes to be guilty commits the crime of perverting the course of justice.²⁰

3.2 WHEN DOES THE COURSE OF JUSTICE BEGIN?

In English law there are various academic opinions as to when the due course of justice is said to begin and therefore when it may be obstructed or perverted. The first opinion is that

¹⁵Card *op cit* (n 1) 536-37.

¹⁶*Ibid.*

¹⁷Card *op cit* (n 1) 537.

¹⁸*Ibid.* See also *Lalani* (1999) 1 Cr App Rep 481 CA.

¹⁹Card *op cit* (n 1) 537.

²⁰*Ibid.*

of Smith and Hogan,²¹ who say that the course of justice begins to run and may be perverted before proceedings are “active.”²² Card²³ supports this view and he maintains that this offence is not limited to matters directly concerning proceedings already in being, nor to imminent proceedings of some kind in a court or judicial tribunal, nor is it necessary that investigations which could result in proceedings be in progress. He argues that this offence can be committed if the requisite tendency and the requisite intention are there.²⁴ The offence can be committed after the perpetration of the principal crime, but before investigations into it have begun. It is further said that this offence can be committed even though a crime has not been committed or the crime cannot be proved, so long as X believed that there might be an investigation which could result in judicial proceedings.²⁵ If X, in order to prevent the detection of the offender, destroys the only evidence of a crime before an investigation can begin, he can be convicted of perverting the course of justice because such conduct has the tendency to pervert the course of justice. X can even be convicted of this offence if he or she mistakenly believed that it was the only evidence of a non-existent crime.²⁶

In *R v Rafique*,²⁷ the accused were convicted of perverting the course of justice when they threw away the murder weapon and thereby impeded the police investigation. The court was called upon to consider whether an act that occurs *after* the commission of the principal crime, but *before* the police begin their investigation, qualifies as perverting the course of

²¹Smith and Hogan *op cit* Chapter Two (n 93) 752.

²²*Ibid.*

²³Card *op cit* (n 1) 537.

²⁴*Ibid.*

²⁵*Ibid.*

²⁶*Ibid.*

²⁷[1993] 4 All ER 1 CA.

justice. The facts of the *Rafique* case were as follows: The appellants drove to a park with their friend A to try out a gun that A had recently acquired. While the first appellant was carrying the gun it accidentally went off and killed A. The appellants threw the gun and cartridges away, abandoned their car and went into hiding for twelve days before giving themselves up to the police. For throwing away the gun and its cartridges, knowing very well that an investigation into the death of A was imminent, they were charged with acts that tended, and were intended, to pervert the course of justice.²⁸ They were convicted of committing acts that tended, and which were intended, to pervert the course of justice. They appealed against their convictions. The court held²⁹ that an act performed after the crime had been committed, but before an investigation into the alleged crime had begun, was capable of tending to pervert the course of justice if an intention to pervert the course of justice was proved. It was immaterial whether the alleged offence was investigated or even discovered. The Court of Appeal found that there was an intention on the part of the appellants to impede the police investigations and that there was the intention to pervert the course of public justice.³⁰ The appeals were dismissed. Therefore, the course of justice begins to run, and may be impeded, at the time the principal offence has been committed even before it had been discovered.³¹

In 1994, subsequent to *R v Rafique*,³² the Court of Appeal (Criminal Division) in *R v Kiffin*³³ was faced with another case of perverting the course of justice. The court had to decide whether an investigation is “in the course of justice before evidence existed that a

²⁸At 1e.

²⁹At 1g-h.

³⁰At 8f.

³¹See Card *op cit* (n 1) 537 and Smith and Hogan *op cit* Chapter Two (n 93) 752.

³²*R v Rafique supra* (n 27).

³³[1994] *Crim LR* 449.

crime has been committed.”³⁴ The facts of this case were as follows. Applicant X was one of the trustees and signatory of the bank account of the management committee of a youth association in her area. The media reported that there was misappropriation of funds and alleged that X had used some of the funds to purchase a house in Jamaica. The Director of Public Prosecutions (DPP) authorised the Fraud Squad to instruct the accountants to find out how the money was spent, and considerable discrepancies were discovered between the accounting records of cash expenditure and actual cash expended. The accountants needed the books and records to conduct further investigations, and a court order was obtained after a request for the records proved to be fruitless.

X flew to Jamaica taking the papers with her. The documents were completely washed away in a flood and the police never saw them. She was charged with acts that tended, and were intended, to pervert the course of justice by removing the documents from the court’s jurisdiction and so impeding police investigation of possible offences of false accounting and theft.³⁵ She was convicted of acts tending, and intended, to pervert the course of justice.³⁶

On appeal following conviction it was contended on behalf of the appellant that the judge was wrong to reject a submission of “no case.”³⁷ It was further argued on behalf of the appellant that an act impeding police investigation could not amount to the offence of tending, and intended, to pervert the course of justice unless it was proven that there was an investigation into a crime or suspected crime.³⁸ The court held that a police inquiry in order

³⁴At 449.

³⁵*Ibid.*

³⁶At 450.

³⁷*Ibid.*

³⁸*Ibid.*

to establish whether an offence had been committed and, if so, who was responsible, was part of the administration of justice.³⁹ The appeal was dismissed.⁴⁰

Phillimore⁴¹ is of the opinion that the course of justice should begin only once a charge has been laid (in criminal cases) or on service of a summons (in civil cases).⁴² That means the period should start at the commencement of judicial proceedings. This view is opposed to Smith and Hogan's view, namely, that if the proceedings have not started they must be imminent or an investigation which might bring about proceedings must be in progress.⁴³ Phillimore's view is also in conflict with *The Queen v Vreones*⁴⁴ where the accused was convicted of an offence although fabrication of evidence took place before the arbitrator was appointed.

3.3 CONDUCT WHICH CONSTITUTES THE COMMON LAW OFFENCE OF PERVERTING THE COURSE OF JUSTICE

In modern English law the following types of conduct have been held to constitute the offence of perverting the course of justice:⁴⁵

- a. Interference with jurors.⁴⁶

³⁹*Ibid.*

⁴⁰*Ibid.*

⁴¹Phillimore: *Report of the Committee on Contempt of Court*, 1974, Cmnd 5794, as cited by Smith and Hogan *op cit* Chapter Two (n 93) 774.

⁴²See Smith and Hogan *op cit* Chapter Two (n 93) 774.

⁴³Smith and Hogan *op cit* Chapter Two (n 93) 753. See also *R v Salvage* (1982) 1 All ER 96 CA.

⁴⁴*The Queen v Vreones supra* at 360 in Chapter Two under 2.3 (n 93).

⁴⁵Card *op cit* (n 1) 538-40; Murphy *op cit* (n 1) 732-34 and SSM Edwards "Perjury and perverting the course of justice considered" (2003) *Crim LR* 527.

⁴⁶G Williams "Evading justice" (1975) *Crim LR* 430, 479, 608 and *Mickleburgh* [1995] 1 Cr App Rep 297 CA.

- b. Interference with witnesses.⁴⁷
- c. Destroying, falsifying or concealing potential evidence.⁴⁸
- d. Making false allegations against another person.⁴⁹
- e. Assisting another person to evade a lawful arrest.⁵⁰
- f. Withholding of evidence in return for payment.⁵¹
- g. Confessing, or pleading guilty to a crime committed by another person in order to shield him or her.⁵²
- h. Knowingly acting outside the limits of one's discretion as a police officer, so as to shield or excuse another person from criminal charges.⁵³
- i. Making a false complaint to the police that is capable of being taken seriously, whether or not it identifies particular individuals.⁵⁴

3.3.1 Interfering with jurors

Interference with, or intimidation of jurors or other persons involved in legal proceedings, may be punishable at common law not only as tending to pervert the course of justice but also as contempt of court. It is said that any improper interference with the jury whether based on intimidation, bribery or persuasion is punishable.⁵⁵ Approaching a jury or any member of a jury to discuss the case or express views about it may likewise constitute an attempt to pervert the course of justice.⁵⁶

⁴⁷*R v Rowell* [1978] 1 WAR 763; *Williams* (1991) 92 Cr App Rep 158 CA; *R v Ward and Hollister* (1995) *Crim LR* 398 and *R v Kellet* (1976) QB 372.

⁴⁸*The Queen v Vreones supra* in Chapter Two under 2.3 (n 93); *R v Murray* (1982) 2 All ER 225 and *Murphy op cit* (n 1) 733.

⁴⁹*R v Rowell supra* (n 47) and Criminal Law Act 1967, section 5(2).

⁵⁰*Card op cit* (n 1) 538; *R v Thomas* [1979] All ER 577 and *R v Spinks* (1982) 1 All ER 587.

⁵¹*R v Bassi* (1985) 2 All ER 255.

⁵²*R v Devito and Devito* (1975) *Crim LR* 175 and *Murphy op cit* (n 1) 733.

⁵³*Murphy op cit* (n 1) 733.

⁵⁴*Card op cit* (n 1) 539.

⁵⁵*Murphy op cit* (n 1) 733 and P *Murphy Blackstone's Criminal Practice* (2002) 658.

⁵⁶*Mickleburgh supra* (n 46) at 304F-G.

In *R v Mickleburgh*⁵⁷ the Court of Appeal observed:⁵⁸

Although it should be well known, we take the opportunity to reassert that any approach to a jury, or any member of it, to discuss the case, or express views about it, may well amount to a contempt of court, or even an attempt to pervert the course of justice. That rule applies to court officials, ushers and jury bailiffs as much as anyone else.

In *R v Owen*⁵⁹ it was observed that the crimes of contempt of court and the attempt to pervert the course of justice are interrelated. The crimes overlap with each other, and with other crimes like bribery.

3.4.2 Interfering with witnesses

To interfere with witnesses or potential witnesses⁶⁰ so as to prevent or dissuade them from giving evidence or to persuade them to change their evidence⁶¹ is both a common law misdemeanour⁶² and a statutory offence.⁶³ It is said that there must be intent to influence the course or the outcome of the case in some way.⁶⁴ The accused who knowingly tries to prevent true evidence from being given by the witness or who tries to obtain false evidence from the witness is guilty of an offence even if he or she did not bribe, or threaten, or unduly pressurise the witness.⁶⁵ If, however, the accused merely persuades a witness in order to prevent him or her from giving false evidence, he or she is not guilty of this

⁵⁷*Mickleburgh supra* (n 46).

⁵⁸At 304F-G.

⁵⁹*R v Owen supra* at 239 in Chapter Two under 2.3.2, text at note n 127. See also Smith and Hogan *op cit* Chapter Two (n 93) 752 and D Lanham "Payment to witnesses and contempt of court" [1975] *Crim LR* 146.

⁶⁰Card describes a potential witness as anyone who (although not actually called at the time to testify) is capable of giving relevant admissible evidence. See Card *op cit* (n 1) 538.

⁶¹Murphy *op cit* (n 1) 733.

⁶²Smith and Hogan *op cit* Chapter Two (n 126) 535.

⁶³See Criminal Justice and Public Order Act, 1994, section 51. This section is discussed *infra* under 3.4.3, text at note 190.

⁶⁴Murphy *op cit* (n 1) 733.

⁶⁵*Ibid.*

offence, even if he or she was wrong in believing that the witness's proposed evidence was false.⁶⁶ If the accused resorted to improper measures like threats, then his or her conduct falls foul of the offence of perverting the course of justice. It is irrelevant that the threat is to do an otherwise lawful act such as to sue for damages.⁶⁷ Murphy⁶⁸ is of the opinion that this offence is not committed by a person who seeks to persuade a witness to tell the truth, provided he or she does not use improper means such as threats, a bribe or undue pressure. The leading cases on perverting the course of justice where the accused interfered with witnesses are *R v Panayiotou*⁶⁹ and *R v Toney*.⁷⁰ *R v Panayiotou* provides authority that any agreement between two or more people to bribe a witness in order to induce him or her to withdraw statements or allegations made to the police constitutes the common law offence of conspiracy to pervert the course of justice.

The facts of the case were as follows: A woman called Mrs Piasecka complained to the police that X had raped her. Later Y, giving a fictitious name and claiming that they had met previously at a party, arranged to meet the woman. The woman informed the police and when the meeting took place the police intervened. It was alleged that Y told the police that he knew that the police wanted X; that X told him (Y) that he had sex with a girl against her will and that he (Y) wanted to hear what the girl was saying in order to see if he could arrange things for X. Allegedly, he hoped to reach some agreement with her about compensation so that she would not continue with the complaint and that he had in mind

⁶⁶*Ibid.*

⁶⁷Card *op cit* (n 1) 538; R Card, Cross and Jones *Criminal Law* 15ed (2001) 442; Murphy *op cit* (n 1) 733 and P Murphy *Blackstone's Criminal Practice* (1996) 580-81.

⁶⁸Murphy *op cit* (n 1) 733.

⁶⁹[1973] 3 All ER 112 CA.

⁷⁰(1993) 1 WLR 264.

that he could find her a flat very cheap.⁷¹ X and Y were charged with conspiracy to pervert the course of justice by seeking, through bribery, to induce Mrs Piasecka to withdraw the allegation of rape which she had made against X.⁷²

On appeal it was contended on behalf of the appellants, *inter alia*, that:⁷³

- (1) the particulars of the conspiracy charge disclosed no offence known to the law, and
- (2) there was no evidence of agreement or any intention to effect an unlawful purpose.

The defence further contended that Mrs Piasecka was not to be regarded as a witness, but as a prosecutor and that an agreement to offer a bribe to her in order to withdraw her allegations could not be an offence unless it fell within section 4(1) or section 5(1) of the 1967 Act⁷⁴ and that the count charged no offence under either subsections. Thus, the basic question in this appeal was whether Mrs Piasecka was to be regarded as a witness or a prosecutor.⁷⁵

The court rejected the submission by the defence that the count disclosed no offence known to the law. It held that the particulars which accompanied the count were sufficient to sustain a charge of conspiracy to pervert the course of justice.⁷⁶ On the matter of whether Mrs Piasecka was a witness or a prosecutor, the court held:⁷⁷

⁷¹*R v Panayiotou supra* (n 69) at 114C-E.

⁷²At 115D.

⁷³At 114J-15A.

⁷⁴The Criminal Law Act of 1967 is discussed *infra* under 3.4.2, text at note 164 and 3.4.3, text at note 182.

⁷⁵*R v Panayiotou supra* (n 69) at 115G-H.

⁷⁶At 116e-f.

⁷⁷At 116a-b.

If a person has made a statement with a view to the provision of evidence in support of criminal proceedings, certainly in that case such a person in relation to those proceedings is a witness, and it is a perversion of the course of justice to offer him or her an inducement to alter or withdraw the statement.

On the first ground of appeal, the court held that the offence was recognised as an indictable misdemeanour by section 29 of Criminal Procedure Act of 1851⁷⁸ and that the Criminal Law Act of 1967 did not abolish the common law offence of perverting the course of justice.⁷⁹ On the second ground of appeal the court found that there was evidence of an intention to interfere with the course of justice.⁸⁰ The court upheld the appellants' conviction.⁸¹

The importance of this case lies, firstly, in the fact that the court confirmed that any attempt to bribe a witness could be prosecuted under the common law offence of perverting the course of justice. Secondly, the decision highlighted that, notwithstanding the coming into being of the Criminal Law Act of 1967, the common law offence of perverting the course of justice was never abolished.

*R v Toney*⁸² is another case which dealt with the offence of perverting the course of justice following interference with a witness. The facts of the case were as follows: Toney was convicted of an act tending, and intended, to pervert the course of justice. It was alleged that he attempted to persuade a witness, May, to change the evidence which he was to give in the trial of Toney's brother, Brian, on a charge of robbery. The question before the court was whether the common law offence of perverting the course of justice by interfering with a potential witness can be committed where there is no evidence of any bribe, threat, undue

⁷⁸Section 29 is discussed in Chapter Two *supra* under 2.3.3, text at note 143.

⁷⁹*R v Panayiotou supra* (n 69) at 115b-d.

⁸⁰At 116g-h.

⁸¹At 117h.

⁸²*R v Toney supra* (n 70).

pressure or other unlawful means.⁸³ He appealed against the conviction on the ground, *inter alia*, that at the conclusion of the prosecution case the court erred in law in ruling on the legal ingredients of the offence that the prosecution had to prove; that he had no intention to pervert the course of justice; that he intended that the witness should give different evidence; that what he did had a tendency to that effect and that the principle that the interference must be unlawful, or improper, applied.⁸⁴ In dismissing the appeal the court held that although in the majority of cases where a defendant committed an act tending, or intended, to pervert the course of justice by interfering with a witness, the *actus reus* would be accompanied by unlawful means such as bribery, threats or unlawful pressure, the use of such unlawful means was not an essential ingredient of the offence. Therefore, even though there was no evidence of the use of unlawful means by the defendant to persuade the witness to alter his evidence, the appellant (Toney) could still be convicted of the common law offence of perverting the course of justice.⁸⁵

The court clearly contemplated that if the end in view is shown to be improper, such as where the defendant has no genuine belief in the falsity of the evidence to be given, the *actus reus* may be complete even though the defendant has used no unlawful means.⁸⁶

3.3.3 Destroying, falsifying or concealing potential evidence

3.3.3.1 Fabrication of evidence

Steps taken by the defendant for the manufacture or fabrication of false evidence infringe

⁸³“Unlawful means” in this context includes a threat to do an otherwise lawful act or to exercise a legal right. For instance, in *R v Kellet supra* (n 47), D threatened to sue P for slander unless P withdrew a statement he had made to solicitors in connection with divorce proceedings instituted against D by his wife. It was held that this was an offence of perverting the course of justice, though D believed P’s statement to be false and although he intended to carry out his threats. See Smith and Hogan *op cit* Chapter Two (n 93) 754.

⁸⁴*R v Toney supra* (n 70) at 365H-66A.

⁸⁵At 365B-C.

⁸⁶*R v Toney supra* (n 70) at 370A.

upon the administration of public justice and are punishable as perverting the course of justice.⁸⁷ This offence may be committed by fabrication of false evidence for the purpose of misleading a judicial tribunal even though the evidence is never tendered.⁸⁸ In *R v Murray*⁸⁹ the court convicted the accused of attempting to pervert the course of justice by altering a blood specimen and subsequently delivering it to an analyst knowing that the resulting analysis was likely to be used in his defence in court proceedings against him.⁹⁰

The facts of this case were as follows: The police stopped Murray while he was driving his car. He was asked to give a breath test but he refused. The police took him to a police station where he was requested, and agreed, to give a specimen of blood. The police kept one half of the specimen for analysis and the other half was handed to him so that he could, if he wished, have it analysed by an independent analyst of his own choice. The level of alcohol found in the blood specimen by Murray's analyst was far below that which was found in the blood specimen kept by the police. The matter was investigated and Murray was then charged and convicted of attempting to pervert the course of public justice in relation to the blood specimen. He appealed against the conviction on a point of law and against sentence.⁹¹

The court had to decide whether there was evidence which was fit to go to the jury to the effect that Murray had the intention to pervert the course of justice and, much more importantly, whether there was evidence that his act had a tendency to have that effect. In

⁸⁷See Card *op cit* Chapter Two (n 91) 429 and Turner *op cit* Chapter Two (n 109) 306.

⁸⁸Card *op cit* (n 1) 538.

⁸⁹*R v Murray supra* (n 48).

⁹⁰At 225d-e.

⁹¹At 227c-d.

dismissing the appeal against the conviction the court held:⁹²

In the view of this court, there must be evidence that the man has done enough for there to be a risk, without further action by him, that injustice will result. In other words, there must be a possibility that what he has done 'without more' might lead to injustice. ... in the present case there plainly was evidence of such a tendency or possibility ...

It is clear that the judicial body would have been misled by Murray's evidence, that he would have been acquitted of driving a vehicle when his blood alcohol was over the limit and that this would have been a miscarriage of justice.

In 1995, in *R v Sinha*,⁹³ the Court of Appeal dismissed the appeal by Sinha who had been convicted of obstructing the course of justice for altering the medical records of a deceased patient. It was observed that if the acts of the defendant had a tendency, and were intended, to mislead any of the judicial proceedings which might have ensued then that was enough to justify any conviction. The facts of this case were as follows: Sinha was the junior doctor in a partnership of three. He prescribed a drug which contained a beta blocker to an asthmatic patient. It was alleged that the patient took one of the tablets on the day of her death. It was common cause that it was dangerous to prescribe a beta blocker to an asthmatic. It was submitted on his behalf that he did not appreciate the deceased was an asthmatic, but he admitted that he should have ascertained that information from the deceased's medical records.⁹⁴

During the trial he admitted that on two or three occasions after the patient's death he had deleted four separate references to her asthmatic condition from her computerised therapy records. The alterations formed the basis of the count of perverting the course of justice.

⁹²At 228g-j.

⁹³[1995] 1 Cr App LR 68.

⁹⁴At 68.

When the Coroner requested the senior partner to send the patient's records, the written records could not be found. The two senior doctors sent the computerized records which included the alterations. Sinha admitted making the alterations, but he submitted that he did so out of fear that the other partners would use his mistake as a reason to force him out of the practice.⁹⁵ He was nevertheless convicted of committing acts tending, or intended, to pervert the course of justice.⁹⁶

The Court of Appeal was called upon to determine, *inter alia*, the following issues: firstly, was it proved that the alterations had a tendency to pervert the course of public justice? Secondly, when making the alterations, did the appellant intend to pervert the course of justice?⁹⁷

In dismissing the appeal the court stated:⁹⁸

[I]f there was more than one possible type of proceedings which might ensue, if the act done might mislead the court in any or all of those proceedings, and it was proved that the defendant intended to mislead in any proceedings which might ensue, that of itself would be sufficient to justify conviction.

If the defendant intended to mislead any judicial tribunal which might investigate the circumstances of his patient's death he had sufficient *mens rea*. The significance of this case lies in the fact that the defendant need not intend to mislead a specific judicial proceeding but *any* judicial proceeding which may be instituted. It does not matter whether the defendant wanted to mislead a tribunal appointed in either the criminal proceedings or civil proceedings or the Coroner's inquest, his act tended, and was intended, to pervert the

⁹⁵*Ibid.*

⁹⁶*Ibid.*

⁹⁷*Ibid.*

⁹⁸*Ibid.*

course of justice.

3.3.3.2 Destruction of evidence

Destruction of any evidence can lead to the miscarriage of justice. Therefore it constitutes the crime of perverting the course of justice. One of the earliest English cases where the two accused were charged with the offence of conspiracy to pervert the course of justice following the concealment and destruction of evidence was *R v Stringer*.⁹⁹ In this case the Court of Criminal Appeal observed that it was sufficient to constitute the crime of conspiracy to defeat the course of public justice if persons conspired to conceal a crime which had been committed, although no proceedings were pending or had commenced.

The facts of this case were the following: It was alleged that Stringer and Sharpe, in different cars, were on their way to a dance in one of the villages. Stringer's car struck and injured a cyclist, and Stringer did not stop. On arrival at the village, Stringer told Sharpe about the accident. They agreed that nothing would be said about the accident. They also agreed to return home by another road in order to avoid going past the scene of the accident. Later, Sharpe proceeded alone to the scene and found an ambulance and helpers there. He said nothing of what he knew as to the cause of the accident. The bicycle was found with some red paint on it and subsequently police called on Stringer and inspected his car, which was painted red. They found a tin of black paint in the car and they also found that the headlamps were fitted with new bolts. He was asked about the bolts and Stringer said that he had got them from a carpenter named Osborne on a neighbouring estate. The next day Stringer went to Osborne and asked him to say that he had provided the bolts.¹⁰⁰ Osborne told the lie to the police, as agreed, to the effect that he had provided the bolts to Stringer but later, when the police interviewed Stringer in Osborne's presence,

⁹⁹(1937) 26 Cr App R 122.

¹⁰⁰At 123.

he admitted that he had made a false statement. Stringer and Sharpe were indicted with conspiracy to defeat the ends of justice.¹⁰¹

During the trial, counsel for Stringer moved to quash the indictment on the ground that it did not disclose any offence known to the law, as there could be no offence of conspiracy to defeat the course of public justice unless proceedings were pending or had been commenced.¹⁰² The indictment was amended.¹⁰³ It alleged that Stringer and Sharpe, together with Osborne, conspired to defeat the ends of public justice by concealing and destroying evidence of commission of a crime by attempting to mislead the police who were investigating the said crime by statements which they knew to be untrue.¹⁰⁴ The accused pleaded guilty.¹⁰⁵

The question before the court was whether that indictment, as amended, disclosed any offence known to the law. If it did not, the appellants, though they pleaded guilty, would be entitled to have their convictions quashed. Therefore, the court was called upon to consider whether persons who conspired to destroy evidence of the commission of a crime and got persons to conceal a crime and attempted to mislead a police officer, were guilty of the indictable offence of conspiracy to defeat the ends of justice.¹⁰⁶

The court held that there was such an offence. Therefore, what was left to consider was whether the offence of conspiracy to defeat the course of public justice could not be

¹⁰¹*Ibid.*

¹⁰²*Ibid.*

¹⁰³At 123-24.

¹⁰⁴At 125.

¹⁰⁵At 124.

¹⁰⁶At 125.

committed unless proceedings were pending or had been commenced. The court viewed that as a hopeless proposition that could not form part of the law of the country.¹⁰⁷ In dismissing the appeal the court held:¹⁰⁸

Public justice requires not only that people should not take steps to conceal a crime or destroy evidence once a summons has been served upon somebody, but also that every crime should be suitably dealt with, and a man who obstructs public justice as soon as the crime is committed and endeavours to avoid the consequences of his wrongdoing by conspiracy with others is just as much guilty of an offence as if he waits until after proceedings are actually pending.

There is academic authority which supports the court's decision. According to Card,¹⁰⁹ a person who, in order to prevent the detection of the offender, destroys the only evidence of a crime before an investigation can begin, can be convicted of the offence of perverting the course of justice if he or she acts with intent to pervert that course. The same would be true if he or she mistakenly believes that it is the only evidence of a crime which does not exist.¹¹⁰ According to this decision, and in as far as the crime of perverting the course of justice by conspiring to destroy evidence is concerned, attempt to commit the impossible amounts to a substantive offence.

In *R v Welsh*,¹¹¹ the appellant, Welsh, was convicted of the offence of attempting to defeat the course of justice. It was alleged that a policeman had seen Welsh in his own motor vehicle and he was obviously unfit to drive due to excessive use of alcohol. He was arrested and taken to the police station. At the station, the arresting officer took a specimen of urine from Welsh. The officer divided the specimen into two containers, and he left the

¹⁰⁷At 126.

¹⁰⁸*Ibid.*

¹⁰⁹Card *op cit* (n 1) 537.

¹¹⁰*Ibid.*

¹¹¹(1974) RTR 478 CA.

urine containers in the room alone with Welsh for a minute. Allegedly, during the policeman's absence, Welsh emptied the containers down a sink and he refused to provide another specimen. He was charged and convicted, *inter alia*, of attempting to defeat the course of justice.¹¹²

3.3.3.3 Concealment of evidence

Concealing evidence that may be vital during a trial constitutes a misdemeanour of perverting the course of justice. For instance, in *R v Rafique*,¹¹³ X shot and killed D with his handgun and knowing that an investigation into D's death was in progress or imminent, he threw the handgun and cartridges into a dam so that the police might not find them. The court held that this conduct tended, and was intended, to pervert the course of justice.¹¹⁴

3.3.4 Making false statements to the police and false allegations against another person

Making false allegations to the police or other officers of justice with a view to perverting the course of, or preventing judicial proceedings and knowingly making a false allegation of criminal conduct against another person, intending that he or she should be prosecuted or knowing that he or she might be prosecuted, constitutes the offence of perverting the course of justice.¹¹⁵ Some academic writers are of the opinion that the existence of this offence at common law is unclear and that such conduct should now always be charged under a provision in a statute.¹¹⁶ The offence of perverting the course of justice may be committed

¹¹²At 478D.

¹¹³*R v Rafique supra* (n 27).

¹¹⁴At 7b.

¹¹⁵Card *op cit* (n 1) 538 and Murphy *op cit* (n 1) 733-34.

¹¹⁶Section 5(2) of the Criminal Law Act of 1967. See the discussion of the provisions of this section *infra*, text at note 182.

when X makes false allegations against D, intending that he or she should be prosecuted or knowing that he or she might be prosecuted.¹¹⁷

3.3.5 Assisting another person to evade lawful arrest

At common law anyone who gives assistance to any person who has committed an offence with intent to enable the assisted person to evade arrest, trial, or punishment, is guilty of the offence as an accessory after the fact.¹¹⁸ Card¹¹⁹ says that this offence amounts to committing an act tending to and with intent to assist a person to evade lawful arrest while knowing that the police are looking for that person. In contrast to statutory law, in common law it does not matter whether the offence was arrestable and it is not strictly necessary to prove the guilt of the person who was assisted.¹²⁰

3.3.6 Withholding of evidence in return for payment

A person is guilty of the offence of perverting the course of justice when, as a potential witness, he or she makes an offer or agreement to withhold or change his or her evidence in return for money. What is punishable here is the suppression of the truth in exchange for monetary reward. There is no doubt that injustice will result where a person who might be of material assistance in securing the prosecution or conviction of the offender makes him- or herself unavailable to give testimony in return for reward. It is said that the gist of the offence is an act which may lead, and is intended to lead, to a miscarriage of justice whether or not that miscarriage actually occurs.¹²¹ Proof of intention alone is not sufficient to invoke this offence. There must be evidence that what that person has done is enough

¹¹⁷Murphy *op cit* (n 67) 581.

¹¹⁸Smith and Hogan *op cit* Chapter Two (n 93) 758-59.

¹¹⁹Card *op cit* (n 1) 538.

¹²⁰Murphy *op cit* (n 1) 732. See the discussion of the statutory offence *infra*, text at note 164.

¹²¹*R v Bassi supra* (n 51) at 672.

for there to be a risk, without further action by him, that injustice will result. In other words there must be a possibility that what he or she has done ‘without more’ might lead to injustice.¹²² The authority regarding this matter is *R v Bassi*.¹²³ In this case, the accused was convicted of committing acts tending, or intended, to pervert the course of justice after he offered not to give evidence or to give evidence exonerating the other person, in exchange for payment.¹²⁴ Bassi’s car had been involved in an accident with another vehicle. The driver of the other vehicle had been charged with driving whilst disqualified. Some time after the accident, Bassi phoned the wife of the other driver offering not to give evidence or to give evidence exonerating the other driver in exchange for payment. It is not clear whether he received the payment. He was convicted of committing acts tending, or intended, to pervert the course of justice. He appealed. It was submitted on behalf of the appellant that to absent oneself from court in such circumstances was not an act that perverts the course of justice and that the prosecution must show not only that this act had a tendency to pervert the course of justice, but moreover that it had in fact done so.¹²⁵ In refusing the leave to appeal the court held:¹²⁶

A person summoned as a witness who deliberately absents himself in return for payment does an act that tends to pervert the course of justice.

R v Bassi has been criticised as being inconsistent with *R v Murray*,¹²⁷ where it was said that the offence would only be complete where a person has done something which might,

¹²²*Ibid.*

¹²³*R v Bassi supra* (n 51).

¹²⁴At 671.

¹²⁵*Ibid.*

¹²⁶At 671-72.

¹²⁷*R v Murray supra* (n 48) at 228.

without further action on his or her part, lead to potential injustice.¹²⁸ Murphy supports the *Bassi* decision,¹²⁹ and argues that the course of justice is jeopardised as soon as such offer or agreement is made, even if the witness could eventually decide to tell the truth.¹³⁰ The significance of this case lies in the fact that the court held that although the charge of committing acts that tend, and are intended, to pervert the course of justice had generally taken the form of an inchoate offence, to incite, conspire or attempt to pervert the course of justice constituted the substantive offence.¹³¹

3.3.7 Confessing, or pleading guilty to a crime committed by another person

A person commits a common law misdemeanour if he or she confesses, or pleads guilty, to a crime he or she never committed, but which has been committed by another person, in order to protect the latter from prosecution.¹³² In this situation the judicial proceedings would carry on in a mistaken presumption that the person before the court is the right person and the judgment passed by the court would be directed to the wrong accused. As a result, the factually guilty will escape conviction and the innocent will be judged falsely.¹³³ The leading case that dealt with pleading guilty to an offence not committed by oneself but by another was *R v Devito and Devito*.¹³⁴ The defendants were father X and his son Y. While driving his father's car without a licence, Y was stopped for speeding and he falsely gave his father's name to the police. He later presented his father's driving documents.¹³⁵

¹²⁸Murphy *op cit* (n 1) 733.

¹²⁹*Ibid.*

¹³⁰*Ibid.*

¹³¹*R v Bassi supra* (n 51) at 672.

¹³²Murphy *op cit* (n 1) 733.

¹³³H Quirk "Identifying miscarriages of justice: Why innocence in the UK is not the answer" (2007) *Modern Law Review* Vol 70 No 5 759.

¹³⁴*R v Devito and Devito supra* (n 52).

¹³⁵At 175.

The summons was served personally to X and he instructed his lawyer that he wished to plead guilty. The lawyer who represented X was completely deceived, and he had no idea of what was going on. Neither X nor Y appeared in court. The prosecution accepted the plea of guilty and X was disqualified from driving for six months. The police inspector who investigated the case was alerted to the deception by the age of the suspect. Upon the completion of the investigation, X and Y were charged and convicted of conspiracy to pervert the course of justice.¹³⁶

The *R v Devito and Devito* case differs from *R v Headley*¹³⁷ because in the latter case the defendant did not act and did not pursue any course of action which could have amounted to the necessary ingredient of the *actus reus* of perverting the course of justice. He remained silent.¹³⁸ In the *R v Devito and Devito* case, X explicitly instructed his lawyer to plead guilty to an offence he never committed. Therefore, his action complied with the *actus reus* required for the crime of perverting the course of justice.¹³⁹

3.3.8 Knowingly acting outside the limits of one's discretion as a police officer so as to shield or excuse another person from criminal charges

According to Murphy,¹⁴⁰ a policeman who knowingly acts outside the limits of his or her discretion so as to shield or excuse another person (for example, a friend or colleague) from criminal liability is guilty of the offence of perverting the course of justice. Leading cases

¹³⁶*Ibid.*

¹³⁷See the discussion of this case *supra*, text at note 8.

¹³⁸*R v Headley supra* (n 8) at 29.

¹³⁹*R v Devito and Devito supra* (n 52).

¹⁴⁰Murphy *op cit* (n 1) 733.

in this regard are *R v Coxhead*¹⁴¹ and *R v Ward Hollister*.¹⁴²

In *R v Coxhead* the court dismissed an appeal by the appellant Coxhead following his conviction of the common law offence of attempting to pervert the course of justice on the basis that he exceeded his discretion as a police officer. The facts of this case were as follows: Coxhead was a police officer convicted for conduct tending, and intended, to pervert the course of justice. It was alleged that on the night of 16 November 1984, the constable who was on duty observed a car being driven in a reckless manner. The constable requested the driver of the car to undergo a breath test. The driver was arrested and taken to the police station where Coxhead was sergeant in charge. Coxhead had been alerted that a case needing a breathalyser test was coming in, and Coxhead and/or his colleague in the police station made the necessary preparations. The constable arrived at the police station with the driver he had arrested. Coxhead recognised the driver as being the son of one inspector from one of the police stations.

Allegedly, Coxhead knew that the inspector suffered from a serious heart condition. He feared the prosecution of the inspector's son might have serious consequences for the inspector's health. He decided, therefore, not to administer the prescribed breath test but instead telephoned the inspector to come and collect his son. It was alleged that the sergeant aborted the proceedings.¹⁴³ Evidence at the trial revolved largely around the question as to the existence and ambit of a police officer's discretion to abort proceedings in the way that Coxhead had, and particularly the ambit and scope of that discretion with regard to breathalyser cases. One of the prosecution witnesses conceded that there was

¹⁴¹[1986] RTR 411.

¹⁴²See *R v Ward and Hollister supra* (n 47).

¹⁴³*R v Coxhead supra* (n 141) at 412A-G.

such discretion in certain trivial cases. The sergeant was, nevertheless, convicted of an attempt to pervert the course of justice.¹⁴⁴

On appeal he submitted that it was for the prosecution to prove as a matter of law that he had no discretion to act as he did. He further submitted that there was not sufficient evidence on which the jury could come to the conclusion that no discretion existed.¹⁴⁵ In dismissing the appeal, the court held that there was sufficient evidence upon which a jury could reach the conclusion which they did.¹⁴⁶

In 1995, in *R v Ward and Hollister*,¹⁴⁷ police officials were charged with perverting the course of justice for failing to administer a breathalyser test. The facts of this case were as follows: G, an off-duty police officer, was seen on two occasions having a drink in a public house. That night he drove his car into a traffic light. An ambulance driver witnessed the accident and called the emergency services. After some time, the police and an ambulance arrived at the accident scene. G was reluctant to go to hospital although he was injured and in spite of signs that he had struck his head against the windscreen, which was broken. Ultimately, the ambulance crew persuaded him to go to hospital. Those who attended to him at the hospital said he smelt of alcohol and his general behaviour was indicative of the consumption of alcohol.

G discharged himself after treatment. The police officers who were at the accident scene

¹⁴⁴At 415C.

¹⁴⁵At 413K-L.

¹⁴⁶At 415L-16A.

¹⁴⁷*R v Ward and Hollister supra* (n 47).

took him home by police car. They failed to administer a breath test which a member of the ambulance crew found surprising, so she reported the police officers for misconduct. They were charged with perverting the course of justice by failing to administer a breath test at the accident scene or thereafter.¹⁴⁸ They were convicted of this offence, but appealed.¹⁴⁹ It was said that police officers had discretion to administer the breath test or not. The court pointed out that if the jury thought that Ward and Hollister had exercised their discretion in a perverse way, or for an improper motive, namely, to protect a fellow police officer, then they might think conclude that their conduct had a tendency to pervert the course of justice and was intended to pervert the course of justice.¹⁵⁰ One of the challenges was whether breath testing at the scene of the accident could have involved the risk of harm to G. There was evidence that he was slightly injured. The court held¹⁵¹ that, in the light of considerations relating to the risk of harm to G if medical assistance were delayed, it would not be right to convict the officers of an offence which depended on failure to administer a breath test at the scene of the accident. Accordingly, the charge of conduct perverting the course of justice was quashed.

R v Ward and Hollister confirmed the academic view that the offence of perverting the course of justice cannot be committed by failure to do something (omission).¹⁵² It contradicted the earlier decision in *R v Coxhead* where the court upheld the appellant's conviction for the crime of attempt to pervert the course of justice following his failure (omission) to administer a breathalyser to a motorist who was suspected of drunk driving.

¹⁴⁸At 398.

¹⁴⁹*Ibid.*

¹⁵⁰*Ibid.*

¹⁵¹At 399.

¹⁵²See Card *op cit* (n 1) 536.

3.3.9 Making a false complaint to the police which is capable of being taken seriously, whether or not it identifies particular individuals

According to Card,¹⁵³ unlawfully exposing individuals to the risk of arrest, imprisonment, pending trial and possible conviction and punishment clearly tend to pervert the course of justice. It is said that in making the complaint, the defendant intends that it should be taken seriously and that there is a possibility of a police investigation being commenced. It is said that where a complaint is so generalised that there is no risk or there is a minimal risk of anyone being arrested or prosecuted, it may be more appropriate to charge the offence of causing wasteful employment of the police.

*R v Cotter and Others*¹⁵⁴ is a case in point. The facts of this case were the following: Cotter was the white boyfriend of a black Olympic athlete, H. Their relationship was in difficulty. Allegedly, Cotter had arranged to visit H. When he did not arrive, H started to look out for him. As she was looking outside, she noticed a car with no headlights passing her home. Shortly after, Cotter appeared. His body was covered with blood. He stated that he had been mugged. The police and ambulance services were contacted. He stated that the attack was racial because he was dating a black person. There was evidence of mobile-phone activity between him and his friends, the other defendants, Wynn and Clair, on the evening of the attack. There was also evidence that Clair had a car fitting the description of the one seen by H. Further, Clair had informed a journalist about the attack on the same evening. He told the journalist that it was a racist attack. They were arrested and charged with conspiracy with intent to pervert the course of public justice.¹⁵⁵

¹⁵³See Card *op cit* (n 1) 539.

¹⁵⁴[2002] *Crim LR* 824 CA.

¹⁵⁵At 824.

The prosecution's case was that the attack on Cotter had been a charade to elicit sympathy from H and to re-establish a relationship with her. It was also intended to enable the defendants to obtain money from the press for the story. It was said that in order to achieve these aims the defendants intended to, and had indeed set in motion, a police investigation into a serious racially-motivated assault which resulted in widespread police investigations and put innocent individuals at risk of detention, arrest, charge and even prosecution. After the state had closed its case, the defence made a submission of no case to answer. The judge ruled against the defence's submission. The judge directed the jury that the course of public justice was a police investigation which may lead to criminal proceedings. The appellants were convicted of the offence of conspiracy with intent to pervert the course of public justice.¹⁵⁶

On appeal it was submitted on behalf of the appellants, *inter alia*, that the facts were not sufficient to justify a charge of perverting the course of justice as there was no binding English authority which justified the conclusion that simply to take an invented crime to the police was of itself sufficient.¹⁵⁷ The court held that English law accorded with the proposition that for the purposes of the offence the "course of public justice" included the process of criminal investigation.¹⁵⁸ The mischief at which it was aimed was the exposure of individuals, identifiable or otherwise, to risk of arrest, imprisonment and punishment.¹⁵⁹ The appeal was dismissed.¹⁶⁰

¹⁵⁶At 825.

¹⁵⁷*Ibid.*

¹⁵⁸*Ibid.*

¹⁵⁹*Ibid.*

¹⁶⁰*Ibid.*

3.4 STATUTORY OFFENCES

3.4.1 General

There are a number of statutory offences which criminalize conduct which has the tendency to obstruct or pervert the course of justice. Some of these statutory offences overlap with the common law offence. Others address conduct relating to the obstruction of the course of justice which is not punishable in terms of the common law.

3.4.2 Concealing relevant offences

Similar to the common law,¹⁶¹ it is a statutory offence¹⁶² to impede the apprehension or prosecution of a person who has committed a certain offence. The statutory crime of perverting the course of justice by deliberately assisting another person to evade lawful arrest requires that X must have impeded the arrest of a person who has committed a relevant offence.¹⁶³

Section 4 of the Criminal Law Act¹⁶⁴ provides:

- (1) Where a person has committed a relevant offence, any other person who, knowing or believing him to be guilty of the offence or of some other relevant offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence.
 - (1A) In this section and section five below, 'relevant offence' means –
 - (a) an offence for which the sentence is fixed by law,
 - (b) an offence by which a person of 18 years or over (not previously convicted) may be sentenced and imprisoned for a term of five years (or might be so sentenced but for the restrictions imposed by section 33 of the Magistrates Courts Acts 1980).

According to Murphy,¹⁶⁵ this offence is not capable of taking the form of an omission.

¹⁶¹Card *op cit* (n 1) 358. See *supra* (n 118).

¹⁶²The Criminal Law Act of 1967.

¹⁶³The Criminal Law Act of 1967.

¹⁶⁴The Criminal Law Act of 1967.

¹⁶⁵Murphy *op cit* (n 1) 739.

Unlike its common law counterpart,¹⁶⁶ this offence requires that Y must have previously committed and at least been charged with a relevant offence before the accused X could be held liable for impeding his apprehension.¹⁶⁷ It is said that it is not necessary for the person, X, who allegedly assisted Y, to be convicted of his or her offence before X can be convicted of assisting him or her.¹⁶⁸ Nor is Y's conviction conclusive proof of X's guilt at a subsequent trial where he or she is accused of assisting Y.¹⁶⁹ The prior conviction of a person assisted (Y) will raise a presumption that he or she was guilty and this will simplify the task of the prosecution at the trial.¹⁷⁰ The relevant case here is *R v Spinks*.¹⁷¹ Spinks was found guilty of concealing a knife with intent to impede the apprehension or prosecution of a person who had committed a relevant offence. Spinks and his friend, Fairey, were drinking together in a public house and one of Fairey's friends became involved in a fight with other people. Fairey went to assist his friend and he stabbed some members of the other group. After the fight, Fairey gave the knife to Spinks to hide, which Spinks accordingly did. Allegedly, Spinks was never at the crime scene and therefore he was not aware that Fairey had committed a relevant offence. Spinks and Fairey were subsequently arrested. Fairey was charged with wounding a person with intent to do grievous bodily harm. Spinks was charged with concealing a knife with intent to impede the apprehension or prosecution of a person who had committed a relevant offence.¹⁷²

The Crown had to prove (a) that a Fairey had committed a relevant offence, (b) that Spinks

¹⁶⁶See Murphy *op cit* (n 1) 732. See *supra* (n 120).

¹⁶⁷Murphy *op cit* (n 1) 739.

¹⁶⁸*Ibid.*

¹⁶⁹*Ibid.*

¹⁷⁰*Ibid.*

¹⁷¹*R v Spinks supra* (n 50).

¹⁷²In contravention of section 4(1) of the Criminal Law Act of 1967.

knew or believed him to be guilty of that offence or some other relevant offence, and (c) that Spinks without lawful authority or reasonable excuse did some act with intent to impede the apprehension or prosecution of that other person, Fairey.¹⁷³ The Crown had no admissible evidence against Spinks to prove the first ingredient of the offence, that is, that Fairey had committed the relevant offence of wounding. The Crown relied solely on an out of court admission by Fairey which was not admissible against Spinks.¹⁷⁴ The trial court ruled¹⁷⁵ that Fairey's admission 'was evidence in the case' and that the jury could act on it when considering the case against Spinks. Spinks was convicted of the statutory offence of concealing a knife with intent to impede the apprehension or prosecution of a person who had committed a relevant offence.¹⁷⁶ He appealed.¹⁷⁷

The appeal was allowed and the conviction was quashed¹⁷⁸ because there was no admissible evidence against Spinks to prove the first ingredient of the offence, that is, that Fairey had committed the relevant offence with which he was charged, i.e. that of wounding. The court held that where a person charged with an arrestable offence and another person charged with assisting him were tried together, the rule that out of court statements could not be used to provide evidence against a co-accused applied.¹⁷⁹

¹⁷³*R v Spinks supra* (n 50) at 589A.

¹⁷⁴At 589C.

¹⁷⁵At 587F.

¹⁷⁶*Ibid.*

¹⁷⁷*Ibid.*

¹⁷⁸At 589H.

¹⁷⁹At 587F-G.

3.4.3 Wasting police time

Wasting police time is akin to perversion of justice. According to Murphy,¹⁸⁰ making false allegations to the police of criminal conduct against another person will also amount to the statutory offence of causing wasteful employment of the police. False stories that waste police time and resources amount to the statutory offence of wasting police time.¹⁸¹

Section 5 of the Criminal Law Act¹⁸² provides:

- (2) Where a person causes any wasteful employment of the police by knowingly making to any person a false report tending to show that an offence has been committed, or to give rise to apprehension for the safety of any persons or property, or tending to show that he has information material to any police inquiry, he shall be liable on summary conviction to imprisonment for not more than six months or to a fine of not more than level 4 on the standard scale or both.

X may also be prosecuted for reporting a hoax crime to any person or to the police and if the police start the investigation of the purported crime, for example, if X calls his friend, to tell him that his car has been hijacked while knowing that it has not. His friend reports the matter to the police and the police waste their scarce resources and time with the search. It is said¹⁸³ that no proceedings for this offence may be instituted except by, or with, the consent of the Director of Public Prosecutions (DPP).

3.4.4 Intimidation of, or retaliation against witnesses, jurors and others

Intimidation of witnesses by violence or threats or by exercising other means of pressure against them raises one of the most disturbing problems within the criminal justice system.¹⁸⁴ When intimidation prevails and the giving of evidence is thereby prevented, the process of proof is prejudiced and the court is presented with only a partial and sometimes

¹⁸⁰Murphy *op cit* (n 1) 733-34.

¹⁸¹Murphy *op cit* (n 1) 744.

¹⁸²The Criminal Law Act of 1967.

¹⁸³Murphy *op cit* (n 1) 744.

¹⁸⁴N Zaltzman "Admitting statements of missing or intimidated witnesses: Section 23(3) of the Criminal Justice Act 1988 compared with the Israeli experience" (1992) *Modern Law Review* 478.

distorted picture of the facts.¹⁸⁵ Some actions that constitute the common law misdemeanour of perverting the course of justice by interfering with witnesses or potential witnesses¹⁸⁶ by threats or intimidation are now also criminalised in terms of legislation.¹⁸⁷ The legislation did not do away with the common law offence of perverting the course of justice – instead it preserved it.¹⁸⁸ This means that the offence can be tried either in terms of the common law or in terms of the Act. Murphy¹⁸⁹ submits that the offence created by section 51(1) has few advantages over the common law offence. It is clear that the statutory offence of perverting the course of justice does not only overlap with the common law offence but it also has a lot of commonalities with the Roman and Roman-Dutch crime of the *lex Cornelia de falsis*.

Section 51 of the Criminal Law and Public Order Act of 1994 provides:¹⁹⁰

(1) A person commits an offence if–

- (a) he does an act which intimidates, and is intended to intimidate, another person (the victim),
- (b) he does the act knowing or believing that the victim is assisting in the investigation of an offence or is a witness or potential witness or a juror or potential juror in proceedings for an offence, and
- (c) he does it intending thereby to cause the investigation or the course of justice to be obstructed, perverted or interfered with.

In *R v Edmonds*¹⁹¹ the court noted that incidents of witness intimidation were endemic and becoming worse. The facts of this case were as follows: Edmonds was convicted by the

¹⁸⁵*Ibid.*

¹⁸⁶See the position in the common law as discussed *supra* under 3.3.2, text at note 60.

¹⁸⁷Section 51 of the Criminal Justice and Public Order Act of 1994 for criminal cases and Sections 30 to 41 of Criminal Justice and Police Act of 2001 for potential witnesses in civil cases.

¹⁸⁸By section 51(11) of the Criminal Justice and Public Order Act of 1994. See Murphy *op cit* (n 1) 736.

¹⁸⁹Murphy *op cit* (n 1) 736.

¹⁹⁰See Murphy *op cit* (n 1) 734-35 and the Criminal Justice and Public Order Act 1994, Chapter 33 (3.11.1994) 37.

¹⁹¹[1999] 1 Cr App R (S) 475.

trial court of intimidation intended to obstruct the course of justice in contravention of section 51 of the Act.¹⁹² It was alleged that he intimidated a 16-year-old woman who was his girlfriend at that time. It was also alleged that their relationship had become violent. He assaulted her twice on separate occasions. The matter was reported to the police but she did not support the prosecution.¹⁹³

It was alleged that even after the assaults Edmonds continued to live at her address. She was afraid to make him leave. She became aware that Edmonds was stealing motor cars or items of property from motor cars. After a subsequent assault it was said that she saw Edmonds driving a stolen motor car and she asked him for a lift. He took her to a friend's house where she called the police and reported the matter. She gave a statement to the police regarding the motor car, which she had seen him break into.¹⁹⁴ It was alleged that the same evening she received a telephone call from Edmonds threatening to carve her up and stab her, and that he was going to smash her place. On her return home she found the message: "Grass. Remember this," painted on a mirror, accompanied by an arrow which pointed to a depiction of a teddy bear. A table lamp had been smashed and her belongings were thrown across the room. All her photographs had been taken from their frames.¹⁹⁵ Edmonds was convicted of intimidating a witness in contravention of section 51.¹⁹⁶

In *R v Singh*,¹⁹⁷ it was held that section 51(1)(c) requires that there must be an investigation under way, not merely that a defendant believed there to be one. The facts of this case were

¹⁹²The Criminal Justice and Public Order Act of 1994.

¹⁹³*R v Edmonds supra* (n 191) at 476.

¹⁹⁴*Ibid.*

¹⁹⁵*Ibid.*

¹⁹⁶The Criminal Justice and Public Order Act of 1994. See *R v Edmonds supra* (n 191) at 475.

¹⁹⁷[1999] *Crim LR* 681.

the following: The defendants were convicted of intimidating a witness and of assault with intent to cause grievous bodily harm. It was alleged that they were involved in fraud in relation to a housing benefit in which the victim had refused to participate. The victim was a relative of the defendants. The victim reported the defendants' unlawful activities to the police, the local authority and to the Official Receiver. The defendants and another man visited the victim and assaulted him. In relation to the count of witness intimidation, the judge directed the jury that it was sufficient that they (defendants) believed that there would be an investigation under way, not that such an investigation was in fact proceeding. On appeal it was submitted that this was misdirection, and that there was no evidence that the investigation of an offence was proceeding.¹⁹⁸ The court held that the judge's direction to the jury that the Crown did not have to prove that there was an investigation under way was wrong. It was further held that section 51(1)(c) requires that there must be an investigation under way, not merely that the defendant believed there to be one. The court observed that there was evidence before the jury that a housing benefit fraud officer¹⁹⁹ had visited the homes of two of the appellants, had interviewed the victim and obtained a witness statement from him. The court held that the offence had accordingly been established²⁰⁰ on the facts because there had already been an investigation in progress.

Legal commentators are of the opinion that section 51(1)(b) is ambiguous as to whether the defendant needs to have knowledge or a belief in the role of the victim as well as the existence of an investigation. It is said that the former interpretation is preferable because it is the one most favourable to the defendant. They observe that this offence is already

¹⁹⁸At 681.

¹⁹⁹This officer is not a policeman but is appointed by the Audit Commission, which is responsible for the audit of local government and the health services at local level to investigate possible fraud in housing benefit. See <http://www.nao.org.uk/pn/9798164.htm> (accessed on 09 June 2007).

²⁰⁰*Ibid.*

unusually harsh in creating a presumption of intention once the intimidation is proved.²⁰¹ Murphy²⁰² submits that an offence under section 51(1) may be committed even where the victim refuses to be intimidated but that it cannot be committed on the basis of a mistaken belief that an investigation is in progress. He further submits that ‘belief’ for the purposes of section 51(2) must also mean a correct or justified belief; a criminal attempt may however be committed on the basis of a mistaken belief.²⁰³

Sections 39, 40 and 41 of the Criminal Justice and Police Act²⁰⁴ also deal with intimidating, harming and threatening witnesses. Various provisions in this Act overlap with provisions in other Acts that deal with the intimidation, harassment and threatening of witnesses with intent to dissuade them from testifying in judicial proceedings.²⁰⁵

Section 39(1) of the Criminal Justice and Police Act provides:²⁰⁶

A person commits an offence if-

- (a) he does an act which intimidates, and is intended to intimidate, another person (‘the victim’);
- (b) he does the act-
 - (i) knowing or believing that the victim is or may be a witness in any relevant proceedings; and
 - (ii) intending, by his act, to cause the course of justice to be obstructed, perverted or interfered with.

²⁰¹*R v Singh supra* (n 197) at 681-82.

²⁰²Murphy *op cit* (n 1) 736.

²⁰³*Ibid.*

²⁰⁴The Criminal Justice and Police Act of 2001.

²⁰⁵Section 51 of the Criminal Justice and Public Order Act of 1994. See the discussion of this section *supra*, text at note 190.

²⁰⁶M Gale, G Scanlan and S Gale *The Criminal Justice and Police Act, 2001: A Guide to Practitioners* (2000) 84-88.

Section 39(2)²⁰⁷ makes it clear that the scope of section 39(1) is fairly wide. It provides:

For the purpose of subsection (1) it is immaterial—

- (c) whether or not the intention to cause the course of justice to be obstructed, perverted or interfered with is the predominating intention of the person doing the act in question.

It is said that there is a presumption that the act was done “with the intention of causing the course of justice to be obstructed, perverted or interfered with” unless there is evidence to the contrary.²⁰⁸

A close look at section 39 reveals that the elements of this offence are:

- (1) an act that intimidates or is intended to intimidate;
- (2) another person;
- (3) that could be a witness; and
- (4) with intention of causing the course of justice to be obstructed.

The accused must perform a positive act that intimidates or that is intended to intimidate a person who could be called as a witness in relevant proceedings. The accused’s intention must be to cause the obstruction of justice. The *mens rea* presumed is intention to obstruct or pervert the course of justice. In terms of section 39(3) the reverse onus of proving the absence of intention lies with the accused. Gale, Scanlan and Gale²⁰⁹ say that sections 39 and 40 were intended to deal mainly with witnesses in civil cases and a small number of criminal cases not covered by the Criminal Justice and Police Act.²¹⁰

²⁰⁷The Criminal Justice and Police Act of 2001.

²⁰⁸Gale, Scanlan and Gale *op cit* (n 206) 85.

²⁰⁹See Gale, Scanlan and Gale *op cit* (n 206) 84.

²¹⁰Act of 2001. For the discussion of the provisions of this Act, see text at notes 206, 207 and 212.

Section 40²¹¹ deals with the harming of witnesses. It is an offence to threaten to harm a witness or someone believed to have been a witness²¹² in “relevant proceedings.”²¹³ For purposes of sections 39 and 40, relevant proceedings mean “any proceedings in or before “the magistrates’ court,” the county court, the High Court, the Crown Court or the Court of Appeal. In terms of section 40(3) an offence is committed if, for instance, X harms or threatens to harm Y who is a supposed witness in relevant proceedings. The threat of harm to a witness is not limited to physical harm only. Any kind of harm, for example, financial harm will suffice. It is also irrelevant whether or not the person threatened is present when the threats are made.²¹⁴

3.5 SUMMARY OF ENGLISH LAW

For the common law crime of perverting the course of justice to be committed, the accused must perform a positive act which has a tendency to obstruct the course of justice. It is said that the offence cannot be committed by an omission hence the requirement of an act or series of acts. The perpetrator must also have intended that his act should pervert justice. This tendency and the intent to impede justice must be present simultaneously for the crime to be committed.

It is clear that the “course of justice” includes police investigations, court proceedings, proceedings before an arbitrator and proceedings before a Coroner of inquiry. However, the “course of justice” also begins to run and may be perverted *before* investigative or legal proceedings are active or have been instituted. The offence is neither limited to matters

²¹¹The Criminal Justice and Police Act of 2001.

²¹²Gale, Scanlan and Gale *op cit* (n 206) 86.

²¹³See Gale, Scanlan and Gale *op cit* (n 206) 87.

²¹⁴Section 40(a)-(c).

directly concerning proceedings already in being, nor need the proceedings of some kind in a court or judicial tribunal to be imminent, nor is it necessary that investigations which could result in proceedings be in progress. It may be committed after the perpetration of a crime but before investigation into it has begun. It is established law that the “course of justice” begins when the principal crime is committed but before the police have begun with their investigation and before any judicial proceedings have commenced.

It can even be committed though a crime has not been committed or cannot be proven, if X believed that there may be an investigation which could result in judicial proceedings. If X, in order to prevent the detection of the offender, destroys the only evidence of a crime before an investigation had begun, he or she can be convicted of perverting the course of justice because such conduct has the tendency to pervert the course of justice. X can be convicted of this offence even if he or she mistakenly believed that it was the only evidence of a non-existing crime.

Numerous forms of conduct constitute this crime. These are: interference with witnesses and jurors; laying a false criminal charge against an innocent person; reporting a false charge to the police; assisting another person to evade lawful arrest; withholding evidence in return for payment; pleading guilty to a crime committed by another person, and police officers acting outside their discretion in order to shield another from criminal charges. Inciting, or conspiring or attempting to pervert the course of justice constitutes the substantive offence.

Some actions that constitute the common law misdemeanour of perverting the course of justice by threatening or intimidating witnesses or potential witnesses are now also punishable in terms of legislation. The legislation overlaps with the common law. This

means that the offence can be tried either in terms of the common law or in terms of the relevant Act.

The following conduct is now also punishable in terms of legislation:

a. To impede the apprehension or prosecution of a person who has committed a relevant (an arrestable) offence. In contrast to the common law offence, this offence requires that X must have impeded the arrest of a person who has committed a relevant offence (meaning an offence identifiable in terms of the Act). Therefore, legislation has narrowed the scope of this offence.

b. To do an act which intimidates and is intended to intimidate another person (the victim) while knowing or believing that the victim is assisting the investigation of an offence or is a witness or potential witness or a juror or potential juror in proceedings for an offence, and he or she does this act intending thereby to cause the investigation or the course of justice to be obstructed, perverted or interfered with. Before the defendant can be found liable for this crime, there must be an investigation under way, not merely that a defendant believe there to be one.

c. To intimidate, harm and threaten witnesses in order to prevent them from testifying in judicial proceedings. A person commits an offence if he or she does an act which intimidates and is intended to intimidate another person ('the victim'). The requirement is that the accused must know or believe that the victim is or may be a witness in any relevant proceedings. It is immaterial whether or not the intention to cause the course of justice to be obstructed, perverted or interfered with, is the predominant intention of the person doing the act in question.

d. Legislation also targets conduct which leads to the wasteful employment of the police. Wasting police time is akin to perversion of justice.

These are the only types of conduct which are targeted in terms of the legislation.

CHAPTER FOUR

AUSTRALIAN LAW

4.1 GENERAL

In Australia, the common law offence of attempting to pervert the course of justice cannot be given a clear and precise definition, even though it seems to connote some unwarranted or unlawful interference with the process of the administration of justice.¹ The substance of the offence of perverting the course of justice consists in “the doing of some act which has a tendency and is intended to pervert the administration of justice.”² It is said that perverting the course of justice means an interference with the due exercise of jurisdiction by courts and other competent judicial authorities.³ Judicial authorities include tribunals whose jurisdiction extends to the enforcement or adjustment of rights and liabilities in accordance with law and whose procedure is judicial in character. Committal proceedings, while administrative, are said to be “curial” and fall within the ambit of this offence.⁴

4.2 WHEN DOES THE COURSE OF JUSTICE BEGIN?

Contrary to English law⁵ where it is said that the course of justice begins to run and may be perverted before judicial proceedings are “active” or as soon as the crime is committed but

¹JK Bentil “Attempt to pervert the course of justice” (1984) *Solicitors’ Journal* Vol 128 213 and P Gillies *Criminal Law* 3ed (1993) 814.

²M Chesterman and RC Evans *The Laws of Australia: Criminal Offences*. Vol 10. (1998) 187; P Gillies *Criminal Law* (1997) 830-31 and *The Queen v Rogerson* (1992) 174 CLR 268 at 275-76. This case is discussed *infra* at note 24.

³*The Queen v Rogerson supra* (n 2) at 280.

⁴Chesterman and Evans *op cit* (n 2) 187-88 and *The Queen v Rogerson supra* (n 2) at 270.

⁵Cf Smith and Hogan *op cit* Chapter Three (n 21) 752-53; Card *op cit* Chapter Three (n 1) 537; *R v Rafique* at 1G-H *supra* in Chapter Three under 3.2, text at note 26 and *R v Kiffin supra* at 450 in Chapter Three under 3.2, text at note 30.

before police investigations have begun, Australian courts have ruled that the course of justice does not begin until the jurisdiction of some court or competent judicial authority is invoked.⁶ Therefore, as a general rule, police investigations before this stage do not form part of the course of justice and interference with them will not constitute the offence of perverting the course of justice.⁷ According to Gillies,⁸ police investigations will usually contemplate the bringing of a prosecution. Thus, conduct which deflects or frustrates a police investigation or which has the potential to do so, will have the tendency to pervert the course of justice and, accordingly, it will have the potential to prevent the investigation from bringing a case within the jurisdiction of the court. However, the Australian courts have held that for the purpose of the offence of perverting the course of justice, the course of justice does not commence in criminal proceedings until the laying of charges against, or the arrest of, an accused person.⁹ It is further said that in civil proceedings the course of justice does not commence until the institution of the proceedings.¹⁰

In *The Queen v Todd*¹¹ and *The Queen v Rogerson*¹² it was held that police investigations do not form part of the course of justice. The facts of *The Queen v Todd* were as follows: Todd, the accused, was charged with the common law offence of “effecting public

⁶*The Queen v Rogerson supra* (n 2) at 283. In *James v Robinson* [1963] 109 CLR 593 the High Court of Australia held (at 606): “The proposition that the proceedings are pending in criminal cases after a person has been arrested and charged is firmly established ...”.

⁷ Gillies *op cit* (n 1) 816-17.

⁸*Ibid.*

⁹*The Queen v Rogerson supra* (n 2) at 303.

¹⁰At 303-04.

¹¹1957 SASR 305 at 331.

¹²*The Queen v Rogerson supra* (n 2) 276.

mischief.” It was alleged that he made a misrepresentation that he had drowned and so caused the police to devote their time and services and to incur expenses in the search for Todd, or his body, thereby temporarily depriving the public of the services of the police officers involved in the search and thereby unlawfully created a public mischief. The evidence before the court was that a police officer received instructions from his superior to accompany other police officers to the river where a vehicle was spotted. As the river was in flood, it was suspected that the driver and the occupants of the car had been washed out by the floodwaters and probably drowned. The police searched for the bodies for some days. At a later time, Mr Todd was discovered alive and residing under an assumed name at a hotel. At first, he gave a false name to the police, but upon further questioning by the detectives, he admitted to his real name and admitted that he had himself driven his car into the river “so that everyone would think I got drowned and then I could go away and start life afresh.”¹³ The accused pleaded not guilty to the charges.¹⁴

At the end of the state’s case, the accused applied for an acquittal on the ground that the offence that he was charged with, and with regard to the proven facts, was not an offence known to the law in the State of South Australia. Alternatively, it was submitted on behalf of the accused that the facts proved did not come within the ambit of any conduct which had been recognised as constituting public mischief and that it was not the responsibility of the court to extend that ambit.¹⁵

¹³*The Queen v Todd supra* (n 11) at 308.

¹⁴At 306.

¹⁵*Ibid.*

At the end of the case for the defence, the jury unanimously found the accused guilty of the charge of effecting public mischief. The court, at the request of the counsel for the accused, reserved the following questions for the consideration and determination of the Full Bench:¹⁶

(1) Whether the offence alleged against the accused was an offence known to the law of the State of South Australia.

(2) If yes, did the proven facts establish the commission of the offence and justify the guilty verdict?

The contention of counsel for the accused was that a false representation by one person, without conspiring with other persons, and which did not constitute a charge against another person, and which did not place an innocent individual in jeopardy of prosecution, would be an extension of the crime of public mischief which the judges should not venture to make.¹⁷

After considering other cases,¹⁸ and although the particulars of the offence in the indictment against Todd differed from the facts in those cases, the Supreme Court found that there was no allegation that Todd by his actions “rendered liege subjects of the Queen liable to suspicion, accusation and arrest.”¹⁹ This thesis interprets that statement by the Supreme

¹⁶At 307.

¹⁷At 309.

¹⁸Cases like *R v Manley* (1933) 1 KB 259 and *Kerr v Hill* (1936) SC (J) 71.

Court as concurring with the submission by counsel for the accused that false representation by the conduct of one person, without conspiring with other persons, and which did not constitute a charge against another person and which did not place an innocent individual in jeopardy of prosecution would be an extension of the crime of public mischief which was not allowed.

In its reasons for judgment, the court held²⁰ that it was unable to accept the proposition that police investigations were part of the “course of justice” as recognised by common law. The Supreme Court held that the offence alleged against the accused was not an offence known to the law of the State of South Australia.²¹ On the second reserved question the court observed that the facts proved did not establish the commission of an offence known to the law and therefore justify the guilty verdict. The appeal was allowed.²²

From the perspective of a “perversion of the course of justice,” the Supreme Court was ambiguous about whether *all* police investigations can be regarded as part of the “course of justice.” What the court said was that it was unable to accept the proposition that the investigations that the police made in *The Queen v Todd* were part of the “course of justice.” It should be noted that in the *Todd* case, police investigations were not directed towards a specific individual but to the possible death of the driver of the car and its occupants in the context of a natural disaster. The court found that in the State of South

¹⁹*The Queen v Todd supra* (n 11) at 326.

²⁰At 331.

²¹*Ibid.*

²²*Ibid.*

Australia there was no such offence as “effecting public mischief” known to the law, but

“there is an offence known to the law of this state which may be described as perverting the course of justice.”²³ By implication the court meant that the accused was wrongly charged with the offence of “effecting public mischief.” He should have been charged with perverting the course of justice. It is submitted that the *obiter dicta* as regards perverting the course of justice in *The Queen v Todd* decision should be interpreted as referring only to police investigations into similar cases, namely, where there was no innocent individual in jeopardy of prosecution as a result of the investigation. Until now, this case has been relied upon as authority for the proposition that police investigations, in general, are not part of the “course of justice.”

In *The Queen v Rogerson*²⁴ the question of whether or not conspiracy to mislead the police during an investigation for the purpose of ascertaining whether a crime has been committed might constitute the common law offence of attempt to pervert the course of justice was also a bone of contention. In this case the Crown sought special leave to appeal against an order of the Court of Criminal Appeal of New South Wales for acquitting three respondents indicted for conspiracy to pervert the course of justice.²⁵ The court followed *The Queen v Todd*²⁶ and rejected that police investigations form part of the course of justice,²⁷ but the

²³*Ibid.*

²⁴*The Queen v Rogerson supra* (n 2).

²⁵At 275 and 295.

²⁶*The Queen v Todd supra* (n 11).

²⁷*The Queen v Rogerson supra* (n 2) at 276, at 283 and at 310.

majority²⁸ of the court held that an act which has a tendency to deflect the police from, *inter alia*, prosecuting a criminal offence or instituting disciplinary proceedings before a judicial

tribunal, or from adducing evidence of the true facts, is an act which tends to pervert the course of justice and, if done with intent to achieve that result, constitutes an attempt to pervert the course of justice.²⁹ The facts of the case were as follows:³⁰ The first respondent, Rogerson, was a police officer. It was alleged that he and the second respondent, Nowytarger, arranged for the latter to deposit sums of money in false names into two bank accounts with the National Australian Bank. The bank's security cameras took photographs of the two accused when they were at the bank. Another police officer told Rogerson that he had been photographed "with a criminal," meaning Nowytarger. Subsequent to that conversation, Rogerson and the third respondent, Paltos, met a solicitor called Dr Karp. Later, Nowytarger joined them. Rogerson told Karp that he and a friend had money in bank accounts under false names. They agreed that Karp would prepare a sale agreement which would falsely show that Karp had paid Rogerson and Nowytarger a sum of money for the sale of a car. The sale agreement was backdated to December 1983.

In 1985, a detective inspector, having been informed that Rogerson and Nowytarger had been photographed at the bank, initiated an investigation in order to ascertain whether Rogerson had breached any departmental regulations or had committed any criminal offence. During an interview, Rogerson asserted that the December 1983 "sale agreement"

²⁸On the majority were Mason CJ, Brennan J and Toohey J. See also Chesterman and Evans *op cit* (n 2) 188.

²⁹*The Queen v Rogerson supra* (n 2) at 278 and at 283-84.

³⁰At 296-97.

was genuine, and that the money came from the sale of a vehicle to Karp.³¹ When police officials interviewed Nowytarger, he likewise maintained the genuineness of the “sale agreement.”³² When Paltos was interviewed, he declined to answer questions in respect of the matter.³³

Rogerson, Nowytarger and Paltos were charged and convicted by the Supreme Court of New South Wales of conspiring to pervert the course of justice.³⁴ The charge arose out of an alleged agreement to fabricate evidence that had as its object the frustration or diversion of a police investigation into the possible commission of a crime.³⁵ The Court of Criminal Appeal set aside the convictions.³⁶ The court said that the offence of attempt to pervert the course of justice by the kind of action that was alleged could not be established in the absence of proof by the Crown of the general nature of the offence which the accused had in his or her contemplation when he or she engaged in the conduct which resulted in him or her being charged.³⁷ The Crown applied to the High Court for special leave to appeal.

This case raised the following two important legal questions:

- a. Whether or not police investigations of a suspected commission of a crime constituted the “course of justice” and whether an agreement to mislead the police during such

³¹At 296.

³²At 297.

³³*Ibid.*

³⁴At 269.

³⁵*Ibid.*

³⁶*Ibid.*

³⁷*Ibid.*

investigations amounted to conspiracy to pervert the course of justice.

b. What the Crown needed to establish in order to prove the offence of conspiracy to pervert the course of justice.

McHugh J, held³⁸ that unless the prosecution proved that the course of justice, as a continuing process, had been perverted or proved facts that showed that an identifiable person had committed an identifiable crime, it was difficult to see how the prosecution could prove that the conduct of the accused interfered with the course of justice. The court observed that it was not enough that the conduct of the accused had misled an investigation into whether a person had committed any offence against the law. In granting special leave to appeal, the court held³⁹ that this application raises questions of exceptional importance concerning the scope of the offence of conspiracy to pervert the course of justice. Therefore, special leave to appeal was granted.

The court stated:⁴⁰

[P]olice investigations are not part of the course of justice ... Unless the judicial proceedings, which would be the subject of the prosecution, are identified, it cannot be proved that the conduct of the accused had the tendency to affect the course of justice in judicial proceedings. And proceedings cannot be identified if their subject matter is not identified. Consequently, the directions of the learned trial judge were erroneous and, by themselves would require a new trial of the charge.

The Crown must prove that an identifiable person (X) had committed an identifiable crime

³⁸At 307.

³⁹At 312.

⁴⁰At 310.

(e.g. theft of money) and it was not enough that the conduct of the accused had misled an investigation into whether a person had committed any offence against the law. It was clear that the Crown could not prevail with the charge of conspiracy to pervert the course of justice against X if the antecedent crime is unknown. Police investigations do not form part of the course of justice. It is said that the gravamen of an attempt to pervert the course of justice is an interference with the due exercise of jurisdiction by courts and other competent judicial authorities.⁴¹

The court did not follow its English counterparts⁴² and found that police investigations did not form part of the course of justice.⁴³ It is said that neither police nor other investigative agencies administer justice.⁴⁴ It is firmly established that police investigations do not form part of the course of justice. Therefore, for the purpose of the offence of perverting the course of justice, the course of justice commences in criminal proceedings after the laying of charges against, or the arrest of, an accused person.⁴⁵ In civil proceedings the course of justice commences after the institution of the proceedings.⁴⁶

It is said that in both criminal and civil proceedings, the course of justice ends when the rights of the parties have been finally determined and declared after “an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined

⁴¹At 284.

⁴²*Cf The Queen v Vreones supra* in Chapter Two under 2.3, text at note 93 and *R v Kiffin supra* in Chapter Three under 3.2, text at note 30.

⁴³*The Queen v Rogerson supra* (n 2) at 310.

⁴⁴At 283.

⁴⁵At 303.

⁴⁶At 303-304.

to the facts as determined.”⁴⁷

4.3 THE COMMON LAW OFFENCE

In Australia the *actus reus* of the common law offence of perverting the course of justice consists of an act which has the potential to deflect a civil or criminal court or other judicial tribunal from the due performance of its duty in the administration of justice. It is also said that the offence targets conduct which has the tendency to pervert the course of justice.⁴⁸ Conduct can either be a positive act or a failure to do something, but there is no judicial or academic authority that supports the proposition that at common law this crime can be committed by mere omission.

The Australian justice system was protected by two very broad categories of crimes, namely, contempt of court which deals with internal aspects of this protection and perverting the course of justice which deals with external aspects.⁴⁹ At common law attempting to pervert or to defeat the course of justice is a substantive offence.⁵⁰ The Australian Capital Territory and Victoria continue to rely on the common law for prosecutions in this category of crime.⁵¹ Other states have statutory provisions which basically state that the common law offence also operates within those jurisdictions.⁵² This

⁴⁷At 304.

⁴⁸*The Queen v Rogerson supra* (n 2) at 279 and Gillies *op cit* (n 1) 816.

⁴⁹Chesterman and Evans *op cit* (n 2) 187.

⁵⁰*The Queen v Rogerson supra* (n 2) at 279; Chesterman and Evans *op cit* (n 2) 190 and Gillies *op cit* (n 2) 830.

⁵¹Chesterman and Evans *op cit* (n 2) 187.

⁵²*Ibid.*

means that the statutory offences exist apart from the common law offence. According to Gillies,⁵³ in New South Wales, the common law misdemeanour of attempting to pervert or defeat the course of justice was abolished and replaced with a broad statutory offence.⁵⁴ In the State of South Australia, this offence was also made a statutory offence.⁵⁵

Gillies says that the common law offence of attempting to pervert the course of justice is broadly conceived and defined.⁵⁶ Due to the fact that Australian courts have not attempted to define this offence precisely, or the nature of its subject matter, the range of acts having the tendency to prejudice the administration of justice are unlimited.⁵⁷ Just as in English law, this offence incriminates any person who with intent to pervert the course of justice perpetrates an act which has the tendency to, or does indeed, deflect a court or other judicial tribunal from its proper course in respect of the administration of civil or criminal justice.⁵⁸

4.3.1 Conduct which constitutes the common law offence of perverting the course of justice

In Australian common law the following conduct constitutes the common law offence of perverting the course of justice:⁵⁹

⁵³Gillies *op cit* (n 2) 830.

⁵⁴Section 341 of the New South Wales Crimes Act of 1900.

⁵⁵Gillies *op cit* (n 2) 830.

⁵⁶*Ibid.*

⁵⁷Gillies *op cit* (n 2) 831.

⁵⁸*Ibid.*

⁵⁹*Ibid.*

- a. Interfering with witnesses or potential witnesses by intimidation.
- b. Bribing a witness.
- c. Obtaining bail by improper means.
- d. Inducement to lie to the police or to commit perjury.
- e. Lying to the police in order to prevent the detection and arrest and ultimate prosecution of an offender.
- f. Concealment or fabrication of evidence.
- g. The improper institution of judicial proceedings.
- h. Bribing the police to hinder prosecution.
- i. Making false accusations against a person to the police.
- j. Publication of a newspaper article impugning the conduct and character of persons on trial.
- k. Destruction of documents.

4.3.1.1 Interference with witnesses

Interference with witnesses constitutes the common law offence of obstructing the course of justice. The leading case in this regard is *Healy v The Queen*.⁶⁰ The facts of this case were the following: Healy was indicted on two counts, namely, fraud and attempt to pervert the course of justice. In the first count it was alleged that Healy, with intent to defraud by deceit and fraudulent means, attempted to obtain money from a certain Mr Connell. It is not clear what he intended to do with the money. He was acquitted on the charge of fraud. In the second count, it was alleged that he engaged in conduct that was

⁶⁰[1995] 15 WAR 104 (FC).

intended to discourage prosecution witnesses from testifying. During the trial the defence argued that there was no *prima facie* case against Healy on the charge of attempting to pervert the course of justice because there was no attempt as such. It was also said that the attempt was diverted because Mr Connell was not going to act on what Healy had done. He was acquitted on the first count and convicted on the second count.⁶¹ He appealed against his conviction.

On appeal it was argued on his behalf that his act was merely preparatory to the commission of the offence. It was argued that the trial judge was wrong in failing to direct the jury as to what acts would be capable of constituting the offence.⁶² In dismissing the appeal the court held:⁶³

By doing what he did, the appellant was enabling Mr Connell to record material, which, if used, as he understood it would be used, had the capacity to pervert the course of justice. He had done all that was required on his part to be done to enable Mr Connell to use the recorded material for the purpose of discouraging the two witnesses from testifying. In my view, the evidence which the jury must have accepted in reaching their verdict, following the directions which were given to them by the learned judge, clearly established that the appellant's conduct gave rise to a risk or possibility, without further action by him, that his conduct might result in the perversion of the course of justice (to use the expressions to be found in *R v Murray*) or his conduct had a tendency to fulfil his guilty intention ...

Healy's counsel approached the charge of attempt to pervert the course of justice as if it was an attempt to commit another substantive offence which would constitute an inchoate offence. The court held that the argument that Healy's acts were merely preparatory to the commission of the offence was irrelevant because the completed offence was committed

⁶¹At 106F.

⁶²At 104E.

⁶³At 116B-D.

whether or not justice was perverted.⁶⁴

4.3.1.2 Bribing a witness

In *Meissner v The Queen*,⁶⁵ Meissner was charged and convicted of the common law offence of attempting to pervert the course of justice by improperly endeavouring to influence Ms Perger to plead guilty to a charge of making a false statutory declaration.⁶⁶

The facts of the case were as follows: Perger was facing charges of making a false statutory declaration in relation to statements she had made that she (Perger) had been a “political whore” and had been photographed in sexually compromising positions with a number of politicians on board a boat owned by Meissner. Firstly, she indicated to her counsel that the charge would be defended. It was alleged that she had discussed her plea with Meissner. Allegedly, after discussing her plea with Meissner, she instructed her counsel that she wanted to plead guilty.

Subsequent to that discussion, Meissner was charged with attempting to pervert the course of justice by improperly endeavouring to influence Perger to plead guilty, either by bribery or intimidation, or both. The allegation of bribery was supported by evidence that Meissner had deposited money in Perger’s bank account and the same day that the money was deposited she instructed her lawyer that she wanted to plead guilty. The allegation of

⁶⁴At 116E-F.

⁶⁵(1995) 184 CLR 132.

⁶⁶A statutory declaration is defined as a written statement declared to be true in the presence of an authorised witness. A person wishing to use a statutory declaration in connection with the law of the Commonwealth, the Australian Capital Territory or certain other Territories must make the declaration in accordance with the Statutory Declarations Act of 1959 and the Statutory Regulations of 1993. See: <http://www.ag.gov.au/statdec> (accessed on 15 May 2007). It seems that this is a form of an affidavit.

intimidation centred on a series of taped conversations between Meissner and other people (but not Perger). He was convicted of attempting to pervert the course of justice. He appealed.⁶⁷ The Court of Criminal Appeal dismissed the appeal but he was granted special leave to appeal to the High Court.

It was argued on behalf of Meissner that the conduct alleged against him was not capable of constituting the offence of attempting to pervert the course of justice. It was argued that inducing a person to plead guilty to a criminal charge could not amount to perverting the course of justice but may constitute other offences because it is something which an accused person is entitled to do. It was said that cases involving interference with witnesses for apparently proper motives could be distinguished.⁶⁸ In reaching its verdict, the High Court relied heavily on a number of cases, including leading English cases.⁶⁹ The court held:⁷⁰

Any conduct designed to intimidate an accused person to plead guilty is improper conduct and necessarily constitutes an attempt to pervert the course of justice even if the intimidator believes that the accused is guilty of the offence with which he or she is charged. A plea made as a result of intimidation has not been made freely and voluntarily and the court that acts on the plea has been misled and its proceedings have been rendered abortive, whether or not it ever becomes aware of the impropriety.

The appeal was accordingly dismissed.⁷¹

⁶⁷*Ibid.*

⁶⁸At 133-34.

⁶⁹*The Queen v Vreones supra* in Chapter Two under 2.3, text at note 93; *R v Toney supra* in Chapter Three under 3.4.2, text at note 57 and *R v Kellett supra* in Chapter Three under 3.3, text at note 44.

⁷⁰*Meisseer v The Queen supra* (n 65) at 143.

⁷¹At 147.

4.3.1.3 Obtaining bail by improper means

In New South Wales, to obtain bail by improper means was regarded as a common law offence of perverting the course of justice. Instances of conduct which constituted this type of offence included obtaining bail under false pretences. One of the cases where the accused faced charges of conspiracy to pervert the course of justice for obtaining bail by improper means was *R v Baba*.⁷² The facts of the case were as follows: Baba was charged and convicted of conspiracy to pervert the course of justice.⁷³ The conspiracy alleged by the Crown culminated in the overt acts that Baba, Western and another unknown woman, had agreed beforehand that the woman would be falsely represented as a joint tenant of a house in order to provide security which would enable Western to be released on bail. In order to procure Western's release on bail she would join as such in executing the required document along with Baba. It was known that Baba owned a house as a co-tenant with his divorced wife. It was foreseen that the ownership of the house would be sufficient to establish the stature of Baba as an acceptable person to provide bail for Western. The unknown woman was brought into the picture because it was foreseen that it might be difficult for Baba alone to be acceptable, because the house was registered in both his names and that of his ex-wife.

After a number of unsuccessful applications Western was ultimately granted bail. The Crown's case was that prior to Western's release on bail, Baba and Western had agreed that Baba would provide his house as security which would enable Western to be granted bail.⁷⁴

⁷²(1977) 2 NSWLR 502.

⁷³At 503G.

⁷⁴At 505B-C.

In its verdict the jury accepted that such conspiracy had been constituted as far as Baba was concerned. He was convicted of conspiracy to pervert the course of justice.⁷⁵ On appeal, it was argued on his behalf that:⁷⁶

- a. the case should have been withdrawn from the jury because the facts, as alleged, did not support the offence charged, and
- b. the interference, in the manner alleged, with the processes of obtaining bail was not a perversion of the course of justice.

In dismissing the appeal the court held:⁷⁷

It cannot be overemphasized too strongly that the process of administration of the laws governing release upon bail are not to be lightly interfered with. They represent a significant part of the machinery of criminal justice. Those who conspire to pervert their due and orderly process must expect to find themselves confronted with serious consequences, as has the present appellant. ... I would accordingly propose that, in so far as there is an appeal against conviction, the appeal should be dismissed.

4.3.1.4 Concealment or fabrication of evidence

Lawyers are legal subjects, not legal saints. In presenting their clients' cases and in the quest to succeed, there is evidence that some lawyers will resort to unconventional legal methods. One such case was *Hatty v Pilkinton*.⁷⁸ The respondent, Mr Pilkinton, was a lawyer who represented the defendant, a certain Ms Camilleri, in a traffic-related criminal case. Camilleri was not charged under her real name but under a false name, Rozanne Marie Crawford. This was the name given to the police. Pilkinton was aware that his client

⁷⁵At 503G.

⁷⁶At 502C.

⁷⁷At 505B-D.

⁷⁸(1992) 108 ALR 149.

had given a false name to the police and that she was appearing before the court in answer to a false name. Pilkinton appeared in court on her behalf and did nothing to correct the situation by revealing her true name to the court. Consequently, she was convicted under a false name.

Pilkinton was charged and convicted of the common law offence of perverting the course of justice for taking an active part in misleading the court.⁷⁹ He appealed to the Supreme Court against his conviction. The Supreme Court set aside the conviction and entered in its place a judgement of acquittal.⁸⁰

The Crown appealed. This was an appeal to the Full Bench of the Federal Court of Australia from a single judge of the Supreme Court of the Australian Capital Territory (ACT). The argument for the Crown was that Pilkinton, knowing that the defendant he represented was being proceeded against under a false name, deliberately deceived the court and aided the defendant in that deception.⁸¹ The fact that the court was intentionally deceived had the tendency to pervert the course of justice.

The court held that the principle of public justice was seriously offended if proceedings in court were conducted on a false basis as they were in this case. In allowing the appeal, the Federal Court of Australia held:⁸²

I consider it inevitable that Mr Pilkinton did not intend to pervert the course of justice by the deception

⁷⁹At 157.

⁸⁰At 154.

⁸¹*Ibid.*

⁸²At 158.

to which he was a party for the reason that there was not only a tendency for justice to be perverted but there was a virtual inevitability that justice would in fact be perverted in the way I have described. I do not think it can be doubted that Mr Pilkinton knew that the due administration of justice would be obstructed by the entry of a false record even if he hoped that no further harm might come of it and

even though he told his client that she should not drive during the period of disqualification imposed upon her in her false name.

The conviction was therefore, restored. The restoration of Pilkinton's conviction should be applauded, because he clearly and intentionally assisted his client in conduct that he, as a lawyer, knew was criminal. This case sent a message that lawyers are neither exempt from the reach of the criminal law nor immune from criminal prosecution and that criminal acts should not be tolerated at all. It was clear that Mr Pilkinton's conduct was both professionally undesirable and criminal in nature.

4.3.1.5 Lying to the police in order to prevent the detection and arrest and ultimate prosecution of an offender

Gillies⁸³ says another form of the common law crime of attempting to pervert the course of justice is to lie to the police in order to prevent the detection and arrest and, ultimately, the prosecution of the offender. He cites *The Queen v Debelis*⁸⁴ as one of the authorities.

It is respectfully submitted that *The Queen v Debelis* cannot be regarded as authority for Gillies's proposition that lying to the police in order to prevent the detection and arrest and ultimate prosecution of the offender amounts to obstruction of justice. In *The Queen v Debelis*, the accused were charged with conspiracy to pervert the course of public justice when they attempted to bribe a police officer to arrange for the initial charges against

⁸³Gillies *op cit* (n 2) 831.

⁸⁴(1984) 36 SASR 1. See Gillies *op cit* (n 2) 831.

Debelis of conspiracy to grow Indian hemp to be dropped.⁸⁵ In this case Debelis was already facing charges when they attempted to bribe the police officer. The accused did not lie in order to prevent the detection and the arrest and ultimate prosecution of any offender. Gillies's proposition cannot be reconciled with the case law.⁸⁶ In terms of Australian law, police investigations for ascertaining whether a crime has been committed do not form part of the course of justice.

4.3.1.6 The improper institution of judicial proceedings

The improper institution of judicial proceedings amounts to the common law offence of attempting to pervert the course of justice. When, for example, prisoner X sends a false petition to the Chief Justice on which the Chief Justice may order a judicial inquiry into the question of X's guilt, X may be found guilty of the offence of attempting to pervert the course of justice.⁸⁷ In *White v R*,⁸⁸ the accused, a lawyer, had been struck off the roll after conviction and sentence for stealing. Allegedly, after serving his sentence for theft, White sent two false affidavits to the Chief Justice of the Supreme Court. These affidavits were purported to come from and been declared by one Morsen. The affidavits were intended to make it appear to the Chief Justice that the offences of which White had been convicted had in fact been committed by Morsen and not by him, and that he had been wrongfully convicted and that his name had been wrongfully struck off the roll.⁸⁹ White was charged,

⁸⁵See *The Queen v Debelis supra* (n 84) at 1 and at 3.

⁸⁶Cf *The Queen v Todd supra* (n 11) at 331 and *The Queen v Rogerson supra* (n 2) at 304.

⁸⁷*White v R* (1906) 4 CLR 152.

⁸⁸*White v R supra* (n 87).

inter alia, with attempting to pervert the course of justice.⁹⁰

Before plea, an objection was raised on behalf of the accused that the indictment did not disclose any attempt to pervert the course of law and justice.⁹¹ The objection was overruled. He was convicted on all counts, including attempting to pervert the course of justice.⁹² The court reserved the following questions for consideration by a Court of Appeal:⁹³

- (1) Whether the court was wrong in overruling the objection; and
- (2) whether the court was wrong in holding that there was evidence in support of each count.

With regard to the charge of attempting to pervert the course of justice it was found that in sending documents to the Chief Justice, supported by affidavits purported to have been made by Morsen, X was attempting to pervert the course of law and justice.⁹⁴ The court said that the first count of attempting to pervert the course of law and justice disclosed an offence.⁹⁵ The court held that the court *a quo* rightly overruled the objection.⁹⁶ The appeal

⁸⁹At 158.

⁹⁰At 152-53.

⁹¹At 158.

⁹²At 153.

⁹³At 154.

⁹⁴At 160.

⁹⁵*Ibid.*

⁹⁶At 164.

was dismissed.⁹⁷

4.3.1.7 Bribing the police to hinder the prosecution

This offence is committed, for example, where X, as a police officer, conspires with other persons and corruptly solicits and obtains rewards for showing or promising favours contrary to his duty as a police officer and thereby obstructs and defeats the course of justice. In *R v Hammersley, Heath and Bellson*,⁹⁸ the accused were three police officers called Hammersley, Heath, Ridge and a bookmaker called Bellson. They were charged with conspiracy to obstruct the course of justice. Allegedly, they conspired together, and with other persons unknown to the Crown, to obstruct the course of public justice in that Hammersley, Heath and Ridge, over a long period and in a great number of cases, were corruptly taking rewards from people either to hinder prosecutions by not bringing offenders before the courts or by warning persons that charges were being contemplated or might be contemplated.⁹⁹ Allegedly, Bellson introduced the persons concerned to one or more of the police officers charged.¹⁰⁰ Ridge was acquitted¹⁰¹ but Hammersley, Heath and Bellson were convicted of conspiracy to obstruct the course of justice.¹⁰² They appealed against the conviction.¹⁰³

⁹⁷*Ibid.*

⁹⁸(1958) 42 Cr App R 207.

⁹⁹At 213.

¹⁰⁰At 208.

¹⁰¹*Ibid.*

¹⁰²At 207.

¹⁰³At 208.

On appeal it was argued on behalf of the accused,¹⁰⁴ *inter alia*, that the indictment was vague, the count for conspiracy was bad on the grounds of (a) uncertainty, (b) duplicity, (c) prejudice to the defence, and (d) that the indictment was bad in law because it disclosed more conspiracies than one.

The court found that the indictment contained sufficient particulars in the sense that it stated that the nature of the conspiracy was to obstruct the course of justice by acting contrary to their public duty as police officers in relation to the administration of the law.¹⁰⁵

The court held:¹⁰⁶

[T]herefore it seems to the court that the particulars which were given in the indictment here do properly disclose the conspiracy with which these defendants were charged and do not show a series of conspiracies. They show one conspiracy, the one conspiracy being that these three defendants ... should act in this way for their own benefit instead of bringing the cases to justice.

The court dismissed the appeal.¹⁰⁷

4.3.1.8 Making false accusations against a person to the police

It is said that a suspect is not obliged to incriminate himself when questioned by the police, but if he lies and blames another person for his crime then he is guilty of the offence of attempting to defeat the course of justice.¹⁰⁸ For instance, X steals a computer from a local computer shop and puts it in the boot of his car. When questioned about the computer at a

¹⁰⁴At 210.

¹⁰⁵At 216.

¹⁰⁶At 214.

¹⁰⁷At 218.

¹⁰⁸*Cane v The Queen* [1968] NZLR787.

police roadblock he tells the police that it was Y who stole the computer from the shop. If X had refused to answer the questions, no fault could be found with his silence, but if he falsely implicates an innocent person (Y) in order to escape liability, he commits the crime of attempting to pervert the course of justice.

4.3.1.9 Publication of a newspaper article impugning the conduct and character of persons on trial

The editor who publishes or conspires to publish any article in the newspaper which affects the character and conduct of persons in the course of the trial, commits the common law offence of attempting to obstruct and pervert the course of justice.

In *The King v Tibbits and Windust*,¹⁰⁹ Tibbis, the editor of a newspaper, and Windust, a reporter for the newspaper, allegedly printed and published statements about the case of two persons (Allport and Chappell) whilst there were charges pending against them in court. It is said that the articles in question formed a considerable part of the issues before the court and contained statements making grave imputations against Chappell, evidence of which would have been inadmissible against those persons in the trial of the offence with which they were charged.¹¹⁰ They were charged, *inter alia*, with attempt to obstruct and pervert the due course of law and justice and conspiracy to obstruct and pervert the due course of law and justice.¹¹¹ The accused were found guilty of all the charges.¹¹²

¹⁰⁹[1902] 1 KB 77-79.

¹¹⁰*Ibid.*

¹¹¹At 77-78.

¹¹²At 80.

The question before the court was whether all or any of the counts of the indictment alleged a criminal offence and whether there was evidence adduced at the trial upon which the accused could properly be found guilty upon all or any of the counts in the indictment.¹¹³

It was argued on behalf of Tibbis and Windust that there was no evidence to support either the counts of conspiracy with intention to pervert the course of justice,¹¹⁴ or, of any intention on the part of the defendants to pervert or interfere with the course of justice.¹¹⁵

The court held:¹¹⁶

Though the accused be really guilty of the offence charged against him; the due course of law and justice is nevertheless perverted and obstructed if those who have to try him are induced to approach the question of his guilt or innocence with minds into which prejudice has been instilled by published assertions of his guilt or imputations against his life and character to which the laws of the land refuse admissibility as evidence.

The court found¹¹⁷ that there was evidence to convict the accused on both counts of conspiracy to pervert the course of justice and attempt to pervert the course of justice.

Their conviction was confirmed.¹¹⁸

4.3.1.10 Destruction of documents

¹¹³*Ibid.*

¹¹⁴At 81.

¹¹⁵At 85.

¹¹⁶At 89.

¹¹⁷At 90.

¹¹⁸*Ibid.*

Cameron and Liberman¹¹⁹ say that evidence is essential to the effective exercise of the fact-finding and decision-making functions of the courts. The process of discovery is one of the ways in which evidence is made available in the civil litigation process. When relevant evidence is lost or destroyed, the fact-finding process is compromised. According to Cameron and Liberman,¹²⁰ the offence of attempting to pervert the course of justice may apply to the destruction of documents prior to the commencement of civil proceedings.

4.4 STATUTORY OFFENCES

Most Australian states have codified their criminal law. Queensland led the way in 1899, New South Wales in 1900, Western Australia followed in 1902, the Northern Territory in 1983 and Tasmania in 1924.¹²¹ The term ‘code jurisdictions’ is used to refer to those jurisdictions which sought to replace the common law with a *Criminal Code*.¹²² As the various State, Territory and Commonwealth governments have their own separate crime legislation, there are literally thousands of criminal offences that are currently on the statute books of Australia.¹²³

¹¹⁹See C Cameron and L Liberman “Destruction of documents before proceedings commence: What is a court to do?” (2003) *Melbourne University Law Review* Vol 12 20, at: <http://www.austlii.edu.au/cgi-bin/disp-pl/au/journals/MULR/2003/12.htm?query=perverting%20course%20justice> (accessed on 19 June 2007).

¹²⁰Cameron and Liberman *op cit* (n 119) 11.

¹²¹RF Carter *Carter’s Criminal Law of Queensland* 9ed (1994) at IX; Gillies *op cit* (n 2) 831; JM Herlihy and RG Kenny *An Introduction to Criminal Law in Queensland and Western Australia* 3ed (1990) 1; RG Kenny *An Introduction to Criminal Law in Queensland and Western Australia* 5ed (2000) 1; C Howard *Australian Criminal Law* 2ed (1970) 3, M Bagaric and KJ Arenson *Criminal Laws in Australia: Cases and Materials* (2004) 17; L Waller and CR Williams *Criminal Law: Text and Cases* 7ed (1993) 5-6; EJ Edwards, RW Harding and IG Campbell *The Criminal Codes: Commentary and Materials* 4ed (1992) 3-13; C Howard *Criminal Law* 3ed (1977) 3 and B Fisse *Howard’s Criminal Law* 5ed (1990) 3.

¹²²E Colvin and S Linden-Laufer *Criminal Law in Queensland and Western Australia: Cases and Commentary* (1994) 3 and D Brow, D Farrier and D Weisbot *Criminal Law* 2ed (1996) 10.

¹²³Bagaric and Arenson *op cit* (n 121) 3.

The Australian Capital Territory and Victoria continue to rely on the common law for the prosecution of crimes, including the crime of perverting the course of justice.¹²⁴ Those jurisdictions which have not codified their criminal law and still rely on the common law as a major source of criminal law are referred to as ‘common law jurisdictions.’¹²⁵ All other Australian states have statutory provisions governing the offence of obstructing or perverting or attempting to obstruct or pervert the course of justice.¹²⁶ Apart from the States’ legislation which prohibits the offence of attempting to pervert the course of justice in respective states, there is also the Commonwealth legislation¹²⁷ which punishes the same crime in all States, Territories and the Commonwealth. This legislation applies throughout the whole of the Commonwealth and the Territories, and also applies beyond the Commonwealth and the Territories.¹²⁸

The statutory offences refer to perverting the course of justice or the due administration of the law. According to Gillies,¹²⁹ the expression “administration of the law” in the statutory provisions has extended the scope of the “course of justice” to include police investigations, but the matter awaits judicial determination. Gillies’s view is opposed to the common law

¹²⁴See Chesterman and Evans *op cit* (n 2) 187 and Bagaric and Arenson *op cit* (n 121) 3.

¹²⁵Colvin and Linden-Laufer *op cit* (n 122) 3; Howard *op cit* (n 121) 7 and Fisse *op cit* (n 121) 7.

¹²⁶Section 319, of the Crimes Act of 1900 as amended in 1990 (New South Wales); Criminal Code (Northern Territory) section 109; Criminal Law Consolidation Act 1935 (South Australia) section 256 and Criminal Code (Tasmania) section 105. See Carter *op cit* (n 121) 187.

¹²⁷The Crimes Act of 1914 (Cth). Australia has a federal system of government and, due to various Constitutions in that system, criminal law is primarily a matter for the states. However, there is a federal criminal jurisdiction created by the Commonwealth Parliament. See Bagaric and Arenson *op cit* (n 121) 17.

¹²⁸Section 3A of the Crimes Act of 1914 (Cth).

¹²⁹Gillies *op cit* (n 2) 836-37.

position reached in *The Queen v Rogerson*¹³⁰ where it was held that police investigations do not form part of the course of justice. The statutory offence of perverting the course of justice of all the relevant States, the Commonwealth and the Territories are discussed

hereunder.

4.4.1 New South Wales

In 1990, the statute¹³¹ in relation to perverting the course of justice was amended by the insertion of a new Part 7, headed “Public Justice Offences.” A number of statutory offences were enacted and a number of common law offences were abolished. Relevant here is the enactment of a provision¹³² under the heading of “General Offence Perverting the Course of Justice.” When looking at the Act,¹³³ there are at least ten types of conduct which constitute the statutory crime of perverting or obstructing the course of justice. They are the following:

a. **False accusations, etc.**¹³⁴ It is an offence for X, knowing that Y is innocent, to intentionally accuse Y of an offence and so cause Y to become the subject of the investigation.

¹³⁰Cf *The Queen v Rogerson supra*, text at note 2.

¹³¹The New South Wales Crimes Act 1900 as amended in 1990.

¹³²Section 319.

¹³³The Crimes Act of 1900 (NSW).

b. **Threatening or intimidating victims or witnesses.**¹³⁵ It is an offence to threaten, or to cause, injury or detriment to another person with intent to influence that person not to bring material information about an indictable offence to the attention of the police or other appropriate authority. It is clear that the purpose of this section is to prevent individuals from threatening or intimidating victims of crime or witnesses so that they cannot report the commission of crime to either the police or any appropriate authority.

c. **Concealing a serious, indictable offence.**¹³⁶ Section 316(1) provides that if Y has committed a serious indictable offence and X, who knows or believes that an offence has been committed and has information which might be of material assistance in Y's apprehension or prosecution or conviction, fails, without reasonable excuse to bring that information to the police or other appropriate authority, commits an offence. It is also an offence for X to solicit, accept or agree to accept any benefit for himself or herself, or any other person, in consideration for doing anything that would be an offence under subsection (1) above.¹³⁷

d. **Tampering with evidence.**¹³⁸ X commits a crime if he or she, with intent to mislead

¹³⁴Section 314 of The New South Wales Crimes Act 1900 as amended in 1990.

¹³⁵Section 315A(1).

¹³⁶Section 316(1) of the Crimes Act of 1900 as amended in 1990.

¹³⁷Section 316(2) of the Crimes Act of 1900 as amended in 1990.

¹³⁸Section 317.

any judicial tribunal in any judicial proceeding, suppresses, conceals, destroys, alters or falsifies anything knowing that it is or may be required as evidence in any judicial proceeding. This crime can also be committed if X fabricates evidence or he or she

knowingly makes use of fabricated false evidence.

e. **Making or using a false official instrument to pervert the course of justice.**¹³⁹ X commits an offence if he or she makes a false official instrument¹⁴⁰ or makes a copy of an instrument which he or she (X) knows to be a false official instrument, with intent that he or she or another person will use it to induce another person to accept the instrument as genuine or to accept the copy as a copy of a genuine official instrument and that acceptance will pervert the course of justice.¹⁴¹ The Act also punishes the use of an instrument or a copy of an instrument, which the person who uses it knows to be a false official instrument or a copy of a false official instrument, with intent to induce another person to accept the instrument or its copy as a genuine official instrument and thereby perverting the course of justice.¹⁴²

f. **General offence of perverting the course of justice.**¹⁴³ A very broad and rather vague offence of perverting the course of justice was also created. It does not specify which conduct constitutes the crime. Section 319 provides:

¹³⁹Section 318.

¹⁴⁰Section 318(1) defines “official instrument” as an instrument of a kind that is made or issued by a person in his or her capacity as a public officer or by a judicial tribunal.

¹⁴¹Section 318 (2)(a) and (b).

¹⁴²Section 318(3)(a) and (b).

¹⁴³Section 319.

A person who does any act, or makes any omission, intending in any way to pervert the course of justice¹⁴⁴ is liable to penal servitude for 14 years.

It is clear that the provisions of section 319 punish both the positive act and an omission to do something which is intended to pervert the course of justice.

g. **Corruption of witnesses and jurors.**¹⁴⁵ It is an offence for X to confer or offer to confer or to procure or to attempt to procure any benefit on or for Y, intending to influence Y who is called or is to be called as a witness in any judicial proceeding to give false evidence or to withhold true evidence or not to attend as a witness or not to produce anything in evidence pursuant to a summons or subpoena. It is also an offence for X to do what is mentioned above, intending to influence Y's conduct as a juror in any judicial proceeding or not to attend as a juror in any judicial proceeding, whether he or she (Y) has been sworn as a juror or not and intending to pervert the course of justice.¹⁴⁶ Y also commits an offence if he or she solicits, accepts or agrees to accept any benefit for him- or herself or for any other person, in consideration for an agreement that he or she or any person will, as a witness in any judicial proceeding, give false evidence or withhold true evidence or not to attend as a witness or to produce anything in evidence pursuant to a summons or subpoena.¹⁴⁷ Soliciting, accepting or agreeing to accept any benefit for him- or herself or for any other person on account of anything to be done or omitted by him or her or another person as a juror in any judicial proceeding, or on account of his or her or

¹⁴⁴The term "pervert the course of justice" imports much of the common law especially the common law offence of attempting to pervert the course of justice.

¹⁴⁵Section 321(1).

¹⁴⁶Sections 321(1)(a) and (b).

¹⁴⁷Section 321(2)(a).

another person's not attending as a juror in any judicial proceeding, with intent to pervert the course of justice is also punishable.¹⁴⁸

h. **Threatening or intimidating judges, witness, jurors, etc.**¹⁴⁹ It is an offence to threaten or intimidate a judge, a witness, a juror, etc., with intent to influence him or her as a witness, to give false evidence or to withhold true evidence or not to attend as a witness or not to produce anything in evidence pursuant to a summons or subpoena or to influence him or her, as a juror, not to attend in any judicial proceeding, whether he or she has been sworn as a juror or not or to influence his or her conduct as a judicial officer or to influence his or her conduct as a public justice official in or in connection with any judicial proceeding.¹⁵⁰

i. **Influencing witnesses and jurors.**¹⁵¹ If X commits an act intending to procure, persuade, induce or otherwise cause any person called or to be called as a witness in any judicial proceeding to give false evidence or to withhold true evidence or not to attend as a witness or not to produce anything in evidence pursuant to a summons or subpoena he or she is guilty of an offence.¹⁵² It is also an offence for X to do an act intending, other than by production of evidence and argument in court, to influence any person in his or her conduct as a juror in any judicial proceeding, whether he or she has been sworn as a juror or not.¹⁵³

¹⁴⁸Section 321(2)(b).

¹⁴⁹Section 322.

¹⁵⁰Section 322 (a)-(d).

¹⁵¹Section 323.

¹⁵²Section 323(a).

¹⁵³Section 323(b).

j. **Preventing, obstructing or dissuading a witness or a juror from attending.**¹⁵⁴ It is an offence, without lawful excuse, to prevent, obstruct or dissuade any witness or potential witness or a juror who has been called in a judicial proceeding, to attend at the judicial proceeding.¹⁵⁵

The new statutory offences against perverting the course of justice cover matters that were once punishable in terms the common law offence of attempting to pervert the course of justice. They leave no scope for the charging of attempting to pervert the course of justice at common law.¹⁵⁶ The offences are broadly defined to mean obstructing, preventing, perverting or defeating the course of justice.¹⁵⁷ They do not, in literal terms, require the intentional doing of an act which actually perverts justice, or one having this tendency. Rather, they require simply that the conduct of the accused be accompanied by the intent to pervert the course of justice.¹⁵⁸

In New South Wales an attempt to prevent, pervert or defeat the course of justice can also be punished in terms of the Commonwealth legislation.¹⁵⁹ In *Foord v Whiddet and Another*,¹⁶⁰ Foord, a judge of the District Court of New South Wales was committed to

¹⁵⁴Section 325.

¹⁵⁵Section 325(1)-(2).

¹⁵⁶Gillies *op cit* (n 2) 832.

¹⁵⁷See section 312 of New South Wales Crimes Act 1900 (as amended in 1990) and Gillies *op cit* (n 2) 837.

¹⁵⁸It is said that any act intended to pervert justice will suffice, even if it does not, from an objective view, either pervert the course of justice, or even have the tendency to pervert the course of justice. See Gillies *op cit* (n 2) 837.

¹⁵⁹Section 43 of the Crimes Act of 1914 (Cth). See the discussion of this section *infra* under 4.4.8.9, text at note 387.

¹⁶⁰(1985) 16 A Crim R 464.

stand trial on a charge of attempting to pervert the course of justice.¹⁶¹ This case was an application for judicial review made against the decision of the second respondent, a

magistrate, who had found a *prima facie* case against Foord for attempting to pervert the course of justice.¹⁶² The facts of the case were the following: Allegedly, one Morgan John Ryan was facing committal proceedings, not related to this case, before a magistrate, Mr Jones. Allegedly, Mr Jones had found a *prima facie* case against Ryan but had not decided whether to commit him for trial. Allegedly, Foord had approached Mr Briese who was a chairperson of the bench of magistrates in New South Wales and Mr Jones's supervisor, with a view to influencing Mr Jones to act in conflict with his duty in respect of the hearing of committal proceedings against Ryan. Briese declined to act upon Foord's request.¹⁶³

Briese testified that in February 1982 he was aware that Mr Jones held that a *prima facie* case had been established against Ryan. Briese stated that in the same week he received a telephone call from Foord requesting a meeting to discuss "a delicate matter." The two met and Foord said to him, "Neville wants something done for Morgan Ryan. I don't know the magistrate who is hearing the case, that's Kevin Jones. If it was one of the old Central Magistrates that I used to know in the past I would go and speak with him myself."¹⁶⁴

Foord's application for review of the second respondent's decision to find a *prima facie* case on the charge involving his approach to Mr Briese were based on the following

¹⁶¹In contravention of section 43 of the Crimes Act of 1914 (Cth). See *Foord v Whiddet and Another supra* (n 160) at 465.

¹⁶²*Foord v Whiddet and Another supra* (n 160) at 465.

¹⁶³At 464.

¹⁶⁴At 466.

grounds:¹⁶⁵

(1) That there was no evidence upon which a *prima facie* case could be found.

(2) That the offence was not committed in relation to the judicial power of the Commonwealth.

The counsel for Foord did not submit that there was no evidence of intent on his part to pervert the course of justice. Instead, it was submitted that there was no evidence of a tendency, arising from what Foord said to Mr Briese, to pervert the course of justice. Counsel for Foord relied upon the fact that Mr Briese was not under any duty to communicate any request associated with the way in which Mr Jones would discharge his magisterial duties because, he said, there was no communication to Mr Jones.¹⁶⁶

The Federal Court noted that there were English authorities regarding the common law offence of attempting to pervert the course of justice. It further noted that in none of the authorities was the conduct of a judicial officer the subject of an alleged offence and there was no precise guidance in relation to a case such as this one.¹⁶⁷

The court painstakingly referred to the English cases of *The Queen v Vreones*¹⁶⁸ and *R v*

¹⁶⁵At 465.

¹⁶⁶At 472.

¹⁶⁷At 468.

¹⁶⁸*The Queen v Vreones supra* in Chapter Two under 2.3, text at note 93.

*Machin*¹⁶⁹ where the accused were charged with attempting to pervert the course of justice and noted that it was established by these authorities that there should be evidence arising from what the accused was alleged to have done which disclosed that there was a tendency to pervert the course of justice. The court held:¹⁷⁰

Upon the assumption that the prosecutor's case must be taken at its highest for the purposes of the argument under consideration, what the applicant is alleged to have done is to have attempted to persuade Mr Briese to attempt to bring the committal proceedings to an end and thus to prevent, in due course of the law, the judicial power of the Commonwealth arising which would occur when Mr Ryan was indicted and tried before a court which was exercising judicial power. In my opinion a case of this kind involves an attempt to pervert the course of justice in relation to judicial power of the Commonwealth.

The court interpreted the words "in relation to judicial power of the Commonwealth" in section 43¹⁷¹ to include a proceeding in which judicial power is not being exercised. In the court's opinion the words "in relation to judicial power of the Commonwealth" were inserted for the purpose of making it clear that the section applied in Commonwealth matters as distinct from State matters. The application was dismissed with costs.¹⁷² The Federal Court of Australia extended the scope of section 43¹⁷³ to include acts that were done outside judicial proceedings or where judicial power is not being exercised.

Conspiracy to obstruct, prevent, pervert, or defeat the course of justice is also an offence

¹⁶⁹[1980] 1 WLR 763.

¹⁷⁰*Foord v Whiddet and Another supra* (n 160) at 476.

¹⁷¹The Crimes Act of 1914 (Cth).

¹⁷²*Foord v Whiddet supra* (n 160) at 477.

¹⁷³The Crimes Act of 1914 (Cth).

and is punished in terms of section 42(1).¹⁷⁴ In New South Wales, for the accused to be convicted of the statutory offence of perverting the course of justice he or she must act with

intent to pervert the course of justice.¹⁷⁵ In 1985, in *R v Freeman*¹⁷⁶ the Court of Criminal Appeal observed that on a charge of conspiracy to pervert the course of justice, the Crown must prove a guilty intention, that is, an intention to pervert or wrongfully interfere with the course of justice. The facts of this case were the following: The crown alleged that the accused, a lawyer called Freeman, and others conspired together and amongst themselves to pervert the course of justice in that they attempted to obtain security bail for a man named Chin, who was in custody awaiting committal proceedings, and they used Chin's own money for that purpose.¹⁷⁷ It was alleged that Freeman was instrumental in her professional capacity in arranging for the provision of bail for Chin. It was further alleged that she visited Chin in prison and interviewed him. Bail was granted to Chin, but he did not have the money to pay it. Allegedly, Freeman made arrangements with him for the transfer of some funds from Malaysia to his trust account. Shortly after the meeting a certain amount of money was credited to Chin in the trust account of Freeman's employer solicitor, Christopher Watson.

After the money was credited, Miss Freeman made a further attempt to arrange for another man to go and file bail papers and hand over the money that was taken from the trust

¹⁷⁴Section 42(1) of the Crimes Act of 1914.

¹⁷⁵Section 42(3)(b) of the Crimes Act of 1914. See Gillies *op cit* (n 2) 838. Clearly this requirement is more or less the same as the requirement at common law.

¹⁷⁶(1985) 3 NSWLR 303.

account. Freeman went back to the prison and arranged with other two co-conspirators to file bail papers in court. The other accused, Kron, provided bail security. She used cash provided from the trust account which was derived from money sent out to Chin from Malaysia. The accused acted as surety and entered into a recognizance using an accused person's money. They were charged and convicted of conspiracy to pervert the course of justice.¹⁷⁸

During trial Freeman gave evidence asserting her innocence of any wrongful intent on her part, asserting a belief that what she did was not unlawful and asserting that she was acting under the instructions of her employer solicitor.¹⁷⁹ The court held that acting on the advice of a lawyer was not a defence to a crime.¹⁸⁰ The court further held that if the surety entered into a recognizance using an accused person's money, it was unlawful, and to agree that should happen could therefore be a conspiracy to pervert the course of justice.¹⁸¹ After a lengthy trial the accused were found guilty of conspiracy to pervert the course of justice. They appealed. On appeal the court held that in its opinion the onus to establish the guilty intention on the part of the accused lay with the Crown. This would involve the Crown proving the intention to agree and the accompaniment of the intention of a guilty mind, that is to say an intention to pervert or wrongfully interfere with the course of justice.¹⁸² The court further held that the trial court erred in withdrawing from the jury a deliberation upon

¹⁷⁷At 304B.

¹⁷⁸At 303F.

¹⁷⁹At 304E-F.

¹⁸⁰At 306B-C.

¹⁸¹At 306C.

¹⁸²At 310E.

the state of mind of the accused in relation to their guilty knowledge of what they were doing.¹⁸³ The appeal was unanimously allowed.¹⁸⁴

This decision provides authority for the proposition that in a charge of conspiracy to pervert the course of justice the *mens rea* needed is a specific intent to wrongfully interfere with the course of justice.

4.4.2 South Australia

In 1935, in this part of the country, a statutory offence of “attempt to obstruct or pervert the course of justice or due administration of the law” was created in the Criminal Law Consolidation Act.¹⁸⁵ The Act prohibits any threats or reprisals relating to duties or functions in judicial proceedings¹⁸⁶ and any attempt to obstruct or pervert the course of justice or due administration of law.¹⁸⁷ In South Australia the following conduct constitutes the statutory offence of perverting the course of justice:

a. **Impeding investigation of offences or assisting offenders.**¹⁸⁸ A person who, knowing or believing that another person has committed an offence, acts with intent to impede the investigation of the offence or of assisting the offender to escape apprehension and prosecution or to dispose of the proceeds of the offence, is guilty of an offence.

¹⁸³At 310F-G.

¹⁸⁴At 311B.

¹⁸⁵The Criminal Law Consolidation Act of 1935 (SA).

¹⁸⁶Section 248.

¹⁸⁷Section 256.

¹⁸⁸Section 241(1)(a) and (b) of the Criminal Law Consolidation Act of 1935 (SA).

According to Gillies,¹⁸⁹ the offence of impeding investigation of an offence is not committed by a mere omission to disclose the existence of an offence, or the identity of the offender, on the part of the person who is not under an obligation to do so.

b. Interference with judicial officers, jurors, witnesses and legal practitioners.¹⁹⁰

Section 248 provides:

- (1) A person who causes or procures, or threatens or attempts to cause or procure, any injury or detriment with the intention of inducing a person who is or may be —
 - (a) a judicial officer or other officer at judicial proceedings (whether proceedings that are in progress or proceedings that are to be or may be instituted at a later time); or
 - (b) involved in such proceedings as a witness, juror or legal practitioner, to act or not to act in a way that might influence the outcome of the proceedings is guilty of an offence.

It is clear from this section that any interference with any judicial officer or other officer in judicial proceeding, any witness, juror or legal practitioner is an offence. Such interference must be accompanied by an intention to induce that person to act or not to act in a way which might influence the outcome of the proceedings. It is also clear that the judicial proceedings should either be in progress or envisaged.

¹⁸⁹Gillies *op cit* (n 2) 841.

¹⁹⁰Section 248(1) of the Criminal Law Consolidation Act of 1935 (SA).

c. **Attempts to obstruct or to pervert the course of justice or the due administration of the law.**¹⁹¹ Just like in Queensland and the Northern Territory, the South Australian Criminal Code has a provision which creates a general offence of attempt to obstruct or to pervert the course of justice or the due administration of the law in a manner that is not dealt with by other provisions.¹⁹² Section 256 provides:

- (1) A person who attempts to obstruct or to pervert the course of justice or the due administration of the law in a manner not otherwise dealt with in the preceding provisions of this Part is guilty of an offence.

According to Gillies,¹⁹³ this provision leaves no room for the charging of a common law offence of attempting to pervert the course of justice.

4.4.3 Queensland

With the passing of the Criminal Code in 1899¹⁹⁴ a fundamental change was introduced into the criminal law of Queensland. The Code almost abrogated all the common law crimes. The Queensland criminal law thus became completely a creature of statute with most of the common law offences being incorporated in the Code.¹⁹⁵ In Queensland the common law offences relating to acts or conduct which was intended and had the tendency to pervert the course of justice, was also codified in 1899. Carter¹⁹⁶ deals extensively with the statutory offences that deal with the administration of justice in general and perverting

¹⁹¹Section 256 (1) of the Criminal Law Consolidation Act of 1935 (SA).

¹⁹²See Gillies *op cit* (n 2) 832.

¹⁹³*Ibid.*

¹⁹⁴The Criminal Code Act of 1899 (Qld).

¹⁹⁵Herlihy and Kenny *op cit* (n 121) 4 and Kenny *op cit* (n 121) 5.

¹⁹⁶Carter *op cit* (n 121) 3462-3504.

the course of justice in particular. Just like its common law predecessor, the Code¹⁹⁷ punishes the following conduct which is intended, and has the tendency, to pervert the

course of justice:¹⁹⁸

- a. Judicial corruption.¹⁹⁹
- b. Official corruption.²⁰⁰
- c. Corrupting or threatening jurors.²⁰¹
- d. Fabricating evidence.²⁰²
- e. Corruption of witnesses.²⁰³
- f. Deceiving witnesses.²⁰⁴
- g. Destroying evidence.²⁰⁵
- h. Preventing witnesses from attending.²⁰⁶
- i. Conspiracy to bring false accusations.²⁰⁷
- j. Conspiracy to defeat justice.²⁰⁸

¹⁹⁷The Criminal Code Act of 1899 (Qld).

¹⁹⁸Carter *op cit* (n 121) 3462-3504.

¹⁹⁹Section 120 of the Criminal Code Act of 1899 (Qld).

²⁰⁰Section 121.

²⁰¹Section 122.

²⁰²Section 126.

²⁰³Section 127.

²⁰⁴Section 128.

²⁰⁵Section 129.

²⁰⁶Section 130.

²⁰⁷Section 131.

k. Attempt to pervert justice.²⁰⁹

4.4.3.1 Judicial corruption

The Act punishes any act by any person who is the holder of a judicial office who corruptly asks, receives or obtains or agrees or attempts to receive or obtain, any property or benefit of any kind for him- or herself or any other person on account of anything already done or omitted to be done, or to be done afterwards or omitted to be done by him- or herself in his or her judicial capacity.²¹⁰ It also punishes any person who by corrupt means gives, confers or procures or makes any promises or offers to give or procure or attempt to procure, any property for any person holding a judicial office.²¹¹ According to Carter,²¹² the term “holder of a judicial office” in this section includes an arbitrator or umpire. It is clear that the objective of these provisions is to prevent judicial officers from receiving bribes and to prevent people from bribing judicial officers.

4.4.3.2 Official corruption

Public officials can easily commit the crime by interfering with the due administration of justice if there are no laws that punish any such interference with the smooth running of the justice system. Section 121 of the Criminal Code of Queensland provides:²¹³

²⁰⁸Section 132.

²⁰⁹Section 140.

²¹⁰Section 120(1).

²¹¹Section 120(2).

²¹²Carter *op cit* (n 121) 3463.

²¹³Section 121(1) of the Criminal Code Act of 1899 (Qld). See Carter *op cit* (n 121) 3463-64.

Any person who—

(1) Being a justice not acting judicially, or being a person employed in the Public Service in any capacity not judicial for the prosecution or detection or punishment of offenders, corruptly asks, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person, on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him, with a view to corrupt or

improper interference with the due administration of justice, or the procurement or facilitation of the commission of any offence, or the protection of any offender or intending offender from detection or punishment ... is guilty of a crime, and is liable to imprisonment for fourteen years, and to be fined at the discretion of the court.

This provision deals with any official involved in the administration of justice who accepts a bribe to not act judicially, with a view to the corrupt or improper interference with the due administration of justice or to facilitate the commission of any offence or the protection of any offender or intending offender from detection or punishment.²¹⁴ This provision is directed towards police officials, prosecutors, and any other official who is involved in the administration of justice, who may, in the execution of their duty, receive bribes in order to pervert justice. Section 121(2) on the other hand is directed towards people who bribe or attempt to bribe a person being a justice to not act judicially, that is, for him or her to do or not to do something.²¹⁵

*R v Smith*²¹⁶ illustrates the application of section 121. In this case the court observed that neither mutuality of purpose between the official and the person offering the benefit nor genuine intention on the part of the official that such person be adequately protected from detention or punishment nor genuine ability on the part of the official to ensure same,

²¹⁴Carter *op cit* (n 121) 3463.

²¹⁵*Ibid.*

²¹⁶[1993] 1Qd R 541.

comprised an element of the offence under section 121(1).²¹⁷

The facts of the case were as follows: During 1985 and 1986 Rodney Smith was a senior police constable. He was, within section 121(1), a person employed as justice for the prosecution of offenders. While Smith was working at a place called Sunshine Coast, there was one Suzanne Greskie who owned a brothel. It was alleged that police officers used to frequent the place.²¹⁸ Allegedly, around May 1985, Rodney Smith and his colleagues visited Greskie's premises. Smith had a conversation with her. He asked her if it was okay if they saw the girls. He meant that the policemen wished to have sexual intercourse with the prostitutes. It was alleged that Smith and Greskie did not discuss the question of payment. The police officers, on many subsequent occasions, went to Greskie's place and had sexual intercourse with the prostitutes and they never paid.²¹⁹

Prior to Smith and other police officers frequenting Greskie's place to satisfy their sexual desires, it was alleged that Greskie had complained to the police about being blackmailed. It is also said that there was once a police raid of her place in which Smith participated. It was shortly afterwards that Smith is alleged to have come to an agreement with Greskie to do (or omit to do) something with a view of protecting Greskie and her employees from punishment under the laws relating to prostitution.²²⁰

Smith was indicted on a single count of official corruption in contravention of section

²¹⁷See Carter *op cit* (n 121) 3464.

²¹⁸*R v Smith supra* (n 216) at 542.

²¹⁹At 543.

²²⁰*Ibid.*

121(1) of the Criminal Code.²²¹ The main witness for the Crown was Ms Greskie. She was an accomplice for purposes of the trial against Smith. She, before giving evidence, pleaded guilty to the offence under section 121(1).²²² The court was told, *inter alia*, that Smith had agreed with Greskie that the latter would be notified in advance when the raid was to take place and she was to arrange for the next girl to take her place at the escort agency and assume another name in order to hide the prostitution activities. Smith was convicted of the offence of official corruption²²³ and appealed against his conviction. After considering matters that were irrelevant the court looked at the following grounds:²²⁴

(1) It was submitted on Smith's behalf that the trial judge erred in ruling that sexual services were a "benefit" within the meaning of section 121(1) of the Criminal Code. It was said that the word "benefit" in section 121(1) must be understood in the context of property benefit.²²⁵

(2) The verdict of the jury was against the weight of the evidence and amounted to a substantial miscarriage of justice.

²²¹At 549.

²²²At 550.

²²³At 549.

²²⁴At 560-61.

²²⁵At 560.

Regarding the former ground the court ruled “sexual favours are thought to be an advantage or benefit.”²²⁶ Regarding the latter ground, Pincus, JA, said that the Crown had to prove that the advantage contemplated ensured the absence of “genuine police action,” with a view to protecting Greskie and her employees from detection and punishment. He further observed that it was not sufficient for the prosecution to satisfy the jury that sexual services were provided on account of an expectation of considerate treatment and absence of harassment.²²⁷ McPherson, JA, held²²⁸ that before the jury could find Smith guilty it was necessary that they should be satisfied beyond any reasonable doubt that the requisite relation under section 121(1)²²⁹ was in fact present. He further observed that it was possible that refraining from prosecution was never part of the agreement to receive sexual services free of charge.²³⁰

Both McPherson, JA, and Pincus, JA, reached a conclusion that it would be unsafe to allow the conviction to stand, thereby allowing the appeal and setting aside of the verdict and conviction, with Thomas, J, dissenting.²³¹ This thesis will now briefly discuss the merits and demerits of the dissenting judgment of Thomas, J.

Thomas J, in his dissenting judgment discussed the elements of the offence in section

²²⁶*Ibid.*

²²⁷At 548.

²²⁸At 547.

²²⁹The Criminal Code Act of 1899 (Qld).

²³⁰*R v Smith supra* (n 216) at 547.

²³¹At 548 and 562.

121(1) that were to be proved by the Crown. The following are the elements:²³²

(1) Accused in the prescribed capacity. The judge found that this element was met as Smith was employed in the Public Service in a non-judicial capacity.

(2) Date. The judge, again, found no problem in the indictment regarding identifying the possible dates of the offence.

(3) Corruptly. The judge observed that it was not suggested that the jury could not reasonably regard Smith's action as corrupt if the jury accepted that there was an agreement to receive benefits of the kind mentioned and if that was on account of his withholding police action against offenders.²³³

(4) Agreeing to receive a benefit. The judge said that it would have been enough for the Crown to allege that Smith received benefits instead of alleging that he agreed to receive benefits. He further said that if Greskie's evidence was accepted, it was sufficient to support a finding that Smith agreed to receive such benefit.

(5) A benefit for him or for any other person. The judge found that the evidence was capable of establishing that the benefits that Smith agreed to receive were for him and for other persons, namely other police officers.

(6) A benefit on account of something to be done or omitted by Smith. The judge had no problem in finding that the evidence was capable of establishing that Smith agreed to

²³²At 557-60.

²³³At 558.

receive relevant benefits. He referred to a 1991 unreported case²³⁴ where the court held that

the phrase “on account of” implies, in the case of an act already done or an omission already made, that the giving of property or conferring of a benefit is done in recognition of its having been done or omitted to be done. He said Smith’s request for sexual favours should be seen against the background that Smith had some months earlier instituted, or purported to institute, an improper system that could be described as a charade. Thomas J said that there was evidence which showed the non-prosecution of Greskie despite knowledge of her habitual offending and despite daily offences of which Smith was aware.

(7) Something done by him to protect intending offenders from detection and punishment.

Thomas J held:²³⁵

The evidence adequately justifies the inference that the appellant received (and agreed to receive) sexual benefits on the designated occasion in May 1985 and for a considerable time thereafter... These factors, when added to the discussion of this issue at 558 to 560, permit the inference quite reasonably to be drawn that one benefit was on account of the other and the appellant must have so regarded it. There is no reason to think that the verdict was against the weight of the evidence or that there was any substantial miscarriage of justice.

In this case what Smith did, or omitted to do, was to refrain from the prosecution of Greskie and her employees despite the fact that Smith knew they were still in the business of

²³⁴*R v Herscu (CA 4/1991)*; Court of Criminal Appeal.

²³⁵*R v Smith supra* (n 216) at 561-62.

prostitution. Secondly, the words “on account of,” mean “because of something or reason for something.”²³⁶ Therefore, it can be said that Smith received sexual benefits in advance of something to be done afterwards, namely, to refrain from prosecuting Greskie and to notify her when the next raid was to take place, and this he did.²³⁷ This can be inferred from un-contradicted evidence that prior to the arrangement, Smith was part of the team of police officers that raided Greskie’s place and harassed her on a number of occasions.²³⁸ There was also un-contradicted evidence that after Smith had agreed to receive sexual benefits from Greskie’s employees, neither he nor any other police officer, ever again harassed Greskie, despite his knowledge that she was contravening laws regarding prostitution.²³⁹ The only reasonable inference, based on the facts discussed above, was that Smith ceased seeking to prosecute Greskie and her clients because of the sexual benefits they received from the brothel. Against this background this thesis is of the opinion that the conviction should have been confirmed and the appeal dismissed. It is submitted that the dissenting judgement was correct.

4.4.3.3 Corrupting or threatening jurors

It is an offence to attempt, by threats or intimidation or by any benefits or promises of benefit of any kind or by other corrupt means, to influence the juror in any judicial proceedings.²⁴⁰ Any person acting as a juror also commits an offence if he or she accepts

²³⁶AP Cowie *Oxford Advanced Learner’s Dictionary* 4ed (1989) 8.

²³⁷See *R v Smith supra* (n 216) at 552 and at 561-62.

²³⁸At 543.

²³⁹At 562.

²⁴⁰Section 121(1) of the Criminal Code Act of 1899 (Qld).

any benefit or promise on account of anything to be done by him or her as a juror in any

judicial proceedings.²⁴¹

4.4.3.4 Fabricating evidence

Section 126(1)-(2) of the Code forbids any fabrication of evidence by any means and knowingly making use of fabricated evidence. This section provides:²⁴²

Any person who, with intent to mislead any tribunal in any judicial proceeding-

- (1) Fabricates evidence by any means other than perjury or counselling or procuring the commission of perjury; or
- (2) Knowingly makes use of such fabricated evidence;

is guilty of an offence ...

The term “judicial proceeding” includes any proceeding held before any court, tribunal, or a person, in which evidence may be taken under oath.²⁴³ To fabricate is to invent or concoct a story, to lie or to fake or forge.²⁴⁴ Section 126 does not require that the accused’s intent should be to obstruct, pervert or obstruct justice. The requisite intent must be to mislead any tribunal in any judicial proceeding.

4.4.3.5 Corruption of witnesses

²⁴¹Section 122(2).

²⁴²Carter *op cit* (n 121) 3467.

²⁴³Section 119 of the Criminal Code Act of 1899 (Qld).

²⁴⁴See Collins *English Dictionary: Complete and Unabridged* 6ed (2003) 583.

In terms of section 127 corrupting witnesses is an offence. This offence can be committed in various ways, such as sending a witness to another country so that he or she cannot testify in court or offering a benefit to a witness in order to withhold true testimony or give

false evidence or to attempt by any means to induce a person to give false testimony.

Section 127 provides:²⁴⁵

Any person who—

- (1) Gives, confers, or procures or promises or offers to give or to confer, or to procure or attempt to procure, any property or benefit of any kind to, upon, or for, any person, upon any agreement or understanding that any person called or to be called as a witness in any judicial proceeding shall give false testimony or withhold true testimony; or
- (2) Attempts by any other means to induce a person called or to be called as a witness in any judicial proceeding to give false testimony or to withhold true testimony; or
- (3) Asks, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person, upon any agreement or understanding that any person shall as a witness in any judicial proceeding give false testimony or withhold true testimony;

is guilty of a crime ...

In terms of section 127(1) this offence is committed when X gives, confers, procures or attempts to procure any property or a benefit of any kind to Z with an understanding that Z, as a witness, will give false testimony in any judicial proceeding. A mere offer of a benefit of any kind made by X to Z for the latter to return the favour by withholding true testimony suffices in order to revoke section 127(1). The words “benefit of any kind” can be an offer of employment, a trip overseas at X’s expense or any other thing that Z was not entitled to receive if it was not for an agreement to withhold true testimony or give false testimony. Procuring or attempting to induce any person called or to be called as a witness in any judicial proceedings to give false testimony or to withhold true testimony is also an offence.

²⁴⁵Carter *op cit* (n 121) 3467.

The Act also punishes any person who, as a witness or potential witness, receives or obtains or agrees to or attempts to receive or obtain any property or benefit so that he or she can give false testimony or withhold true testimony in judicial proceedings.

In *R v Danahay*²⁴⁶ it was observed that the offence of corrupting a witness by entering into an agreement or understanding in terms of which the witness should withhold true testimony was complete whether or not true testimony is in fact withheld.²⁴⁷

The facts of the case were as follows: There were outstanding charges against one Gibbs for possession and supply of a dangerous drug and of committing an act of gross indecency with one Edwards. Edwards was to be called as a witness against Gibbs on these charges. It was alleged that Danahay offered to give Edwards benefits, namely a contract of employment in one of Danahay's companies and overseas travel upon an understanding that Edwards should either withhold true testimony from such judicial proceedings or, in the event of being called upon to give testimony, to give false testimony.²⁴⁸

Allegedly, Danahay met Edwards and offered him a job overseas for two years if he signed a statement saying that nothing happened so that the case could be squashed. It was alleged that he arranged for lawyers to visit Edwards for the purpose of taking a statement from him. In the presence of the said lawyers, it was alleged that he told Edwards to tell the lawyers that nothing had happened. Edwards agreed to make an affidavit purporting to withdraw all allegations he made against Gibbs. What was interesting here was that Gibbs

²⁴⁶[1993] 1 Qd R 271.

²⁴⁷See Carter *op cit* (n 121) 3468.

²⁴⁸*R v Danahay supra* (n 246) at 276.

pleaded guilty to offences laid against him.²⁴⁹ Danahay was convicted of contravening

section 127(1) of the Criminal Code.²⁵⁰ He appealed alleging that:²⁵¹

(1) the evidence did not establish that Edwards was a person about to give evidence in the judicial proceeding, and

(2) the offence charged was not made out by the evidence that Danahay offered Edwards a benefit to go overseas and thereby not give evidence or go into hiding and thereby avoid giving evidence.

The first submission on behalf of Danahay concentrated on the words contained in section 127, “called or to be called as a witness.”²⁵² Counsel for Danahay submitted that when a person is formally called upon to take the oath as a witness then that person has been called as a witness in a judicial proceeding. It was submitted that until that point of time, even where a subpoena or summons to the witness had been served, it could not be said that a person had been called as a witness.²⁵³ Williams J²⁵⁴ held that as a matter of practicality it would be more often than not too late for a person so minded to corrupt a witness after that person had been called to be sworn. He observed that the category of person who might be

²⁴⁹ At 277.

²⁵⁰ At 271.

²⁵¹ At 278.

²⁵² At 279.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

corrupted as a witness must be broadened.²⁵⁵ He said that the test to determine whether or not a person is “to be called as a witness”²⁵⁶ cannot be whether or not that person was in fact subsequently called as a witness. The court held that the gravamen of the offence is corrupting a witness whether the inducement was effective or not.²⁵⁷ It was found that at all material times Edwards was a person “to be called as a witness” in the judicial proceeding.²⁵⁸

The second contention on behalf of Danahay was that the offence in question was not satisfied by proof of an offer to a potential witness to go away with assistance and simply not give evidence. Counsel, on behalf of Danahay, submitted that the requisite proof under section 127(1) was an understanding that when the person gave evidence, he would withhold the truth.²⁵⁹ The court held that there was more than one way of withholding true testimony from a judicial proceeding. One was to amputate the evidence. Another was to withhold it entirely by not going to court.²⁶⁰ Concurring with Williams, J, Thomas, J, held²⁶¹ that an agreement for corrupt consideration not to take the stand aptly satisfies the requirements of an agreement that true testimony be withheld. The judge also held²⁶² that the essential element of the offence created by section 127(1) was the corrupt “agreement or understanding” with a witness with intent that the witness ‘shall give false testimony or

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.* Williams J, did not give any meaning to the phrase “to be called as a witness.”

²⁵⁹ *Ibid.*

²⁶⁰ At 273.

²⁶¹ *Ibid.*

²⁶² At 282.

withhold true testimony.’ It was against this background that the Criminal Court of Appeal in the split decision dismissed the appeal, with Lee, J, dissenting.²⁶³

In his dissenting judgment, Lee, J’s point of departure was that Danahay engaged in a course of reprehensible conduct designed to ensure that Edwards did not appear in court to give evidence on criminal charges against Gibbs. Lee, J, was of the opinion that that conduct was capable of violating section 140 of the Criminal Code (attempting to pervert justice) and possibly section 132 (conspiring to defeat justice).²⁶⁴ In addressing the question of whether the essential element was satisfied, namely that the offer was made by Danahay to give benefits to Edwards upon the understanding that the latter, being a person then to be called as a witness in a judicial proceeding, should withhold true testimony, the judge used, among other authorities, the *R v Miras*²⁶⁵ case. In his opinion the *R v Miras* decision was directly in point and supported the submission for the appellant that section 127(1) required that the agreement or understanding arrived at in consideration of the offer of a benefit should, at the time it was arrived at, be that the person then called or then to be called as a witness should, when called, “give false testimony or withhold true testimony.” It is said that it must be contemplated by both parties to the understanding, at the time the understanding was made, that the person concerned was to be called as a witness. The question that was dealt with by the judge was whether an understanding that the proposed witness would go out of the country and not give evidence at all was capable of constituting

²⁶³At 297.

²⁶⁴At 288. See the discussion of section 132 *infra* under 4.4.3.9, text at note 279.

²⁶⁵(1986) 84 FLR 273. In this case the Supreme Court of Australian Capital Territory dealt with the offence against section 37(a) of the Crimes Act of 1914 (Cth) which is the equivalent of section 127(1) of the Criminal Code. In relation to the necessity for the Crown to prove that the evidence sought to be withheld was true, it was concluded that the phrase “withhold true testimony” should be read *ejusdem generis* with the phrase “give false testimony.” The court said that it was essential to the charge to show that the attempt was made in relation to the testimony to be given by a witness when called or to be called. It was further said that a mere attempt to prevent him or her from giving testimony at all did not amount to the offence charged under section 37(a). See *R v Danahay supra* (n 246) at 293.

an understanding that the proposed witness should withhold true testimony within the meaning of section 127(1).²⁶⁶ In answering this novel and rather vexing question, Lee, J, observed that the expression “withhold true testimony,” when read with the expression “give false testimony,” suggested that evidence should in effect be given in such a way that a false or incomplete picture was presented before the court. He further observed that those expressions suggested that evidence should be given. A witness should be in court. The judge observed that if the understanding between Danahay and the witness was that the witness should simply not attend the court proceedings at all, “that does not appear to constitute an offence against the subsection.”²⁶⁷ The judge concluded that it appeared that ground 2 of the appellant’s contention was established, that the evidence did not establish an offence against section 127(1). As a result he held that he would allow the appeal and quash the conviction.²⁶⁸

It is respectfully submitted that the minority judgment was the correct one. Danahay was charged under the wrong section and was wrongly convicted in terms of section 127(1). This section requires a witness to “withhold true testimony” or “give false testimony” or to merely agree to “withhold true testimony” or “give false testimony.” The only place where one may withhold true testimony or give false testimony is in court or before a judicial tribunal. The wording of section 127(1) implies that X can withhold his or her silence in a court of law. He or she cannot withhold his or her silence when he or she has failed to appear in court. This thesis respectfully submits that the Court of Criminal Appeal erred in

²⁶⁶At 293.

²⁶⁷At 294.

extending the expression “withholding true testimony” or “giving false testimony,” in

section 127(1), to include going away in order not to testify. This thesis does not suggest that Danahay did not commit an offence by offering a benefit to Edwards for going away in order not to testify. It is further submitted that Danahay should have been charged under section 130 of the Criminal Code²⁶⁹ which deals with preventing a witness from attending any court or tribunal, or section 132²⁷⁰ which deals with conspiracy to defeat justice. In *R v Russell*,²⁷¹ the court observed that on a charge of inducing a witness to withhold true testimony there must be evidence that the testimony that was to be withheld was true.

4.4.3.6 Deceiving witnesses

Deceiving witnesses in order to affect their testimony has a tendency of perverting the course of justice. Such action is prohibited under the Criminal Code of Queensland. Section 128 prohibits deceiving witnesses with intent to affect their testimony during judicial proceedings. Section 128 provides:²⁷²

Any person who practices any fraud, deceit, or knowingly makes or exhibits any false statement, representation, token, or writing, to any person called or to be called as a witness in any judicial proceeding, with intent to affect the testimony of such person as a witness, is guilty of a misdemeanour...

A police officer (X), for example, takes a statement from Y, a witness who has been called or who is to be called as a witness in a judicial proceeding. If, after Y has signed the

²⁶⁸At 297.

²⁶⁹See section 130 *infra* under 4.4.3.7, text at note 275.

²⁷⁰See section 132 *infra* under 4.4.3.9, text at note 279.

²⁷¹[1932] QWN 37.

²⁷²The Criminal Code Act of 1899 (Qld).

statement, X, with intent to affect Y's testimony as a witness, fraudulently removes some pages from Y's statement and inserts other pages with a different version of what Y has said, X has contravened section 128.²⁷³

4.4.3.7 Destroying evidence

The destruction of any form of evidence may lead to the miscarriage of justice. Section 129²⁷⁴ punishes any person who, knowing that any book, document or other thing of any kind is, or may be, required in evidence in a judicial proceeding, wilfully destroys it or renders it illegible or incapable of identification, with intent thereby to prevent it from being used in evidence.

4.4.3.8 Preventing a witness from attending

Wilful prevention or attempt to prevent any person who has been duly summoned to attend as a witness before any court or tribunal from attending as a witness or from producing any evidence constitutes an infringement of section 130 of the Act. Section 130 provides:²⁷⁵

Any person who wilfully prevents or attempts to prevent any person who was been duly summoned to attend as a witness before any court or tribunal from attending as a witness, or from producing anything in evidence pursuant to the subpoena or summons, is guilty of a misdemeanour ...

4.4.3.9 Conspiracy to bring false accusations

Malicious vexation of a person with lawsuits or criminal action in order to harass him or her is an offence and is punishable in terms of section 131.²⁷⁶ This section prevents any

²⁷³The Criminal Code Act of 1899 (Qld).

²⁷⁴The Criminal Code Act of 1899 (Qld).

²⁷⁵See also Carter *op cit* (n 121) 3468-69.

²⁷⁶The Criminal Code Act of 1899 (Qld).

conspiracy to knowingly lay false charges against an innocent person. Section 131 provides:²⁷⁷

Any person who conspires with another to charge any person or cause any person to be charged with an offence, whether alleged to have been committed in Queensland, or elsewhere, knowing that such person is innocent of the alleged offence, or not believing him to be guilty of the alleged offence, is guilty of a crime.

In *Conteh v R*²⁷⁸ it was observed that the gist of the offence of conspiracy to lay a false accusation against another person was that the accusation should be false to the knowledge of the conspirators. It is not clear whether or not X commits this offence if there is no conspiracy, that is, if X acts on his own and brings a false accusation against another person.

4.4.3.10 Conspiring to defeat justice

As in Western Australia, section 132 of Criminal Code of Queensland creates a very broad and vague offence of conspiring to defeat justice. This section provides:²⁷⁹

Any person who conspires with another to obstruct, prevent, pervert, or defeat the course of justice is guilty of a crime ...

Section 132 does not specify which conduct constitutes the offence of conspiracy to defeat justice. It is only in the case law that the provisions of this section become clear. In the case law the following acts are among those punished as conspiracy to defeat justice:

²⁷⁷Carter *op cit* (n 121) 3469.

²⁷⁸[1966] AC 158. See Carter *op cit* (n 121) 3469.

²⁷⁹Carter *op cit* (n 121) 3469-70.

a. **Conspiring to obstruct the police in the execution of their duty.**²⁸⁰ An act which has a tendency to deflect police officials from the prosecution of a criminal offence or the institution of disciplinary proceedings before a judicial tribunal or from adducing evidence of the true facts, is an act tending to pervert the course of justice and if done with intent to achieve that result, it constitutes an attempt to pervert the course of justice.

b. **By abstaining from prosecution.**²⁸¹ Conspiracy to defeat the course of justice by abstaining from prosecution is an indictable misdemeanour. A charge of this nature came before the court in the case of *R v Hamp and Others*.²⁸² The indictment of conspiracy to defeat the ends of justice against Hamp and two others came about as a result of a case of fraud against Y and others, who had defrauded Hamp. Hamp was notified to appear in court and prosecute.²⁸³ It was alleged that while a charge of fraud was still pending against Y and others, Hamp, Watkins and Probert corruptly and unlawfully contrived and intended to defeat and obstruct the due course of justice, by conspiring with Y's wife that the fraud charge would not be prosecuted and that Hamp would not attend to prosecute or give evidence upon the said ensuing trial. It was agreed that Hamp would receive some money for not prosecuting the case. As agreed upon, Hamp did not appear in court and he forfeited his right to prosecute. They were then indicted on a charge of conspiracy to defeat the course of law and justice.

²⁸⁰See *R v Field* [1965] 1 QB 402.

²⁸¹*R v Hamp and Others* (1852) 6 Cox CC 167.

²⁸²*R v Hamp and Others supra* (n 281).

²⁸³At 168.

The jury returned a guilty verdict, “but strongly recommended the defendants to mercy, on the grounds that they were themselves victims of a base and infamous conspiracy.”²⁸⁴ The court reserved the judgment. It is not clear from a reading of this case why Hamp was bound by notification to appear in court and prosecute Y. In ordinary circumstances Hamp would have been a state witness, but it is not clear from the case whether it was a public prosecution or a private prosecution. Nevertheless, the *Hamp* decision raised a very crucial question that has not been dealt with in other jurisdictions. That question is: what does the law say if the state has refused to prosecute Y, and X applied for private prosecution and after he had filed his papers with the court, he received a bribe from Y and his friends in order not to proceed with his private prosecution? Would X’s conduct amount to obstructing the course of justice? This matter is not dealt with anywhere in Australian law.

4.4.3.11 Attempt to pervert justice

As in South Australia and the Northern Territory, the Criminal Code of Queensland contains a section which created a general offence of attempting to obstruct or to pervert the course of justice or the due administration of the law in a manner that is not dealt with by

other sections.²⁸⁵ This section provides:²⁸⁶

Any person who attempts, in any way not specifically defined in this *Code*, to obstruct, prevent, pervert, or defeat, the course of justice is guilty of a misdemeanour, and is liable to imprisonment for two years.

A crime suspect has a right against self-incrimination when questioned by the police, but if he or she lies to the effect that someone else committed an act done by him- or herself, it would be a crime, and he or she is guilty of the offence of attempting to defeat the course of justice.²⁸⁷ For example, the police question X about the rape which has been committed. If he keeps quiet when the police question him, X does not commit any offence, but if he lies to the police and says that Y committed the rape, X commits a section 140 offence. This offence can also be committed by X when another offence has been committed and the police are investigating it and X conducts him- or herself in such a way that his or her conduct is aimed at preventing or obstructing a prosecution which he or she contemplates may follow.²⁸⁸

²⁸⁴At 173.

²⁸⁵Section 140 of the Criminal Code Act of 1899 (Qld).

²⁸⁶Carter *op cit* (n 121) 3502-03.

²⁸⁷See *Cane v The Queen supra* (n 108).

²⁸⁸*R v Kane* [1967] NZLR 60. In this case the court held that when a crime has been committed, public justice encompasses more than the process of adjudication by the courts, and a person commits the offence of attempting to pervert the course of justice who, when the offence has been committed and is being investigated, does something aimed at preventing or obstructing a prosecution which he or she contemplates

4.4.4 Victoria

In Victoria,²⁸⁹ to conceal a serious indictable offence for benefit is a statutory offence punishable in terms of section 326.²⁹⁰ Section 326 provides:

- (1) Where a person has committed a serious indictable offence, any other person who, knowing or believing that the offence, or some other serious indictable offence, has been committed and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts any benefit for not disclosing that information shall be guilty of an indictable offence and liable to imprisonment for a term of not more than two years.

According to Gillies,²⁹¹ the offence may only be committed in relation to serious indictable offences where X acts on account of a benefit or a promise of a benefit. The *actus reus* of the offence requires proof of the commission of a serious indictable offence and that X accepted any benefit or promise of a benefit in return for a failure to disclose material information which may lead to the prosecution or conviction of the offender. The *mens rea* for this offence consists of:²⁹²

- a. knowledge or belief that a serious indictable offence in question or other such offence has been committed;
- b. knowledge or belief that he or she has information which might be of material significance in securing the prosecution or conviction of the offender; and
- c. the intent to receive a benefit or its promise for non-disclosure of this information.

may follow.

²⁸⁹Although it has been said that Victoria continues to rely on common law for the prosecution of the offence of perverting the course of justice, (see *supra* under 4.3, text at note 51) concealing a serious indictable offence which is akin to perverting the course of justice is discussed here.

²⁹⁰The Crimes Act of 1958 (Vic).

²⁹¹Gillies *op cit* (n 2) 842.

²⁹²*Ibid.*

4.4.5 Tasmania

In Tasmania the offence of perverting the course of justice is found in the Criminal Code of 1924.²⁹³ The Tasmanian Criminal Code deals with the crime of obstructing the course of justice comprehensively. The Criminal Code prohibits the following acts or conduct:

a. **Judicial corruption.**²⁹⁴ Section 90 punishes any person who, being a judicial officer, corruptly solicits, receives or obtains or agrees to receive or obtain any property of any kind on account of anything done or omitted or to be done or omitted by him in his judicial capacity. This section also punishes any person who corruptly gives, confers or procures or promises or offers to give, confer, procure or attempt to procure, to, upon or for any judicial officer or any other person, any property or benefit of any kind on account of anything done or omitted or to be done or omitted by such judicial officer.²⁹⁵ The provisions of section 90 prevent X from bribing B (a juror). It also prevents B from accepting a bribe from X.

b. **Corrupting or threatening jurors.**²⁹⁶ Section 93 prohibits any person from influencing or threatening any juror in any judicial proceeding, whether or not the juror has been sworn in. It also prohibits a juror from accepting or agreeing to accept any benefit on account of anything done or to be done by him or her in any judicial

²⁹³The Criminal Code Act 69 of 1924 (Tas).

²⁹⁴Section 90.

²⁹⁵Section (90)(a)-(b).

²⁹⁶Section 93.

proceeding.²⁹⁷

c. **Fabrication of evidence.**²⁹⁸ The Act prohibits any person who, with intent to mislead a judicial tribunal, fabricates evidence in any manner or knowingly makes use of fabricated evidence.²⁹⁹ What is punishable here is both to fabricate evidence and to use fabricated evidence.

d. **Corruption of witnesses.**³⁰⁰ The Act punishes any person who solicits, receives, etc., any property or benefit for him- or herself or for any other person with an understanding that he shall, as a witness, give false evidence in a judicial proceeding. Any person who gives, confers or procures, etc., any property or benefit of any kind, upon any person with an understanding that any person called or to be called as a witness in any judicial proceeding shall give false evidence also commits an offence.³⁰¹ The crime is charged as corruption with regard to a witness or corrupting a witness.

e. **Suppressing evidence.**³⁰² Section 99 prohibits any person from wilfully destroying, altering or concealing any evidence with intent to mislead any tribunal in any judicial proceeding. It is clear that the elements of the offence created by this section are the act itself (e.g. to destroy, alter, etc.), wilfulness and intent to mislead a tribunal.

²⁹⁷Section 93(a)-(c).

²⁹⁸Section 97.

²⁹⁹Section 97(a)-(b).

³⁰⁰Section 98.

³⁰¹Section 98(a)-(b).

³⁰²Section 99.

f. **Interfering with witnesses.**³⁰³ Section 100 prohibits any wilful interference with another person by preventing, obstructing or dissuading him or her from attending as a witness at a judicial proceeding or from giving evidence or producing anything to be used as evidence at a judicial proceeding, with intent to obstruct the due administration of justice.³⁰⁴ This section also makes it a crime for any person to use, cause, inflict, procure or threaten any violence, punishment, damage, loss or disadvantage to another person for, or on account of, that other person having given evidence at a judicial proceeding or having produced or surrendered any document or thing at a judicial proceeding³⁰⁵ or any evidence given by that other person at a judicial proceeding or any document or thing produced or surrendered by that other person at a judicial proceeding.³⁰⁶

g. **Falsifying evidence as a shorthand writer.**³⁰⁷ Section 101 punishes any person who is a shorthand writer who wilfully falsifies or incorrectly records any evidence, ruling, direction³⁰⁸ or summing up which it is his or her duty to record or permits any person to falsify any such thing³⁰⁹ or any transcript thereof or wilfully certifies as correct any note or transcript of any such thing which is false in any manner.³¹⁰

³⁰³Section 100.

³⁰⁴Section 100(a).

³⁰⁵Section 100(b)(i).

³⁰⁶Section 100(b)(ii).

³⁰⁷Section 101.

³⁰⁸Section 101(a).

³⁰⁹Section 101(b).

³¹⁰Section 101(c).

h. **Compounding crimes.**³¹¹ Soliciting, receiving or obtaining or agreeing to obtain any property or benefit of any kind as a consideration for any agreement or understanding to compound or conceal a crime or to abstain from, to discontinue or to delay a prosecution for a crime is a punishable offence.³¹²

i. **Perverting justice.**³¹³ As in New South Wales, Tasmania has a broad crime of perverting the course of justice created by section 105 of the Criminal Code.³¹⁴ Although the conduct mentioned in sections 90, 93, 97-102 have the tendency to defeat or obstruct the course of justice, a broad crime of perverting justice in the form of section 105 was also created. This section punishes any person who does any act or omits to do anything with intent in any way to obstruct, prevent, pervert or defeat the course of justice or the administration of law.

4.4.6 The Northern Territory

A fundamental point about the Northern Territory criminal law is that it has been codified.³¹⁵ The Criminal Code was assented to on 4 October 1983 and came into force on 1 January 1984. It is said that the purpose of the Northern Territory Criminal Code is to replace the common law.³¹⁶ In the Northern Territory, like the other States mentioned above, conduct that has the tendency to pervert the course of justice is also statutorily

³¹¹Section 102.

³¹²Section 102(1).

³¹³Section 105.

³¹⁴Act 69 of 1924.

³¹⁵The Criminal Code Act 1983 (NT).

³¹⁶S Gray *Criminal Laws of the Northern Territory* (2004) 3-4.

defined. The following conduct that has the tendency of perverting the course of justice is made punishable in the Criminal Code:

a. **Judicial corruption.**³¹⁷ Section 93 of the Act prohibits judicial corruption. It punishes any person who holds judicial office and corruptly asks, receives or obtains or agrees or attempts to receive or obtain any property or benefit of any kind for him- or herself or any other person in relation to anything already done or to be done in future, by him or her in his or her capacity as a judicial officer.³¹⁸ The Act also punishes the provider of the benefit. A person, who corruptly gives, confers or procures or promises or offers to give property or any benefit to a judicial officer in relation to such conduct including an attempt to do the abovementioned conduct, is guilty of an offence.³¹⁹

b. **Corrupting or threatening jurors.**³²⁰ In terms of section 95 it is an offence to corrupt or threaten jurors. Any attempt by menace of any kind or benefits or promises of any kind or by any other corrupt means in order to influence that particular person in his or her capacity as a juror in any judicial proceeding is an offence. It is not necessary for that particular person to have been sworn as a juror or not.³²¹ Any threat of injury or threats to cause any detriment of any kind to any person in relation to anything done by that person as a juror in any judicial proceeding is also a punishable offence.³²² The Act also punishes a

³¹⁷Section 93.

³¹⁸Section 93(1)(a).

³¹⁹Section 93(1)(b).

³²⁰Section 95.

³²¹Section 95(a).

³²²Section 95(b).

juror who accepts any benefit or promise of a benefit in relation to anything to be done or already been done by him or her in any judicial proceeding.³²³

c. **Fabricating evidence.**³²⁴ Fabrication of any evidence by any means (other than perjury or counselling or procuring the commission of perjury) with intent to mislead any judicial proceeding³²⁵ or to knowingly make use of such fabricated evidence is an offence.³²⁶ Just like section 97 of the Criminal Code³²⁷ of Tasmania, section 99 also punishes the knowing use of fabricated evidence.

d. **Corrupting,³²⁸ deceiving,³²⁹ preventing witnesses from attending³³⁰ proceedings and intimidating witnesses.**³³¹ The Act punishes any person who corrupts any person who is a witness in a judicial proceeding with an understanding that that other person is called or is to be called as a witness in a judicial proceeding shall give false testimony or withhold true testimony.³³² Any attempts by any means to induce a person called or to be called as a witness in a judicial proceeding to give false testimony or to withhold true testimony is an

³²³Section 95(c).

³²⁴Section 99.

³²⁵Section 99(a).

³²⁶Section 99(b).

³²⁷Act 69 1924 (Tas). See the discussion of section 97 *supra* under 3.4.5, text at note 298.

³²⁸Section 100.

³²⁹Section 101.

³³⁰Section 103.

³³¹Section 103A.

³³²Section 100(a).

offence.³³³ The Act also punishes a witness who asks, receives or obtains or attempts to receive or obtain any property or benefit for him- or herself or for any other person, upon agreement that he or she shall, as a witness in a judicial proceeding, give false testimony or withhold true testimony.³³⁴

In terms of section 101, it is an offence to deceive any person to be called as a witness in a judicial proceeding, with intent to affect the testimony of such a witness. Section 103 makes it a crime to prevent or attempt to prevent any person whom he or she knows has been summoned as a witness before any court or tribunal from attending as a witness or from producing anything in evidence pursuant to a subpoena or summons. In terms of section 103A(1) and (2), it is also an offence to intimidate any person because he or she has appeared or has been called or may be called to appear as a witness in any judicial proceeding.

e. **Destroying evidence.**³³⁵ Destroying any book, document, tape recording, photograph or anything or rendering it illegible or incapable of identification with intent to prevent it from being used in evidence while knowing that it may be required in evidence in a judicial proceeding, is punishable in terms of section 102 of the Act.

f. **Compounding crimes.**³³⁶ This crime is committed when a person asks, receives or

³³³Section 100(b).

³³⁴Section 100(c).

³³⁵Section 102.

³³⁶Section 104.

obtains or agrees or attempts to receive any property or benefit for him- or herself or any other person upon an agreement or understanding that he or she will compound or conceal a crime or will abstain from, discontinue or delay a prosecution of a crime. This crime is punishable in terms of section 104(1).

g. **Attempting to pervert the course of justice.**³³⁷ As in South Australia and Queensland, the Northern Territory has a broader offence of attempting to pervert the course of justice. Section 109 created an offence of attempt to obstruct, prevent, pervert or defeat the course of justice in any way not specified in this Code.

4.4.7 Western Australia

In Western Australia offences in relation to the administration of justice in general and obstructing the course of justice in particular are found in Chapter XVI of the Criminal Code.³³⁸ In terms of the Criminal Code the following conduct constitutes the crime of obstructing the course of justice:

a. **Judicial corruption.**³³⁹ This crime is committed when X (the corruptee) being the holder of a judicial office, corruptly asks, receives or obtains or agrees or attempts to receive or obtain any property or benefit of any kind for him- or herself or any other person on account of anything already done or omitted or to be done or omitted in future, by him

³³⁷Section 109.

³³⁸The Criminal Code Act 28 of 1913.

³³⁹Section 121.

or her (X) in his or her judicial capacity.³⁴⁰ The Act also punishes the corruptor. This is the person who corruptly gives, confers or procures or promises or offers to give or confer or to procure or attempt to procure to, upon, or for any person holding a judicial office as mentioned above, or to, upon or for any other person, any property or benefit of any kind on account of any such conduct on the part of the person holding a judicial office.³⁴¹

b. **Corrupting or threatening jurors.**³⁴² X commits a crime where he or she attempts, by threats or intimidation or by benefits or promises of benefit of any kind or by any other corrupt means, to influence Y who is a juror in a judicial proceeding. The threats can manifest in causing any injury or detriment on account of anything done by Y in his or her capacity as a juror in a judicial proceeding. Y also commits an offence if he or she accepts a benefit or promise of a benefit on account of anything he or she did as a juror in any judicial proceeding.³⁴³

c. **Threatening witnesses before a Royal Commission.**³⁴⁴ The Act extended the punishment of threatening witnesses to threats of any kind made to people who are summoned to testify before a Royal Commission, in order to prevent or hinder them from

³⁴⁰Section 121(1).

³⁴¹Section 121(2).

³⁴²Section 123.

³⁴³Section 123(1)-(3).

³⁴⁴Section 128. A Royal Commission is a major government public inquiry into an issue. The commission is created by Cabinet and formally appointed by Letters Patent. It is said that once a Commission has started the government cannot stop it. It has considerable powers, generally, even greater than those of a judge but restricted to the "Terms of Reference" of the Commission. See B Stone "Constitutional design, accountability and Western Australian Government: Thinking with and against the "WA Inc" Royal Commission" (1994) *The University of Western Australia Law Review* Vol 24 No 1 51.

giving evidence. This crime is also committed by any person who threatens or in any way punishes, damnifies or injures or attempts to do the above, to any other person for having given evidence before a Royal Commission, unless such evidence was given in bad faith.³⁴⁵

d. **Fabricating evidence.**³⁴⁶ In terms of section 129(1) and (2), it is an offence to fabricate evidence or to make use of fabricated evidence with intent to mislead any tribunal in any judicial proceeding.

In *R v Love*³⁴⁷ the word “fabricates” had been interpreted as not necessarily used in the pejorative sense in that the evidence was derived or contrived so that whatever is fabricated speaks falsely about itself as being genuine when it is not genuine. It was said that the word might mean only to “make up” or to “get together” without any dishonest connotation.³⁴⁸ An example of the offence of fabrication of evidence is when the accused makes a false entry in a document that can be the subject of litigation as in *R v Love*.³⁴⁹ In this case the accused was charged with fabricating evidence after he made a false entry in the company’s minute book of the directors’ meeting.

The facts of the case were as follows: This was an appeal arising out of the conviction of

³⁴⁵Section 128(1) and (2).

³⁴⁶Section 129.

³⁴⁷(1983) 9 A Crim R 1.

³⁴⁸At 5.

³⁴⁹*Ibid.*

the appellant, Mr Love, on a charge of fabricating evidence³⁵⁰ and of perjury.³⁵¹ The offences were alleged to have occurred at an earlier trial which took place in 1980, where Love was facing charges of a false entry in a minute book with intent to defraud.³⁵² In the first trial he denied that the document that the Crown claimed to be a false entry was in fact the official minutes of the company, and claimed it was only a draft. He said that the true minutes³⁵³ were contained in another book which he produced and which he, under oath, claimed he purchased between June and July 1978. He was acquitted in the initial trial.³⁵⁴

In the second trial the Crown contended that Love fabricated volume 2 that was produced at the initial trial. The Crown alleged that it was not a true record of the minutes of directors' meetings and was created for the purpose of the trial. The Crown further alleged that Love's sworn evidence that he had bought volume 2 between June and July 1978 was untrue.³⁵⁵ The two charges of fabrication of evidence and perjury followed from the fabrication of the minutes of the directors' meeting. In October 1982 the jury found him guilty on both counts. He appealed.

Although it was never alleged in an indictment that Love fabricated the minute book in order to obstruct the course of justice, but to mislead the court, such fabrication and the resultant misleading of the tribunal of judicial proceeding constituted the crime of

³⁵⁰In contravention of section 129 of the Criminal Code Act 28 of 1913 (WA).

³⁵¹In contravention of section 124 of Criminal Code Act 28 of 1913 (WA).

³⁵²*R v Love supra* (n 347) at 13-14.

³⁵³Hereinafter referred to as volume 2.

³⁵⁴*R v Love supra* (n 347) at 7.

³⁵⁵*Ibid.*

obstruction of justice. The appeal was dismissed.³⁵⁶

e. **Corrupting,³⁵⁷ deceiving³⁵⁸ and preventing witnesses from attending.³⁵⁹** It is an offence to corrupt or attempt to corrupt a witness in any manner, in order to give false testimony or to withhold true testimony in a judicial proceeding. A witness, who asks, receives or obtains or agrees to or attempts to receive or obtain any benefit for him- or herself or for any other person, in order to give false evidence or withhold true evidence in a judicial proceeding, is also guilty of an offence.³⁶⁰ In terms of section 131, another way of interfering with witnesses is to deceive witnesses by fraud, or to knowingly make or exhibit any false statement, representation, token or writing to a witness in a judicial proceeding, with intent to affect the testimony of such a witness. Section 133 also prohibits any person from wilfully preventing or attempting to prevent any witness from attending any court or tribunal or producing anything in evidence in any court or tribunal.

f. **Destroying evidence.³⁶¹** Any wilful destruction or rendering illegible or incapable of identification of any book, document or other thing of any kind which is or may be required in evidence in a judicial proceeding, with intent to prevent it from being used in evidence, is punishable in terms of section 132.

³⁵⁶At 26.

³⁵⁷Section 130.

³⁵⁸Section 131.

³⁵⁹Section 133.

³⁶⁰Section 130(1)-(3).

³⁶¹Section 132.

g. **Making a false complaint.**³⁶² It is an offence, in terms of section 133A, for X to knowingly sign a prosecution notice (a sworn declaration of complaint) which he or she knows very well is false.

h. **Conspiracy to bring a false accusation.**³⁶³ Any conspiracy by X with another person to bring false charges against an innocent person while knowing that the person is innocent is a contravention of section of section 134.

i. **Conspiracy to defeat justice.**³⁶⁴ Western Australia, like Queensland, has a broad offence of conspiring to defeat the course of justice. This offence is committed when a person conspires with another person to obstruct, prevent, pervert or defeat the course of justice. This broad offence is punishable in terms of section 135.

j. **Compounding or concealing offences.**³⁶⁵ This crime is committed when X obtains or seeks or agrees to receive any property or benefit for him- or herself or any other person upon an agreement or understanding that he or she will compound or conceal a crime or will abstain from, discontinue or delay a prosecution of a crime. This crime is punishable in terms of section 136 of the Act.

³⁶²Section 133A.

³⁶³Section 134.

³⁶⁴Section 135.

³⁶⁵Section 136.

4.4.8 The Commonwealth

Australian States have their own legislation which deals, *inter alia*, with the offence of perverting, preventing or obstructing the course of justice. A State's legislation is applicable only within that particular state. There is also Commonwealth legislation which is applicable to all the States and Territories. Conduct which constitutes the offence of perverting the course of justice in terms of the Commonwealth legislation, is discussed hereunder.

4.4.8.1 Fabricating evidence

Under the Commonwealth legislation,³⁶⁶ to fabricate evidence or make use of fabricated evidence with intent to mislead any tribunal in any judicial proceedings is an offence.

4.4.8.2 Intimidation of witnesses

X commits an offence when he or she intimidates any person who has appeared or is about to appear as a witness in a judicial proceeding.³⁶⁷ X can commit this offence in the following ways:

- a. By threatening, intimidating or restraining a witness.³⁶⁸
- b. By using violence to injure or by inflicting an injury on a witness.³⁶⁹

³⁶⁶Section 36 of the Crimes Act of 1914 (Cth).

³⁶⁷Section 36A of the Crimes Act of 1914 (Cth).

³⁶⁸Section 36A(a).

³⁶⁹Section 36A(b).

- c. By causing or procuring violence, damage, loss or disadvantage to a witness.³⁷⁰
- d. By causing or procuring the punishment of a witness.³⁷¹

4.4.8.3 Corruption of witnesses

Corruption of witnesses is an indictable offence under the Commonwealth law.³⁷² This section provides:

Any person who:

- (a) gives, confers, or procures, or promises or offers to give, confer, procure or attempts to procure, any property or benefit of any kind to, upon, or for, any person, upon any agreement or understanding that any person called or to be called as a witness in any judicial proceeding shall give false testimony or withhold true testimony; or
- (b) does an act with the intention of inducing a person called or to be called as a witness in any judicial proceeding to give false testimony, or to withhold true testimony; or
- (c) asks, receives, or obtains, or agrees to receive or obtain, any property or benefit of any kind for himself, or any other person, upon any agreement or understanding that any person shall as a witness in any judicial proceeding give false testimony or withhold true testimony;

shall be guilty of an indictable offence.

X (the corruptor) commits this offence when he gives, confers, or procures, or promises or offers to give, confer, procure or attempt to procure, any property or benefit of any kind to Y who already has been called as a witness or who is not yet called but who might be called as a witness so that the latter gives false testimony or withholds true testimony. Y (the corruptee), who has already been called or who has not yet been called as a witness also commits this offence when he asks, receives, or obtains, or agrees to receive or obtain, any property or benefit of any kind for himself, or any other person, in return for him to give

³⁷⁰Section 36A(c).

³⁷¹Section 36A(d).

³⁷²Section 37 of the Crimes Act of 1914 (Cth).

false evidence or withhold true evidence in any judicial proceeding.

4.4.8.4 Deceiving witnesses

Deceiving a witness is an offence of attempting to pervert the course of justice under the Commonwealth legislation.³⁷³ This legislation prohibits X from committing any fraud or deceit, or to intentionally make or exhibit, *inter alia*, any false statement to Y who has already been called as a witness or is yet to be called as a witness, with intent to affect the latter's testimony.

4.4.8.5 Destroying evidence

Section 39³⁷⁴ punishes any wilful destruction or rendering illegible or incapable of identification, of any book, document or other thing of any kind which is or may be required in evidence in a judicial proceeding, with intent to prevent it from being used in evidence.

4.4.8.6 Preventing witnesses from attending the court

Under the Commonwealth legislation,³⁷⁵ X commits an offence of attempting to pervert the course of justice when he intentionally prevents another person who has been summoned to attend as a witness in a judicial proceeding from attending as a witness or from producing anything in evidence pursuant to the subpoena or summons. It is clear that this offence can only be committed in relation to preventing a witness who has already been summoned to

³⁷³Section 38 of the Crimes Act of 1914 (Cth).

³⁷⁴The Crime Act of 1914 (Cth).

³⁷⁵Section 40.

attend a judicial proceeding. This section does not apply to a person who is still to be summoned as a witness in a judicial proceeding.

4.4.8.7 Conspiracy to bring a false accusation

Under the Commonwealth law, X commits an indictable offence if he conspires with another person to bring false accusations against an innocent person or cause any person to falsely charge an innocent person.³⁷⁶ This section provides:

- (1) Any person who conspires with another to charge any person falsely or to cause any person to be falsely charged with any offence against the law of the Commonwealth or of a Territory, shall be guilty of an indictable offence.

To be convicted of this offence X must have entered into an agreement with one or more other persons³⁷⁷ even if the other party to the agreement is a body corporate³⁷⁸ or a person who is not criminally responsible.³⁷⁹

4.4.8.8 Conspiracy to defeat justice

The Commonwealth, just like Western Australia and Queensland, has a broad offence of conspiring to defeat the course of justice. This offence is committed when a person conspires with another person to obstruct, prevent, pervert or defeat the course of justice. This broad offence is punishable in terms of section 42.³⁸⁰ This section provides:

³⁷⁶Section 41.

³⁷⁷ Section 41(2)(a).

³⁷⁸Section 41(3)(b).

³⁷⁹ Section 41(3)(c).

³⁸⁰The Crime Act of 1914 (Cth).

- (1) Any person who conspires with another to obstruct, prevent, pervert, or defeat the course of justice in relation to the judicial power of the Commonwealth shall be guilty of an indictable offence.

To be convicted of this offence, X must have entered into an agreement with one or more other persons to prevent, pervert or obstruct the course of justice in relation to the judicial power of the Commonwealth.³⁸¹ X may be found guilty of this offence even if obstructing, perverting or defeating the course of justice pursuant to the agreement is impossible³⁸² or even if the other party to the agreement is a body corporate³⁸³ or a person who is not criminally responsible.³⁸⁴

4.4.8.9 Attempting to pervert justice

As in South Australia and the Northern Territory, the Commonwealth has a broad crime of attempting to pervert the course of justice.³⁸⁵ The offence of attempting to pervert the course of justice may be committed, *inter alia*, by seeking to influence, bribe or by other means, persuading witnesses or potential witnesses to give false information. This section provides:³⁸⁶

- (1) Any person who attempts, in any way not specifically defined in this Act, to obstruct, prevent, pervert, or defeat, the course of justice in relation to the judicial power of the Commonwealth, shall be guilty of an offence.

Any threat made to a witness is an attempt to pervert the course of justice if made with the

³⁸¹Section 42(3)(a).

³⁸²Section 42(4)(a).

³⁸³Section 42(4)(b).

³⁸⁴Section 42(4)(c).

³⁸⁵Section 43 of the Crimes Act of 1914 (Cth).

³⁸⁶Section 43.

intention of persuading him or her to alter or to withhold evidence, even if the threat was to exercise a legal right. It is immaterial that the evidence was false or that the threat was made *bona fide* so long as one of the motives of the accused was to intimidate the witness into altering or withholding evidence.³⁸⁷

One of the leading cases in relation to attempting to pervert the course of justice in contravention of section 43 was *R v Morex Meat Australia (Pty) Ltd*.³⁸⁸ Appellants in that case were Morex Meat Australia (Pty) Ltd and its Managing Director, Doube. Among other things, Doube was charged and convicted of attempting to pervert the course of justice.³⁸⁹

The facts of this case in relation to count 17 were as follows: It was alleged that Doube had attempted to pervert the course of justice in contravention of section 43 by seeking to influence, bribe and persuade Laffey and Schmidt to give false information during the Department of Primary Industries (DPI) and Australian Quarantine and Inspection Service (AQIS) investigation, for the purpose of preventing a proper investigation of the alleged breaches of certain legislation which dealt with export control.³⁹⁰ The DPI and AQIS were investigating allegations that Morex Meat Australia (Pty) Ltd and Doube put a set of new labels on the export beef to make it look as if it had been slaughtered in March 1992, when

³⁸⁷Carter *op cit* (n 121) 3503.

³⁸⁸[1996] 1 Qd R 418.

³⁸⁹In contravention of section 43 of the Act.

³⁹⁰*R v Morex Meat Australia (Pty) Ltd and Doube supra* (n 388) at 437.

in fact it had been slaughtered in February 1992.³⁹¹ It is said that Doube attempted to procure Laffey and Schmidt to give a version of events which omitted the involvement of Doube in paying for Schmidt's trip to the United States of America. It was submitted on behalf of Doube that it was not open to the Crown to charge a number of separate acts of different character as constituting a single offence under section 43 of the Crimes Act of 1914.³⁹² It was said that doing so would create the risk that different jurors might reach different conclusions about each of the eight particulars.

The court considered that Doube was properly charged and convicted on count 17 of a single offence of attempting to pervert the course of justice. The appeal against the conviction failed.³⁹³ The court held that any threat made to a witness is an attempt to pervert the course of justice if made with an intention of persuading him or her to alter or to hold evidence, even if the threat was to exercise a legal right. It is immaterial that the evidence was false or that the threat was made *bona fide* so long as one of the motives of the accused was to intimidate the witness into altering or withholding evidence.³⁹⁴

³⁹¹At 422.

³⁹²At 438.

³⁹³At 441.

³⁹⁴Carter *op cit* (n 121) 3503.

4.4.8.10 Compounding or concealing an indictable offence

In terms of Section 44 of the Crimes Act,³⁹⁵ X commits an offence when he enters into an agreement or understanding with another person that he (X) will compound or conceal any indictable offence which has been committed against the law of the Commonwealth or a Territory. Section 44 provides:

Any person who asks, receives, or obtains, or agrees to receive or obtain, any property or benefit of any kind for himself or any other person, upon any agreement or understanding that he will compound or conceal any indictable offence against the law of the Commonwealth or a Territory, or will abstain from, discontinue, or delay any prosecution for any such offence, or will withhold any evidence thereof, shall be guilty of an offence.

Section 44 punishes X (the corruptee) for, *inter alia*, receiving or obtaining any property or benefit of any kind not only for himself or herself, but also for any other person upon agreeing to either compound or conceal any indictable offence or that he or she will abstain from or discontinue or delay the prosecution of such offence.

³⁹⁵Section 44 of the Crimes Act of 1914 (Cth).

4.5 SUMMARY

In Australia, the common law offence of attempting to pervert the course of justice does not have a clear and concise definition. The substance of the common law offence of perverting the course of justice consists in the performance of conduct which has a tendency, and is intended to pervert the administration of justice. It is also said that the offence targets conduct which does, or has the tendency to pervert the course of justice. Conduct means either a positive act or a failure to do something (omission), although there is no judicial or academic authority that supports the proposition that at common law this crime can be committed by mere omission. It seems that the offence connotes some unwarranted or unlawful interference with the process of administration of justice by judicial authorities. Judicial authorities include tribunals whose jurisdiction extends to the enforcement or adjudication of rights and liabilities in accordance with law and whose procedure is judicial in character. Committal proceedings, while administrative, are curial and fall within the ambit of this offence.

Australian courts have ruled that, at common law, the course of justice does not begin until the jurisdiction of a court or a competent judicial authority is invoked. Therefore, as a general rule, police investigations do not form part of the course of justice. There is scholarly support for the notion that because police investigations usually contemplate a prosecution, any conduct that deflects or frustrates a police investigation, or has the potential to do so, will have the tendency to pervert the course of justice and therefore have the potential to prevent the investigators from bringing a case within the jurisdiction of the court. However, this view has not received judicial confirmation.

It is said that in criminal proceedings the course of justice commences when charges have been laid against the accused or when he or she has been arrested. In civil proceedings the course of justice does not commence until the institution of the proceedings. In both criminal and civil proceedings, the course of justice ends when the rights of the parties have been finally determined and declared after an inquiry concerning the law as it is and the facts as they are, followed by an application of the law to the facts as determined.

The Australian Capital Territory and Victoria continue to rely on the common law for the prosecution of any attempt to pervert the course of justice. Those jurisdictions which have not codified their criminal law and still rely on the common law as a major source of criminal law are referred to as 'common law jurisdictions.' In New South Wales the common law misdemeanour of attempting to pervert the course of justice was abolished and replaced by a broad statutory offence. In South Australia, this offence was also made a statutory offence. Some states have statutory provisions which basically state that the common law offence still operates within those jurisdictions. This means that the statutory offences exist together with the common law offence. Some states have statutes which completely replaced the common law offence of perverting the course of justice.

The following conduct has been identified as constituting the common law offence of perverting the course of justice:

- a. Interfering with witnesses or potential witnesses by intimidation.
- b. Bribing witnesses.
- c. Obtaining bail by improper means.

- d. Inducement to lie to the police or to commit perjury.
- e. Concealment or fabrication of evidence.
- f. The improper institution of judicial proceedings.
- g. Bribing the police to hinder prosecution.
- h. Making false accusations against a person to the police.
- i. Publication of a newspaper article impugning the conduct and character of persons on trial.
- j. Lying to the police in order to prevent the detection and arrest and ultimate prosecution of an offender.
- k. Destruction of documents.

In Australia the common law offence of perverting the course of justice differs from the offence in English law in the following ways:

- a. In English law, the course of justice is said to commence and may be perverted before proceedings are active. The offence can be committed after the perpetration of the principal crime, but before investigation into it has begun. In Australian law the course of justice does not begin until the jurisdiction of some court or competent judicial authority is invoked.
- b. In English law, police investigations form part of the course of justice whereas in Australia, as a general rule, they do not.

Regarding similarities in both jurisdictions, judicial proceedings include proceedings before

tribunals whose procedure is judicial in character. Also, in both jurisdictions, attempting to pervert the course of justice is a substantive crime. In both jurisdictions the offence of perverting the course of justice cannot be committed by mere omission.

Most Australian states have statutes which punish the offence of perverting the course of justice. 'Code jurisdictions' is the term used to refer to those jurisdictions that have sought to replace the common law with a Criminal Code. All the states that have codified their criminal law have a broad, general offence and specific offences of perverting the course of justice. In New South Wales, any conduct which perverts the course of justice is punishable in terms of section 319 of the Crimes Act of 1900 as amended in 1990. This section punishes a person who commits any act or any omission intending to pervert justice. However, of particular significance is that in New South Wales, a specific offence makes failure to reveal that a serious indictable offence has been committed by somebody else, punishable in certain circumstances. These circumstances are: (1) when any person who, knowing or believing that the offence has been committed and (2) that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it. In Victoria, the acceptance of benefit for not disclosing that a serious indictable offence has been committed by somebody else is punishable in the same circumstances as in terms of the specific offence in the New South Wales.

In the Northern Territory, the offence is punishable in terms of section 109 of the Criminal Code Act (NT). In South Australia, section 256 of the Criminal Law Consolidation Act of 1935 punishes conduct that has a tendency to pervert the course of justice. The Criminal

Code Act 69 of 1924 is applicable in Tasmania and it punishes conduct (be it a positive act or an omission) that has a tendency to pervert the course of justice. In Queensland, section 120 of the Criminal Code Act of 1899 punishes similar conduct. In addition to the specific sections which are mentioned above, the following acts constitute specific offences of perverting the course of justice in most Australian states and in the Commonwealth: judicial corruption; corrupting or threatening jurors; fabricating or destroying or suppressing evidence; corrupting, deceiving, or preventing witnesses from attending and intimidating witnesses; conspiring to falsely accuse an innocent person, conspiring to defeat justice; compounding or concealing a crime and attempting to pervert justice. In Queensland official corruption (meaning corruption by or of a person being a justice not acting judicially) is also punishable. In Western Australia, threatening witnesses before a Royal Commission is a punishable offence.

Some commentators are of the view that the expression “administration of the law” in the statutory provisions has extended the scope of “course of justice” to include police investigations, but the matter awaits judicial determination. This view is opposed to the common law position where it is said that police investigations do not form part of the course of justice.

Under English law, it is a statutory crime to impede the apprehension of a person who has committed a relevant offence. This crime is not mentioned in any statute of any Australian State except in South Australia, Victoria and the Commonwealth.

CHAPTER FIVE**CANADIAN LAW****5.1 GENERAL**

Canadian criminal law originates from English common law,¹ but in 1892 the Canadian Parliament enacted its first complete Criminal Code which came into force in July 1893.² This is viewed as a major event in Canadian legal history.³ One of the readily acknowledged advantages of the codification was the constitutional imperative that no person could be convicted of an offence unless it was specifically provided for in a statute.⁴ Between 1892 and 1899, amendments were made to the Criminal Code, but major amendments took place in 1955.⁵ The most important reform of the 1955 Code was its repeal of liability for common law offences,⁶ which meant that in 1955 Canada abolished all common law offences.

In 1984, the current Canadian Criminal Code was coming into being,⁷ and in December 1986, Volume 1 of the Draft Code was tabled in Parliament.⁸ This Code contained various

¹See: <http://www.duhaime.org/LegalResources/CriminalLaw.aspx> (accessed on 28 November 2007). The public policy of codification began in England at the end of the 18th Century where in the words of Canadian Federal Court Judge, Allen Linden, the Criminal law had evolved into “a bottomless pit of complex case law, petty anachronistic offences and harsh punishments.”

²A M Linden and P Fitzgerald “Recodifying criminal law” (1987) *Canadian Bar Review* Vol 66 529-30 and AW Mewett “The Canadian Criminal Code, 1892-1992” (1993) *Canadian Bar Review* Vol 72 1.

³One judge wrote to the then Prime Minister, Thompson, to say: “Just think of it ... Canada in the Van! It is far and away the best measure of the kind ever submitted to any legislature.” See: <http://www.wwlia.org/Cacrhist.htm> (accessed on 28 November 2007).

⁴See: <http://es/CanadianLegalHistory/tabid/1553/articleType/ArticleView/articleId/94/Canadas-Criminal-Code-A-History.aspx> (accessed on 28 November 2007).

⁵Criminal Code, SC 1953-54. This Code received Royal assent on the 26th of June 1954 and came into force on the 1st of April 1955. See Mewett *op cit* (n 2) 7.

⁶Mewett *op cit* (n 2) 7-8. The Criminal Code was reduced from 1100 sections to 753 sections. See: <http://es/CanadianLegalHistory/tabid/1553/articleType/ArticleView/ArticleId/94/Canadas-Criminal-Code-A-History.aspx> (accessed on 28 November 2007).

⁷RSC 1985 c - C46. See Linden and Fitzgerald *op cit* (n 2) 533-35.

⁸Linden and Fitzgerald *op cit* (n 2) 534-35.

offences including offences against the administration of law and justice found in Part IV of the Code. In this chapter the statutory crimes of obstructing or perverting the course of justice and crimes akin to obstructing or perverting the course of justice are discussed, together with the beginning and the end of the course of justice. The phrase “course of justice” is understood to have a broad meaning and encompasses all aspects of the functioning of the justice system.⁹ The administration of justice is interfered with when the institution of a prosecution is improperly prevented or when a prosecution which has already begun is corruptly aborted.¹⁰

5.2 WHEN DOES THE “ADMINISTRATION OF JUSTICE” BEGIN?

Canadian law distinguishes between conduct related to a “judicial proceeding”¹¹ and conduct unrelated to a “judicial proceeding.”¹² Section 139 of the Canadian Criminal Code¹³ provides:

- (1) Everyone who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding,
 - (a) by indemnifying or agreeing to indemnify a surety, in any way and either in whole or in part,
 - or
 - (b) where he is surety, by accepting or agreeing to accept a fee or any form of indemnity

⁹L Vandervort “Mistake of law and obstruction of justice: A ‘bad excuse’ even for lawyers” (2001) *University of New Brunswick Law Journal* Vol 50 174.

¹⁰See *Kalick v The King* (1920) 55 DLR 104 at 108-109.

¹¹Section 139(1) of the Criminal Code 1985. See GP Rodrigues *Crankshaw’s Criminal Code of Canada* Vol 1 (1997) 4-108; EL Greenspan and M Rosenberg *Martin’s Annual Criminal Code* (2007) 262; EL Greenspan and M Rosenberg *Martin’s Annual Criminal Code* (2005) CC/259; D Watt and M Fuerst *Tremear’s Criminal Code: 1996 Annotated* (1996) 237-38; BJ Saxton and RT Stansfield *Understanding Criminal Offences* 2ed (1990) 50; AW Mewett and M Manning *Mewett and Manning on Criminal Law* 3ed (1994) 660-62; R Heather *Snow’s Annotated Criminal Code* (1990) 4-13; R Heather *Snow’s Annotated Criminal Code* (1989) 4-12 and D Rose *Snow’s Annotated Criminal Code* (2006) 4-13.

¹²Section 139(2) of the Criminal Code 1985. See Greenspan and Rosenberg *op cit* (n 11) 262; Saxton and Stansfield *op cit* (n 11) 50 and Mewett and Manning *op cit* (n 11) 661; Heather *op cit* (n 11) 4-13 and Watt and Fuerst *op cit* (n 11) 237.

¹³The Criminal Code 1985. See Greenspan and Rosenberg *op cit* (n 11) 237-38; Saxton and Stansfield *op cit* (n 11) 50 and Mewett and Manning *op cit* (n 11) 660-62. See also <http://ime.org/LegalResources/CriminalLaw/tabid/340/articleType/ArticleView/articleId/117/Obstruction-of-Justice.aspx> (accessed on 28 November 2007).

whether in whole or in part from or in respect of a person who is released or is to be released from custody,

is guilty of

(c) an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(d) an offence punishable on summary conviction.

(2) Everyone who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(3) Without restricting the generality of subsection (2), every one shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,

(a) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence;

(b) influences or attempts to influence by threats, bribes or other corrupt means a person in his conduct as a juror; or

(c) accepts or obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror.

Section 118 of the Criminal Code broadly defines a “judicial proceeding” as a proceeding:¹⁴

(a) in or under the authority of the court

(b) before the Senate or House of Commons, or a committee of the Senate or House of Commons, or before a legislative council, legislative assembly or house of assembly or a committee thereof that is authorised by the law to administer an oath

(c) before a court, judge, justice, provincial court judge or coroner

(d) before an arbitrator or umpire, or a person or body of persons authorised by law to make an inquiry and take evidence therein under oath, or

(e) before a tribunal by which a legal right or legal liability may be established whether or not the proceeding is invalid for want of jurisdiction or for any other reason.

It is clear that the validity of the proceeding itself is not a prerequisite. Prior to the promulgation of the new Criminal Code of 1985 and section 118, the case law¹⁵ provided authority that established liability for the corruption of juries or witnesses if the judicial proceeding was authorized to take evidence from the witness, or, the jury had been

¹⁴The Criminal Code of 1985. See Rodrigues *op cit* (n 11) 4-1; Greenspan and Rosenberg *op cit* (n 11) CC/230-31; Watt and Fuerst *op cit* (n 11) 209; Mewett and Manning *op cit* (n 11) 658; Saxton and Stansfield *op cit* (n 11) 52 and Heather *op cit* (n 11) 4-1.

¹⁵*Rosen* (1917) 27 CCC 259 (Sask CA) and *St Jean* (1938) 69 CCC 240 (Que KB).

empanelled. Contrary to English law,¹⁶ where it is said that the course of justice begins to run and may be prevented *before* proceedings are “active,” section 139(1) of the 1985 Canadian Criminal Code requires that the judicial proceeding must be “existing” or “proposed.”¹⁷ It is said that a judicial criminal proceeding is “existing” once a charge has been laid, and it is “proposed” when the decision to prosecute has been made, and perhaps when prosecution is contemplated.¹⁸ According to Mewett and Manning,¹⁹ a judicial proceeding is not proposed, for the purposes of section 139(3),²⁰ merely when an investigation to determine whether there has been criminal conduct is under way. Therefore, if X interferes with a potential witness before the Crown has decided to lay, or has considered laying charges in the matter, the proper charge will be under section 139(2) of the Criminal Code for obstructing the course of justice.

Contrary to section 139(1) and (3), no mention is made of a “judicial proceeding” in section 139(2). Therefore the obstruction of justice does not have to occur in respect of a “judicial proceeding.” This means that when a wilful attempt to tamper with prospective witnesses occurs at a stage before the state decides to lay, or considers laying, a charge in the matter, X has to be charged under section 139(2) for attempting to obstruct the course of justice.²¹ This section is much broader than section 139(1).²² Therefore, it is clear that, under Canadian law, the “course of justice” describes the entire process, from the detection of the

¹⁶Cf Smith and Hogan *op cit* Chapter Two (n 93) 752-53; Card *op cit* Chapter Three (n 1) 537 and *R v Rafique supra* Chapter Three (n 27) at 1G-H.

¹⁷Section 139(3) of the Criminal Code 1985. See Watt and Fuerst *op cit* (n 11) 237; Greenspan and Rosenberg *op cit* (n 11) CC/256; Heather *op cit* (n 11) 4-12 and Rose *op cit* (n 11) 4-13.

¹⁸AW Mewett and M Manning *Criminal Law* 2ed (1985) 489.

¹⁹*Ibid.*

²⁰Section 139(3) of the Criminal Code 1985.

²¹Mewett and Manning *op cit* (n 18) 489.

²²Saxton and Stansfield *op cit* (n 11) 51; Mewett and Manning *op cit* (n 18) 489 and Watt and Fuerst *op cit* (n 11) 239.

criminal act to the prosecution and punishment of offenders.²³

According to *R v Whalen*,²⁴ an attempt by X to dissuade Y from reporting an incident to police officials may amount to obstruction of justice regardless of the fact that neither police investigations nor judicial proceedings have been instituted. In 1968, in *R v Balsdon*,²⁵ the scope of the “course of justice” was extended to include post-trial activities. For instance, the course of justice may also be obstructed after judicial proceedings have been terminated, for example, when someone interferes with the execution by the police of a warrant of committal for non-payment of a fine.²⁶

In 1985, following the *R v Balsdon*²⁷ decision, the scope of the crime was extended even further in *R v Wijesinha*²⁸ to include proceedings of a quasi-judicial nature. The latter case is discussed below.

5.2.1 The broadening of the scope of the concept “the course of justice”

In *R v Wijesinha*²⁹ the phrase “the course of justice” used in section 139(2)³⁰ was understood to include the investigatory stage of justice. It was held that the term is also applicable to the disciplinary proceedings of the Law Society. It was further held that the

²³Mewett and Manning *op cit* (n 18) 491.

²⁴(1974) 17 CCC (2d) 217 (Ont Co Ct) at 220.

²⁵[1968] 2 CCC 164 (Ont Co Ct).

²⁶At 164. See also Mewett and Manning *op cit* (n 11) 664.

²⁷See *R v Balsdon supra* (n 25).

²⁸[1995] 100 CCC (3d) 410.

²⁹*R v Wijesinha supra* (n 28).

³⁰See the provisions of section 139(2) *supra* (n 13).

course of justice includes all judicial proceedings defined in section 118.³¹ Any decision-making body would be encompassed by the phrase “the course of justice” if:

- (1) it was a body which judged;
- (2) its authority to do so was derived from a statute; and
- (3) in terms of its empowering statute, it was required to act in a judicial manner.³²

The facts of *R v Wijesinha* were as follows: Wijesinha was a criminal defence lawyer. He was charged with four counts of attempting to obstruct justice in contravention of section 139(2).³³ It was alleged that he approached a police officer, Constable Stade, who was also a breathalyzer operator, and proposed that Stade refer persons who had failed breathalyzer tests to Wijesinha. Allegedly, Wijesinha promised to pay Stade a sum of money for each person referred. Stade was made to believe that another breathalyzer operator was already referring potential clients to the accused. Stade reported the matter to his superiors who told him that he should appear to go along with Wijesinha’s proposition. Stade, while equipped with a body-pack, met with another officer who was allegedly involved in the scheme and this fellow officer did indeed confirm that he was referring potential clients to the accused for a fee. After obtaining advice from the Crown counsel, the police did not pursue the investigation of Wijesinha, and instead provided the Law Society with the evidence they had gathered in their investigation. The Law Society wrote to the accused, setting out the substance of the allegations and invited him to respond to them. The accused prepared false statutory declarations (affidavits) which he gave to the officer and three of the referred clients to sign. The statutory declarations signed by the three clients contained a paragraph stating that: “At no time did any police officer direct or suggest that I

³¹*R v Wijesinha supra* (n 28) at 411g-h. See the provisions of section 118 *supra*, text at note 14.

³²*R v Wijesinha supra* (n 28) at 412a-b.

³³The Criminal Code 1985. See *R v Wijesinha supra* (n 28) at 416c.

retain [the appellant]. At no time did any police officer give me any business cards of [the appellant].”³⁴ The charges of attempting to obstruct justice arose out of those false statutory declarations.³⁵

The accused was convicted as charged and on appeal to the Ontario Court of Appeal it was argued, *inter alia*, that the accused could not be convicted of the offence of attempting to obstruct the course of justice because the investigation by the Law Society into the alleged professional misconduct did not fall within the meaning intended by the phrase “the course of justice” in section 139(2) of the Criminal Code.³⁶ The court determined that the preparation, swearing, and submission of the statutory declarations formed the very *actus reus* of the crime of “wilfully attempting by any means to obstruct the course of justice.”³⁷ The Appeal Court dismissed the appeal.³⁸ The accused then appealed to the Supreme Court of Canada.

The Supreme Court of Canada was called upon to consider whether the phrase “the course of justice,” which appears in section 139(2) of the Criminal Code,³⁹ applies to the investigatory stage of disciplinary proceedings before the Law Society of Upper Canada.⁴⁰ The court had to determine the following: Firstly, does section 139(2) apply to the investigatory stage or only to formal legal proceedings? Secondly, does section 139(2) apply to matters other than criminal and quasi-criminal offences?⁴¹

³⁴*Rv Wijesinha supra* (n 28) at 415g-h. The appellant referred to here is Wijesinha.

³⁵At 411e.

³⁶At 411f.

³⁷At 417e.

³⁸At 411g.

³⁹RSC 1985 c C - 46

⁴⁰*R v Wijesinha supra* (n 28) at 419e.

⁴¹At 419e-f.

In answering the first question, the court noted that any court proceedings or, indeed, the proceedings of most administrative tribunals would almost always commence with an investigation. It further noted that investigation is necessary to determine if a crime has been committed or not, and that investigation is the essential first step in any judicial or quasi-judicial proceeding which may result in prosecution. It follows that one who perverts the course of an investigation also perverts the course of justice.⁴² The court held that since a false statement at the investigation stage may prevent any proceedings from taking place and so prevent the course of justice, section 139(2) must encompass investigatory proceedings.⁴³

In answering the second question, the court examined both section 118⁴⁴ and section 139 of the Criminal Code. The court noted that section 139(2) describes an offence which is much wider in its ambit and which encompasses many more acts than those in subsections (1) and (3). The court was of the opinion that the section 118 definition of a “judicial proceeding” was of no relevance when considering the scope of the phrase “the course of justice.”⁴⁵

The court, per Galligan JA, held that the phrase “course of justice” would include an investigation which could lead to proceedings being taken against a person. He observed that the phrase would apply to any body which is authorised by statute to act and “which judges.” He determined that the Law Society was just such a body and that section 139(2)

⁴²At 420f-g.

⁴³*R v Wijesinha supra* (n 28) at 422d-e. The court relied, among other authorities, on the Australian High Court decision of *The Queen v Rogerson supra* Chapter Four (n 5). In that case, Mason CJ stated (at 277):

[i]t is enough that an act has a tendency to frustrate or deflect a prosecution or disciplinary proceeding before a judiciary tribunal which the accused contemplates may possibly be instituted, even though the possibility of instituting that prosecution or disciplinary proceeding has not been considered by the police or the relevant law enforcement agency.

⁴⁴See the provisions of sections 118 *supra*, text at note 14.

of the Criminal Code extended to the investigatory stages of potential disciplinary proceedings before the Law Society.⁴⁶ The appeal was dismissed.⁴⁷

This thesis supports the decision of the court in finding that section 139(2) of the Criminal Code extended to the investigatory stages of potential disciplinary proceedings before the Law Society. However, the reasoning of the court is questioned, but not the route followed by the court. It is respectfully submitted that the court's opinion that the definition of "judicial proceeding" in section 118 was of no relevance in considering the scope of the phrase "the course of justice" was incorrect for the following reasons. Firstly, both section 118 and section 139 are found in Part IV of the Criminal Code under the heading 'Offences Against the Administration of Law and Justice.' The two sections should be read together. Secondly, section 118(d) states that "judicial proceeding" means a proceeding before, among other things, a "person or persons authorised by law to make an inquiry and take evidence under oath." The investigatory proceedings of the Law Society fall within the definition of "person or persons," because the oath is administered when statements are taken. Section 118(e) is also applicable to the disciplinary proceedings of the Law Society because the sitting of such proceedings determined a legal right, or liability of the applicant in this case. It is against this background that it is submitted that section 118 and section 139 should not be interpreted separately, but should be read together when determining the meaning of the phrase "the course of justice."

In 1983, the meaning of the words "course of justice" was interpreted even more broadly to include threats made after sentence was passed. In *R v Vermette*⁴⁸ the court was of the

⁴⁵*R v Wijesinha supra* (n 28) at 422f-g to 23a-f.

⁴⁶At 418e-h.

⁴⁷At 431e-f.

⁴⁸(1983) 6 CCC (3d) 97.

opinion that section 127(2)⁴⁹ (now section 139(2)) was wide enough to include a threat by an accused to cause bodily harm to the complainant who was present in court, notwithstanding that at the time of the threat the accused had already been convicted and sentenced for the offence initially reported by the complainant.⁵⁰

The facts of this case were as follows: Vermette pleaded guilty and was sentenced for the offence of theft. After his sentencing, he made threats of bodily harm against the complainant. She reported these threats to the police, whereupon Vermette was arrested and charged with the common law offence of contempt of court. He pleaded guilty and was convicted upon his guilty plea, but having obtained new counsel, he appealed to set aside his conviction.⁵¹

The Court of Appeal was called upon to consider whether or not Vermette had been correctly charged, and convicted. Put differently, the issue was whether the charge of the common law offence of contempt of court was a correct charge against Vermette. It was observed that in a case involving threats to a complainant outside court, the Crown could either charge the accused with attempting to obstruct justice under section 127(2) (now section 139(2) of the Criminal Code) or make a summary application to the court for contempt of court.⁵² The court observed that Vermette was wrongly indicted for the common law offence of criminal contempt of court and that his conviction was an error.

⁴⁹Section 127(2) provided: “Everyone who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an offence and is liable to imprisonment for ten years.” See Mewett and Manning *op cit* (n 18) 489.

⁵⁰Greenspan and Rosenberg *op cit* (n 11) CC/261 and *R v Vermette supra* (n 48) at 97.

⁵¹*R v Vermette supra* (n 48) at 98.

⁵²At 105.

The court allowed the appeal and set aside the conviction.⁵³

As far as obstructing the “course of justice” is concerned, the importance of this case lies, firstly, in the fact that the Court of Appeal broadened the scope of the meaning of “the course of justice” beyond matters which are *sub judice* in any specific instance to include threats made by an accused outside a courtroom after he had been sentenced. This is very important, because possible retaliation by an accused towards witnesses could discourage future witnesses from testifying in courts and that would have far-reaching consequences for the proper administration of justice. Secondly, this decision highlighted the overlap between the offence of obstructing the “course of justice” and contempt of court which is punished summarily by the courts.⁵⁴

5.3 ACTS WHICH AMOUNT TO THE OFFENCE OF PERVERSION OR OBSTRUCTION OF THE COURSE OF JUSTICE

The following acts or conduct are proscribed under the Canadian Criminal Code as acts, or conduct, which obstruct or pervert the course of justice:⁵⁵

- a. Indemnifying or agreeing to indemnify a surety.⁵⁶
- b. Accepting or agreeing to accept a fee or any kind of indemnity by a surety.⁵⁷

⁵³*Ibid.*

⁵⁴In terms of section 8 of the Criminal Code, which was in force before the enactment of the 1985 Criminal Code, it is stated that: “... nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or magistrate had, immediately before the 1st day of April 1955, to impose punishment for contempt of court.” See *R v Vermette supra* (n 48) at 100.

⁵⁵The Criminal Code RSC 1985 Chapter C-46.

⁵⁶Section 139(1)(a).

⁵⁷Section 139(1)(b).

- c. Attempting to obstruct, pervert or defeat the course of justice.⁵⁸
- d. Interfering with witnesses.⁵⁹
- e. Interfering with a juror.⁶⁰
- f. Acceptance of bribes by witnesses and juries.⁶¹

5.3.1 Indemnifying, or agreement to indemnify, a surety and accepting, or agreeing to accept, a fee or any kind of indemnity as a surety

The offence in section 139(1) relates to conduct of, or in relation to, sureties. This section proscribes two acts. Firstly, it proscribes X, as the donor or offeror, from indemnifying Z, the surety, from entering into an agreement with Y to indemnify Z. Secondly, this section makes it an offence for Z himself, the surety, to accept or enter into an agreement to accept indemnity in money or in kind from X, the donor or offeror.⁶² To indemnify a surety means to compensate a person who has undertaken to forfeit money in the event that the accused fails to appear in court for trial.⁶³

It is said that the practical effect of this section is to eliminate the existence of professional bail bondsmen.⁶⁴ According to Mewett and Manning,⁶⁵ if bail is regarded as a personal

⁵⁸Section 139(2).

⁵⁹Section 139(3)(a).

⁶⁰Section 139(3)(b).

⁶¹Section 139(3)(c).

⁶²Greenspan and Rosenberg *op cit* (n 11) CC/260 and Watt and Fuerst *op cit* (n 11) 238.

⁶³Saxton and Stansfield *op cit* (n 11) 50.

⁶⁴These are people who make their living by providing bail money to individuals awaiting trial in custody on the understanding that when he or she is released the accused will pay the bondsmen a fee. See Saxton and Stansfield *op cit* (n 11) 50.

obligation undertaken by the surety towards the court to ensure the appearance of the accused, the personal relationship between the surety and the court is lost if the surety is in the business of providing bail for profit or if he or she has nothing to lose when the accused does not appear. Bail then becomes nothing more than a monetary penalty rather than a personal obligation. It is also important to note that this offence can be prosecuted by way of summary conviction or by way of an indictment.⁶⁶ We shall now look at the elements that the prosecution has to prove in order to secure a conviction in a charge made under section 139(1).

The elements of the offence of indemnifying or agreeing to indemnify a surety and accepting or agreeing to accept, a fee or any kind of indemnity by a surety are the following:⁶⁷

- i. X must have acted, for example, by indemnifying Z, who is a surety, or, where he or she was a surety, by accepting money or agreeing to accept indemnity;
- ii. X's act must have been intended, and must have had a tendency, to obstruct, pervert or defeat the course of justice in a judicial proceeding.⁶⁸

5.3.2 Attempt or conspiracy to attempt to obstruct, pervert or defeat the course of justice

The second way in which an obstruction of justice can occur is when any attempt in any manner other than that mentioned in section 139(1) is made to obstruct, pervert or defeat

⁶⁵Mewett and Manning *op cit* (n 18) 488.

⁶⁶Greenspan and Rosenberg *op cit* (n 11) CC/260.

⁶⁷Saxton and Stansfield *op cit* (n 11) 51. See also the commentary in Watt and Fuerst *op cit* (n 11) 238.

⁶⁸As defined in section 118 of the Criminal Code *supra*, text note 14.

the course of justice.⁶⁹ Although it is framed in the language of an attempt, section 139(2) creates a substantive offence, the gist of which is the performance of an act which has a tendency to pervert or obstruct the course of justice and which is done for that purpose.⁷⁰ Section 139(2) constitutes a much broader offence than section 139(1) and is strictly an indictable offence. No “judicial proceeding” is required for section 139(2). There is judicial authority⁷¹ to the effect that conspiracy⁷² to attempt to obstruct the course of justice also amounts to obstructing the course of justice and is punishable in terms of section 139(2). The section 139(2) offence is also vague because there are no specific acts or conduct mentioned which amount to this particular form of the offence.⁷³ Only through the case law did it become clear which acts infringe section 139(2). The following acts have been recognised as such:⁷⁴

a. **Wasteful employment of police.**⁷⁵ Unlike English law⁷⁶ where wasteful employment of police time and resources constitutes an offence akin to obstructing the course of justice, any diversion of the police which could cause time and effort to be wasted, impeding or retarding the course which the operation of justice would normally take, amounts to

⁶⁹Section 139(2).

⁷⁰See Greenspan and Rosenberg *op cit* (n 11) CC/26; Heather *op cit* (n 11) 4-13 and Rodrigues *op cit* (n 11) 4-112.

⁷¹*R v May* (1984) CCC (3d) 257. See also Heather *op cit* (n 11) 4-13 and Rodrigues *op cit* (n 11) 4-112.

⁷²The history of the conspiracy offence suggests that the law applicable to this crime has at least in part developed from the view that conspiracy is an act inherently heinous or culpable and a substantive offence in its own right. See P MacKinnon “Developments in the law of criminal conspiracy” (1981) *Canadian Bar Review* Vol 59 304.

⁷³It may be argued that it violates the principle of legality, which requires that crimes should not be formulated vaguely (the *ius certum* principle).

⁷⁴Mewett and Manning *op cit* (n 18) 491-92 and Rodrigues *op cit* (n 11) 4-111-118.

⁷⁵*R v Snider* (1953) 106 CCC 164 (Ont Ct).

⁷⁶The offence is punishable in terms of section 5(2) of the Criminal Law Act 1967. See Chapter Three *supra* (n 174).

obstruction of justice for purposes of section 139(2) of the Code.⁷⁷ This offence is committed, *inter alia*, by wilfully making a false report to the police tending to show that an offence has been committed.⁷⁸

b. **Removing a witness or the accused out of the court's jurisdiction.**⁷⁹ This offence is committed by X, when contemplating a court case against himself or herself or against any other person and knowing that Z will be a Crown witness or accused, he or she attempts to remove the witness or that other person to another place where it will be difficult if not impossible for him or her to testify in the upcoming case. A case in point here was *R v Kadin*.⁸⁰ The Court of Appeal heard an appeal by the Crown against Kadin's acquittal on a charge of obstructing the course of justice for taking his wife out of the country while there were pending charges against her.

The facts of this case were as follows: Kadin's wife was facing some criminal charges. While charges against his wife were still pending, he took her away from home to the United States of America with the intention of preventing her from being submitted to examination. He was charged with an attempt to obstruct, pervert or defeat the course of justice in contravention of section 180(d) of the then existing Criminal Code,⁸¹ because her attendance at her own trial was obviously essential to the due course of justice.⁸²

It was argued that the trial against Kadin's wife had not commenced and the trial court held

⁷⁷Mewett and Manning *op cit* (n 18) 491-92.

⁷⁸Rodrigues *op cit* (n 11) 4-113.

⁷⁹Rodrigues *op cit* (n 11) 4-114.

⁸⁰(1937) 2 DLR 800 (BCCA).

⁸¹Criminal Code 1927. Section 180(d) became section 127(2) and in 1985, when the current Criminal Code came into being it became section 139(2).

that the accused (Kadin) had committed no offence since his wife, at that specific stage, had committed no offence in failing to attend the trial.⁸³ He was acquitted and the Crown appealed against the acquittal.

On appeal Martin, JA held:⁸⁴

If the real reason for her “default” was that her husband had, for example, attempted to take her out of Canada, or had assisted or induced her to leave Canada in order to enable her to evade her legal trial, then it is clear that his conduct would constitute an attempt to “obstruct, pervert or defeat the course of justice” within the meaning of subsection (d) of section 180, Criminal Code, because her attendance at her trial was obviously essential to the due “course of justice ...

However, the court was not convinced that proof of the husband’s attempt had been established with that reasonable certainty that the law required. Therefore, the court unanimously dismissed the appeal.⁸⁵

It is submitted that the importance of this case lies in the fact that the charge of wilful attempt to obstruct the course of justice was laid against a person who was not an accused in a case, but a third party who tried to encourage the accused to abscond. This shows that the word “everyone” in section 139(2) of the Criminal Code and its predecessors applies to witnesses, accused, and anyone who attempts to prevent either an accused (as in this case), a witness, or officers of the court, etc., from attending judicial proceedings by taking them away with intent to obstruct the course of justice.

c. Persuading a victim not to prosecute his or her assailant, or persuading a person not to report an incident to the authorities.⁸⁶ In *R v Whalen*⁸⁷ the court observed that an

⁸²*R v Kadin supra* (n 80) at 801.

⁸³At 801.

⁸⁴*Ibid.*

⁸⁵*Ibid.*

⁸⁶Rodrigues *op cit* (n 11) 4-115 and Mewett and Manning *op cit* (n 11) 663-65.

attempt to dissuade a person from reporting an incident to the authorities might constitute a mode in which the offence of obstructing justice could be committed. The court further observed that it was irrelevant that neither formal police investigations nor judicial proceedings had been instituted. In this case the accused were facing two charges of obstructing justice for:

(1) the dissuasion or attempted dissuasion of persons, by threats or other corrupt means, from giving evidence in judicial proceedings; and

(2) dissuading or attempting to dissuade persons by threats or other corrupt means from reporting to the police incidents which were known or ought to have been known should have been dealt with by a court of law.⁸⁸

The accused filed two motions, one of them to quash the indictment. In dismissing the motion the court made the following observation:⁸⁹

I am persuaded that in our form of society where the individual has the right to conduct his affairs independently of his neighbour, within the confines of the law, that where someone attempts to dissuade him from reporting an incident, that may constitute an obstruction of justice.

d. **Destroying evidence.**⁹⁰ Another way of violating section 139(2) of the Criminal Code is when X wilfully attempts to destroy any evidence with intent to obstruct, pervert or defeat the course of justice in an existing or proposed judicial proceeding. In *R v*

⁸⁷(1974) 17 CCC (2d) 217 (Ont Co Ct).

⁸⁸At 218.

⁸⁹At 220.

⁹⁰Rodrigues *op cit* (n 11) 4-113 and Mewett and Manning *op cit* (n 18) 492.

Andruszko,⁹¹ the Court of Appeal was called upon to consider an appeal by the Crown following Andruszko's acquittal on a charge of attempting to obstruct justice by destroying evidence. The facts of this case were as follows: Allegedly, a police officer, who was patrolling the streets around Andruszko's neighbourhood, noticed Andruszko sitting in a car parked on private property adjacent to what the police official believed to be his property. As the police vehicle approached Andruszko's car, Andruszko alighted from the car and the police officer drew up close to the parked car. Andruszko then jumped back into the car, locked the doors and windows, with the exception of the driver's window which he left partly open. The police officer approached Andruszko and indicated that he wished to talk to him, and requested him to produce his driver's licence and proof of ownership of the car. It is said that Andruszko replied that he did not wish to talk to the police officer.

The police officer then noticed that Andruszko had a small plastic bag in his hand from which he began to eat a greenish-brown plant material the officer suspected was *marijuana*.⁹²

When he had finished eating from the plastic bag, Andruszko threw the bag onto the floor of the car and attempted to exit from the car. The police officer chased him around and prevented him from escaping. He was arrested a short distance from the car. After the arrest, the police officer returned to Andruszko's car and discovered on the floor on the passenger's side a plastic bag containing a small quantity of *marijuana*.

Andruszko was charged with attempting to obstruct the course justice by destroying evidence in contravention of section 127(2).⁹³ He was acquitted and the Crown appealed

⁹¹(1978) 44 CCC (2d) 382 (Ont CA).

⁹²At 383.

⁹³Now section 139(2) of the Criminal Code. See the provisions of section 127(2) *supra* (n 49).

against his acquittal.⁹⁴ On appeal, the court was satisfied that the offence charged under section 127(2)⁹⁵ was made out. As a result the appeal was allowed, the verdict of acquittal set aside and the verdict of guilty substituted.

The reasons which led to Andruszko's acquittal were not advanced in the record of this case. This makes it difficult to comprehend and to argue for or against the trial court's decision. Nevertheless, it suffices to submit that evidence is an essential component in any judicial proceeding. Without evidence, courts will be unable to function properly and that can lead to the miscarriage of justice and the total collapse of the administration of justice.

Another important matter worth mentioning in this case was the extension of the scope of the "course of justice" to include police investigations. Andruszko destroyed evidence before he was charged with any offence. By setting aside his acquittal and substituting the verdict of guilty, the Court of Appeal incorporated police investigations of suspected criminal activities into the "course of justice."

e. **Misleading the court.**⁹⁶ The offence of obstructing the "course of justice" by misleading the court can be committed, for example, when X pleads guilty to an offence committed by another person (Y) or when X gives a false identification to the police during the investigation of the crime and ultimately X appears in court under that false name. These acts seriously offend the principle of public justice if the proceedings in court are conducted on a false basis. In *R v Doz*⁹⁷ the Supreme Court of Appeal observed that a lawyer is under a duty not to mislead the court and may be convicted of obstructing justice where he participates in the client's deception by arranging for the client's friend to attend

⁹⁴*R v Andruszko supra* (n 90) at 382.

⁹⁵Now section 139(2).

⁹⁶See *Rodrigues op cit* (n 11) 4-117-118.

⁹⁷(1984) 12 CCC (3d) 200.

in court and answer to a charge against a client who had previously given a friend's name to the police as his own upon arrest.

The facts of the case were as follows: Doz was a lawyer obtained to act as legal representative of Mark Woitt, a motorist, whom the police found vomiting beside his car and showing signs of impairment. He was arrested and when requested to identify himself, he gave his friend's name, Jeff Hutchinson. He was charged with being in care and control of a motor vehicle while his ability to drive was impaired by alcohol.⁹⁸

During his consultation with Doz, Woitt explained that he had falsely identified himself to the police as Jeff Hutchinson. Doz told him to bring in Hutchinson, and the following day Woitt and Hutchinson came to see Doz. It was agreed that Hutchinson would attend the trial instead of Woitt.

It is important to note that during the trial Doz misled the court in the following ways:

(1) The court directly asked Doz if his client was in court and he responded: "Mr Hutchinson is here."⁹⁹

(2) He cross-examined the state witness, thereby creating an impression to the court that the police did not know their facts.¹⁰⁰

(3) He called Hutchinson to the witness box and examined him. Hutchinson denied having

⁹⁸At 204.

⁹⁹At 205.

¹⁰⁰At 206.

been arrested, or taken to jail, or photographed, or fingerprinted by the police.¹⁰¹

As a result of the “mistaken” identification problems the court dismissed the case.¹⁰²

After the case, Hutchinson took his parents’ advice and obtained a lawyer, and through his lawyer he told the police authorities what had happened. These revelations led to Doz’s indictment on two charges: count 1: impersonation, count 2: attempt to obstruct, pervert, or defeat the course of justice in contravention of section 127(2) (now section 139(2)).¹⁰³ He was convicted of these charges and he appealed.

As to the charge of obstructing justice, it was noted that when Doz was called upon to identify his client in court, his words “Mr Hutchinson’s here” were correct, but it was not the honest answer to the question asked and it was intended by him to mislead the judge. He actively misled the court as to the accused being present in court. At all material times Doz knew that he was misleading the court and that the actual accused was not before the court. By his conduct Doz was not only guilty of conduct unbecoming a lawyer but also of the criminal offence of attempting to obstruct the course of justice.¹⁰⁴

Like the English and Australian cases of *R v Murray*¹⁰⁵ and *Hatty v Pilkinton*,¹⁰⁶ this was another instance where a lawyer was over-zealous and overstepped his duty to represent his client. Furthermore, as an officer of the court he betrayed his duty not to mislead the court. Doz not only condoned his client’s misrepresentation of his identity to the police, he took

¹⁰¹At 207.

¹⁰²At 208.

¹⁰³At 202.

¹⁰⁴At 220.

¹⁰⁵*R v Murray supra* Chapter Three (n 48).

¹⁰⁶*Hatty v Pilkinton supra* Chapter Four (n 75).

part in maintaining the deception. As an officer of the court, when he learned his client gave a false name to the police, he was expected to either tell his client not to carry on with the false name, or to tell the court the real name of his client, or to withdraw as legal counsel. He made no effort to persuade his client to refrain from misleading the court. Instead, he became an active participant to that falsity.

f. **Refusal to testify at a preliminary inquiry.**¹⁰⁷ There is authority in the Canadian case law to suggest that if X refuses to be sworn in and to testify at a preliminary inquiry, such refusal amounts to obstructing the course of justice and he or she can be charged for contravening section 139(2) of the Criminal Code. It is said that if X refuses to be sworn in, or refuses to testify after being sworn in, at the preliminary inquiry without any reasonable excuse, the justice may adjourn the inquiry and summarily commit him or her to prison in terms of section 545 of the Criminal Code.¹⁰⁸ Section 545 is a summary conviction procedure at the disposal of the presiding officer of a preliminary inquiry where a witness, *inter alia*, refuses to be sworn in. Two cases which deal with witnesses who refused to testify in a preliminary inquiry are *R v Mercer*¹⁰⁹ and *R v Poulin*.¹¹⁰ In these cases the courts observed that if the witness refuses to be sworn in and testify, and the justice presiding over the preliminary inquiry has resorted to the section 545 procedure, the witness cannot be charged in terms of section 139(2) for the same conduct. However, if the justice did not resort to the section 545 procedure, or if the conduct was repeated after the initial recourse to section 545, then the witness may be charged for contravening section

¹⁰⁷Rodrigues *op cit* (n 8) 4-118.

¹⁰⁸Canadian Criminal Code 1985. See Greenspan and Rosenberg *op. cit.* (n 11) 1005. Section 545(1) provides: Where a person, being present at a preliminary inquiry and being required by the justice to give evidence, (a) refuses to be sworn, (b) having been sworn, refuses to answer the questions that are put to him, (c) fails to produce any writings that he is required to produce, or (d) refuses to sign his deposition, without offering a reasonable excuse for his failure or refusal, the justice may adjourn the inquiry and may, by warrant in Form 20, commit the person to prison for a period not exceeding eight clear days or for the period during which the inquiry is adjourned, whichever is a lesser period.

¹⁰⁹(1988) 43 CCC (3 d) 347.

139(2) or for contempt of court.¹¹¹ The two cases will be discussed in more depth below, commencing with *R v Mercer*.

*R v Mercer*¹¹² was an appeal by the Crown following an acquittal of the respondent on a charge of attempting to obstruct justice in contravention of section 127(2) (now 139(2)) of the Criminal Code. The facts of this case were as follows: The accused, who was serving a prison sentence for an offence not related to the one in question, was called as a Crown witness at a preliminary hearing of a charge against one Milton Muise. He refused to be sworn in and refused to testify. The court resorted to the section 472 (now section 545) procedure and committed him for eight days. The preliminary hearing was adjourned. Eight days later, the preliminary inquiry resumed. Muise appeared, but this time the court did not ask him if he would consent to be sworn in and testify. It was assumed that he would continue with his refusal. Failure to ask the respondent whether he would consent to be sworn in and testify was a grave mistake in this case as will be discussed later. He was then charged with attempting to obstruct the course of justice contrary to section 127(2) by refusing to testify at a preliminary inquiry. He pleaded not guilty and, following a trial, he was acquitted.¹¹³ The court considered the judgment of the Supreme Court of Canada in *Lacroix and The Queen*¹¹⁴ and held:¹¹⁵

[The] Supreme Court of Canada has said that where the power under section 472 has been used by the inferior court there is no further remedy – or there is no further criminal procedure to be taken against that accused. That is what I hold now.

¹¹⁰(1998) 127 CCC (3d) 115 (Que CA).

¹¹¹Greenspan and Rosenberg *op cit* (n 11) CC/262.

¹¹²*R v Mercer supra* (n 106).

¹¹³At 349.

¹¹⁴(1984) 15 CCC (3d) 265.

¹¹⁵*R v Mercer supra* (n 109) at 349.

The Crown appealed against Mercer's acquittal. The following three issues were raised in this appeal:¹¹⁶

- (1) Once exercised, was section 472 the only remedy against the disobedient witness at a preliminary inquiry?
- (2) Did section 472 create an offence that afforded the accused the defence of double jeopardy if a charge, arising from the same circumstances, was laid under section 127(2)?
- (3) Were the section 472 procedures the only way to deal with the disobedient witness?

In reaching an appropriate decision, the judge had to look at the *Lacroix and The Queen* decision of the Supreme Court of Canada.¹¹⁷ The court interpreted this decision to mean that if a judge at a preliminary inquiry did not act under section 472, it was open for him or her to act under section 127(2). In dismissing the appeal the court held:¹¹⁸

If in the case at bar the respondent had in his second appearance been asked to testify and had again refused, he could have been charged under sections 127(2) or (8). The respondent was, however, not given the opportunity to repent and the charge under section 127, the charge that is the subject of this appeal, was for his refusal in the first instance.

The judgment of the court can be viewed in two respects. Firstly, it is in respect to the discretion available to the judge presiding at a preliminary inquiry when is faced with a disobedient witness who refuses to be sworn in and to testify. Section 545 provides that in such cases the court may adjourn the proceedings and may commit the witness to prison.

¹¹⁶At 350.

¹¹⁷In the case of *Lacroix and The Queen supra* (n 114), the Quebec Court of Appeal held (at 271): Regardless of inconvenience, or ineffectiveness, of the punishment provided for by section 472, it remains nonetheless, the penalty specifically provided for in the case of a witness who refuses to testify at a preliminary inquiry and no other punishment may be substituted for it. On appeal, the Supreme Court of Canada, in allowing the appeal, found it unnecessary to consider the reasoning of the Quebec Court of Appeal because in the first instance the judge had not utilised section 472. The Supreme Court of Canada noted : 'In view of the circumstances of the case at bar, and in particular the fact that the judge did not utilise the powers of committal conferred on him by section 472 of the Criminal Code, the questions raised by the accused in the Court of Appeal did not arise.' See *R v Mercer supra* (n 109) at 351.

¹¹⁸*R v Mercer supra* (n 109) at 352.

The presiding judge has the discretion to commit the witness to prison or to use other remedies. If the judge resorts to the section 545 procedures, he or she is precluded to invoke section 139(2) for the same conduct of refusing to be sworn in and to testify. However, if, for the first refusal, section 545 is used and the accused is asked for the second time, after adjournment, to testify and he refuses, the Crown is not precluded from using section 139(2) for the second refusal. Each refusal to be sworn in and testify constitutes a separate offence. In *R v Mercer*¹¹⁹ the witness was never asked to consent to be sworn in and to testify because it was presumed that he would not be interested. This thesis supports the decision of the court in dismissing the appeal by the Crown because the witness was already punished for the first refusal and any trial in terms of section 139(2) for the same matter would lead to double jeopardy. This takes us to the second aspect of this case. Considered in the second respect, the judgment implies that after committal to prison in terms of section 545, the witness cannot be vexed for the second time for the same act. The doctrine of *res judicata* precludes parties from litigating the same cause of action that has been finally determined by a court of competent jurisdiction.¹²⁰

Similarly to *R v Mercer*, *R v Poulin*¹²¹ was an appeal by the Crown against the acquittal of the accused after he was charged with attempting to obstruct justice in contravention of section 139(2) for refusing to testify at a preliminary inquiry. The facts of this case were as follows. Poulin appeared as a witness at a preliminary inquiry of one Jose Boulet. He refused to answer questions put to him by the Crown's counsel. The presiding judge adjourned the inquiry and issued a warrant of committal to prison in terms of section 545 of the Criminal Code. On the second occasion, after being sworn in, Poulin again refused to

¹¹⁹*R v Mercer supra* (n 109).

¹²⁰The doctrine of *res judicata* states that once an issue has been decided by a court of competent jurisdiction, the same issue cannot be re-litigated in future between the same parties. See PW Hogg *Constitutional Law of Canada* 3ed (1992) 1247 and Hendricks, Charles and Williams "100 Years of double jeopardy erosion: Criminal collateral estoppel made extinct" (2000) *Drake Law Review* Vol 48 No 2 390.

¹²¹*R v Poulin supra* (n 110).

testify. This time the judge ordered that he be removed from the courtroom. He did not issue a warrant of committal against him for the second refusal. The charge of contravening section 139(2) against Poulin emanated from the second refusal to testify.

It was advanced for the defence that Poulin could not be charged with the offence in question because a witness who refuses to testify at a preliminary inquiry could only be dealt with in terms of section 545.¹²² The trial court was of the opinion that when the presiding judge exercised the discretion, conferred on him by section 545, at the time of Poulin's first refusal to testify, to commit Poulin to prison, he "set in motion" a process of punishment which had to apply to all subsequent refusals of the same nature.¹²³ The Supreme Court of Appeal was called upon to consider whether or not, after resorting to the section 545 procedure in the first refusal to testify, the Crown could charge Poulin under section 139(2) for the second refusal.

The Supreme Court of Appeal observed that the decision of the *court a quo* was erroneous insofar as Poulin's refusal to testify for a second time could form the offence of obstructing justice within the meaning of section 139(2) because the court had not exercised its jurisdiction under section 545.¹²⁴ The acquittal was quashed and substituted by a verdict of guilty under section 139(2).¹²⁵

It is submitted that the decision of the Supreme Court of Appeal in setting aside Poulin's acquittal is correct. The respondent's refusal to testify on the first occasion before his committal to prison and the second refusal constituted two distinctive causes of action. He was already punished for the first cause of action. It was, therefore, absurd to say that the

¹²²At 117-18.

¹²³At 118.

¹²⁴*Ibid.*

¹²⁵At 120.

judge should have followed the same process he followed to punish the first cause of action when dealing with the second refusal. In *R v Mercer*¹²⁶ it was said that if the respondent had in his second appearance been asked to testify and had again refused, he could have been charged under sections 127(2) or (8).¹²⁷

The difference between the *R v Mercer* and *R v Poulin* cases is that in the former case, the respondent was never asked to be sworn in and to testify after his committal to prison for the first refusal. Charging him under section 139(2) for the first refusal would be like vexing him twice for the same offence. In the latter case, the respondent was again called upon to testify after he was sworn in, but again he refused to answer questions from the Crown counsel. The first and the second refusals to testify constituted two distinctive offences that could be dealt with either under section 545 or under section 139(2) of the Criminal Code. Another difference between these cases is that, in *Mercer*, the respondent refused to be sworn in whereas in *Poulin* he had been sworn in but refused to testify.

g. **Counselling false testimony.**¹²⁸ This offence is committed when X approaches Y, who is not necessarily a witness in a case against X, and requests him to provide false testimony in a judicial proceeding for the benefit of X with the intention of leading the court to reach a false conclusion. Authority that deals with counselling false evidence is found in *R v Hearn and Fahey*¹²⁹ and *R v Charbonneau*.¹³⁰

In *R v Hearn and Fahey*, the Court of Appeal was called upon to hear an appeal by the

¹²⁶*R v Mercer supra* (n 109).

¹²⁷At 352.

¹²⁸Rodrigues *op cit* (n 11) 4-111.

¹²⁹(1989) 48 CCC (3d) 376.

¹³⁰(1992) 74 CCC (3d) 49.

Crown against the acquittal of the accused on a charge of attempting to obstruct justice by counselling false testimony to be presented in a judicial proceeding. The facts of this case were as follows. The respondents, Hearn and Fahey, were charged with wilfully attempting to obstruct the course of justice. Allegedly, sometime in 1986, Mr Fahey was found in the driver's seat of a vehicle in an intoxicated condition. A peace officer demanded breath samples from him and Fahey refused, stating that he had not been driving the vehicle. He was then charged for refusing to comply with a demand for breath samples. Allegedly, prior to trial, Fahey and Hearn, who was Fahey's lawyer, approached one Donald Griffin and requested him to testify that he had been driving the vehicle on the said evening and that he abandoned it after it had broken down, leaving Fahey and another companion in it. Griffin reported the matter to the police. Fahey was convicted of refusing the peace officer's demand for a breath sample. After that trial Fahey and Hearn were charged with wilful attempt to obstruct the course of justice in contravention of section 127(2), now section 139(2),¹³¹ by counselling Griffin to give false testimony. The trial court considered Griffin's evidence would have been irrelevant to the outcome of the trial of Mr Fahey on a charge of refusing to give a breath sample. The court acquitted both respondents¹³² on the charge of obstruction the course of justice on the basis that the question of who was driving the vehicle earlier in the evening was not relevant to the issue which had been before the court on the breathalyser charge.¹³³ The Crown appealed against the acquittal.

The issue before the Court of Appeal was whether a person may be guilty of an offence of wilfully attempting to obstruct the course of justice by counselling another person to testify falsely at a trial when the false testimony proposed could not, as a matter of law, affect the outcome of that trial.¹³⁴ In answering the question, the Court of Appeal referred to English

¹³¹*R v Hearn and Fahey supra* (n 129) at 378.

¹³²At 379.

¹³³At 376.

¹³⁴At 379.

authorities like *The Queen v Vreones*,¹³⁵ and *R v Rowell*¹³⁶ and found that the gist of the offence under section 127(2) was the performance of an act which has a tendency to pervert or obstruct the course of justice and which was done for that purpose.¹³⁷ The court noted that the gravamen of the offence under section 127(2) (now section 139(2)) was the wilful attempt to obstruct justice no matter whether the attempt was successful or not. The court held that on a charge of wilful attempt to obstruct justice by counselling false testimony in a pending trial, if the evidence revealed a guilty mind, it did not matter that the intention could not be satisfied by the act undertaken.¹³⁸

The court's decision is supported because when Fahey and Hearn counselled false testimony from Griffin, they intended that false evidence be put before the court to exonerate Fahey in the breath sample charge. Their conduct had the requisite tendency and requisite intent to pervert or obstruct the course of justice. The offence of obstructing the course of justice was committed and completed the moment the respondents attempted to procure false testimony from Mr Griffin.

It is against this background that this thesis respectfully submits that the trial judge's point of departure was misplaced when he said: "... if that counselling had been brought to its intended conclusion, would have likely resulted in an obstruction of justice."¹³⁹ The court concluded that the evidence of Mr Griffin would have been irrelevant to the outcome of the trial of Mr Fahey and dismissed charges against both respondents. The trial judge approached this crime like a result crime, where justice had to be obstructed as a result of

¹³⁵*The Queen v Vreones supra* Chapter Two (n 93).

¹³⁶*R v Rowell supra* Chapter Three (n 46).

¹³⁷*R v Hearn and Fahey supra* (n 129) at 380.

¹³⁸At 381.

¹³⁹At 379.

the respondents' conduct. This is not what section 127(2) (now section 139(2))¹⁴⁰ says; it requires a wilful attempt to obstruct, pervert or defeat the course of justice. This leads us to the decision in *R v Charbonneau*.¹⁴¹

The facts of the case were as follows: A lawyer, Charbonneau, was asked by a fellow lawyer to speak to one of that other lawyer's clients in order to obtain an affidavit. It was alleged that in November 1984 a violent explosion killed one Paul April and some of his friends. In 1985, an inquest was held concerning the death of Mr April. Mr Yves Trudeau testified to the effect that he and Michel Blass, Charbonneau's client, had committed the killings by planting a time bomb in a television set delivered to the scene of the crime by Blass. He told the Coroner that he and Blass had been engaged by one Allan Ross to kill April to avenge the killing of a drug dealer called Frank Ryan.¹⁴²

After learning of Trudeau's evidence at the Coroner's inquest, Allan Ross, accompanied by his attorney, Sidney Leithman, went to the police and maintained his innocence. Leithman told the police that he would attempt to obtain a statement from Blass which would confirm his client's innocence.¹⁴³ When Leithman contacted Michael Blass he was not willing to talk to anyone except Charbonneau. Leithman requested Charbonneau to meet Blass and have him sign an affidavit denying the participation of Blass and Ross in the explosion that killed April and his friends.¹⁴⁴

It was alleged that on September 20, 1985, Charbonneau remitted to Blass a draft affidavit

¹⁴⁰The Criminal Code 1985.

¹⁴¹*R v Charbonneau supra* (n 130).

¹⁴²At 53c-d.

¹⁴³At 53f-g.

¹⁴⁴At 53h.

prepared by Leithman and a copy of the transcript of Trudeau's evidence before the Coroner. In substance the affidavit claimed that the evidence given by Trudeau concerning Blass was false, that Blass had never delivered the television set and that he never received any money from Trudeau.¹⁴⁵ Immediately after that conversation with Charbonneau, Blass complained to the police that Charbonneau was attempting to have him sign an affidavit that was false. Police requested his permission to record his conversations with Charbonneau. The police, without any judicial authorisation, fitted Blass with a body-pack.¹⁴⁶ Charbonneau was then charged with attempting to obstruct justice contrary to section 139(2) of the Criminal Code for counselling false testimony from Blass.¹⁴⁷ He was convicted of attempting to obstruct the course of justice in contravention of section 139(2) of the Criminal Code for counselling false testimony from Blass. He appealed against this conviction on the following bases:¹⁴⁸

(1) That the trial judge erred as to the *mens rea* required for the crime of obstructing the course of justice. He argued that the essential element of the crime of obstructing the course of justice to be proved by the Crown was the specific intent to obstruct the course of justice. It was argued that the trial judge erred in not directing himself regarding to the specific intent required.¹⁴⁹ On this point the Appeal Court observed that it was unlikely that the trial judge could have misunderstood or misdirected himself on the element of intent because he recognised that the "act had to be committed wilfully" and that the court acknowledged that the purpose or tendency to obstruct justice had to be present.¹⁵⁰

¹⁴⁵At 54a-b.

¹⁴⁶At 54c-d.

¹⁴⁷At 50f.

¹⁴⁸At 51.

¹⁴⁹At 59d-e.

¹⁵⁰At 60b-c.

(2) That the trial judge erred in refusing to recognise Charbonneau's defence that he honestly believed the facts set out in the affidavit to be true. Charbonneau contended that even if allegations in the affidavit presented to Blass were false, he ought not to have been convicted of obstructing the course of justice if he honestly believed that the affidavit was true or if there was a reasonable doubt in the evidence that he believed so.¹⁵¹ After taking into context the whole judgment, the Appeal Court ruled that the trial judge did not exclude, in principle, the defence of honest belief. It further observed that the trial court did not shift the burden of proving honest belief to Charbonneau.¹⁵²

(3) That, even if the trial judge recognised, in theory, the defence of honest belief in the truth of the affidavit, the judge did not, in any event, give Charbonneau the benefit of a reasonable doubt as to his honest belief, but instead imposed on Charbonneau a burden that was heavier than that of raising a reasonable doubt as to his belief in the truth of the affidavit. This ground of appeal was also overruled.¹⁵³

(4) That the trial judge erred in concluding that the false affidavit would have a "tendency" to obstruct, pervert or defeat the course of justice. He contended that even if there was enough evidence that he intended to obstruct the course of justice, the act of counselling false evidence from Blass did not have a tendency to obstruct the course of justice and it did not meet the requisite tendency. The Appeal Court noted that if the false affidavit had been delivered to the police or used to discredit Blass's evidence during the trial, it would certainly have had that requisite tendency to pervert the course of justice. The court held that Charbonneau knew that the affidavit was false and that he actively attempted to have

¹⁵¹At 60f-g.

¹⁵²At 62a-g.

¹⁵³*Ibid.* The court provided the same reasons.

Blass execute it, in spite of Blass's insistence that it was false.¹⁵⁴

(5) That the trial judge erred in refusing Charbonneau access to statements given by Blass concerning his previous crimes.¹⁵⁵

(6) That the trial judge erred in refusing to permit Charbonneau to cross-examine Blass on certain conversations with Charbonneau on grounds of attorney-client privilege.¹⁵⁶ The court held that "the trial judge erred in limiting the cross-examination of Blass on grounds of privilege."¹⁵⁷

(7) That the trial judge failed to direct himself as to Blass's credibility. The court observed that this was unfounded.¹⁵⁸

The court allowed the appeal and ordered a new trial.¹⁵⁹ It is clear that the appeal was allowed partly because of the sixth ground of appeal that was decided in Charbonneau's favour.¹⁶⁰

The difference between *R v Charbonneau* and *R v Hearn and Fahey* is that in *Charbonneau* the accused attempted counselling false evidence from a person who was not a potential witness in a case against him. In the latter case, Blass was a potential witness in the Coroner's inquest where Allan Ross was implicated by Trudeau's testimony.

¹⁵⁴At 63g-h.

¹⁵⁵At 56a.

¹⁵⁶At 56a-b.

¹⁵⁷At 71f.

¹⁵⁸At 64a-b.

¹⁵⁹At 73e.

Contrary to section 139(3) where it is said that where the accused used corrupt means to dissuade a witness, in terms of section 139(2) it is immaterial whether he or she believed that evidence sought to be suppressed was true or false.¹⁶¹ Where no corrupt means are used and X is charged under subsection (2) for wilfully attempting to obstruct justice by inducing another to give false evidence the state must prove that X's action was a wilful attempt to obstruct the course of justice.¹⁶² For the state to succeed on a charge under section 139(2) it is not necessary that the course of justice actually be impeded by the accused. The offence is complete once he or she has wilfully attempted to impede the due administration of justice. It is said that the actions of the accused must have a tendency to obstruct, pervert or defeat the course of justice. This means that it must be possible to carry it through to its conclusion.¹⁶³

Greenspan and Rosenberg¹⁶⁴ say that any attempt to pay compensation in any form to a witness that has, as its purpose, a direct tendency to influence a witness not to give evidence in a judicial proceeding, irrespective of the motive for doing so, is a corrupt attempt to obstruct justice. Similarly, an attempt by the assailant to pay compensation to the complainant in order to influence the proceeding, for example, persuading the state to withdraw the charge, is capable of amounting to an offence of obstruction of justice. However, in *R v Kotch*¹⁶⁵ it was said that honestly approaching a witness who has made a false or mistaken statement and, by reasoned arguments supported by material facts, trying

¹⁶⁰See the discussion of this ground of appeal *supra* (n 156 to n 157).

¹⁶¹Mewett and M Manning *op cit* (n 18) 490.

¹⁶²Mewett and Manning *op cit* (n 11) 663 490.

¹⁶³Mewett and Manning *op cit* (n 11) 664.

¹⁶⁴Greenspan and Rosenberg *op cit* (n 11) CC/261 and Rodrigues *op cit* (n 11) 4-115-116.

¹⁶⁵(1990) 61 CCC (3d) 132 (Alta CA).

to dissuade him or her from giving perjured or erroneous testimony does not constitute an offence.

The facts of this case were as follows: Kotch was charged with wilful attempt to obstruct the course of justice in violation section 139(2).¹⁶⁶ A friend of Kotch had been charged with shoplifting. In an effort to have the charges against his friend withdrawn, the accused approached Frederick Burton, an employee at the store concerned, and offered to pay a sum of money as a charitable donation on behalf of the store if they would withdraw the charge. He indicated that the store could take advantage of the charitable donation by making it a promotional gesture for the store. In his conversation with Burton, the accused told Burton that he was not trying to bribe him.¹⁶⁷ It was alleged that before the accused approached the said employee he sought legal advice, and he was told that it was not an offence provided that the particular store did not receive any benefit. It was also alleged that he did not disclose to his lawyer the plan of making the seeming charitable donation on behalf of the store and the promotion attached to the gesture.¹⁶⁸ During the trial Kotch indicated that he had no intention of committing a criminal offence, but that was dismissed. He was found guilty of contravening section 192(2). He appealed.¹⁶⁹ The conviction was challenged on the grounds that the trial judge failed to tell the jury that although Kotch intended his actions there was enough evidence to support the fact that he did not know, or he did not intend, that his actions would have the effect of obstructing justice. He argued that there was no proof that he had specific intent of wilfully attempting to obstruct justice.¹⁷⁰ The court confirmed that the presence of the word “wilfully” in subsections (1),(2) and (3) of

¹⁶⁶The Criminal Code 1985.

¹⁶⁷*R v Kotch supra* (n 165) at 132.

¹⁶⁸*Ibid.*

¹⁶⁹At 135.

¹⁷⁰At 135-36.

section 139 and the presence of the phrases “corrupt means” and “corrupt considerations” in section 139(3) invite a declaration that the offence described within section 139(3) is an offence requiring proof of a specific intent. Notwithstanding this confirmation, the court held that any attempt to pay compensation, in any form, to a witness that has as its purpose a direct tendency to influence the witness not to give evidence in a judicial proceeding, irrespective of the motive for doing so, is a corrupt attempt to obstruct justice.¹⁷¹ The appeal was dismissed¹⁷² because there was no doubt that Kotch offered the store a benefit in exchange for its withdrawal of the charges against his friend and that it was intended as such. The court held that the gravamen of this type of obstruction of justice is the corrupt attempt itself.¹⁷³ The court further held that the offence would not, however, cover a *bona fide* negotiation for the withholding, withdrawal or reduction of a charge that is conducted with a law officer of the Crown.¹⁷⁴

This thesis supports the dismissal of the appeal because Kotch’s actions were intended and had a tendency of obstructing the course of justice. Although he was not going to benefit anything from the deal, his friend would benefit. His acts aptly fitted the specific intent required by the words “wilfully” in section 139(2).

5.3.3 Interfering with witnesses

Any interference with witnesses and potential witnesses by threats, bribes or other corrupt means, in order to dissuade or attempt to dissuade them from giving evidence constitutes obstruction of the course of justice and is governed by section 139(3)(a). This subsection does not refer to “witnesses,” but simply states to “dissuade a person.” The law forbids the

¹⁷¹At 136.

¹⁷²At 139.

¹⁷³At 132.

¹⁷⁴At 132-33.

actual or attempted, and by corrupt means, dissuasion of a person from testifying in a particular way or to dissuade him or her from testifying at all. Where the accused used corrupt means to dissuade a person, it is immaterial whether the accused believed that the evidence he or she sought to suppress was true or false. It is sufficient for liability that the accused intentionally did the prohibited act for the purpose of dissuading a person from giving evidence.¹⁷⁵

In *R v Walker*¹⁷⁶ the court found that it was immaterial whether the accused believed the evidence he seeks to suppress by his corrupt dissuasion was true or false.¹⁷⁷ The facts of *R v Walker* were as follows: Y made a statement to the police that falsely implicated X, the accused, as the person who had committed a particular robbery.¹⁷⁸ Before he was formally charged, the accused threatened Y to dissuade him from repeating this false allegation in a later trial. At a preliminary hearing, Y told the truth and the accused (X) was discharged.

X was charged with the wilful attempt to dissuade Y from giving evidence in contravention of section 127(2)(a) (now section 139(3)(a)).¹⁷⁹ The legal question in this case was, if the accused was not guilty of robbery, would his threat to Y which successfully induced Y to correct the statement he gave to the investigating officer, constitute obstructing the course of justice because he had dissuaded Y from giving evidence?¹⁸⁰ It was held that the offence of obstructing the course of justice covers not merely attempts to dissuade a witness from

¹⁷⁵Mewett and Manning *op cit* (n 11) 662-63 and Rodrigues *op cit* (n 11) 4-113.

¹⁷⁶(1972) 7 CCC (2d) 270.

¹⁷⁷At 274.

¹⁷⁸By falsely implicating X to have committed an offence, Y commits an offence of public mischief in contravention of section 140(1) of the Criminal Code. The provisions of section 140(1) are discussed *infra*, text note 207.

¹⁷⁹The Canadian Criminal Code 1985. See *R v Walker supra* (n 176) at 274

¹⁸⁰*R v Walker supra* (n 176) at 272.

testifying, but also attempts to dissuade a witness from giving certain specific evidence.¹⁸¹

The accused was convicted of attempting to obstruct the course of justice by attempting to dissuade a witness by threats to testify in a certain manner.¹⁸²

It is submitted that the conviction of the accused was correct because section 127(2)(a) (now section 139(3)(a)) is clear on the matter. Wilfully dissuading or attempting to dissuade a person by threats does obstruct or pervert the course of justice and the accused's conduct fitted squarely into what this subsection forbids. Any attempt to interfere with a witness in order to make him or her to change his or her testimony and to say what the accused thinks is the truth has a tendency of obstructing the course of justice. Similarly, an offer of money to a witness to induce him or her to speak what the offeror believes to be the truth may be an offence.¹⁸³

5.3.4 Concealing or suppressing evidence

Wilfully concealing or suppressing evidence with intent to obstruct the course of justice is a violation of section 139(2).¹⁸⁴ This offence is committed when X, in contemplating a judicial proceeding, conceals or suppresses evidence that may be needed in that judicial proceeding. The wilful attempt to conceal or suppress evidence has the tendency to obstruct the course of justice and, therefore, infringes section 139(2). Such concealment or suppression has far-reaching consequences for the proper administration of justice in all of its stages. Any attempt to conceal evidence from the police, for example, may obstruct them in their duty to investigate criminal activities. It may also deprive the court of admissible evidence.

¹⁸¹At 270.

¹⁸²At 275.

¹⁸³See Smith and Hogan *op cit* Chapter Two (n 93) 754.

¹⁸⁴Vandervort *op cit* (n 9) 171 and Mewett and Manning *op cit* (n 18) 490.

A charge of concealment or suppression of evidence came before the Canadian court in 2000 in *R v Murray*.¹⁸⁵ The accused was charged with attempt to obstruct the course of justice¹⁸⁶ in terms of section 139(2). Murray, a lawyer and a member of the Ontario Bar, was charged with attempting to obstruct justice by concealing six videotapes which he removed from his client's home at the instruction of his client. Murray kept the tapes for seventeen months without disclosing their existence to the prosecution. The videotapes constituted material evidence against his client, Paul Bernado, who was charged with first degree murder and related offences concerning the deaths of two teenage girls.¹⁸⁷ The charge of obstructing the course of justice emanated from the actions of Bernado's defence team, Murray, Doyle and MacDonald, when they visited Bernado's house, searched for and found the tapes, and then concealed them. Murray found the tapes, as directed by his client, and he requested his colleagues to ensure that no one found out about the existence of the tapes. Murray locked the tapes in a safe or a credenza at his office, because he felt the discovery of those tapes was a "bonanza" for the defence. He was charged with attempt to obstruct the course of justice for concealing the tapes. The six videotapes, and two critical tapes, formed the basis of the charge against the accused. The critical tapes contained horrifying visuals of two girls of 14 and 15 years, who were abducted by Bernardo and his wife, Homolka, being forced to participate with Bernardo and his wife in the grossest sexual perversions.¹⁸⁸ He did not alert the prosecuting counsel about the existence of any videotapes.

In his defence on charges of attempt to obstruct justice by concealing the tapes, Murray

¹⁸⁵(2000) 144 CCC (3d) 289 (Ont SCJ).

¹⁸⁶In contravention of section 139(2).

¹⁸⁷*R v Murray supra* (n 185) 289.

¹⁸⁸At 295.

testified that he had to retain the critical tapes for Bernardo's defence. He testified that he had two alternative plans for the use of the tapes. Firstly, to hold back the tapes, tie down the main prosecution witness's evidence at a preliminary inquiry and show her the tapes in cross-examination during trial. Secondly, he would use them in an attempt to negotiate a resolution of the charges against the client on the basis that the defence had evidence which would show that the main prosecution witness was not credible. He told the court that it was never his intention to permanently conceal the tapes and that at the very least they would come out at the trial.¹⁸⁹

The court held:¹⁹⁰

The *mens rea* of the offence of attempting to obstruct justice required the crown to prove beyond a reasonable doubt that the accused intended to obstruct the course of justice. This required consideration of whether the accused intended to conceal the tapes permanently or only up to the point of resolution discussions or trial, and whether it was the accused's honest belief that he was entitled to do so. The accused's explanation as to his use of the two critical tapes in the defence of his client was one that might reasonably be true, and he may well have believed under the circumstances that he had no legal duty to disclose the tapes until resolution discussions or trial. There was a reasonable doubt as to the accused's intention to obstruct justice.

The accused was acquitted on the charge of attempting to obstruct justice because, according to the court, in the context of the evidence, Murray's testimony raised a reasonable doubt as to his intention to obstruct justice.¹⁹¹

The *R v Murray* decision is strongly criticised by some legal commentators, especially by Vandervort.¹⁹² According to Vandervort,¹⁹³ the trial judge erred in his interpretation and application of the law of *mens rea* in the offence of wilfully attempting to obstruct the

¹⁸⁹At 290.

¹⁹⁰*Ibid.*

¹⁹¹At 322.

¹⁹²Vandervort *op cit* (n 9).

¹⁹³Vandervort *op cit* (n 9) 171.

course of justice. Vandervort argues that even if Murray honestly believed that he had a duty to his client not to disclose the existence of the videotapes, such belief could not provide him with an exculpatory defence because in Canada mistakes of law do not excuse the accused from responsibility for criminal conduct in the absence of statutory exception.¹⁹⁴ The court held that the confidentiality of the tapes was not protected under the umbrella of attorney-client privilege.¹⁹⁵ Attorney-client privilege protects communication between an attorney and his or her client. It was further held that videotapes were not such communications and hiding them from the police on behalf of the client could not be said to be an aspect of attorney-client communication.¹⁹⁶ It is said that the *R v Murray* case was wrongly decided in law and that it should not be followed as a precedent creating a judicial exemption from criminal responsibility for lawyers who obstruct justice. Vandervort says that mistake of the law, as the defence to the offence of obstruction of justice is a “bad excuse” for lawyers and laymen alike.¹⁹⁷

This thesis agrees with the critique of the *Murray* case as a poor decision, because at all material times the accused concealed the tapes knowing very well that they were material to the charge of murder against his client. In keeping those tapes, Murray ventured outside the limits of attorney-client privilege, and entered the domain of section 139(2). The concealment of the incriminating tapes was intended, and had the tendency, to obstruct the due administration of justice because it deprived the court of vital admissible evidence. In the eyes of the general public, decisions like this create an impression that the courts are prepared to treat legal practitioners who find themselves on the wrong side of the law with leniency. It is respectfully submitted that, if followed, the *Murray* decision has a tendency

¹⁹⁴*Ibid.*

¹⁹⁵*R v Murray supra* (n 185) at 313. See also Vandervort *op cit* (n 9) 175.

¹⁹⁶*R v Murray supra* (n 185) at 313.

¹⁹⁷Vandervort *op cit* (n 9) 185.

to bring any country's judicial system into disrepute, and it must therefore be treated with the greatest circumspection.

5.4 OTHER STATUTORY OFFENCES AKIN TO OBSTRUCTION OF JUSTICE

Under the Criminal Code there are many specific provisions which cover conduct which has the effect of obstructing the course of justice, such as obstructing a peace officer, giving contradictory evidence in judicial proceeding, fabricating evidence, public mischief and attempting to bribe a trial judge.¹⁹⁸ Mewett and Manning¹⁹⁹ argue that by enacting these specific provisions, Parliament intended to exclude the conduct contained in them from the general offence under section 139(2).

5.4.1 Obstructing a peace officer

Obstructing a peace officer is an offence related to obstructing the course of justice. The offence is found in the provisions of section 129 of the Criminal Code.²⁰⁰ This section provides:²⁰¹

Everyone who—

- (a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person acting in aid of such an officer,
- (b) omits, without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he is required to do so, or
- (c) resists or wilfully obstructs any person in the execution of a process against lands or goods or in making a lawful distress or seizure, is guilty of

¹⁹⁸Mewett and Manning *op cit* (n 11) 667 and Watt and Fuerst *op cit* (n 11) 240.

¹⁹⁹Mewett and Manning *op cit* (n 18) 494.

²⁰⁰The Canadian Criminal Code 1985.

²⁰¹Greenspan and Rosenberg *op cit* (n 11) CC/245; Watt and Fuerst *op cit* (n 11) 237-38; Saxton and Stansfield *op cit* (n 11) 50 and Heather *op cit* (n 11) 4-7.

- (d) an indictable offence and is liable to imprisonment for a term not exceeding two years, or
- (e) an offence punishable on summary conviction.

Although it is a separate offence, section 129(a) and (c) are related to the offence of obstructing, perverting or defeating the course of justice found in section 139(2). The scope of the course of justice includes the investigatory stage of the criminal act. By implication, if X wilfully obstructs a peace officer, for instance, in the investigation of a criminal act, X obstructs the course of justice. Seizure of any article, goods or documents that could be made available as evidence in a judicial proceeding is essential for the administration of justice. If X obstructs a peace officer when executing the seizure of any piece of evidence that may be of assistance in court, such obstruction has a tendency to frustrate the course of justice. Depending on X's intent when obstructing the peace officer, a charge of obstructing the course of justice may also be invoked in some of the circumstances set out in section 129.

5.4.2 Witness giving contradictory evidence

Giving contradictory evidence in judicial proceedings is a punishable offence. Section 136 provides:²⁰²

- (1) Everyone who, being a witness in a judicial proceeding, gives evidence with respect to any matter of fact or knowledge and who subsequently, in a judicial proceeding, gives evidence that is contrary to his previous evidence is guilty of an indictable offence ...

This offence may amount also to obstruction of justice because the witness withholds true evidence from the judicial proceeding. This offence also overlaps with perjury.

5.4.3 Fabricating evidence

Under the Canadian Criminal Code, and unlike the law of England²⁰³ and Australia,²⁰⁴ the

²⁰²Greenspan and Rosenberg *op cit* (n 11) CC/255; Watt and Fuerst *op cit* (n 11) 237-38; Saxton and Stansfield *op cit* (n 11) 50; Heather *op cit* (n 11) 4-11 and Rose *op cit* (n 11) 4-12.

²⁰³*The Queen v Vreones supra* Chapter Two (n 93).

offence of fabricating evidence does not fall under obstruction of the course of justice, but nevertheless it is discussed under this heading. The prohibition of fabricating evidence is found in section 137.²⁰⁵ This section provides:²⁰⁶

Everyone who, with intent to mislead, fabricates anything with intent that it shall be used as evidence in a judicial proceeding, existing or proposed, by any means other than perjury or incitement to perjury is guilty of an indictable offence and is liable to imprisonment for a term not exceeding fourteen years.

This section creates an indictable offence of fabricating anything which the accused intends to use in a judicial proceeding. Section 137 is broadly worded to apply to circumstances in which such proceedings are either in existence or are proposed at the time the fabrication occurs.²⁰⁷ The culpability required for this offence is that the accused acted with intention to mislead even if the evidence is not used.²⁰⁸

5.4.4 Public mischief

X commits an offence and contravenes section 140(1) of the Criminal Code by causing the police or other peace officer to start or to continue an investigation with intent to mislead them.²⁰⁹ X, for example, makes a false statement to the police that Y is the person who committed a bank robbery. As a result of that statement the police commence with the investigation against Y. Section 140²¹⁰ provides:

²⁰⁴Gillies *op cit* Chapter Four (n 6) 815.

²⁰⁵The Canadian Criminal Code 1985. See Greenspan and Rosenberg *op cit* (n 11) CC/257.

²⁰⁶Greenspan and Rosenberg *op cit* (n 8) CC/257; Watt and Fuerst *op cit* (n 8) 237-38; Saxton and Stansfield *op cit* (n 11) 50 Heather *op cit* (n 11) 4-11 and Rose *op cit* (n 11) 4-12.

²⁰⁷EL Greenspan and M Rosenberg *Martin's Annual Criminal Code* (2004) CC/225 and Watt and Fuerst *op cit* (n 11) 235.

²⁰⁸Greenspan and Rosenberg *op cit* (n 11) CC/257 and Heather *op cit* (n 11) 4-11-12.

²⁰⁹See Saxton and Stansfield *op cit* (n 11) 53 and Greenspan and Rosenberg *op cit* (n 206) CC/260.

²¹⁰Criminal Code 1985. See Saxton and Stansfield *op cit* (n 11) 53-4; Watt and Fuerst *op cit* (n 11) 240-4 and

- (1) Everyone commits public mischief who, with intent to mislead, causes a peace officer to enter on or continue an investigation by
- (a) making a false statement that accuses some other person of having committed an offence;
 - (b) doing anything that is intended to cause some other person to be suspected of having committed an offence that the other person has not committed, or to divert suspicion from himself;
 - (c) reporting that an offence has been committed when it has not been committed; or
 - (d) reporting or in any other way making it known or causing it to be made known that he or some other person has died when he or that other person has not died.
- (2) Everyone who commits public mischief
- (a) is guilty of an offence and liable to imprisonment for a term not exceeding five years; or
 - (b) is guilty of an offence punishable on summary conviction.

The *actus reus* of this offence is to cause the police or other peace officer to start or to continue an investigation.²¹¹ There must be a causal link between the police investigation and the false statement.²¹² The *mens rea* is intent to mislead the peace officer.²¹³

5.4.5 Attempt to bribe a trial judge

In terms of section 119(1)(a) of the Criminal Code, X, being, *inter alia*, the holder of a judicial office, commits an offence if he or she accepts or obtains or agrees to accept or attempts to obtain, any money, valuable consideration, etc., for himself or herself or another person in respect of anything done or omitted or to be done or omitted by him or her in his

Rodrigues *op cit* (n 11) 4-120.

²¹¹Saxton and Stansfield *op cit* (n 11) 53 and Watt and Fuerst *op cit* (n 11) 241.

²¹²Watt and Fuerst *op cit* (n 11) 241.

²¹³Saxton and Stansfield *op cit* (n 11) 53 and Watt and Fuerst *op cit* (n 11) 241.

or her official capacity.²¹⁴

In terms of section 119(1)(b), X commits an offence if he or she corruptly gives or offers any money, valuable consideration, etc., to, *inter alia*, the holder of a judicial office in respect of anything done or omitted or to be done or omitted by him or her (the holder of a judicial office) in his or her official capacity.²¹⁵

5.5 SUMMARY

The offence of obstructing, perverting or defeating the course of justice is governed by section 139(1)-(3) of the Criminal Code, RSC 1985. Section 139(1) only creates an offence of perverting the course of justice by indemnifying a surety. Section 139(2) creates a broad offence of obstruction of justice. Section 139(3) deals with witnesses in judicial proceeding.

Canadian law distinguishes between conduct related to a judicial proceeding and conduct not related to a judicial proceeding. Sections 139(1) and (3) require that an attempt to obstruct, pervert or defeat “should relate to the course of justice in a judicial proceeding.” Contrary to section 139(1) and (3), no mention is made of a “judicial proceeding” in section 139(2). Therefore, in terms of this section, the obstruction of justice does not have to occur in relation to a “judicial proceeding.” This means that when a wilful attempt to interfere with prospective witnesses occurs at a stage before the state has considered, or decided, to lay a charge in the matter, X has to be charged under section 139(2) for attempting to obstruct the course of justice. Although this offence is framed in the language of an attempt, section 139 creates a substantive offence.

²¹⁴See Heather *op cit* (n 11) 4-1-2 and Watt and Fuerst *op cit* (n 11) 211.

²¹⁵See Heather *op cit* (n 11) 4-2 and Watt and Fuerst *op cit* (n 11) 211.

A “judicial proceeding” is defined broadly in section 118 of the Criminal Code as a proceeding:

(a) in or under the authority of the court;

(b) before the Senate or House of Commons, or a committee of the Senate or House of Commons, or before a legislative council, legislative assembly or house of assembly or a committee thereof that is authorised by the law to administer an oath;

(c) before a court, judge, justice, provincial court judge or coroner;

(d) before an arbitrator or umpire, or a person or body of persons authorised by law to make an inquiry and take evidence therein under oath; or

(e) before a tribunal by which a legal right or legal liability may be established whether or not the proceeding is invalid for want of jurisdiction or for any other reason. It is clear that the validity of the proceeding is not a prerequisite.

In terms of section 139(1) an attempt to obstruct, pervert or defeat the course of justice is constituted by wilfully indemnifying or agreeing to indemnify a surety, or by a surety in accepting or agreeing to accept any form of indemnity in respect of a person who is released or is to be released from custody.

Section 139(2) prohibits *any* wilful attempt to obstruct, pervert or defeat the course of justice. This includes, but is not limited to the following conduct:

- a. Wasteful employment of police. This offence is committed by wilfully making a false report to the police tending to show that an offence has been committed.
- b. Removing a witness or the accused from the court's jurisdiction.
- c. Persuading a victim not to prosecute his or her assailant.
- d. Destroying evidence. When X wilfully attempts to destroy any evidence with intention to obstruct, pervert or defeat the course of justice.
- e. Concealing or suppressing evidence. This offence is committed when X, in contemplating a judicial proceeding, conceals or suppresses evidence that may be needed in court.
- f. Misleading the court. A lawyer, for example, is under a duty not to mislead the court and may be convicted of obstructing the course of justice where he participates in the client's deception by arranging for the client's friend to attend in court and answer to a charge against a client, who had previously given that friend's name to the police as his own upon arrest.
- g. Refusal to testify in an inquiry. If X refuses to be sworn in and testify at a preliminary inquiry, such refusal amounts to obstructing the course of justice and he or she can be charged with contravening section 139(2) of the Criminal Code.

Section 139(3)(a)-(c) prohibits, in an "existing" or "proposed" judicial proceeding, the dissuasion or attempt to dissuade a person by threats, bribes, etc., from giving evidence, or

from corruptly influencing a juror or to accept or obtain, or any attempt thereof, a bribe in order to abstain from giving evidence or from doing anything as a juror. Section 139(3) of the Criminal Code 1985 requires that the judicial proceeding be “existing” or “proposed.” It is said that a judicial proceeding is “existing” in the case of criminal proceedings once a charge has been laid, and it is “proposed” when a decision to prosecute has been made and perhaps when prosecution is contemplated. It is said that a judicial proceeding is not “proposed,” for the purposes of section 139(3), when an investigation to determine whether there has been criminal conduct is merely under way. Therefore, if X interferes with a potential witness before the Crown has decided to, or considered, laying charges in the matter, then the proper charge will be under section 139(2) of the Criminal Code for obstructing the course of justice. The scope of the crime of obstructing the course of justice has been widened to include conduct which amounts to interference with police investigations of criminal activities and threats made by the accused after sentence has been passed. The words used in section 139(2), namely, “the course of justice” are interpreted as including the investigatory stage of a crime. The term is also applicable to disciplinary proceedings of the Law Society.

There are similarities between the Canadian and Australian law as to when the course of justice begins. Just as Australian law states that the course of justice only begins once the jurisdiction of some court or competent judicial authority is invoked, section 139(3) of the Canadian Criminal Code requires that there must be an “existing” or “proposed” judicial proceeding before the offence of perverting, preventing or defeating the course of justice can be committed. On the other hand, similar to English law, under section 139(2) of the Canadian Criminal Code the proceedings need not be existing or proposed before the course of justice can be perverted. It can be perverted before proceedings are active. In Canadian (and English) law, but not Australian law, police investigations form part of the course of justice. In all of these jurisdictions, the attempt to prevent or pervert or defeat the

course of justice is a substantive offence. In all of these jurisdictions the intent to prevent, pervert or defeat the course of justice is an element of the offence. Like in English law, this thesis could not find any case law or academic opinion to the proposition that an omission may give rise to liability for obstruction of the due administration of justice in terms of the Canadian law.

In jurisdictions like England and Australia the fabrication of evidence falls within the ambit of the crime of obstructing the course of justice, but in Canadian law, this conduct is governed by section 137 of the Canadian Criminal Code. There is no authority in case law where it was found that fabrication of evidence is also regarded as a contravention of section 139 of the Canadian Criminal Code. The crime is discussed in this thesis because fabricating evidence in order to mislead a judicial proceeding also has the tendency to obstruct, pervert or defeat the course of justice.

Unlike English law, the crime of obstructing a police officer in the execution of his or her duty, in terms of section 129 of the Criminal Code, does not fall within the scope of the crime of obstructing the course of justice. Likewise, the fabrication of evidence, obstructing a police officer, public mischief and attempt to bribe a judicial officer are discussed here because they have the tendency to obstruct or to pervert the course of justice. They constitute separate offences from obstruction of justice in terms of section 139 of the Canadian Criminal Code.

CHAPTER SIX**AMERICAN LAW****6.1 GENERAL**

In the United States of America the crime of obstructing the course of justice is defined as an act by which one or more persons attempt to prevent or actually prevent the execution of a lawful process.¹ This offence falls under offences against the administration of justice.² American law belongs to the common law family and the law is generally analogous to that of English common law.³ However, in the United States of America there is no federal common law as each state has its own common law.⁴ The influence of English common law on the United States of America is apparent in that it was a common law crime in the states to commit an act obstructing, or tending to obstruct public justice.⁵ In the United States of America, any act which prevented, impeded or hindered the administration of justice was considered a common law misdemeanour.⁶ Conduct which constituted the common law crime of obstructing the administration of justice included obstructing an officer, tampering with jurors or witnesses, preparing false evidence, destroying evidence, resisting arrest, and compounding a crime.⁷

United States federal law on the obstruction of justice dates back to 1831, when Congress confirmed the power of the judiciary to punish contempt of court and codified the common

¹AZ Gammage and CF Hemphill *Basic Criminal Law* 2ed (1979) 298 and G Lou "Obstruction of Justice" (1999) *American Law Review* Vol 36 No 3 930.

²Others are perjury, misconduct in office, bribery, etc.

³R David and JEC Brierley *Major Legal Systems in the World Today* 2ed (1978) 377.

⁴David and Brierley *op cit* (n 3) 387.

⁵JM Scheb and JM Scheb II *Criminal Law and Procedure* 4ed (2002) 320.

⁶*Ibid.*

⁷Scheb and Scheb *op cit* (n 5) 320-22.

law crime of obstructing justice.⁸ Legislation was introduced by both the states and the federal government to legislate the offence of obstructing the course of justice. It may be treated as a felony or a misdemeanour, depending on the seriousness of the offence.⁹ Scheb and Scheb¹⁰ point out that as the federal statutory law came into being, certain conduct previously prosecuted as common law crimes of obstructing the course of justice, such as escaping from prison or resisting arrest, are now dealt with as distinct crimes. The federal statute¹¹ forbids the obstruction of justice and protects the integrity of proceedings before the federal judiciary and other government bodies.¹² It is said that crimes like obstruction of justice and perjury are quintessentially opposed to the American system of government. It is said that obstruction of justice subverts the very judicial process on which the rule of law so vitally depends.¹³

6.2 WHEN DOES THE “COURSE OF JUSTICE” BEGIN?

In the United States of America the federal offences of obstruction of justice and tampering with witnesses are two different offences. Obstructing the due administration of justice in any court of the United States, corruptly or by threats or by force, is a criminal offence and is punishable in terms of sections 1503, 1507 and 1513 of the United States Code.¹⁴ Tampering with witnesses is punishable in terms of section 1512.¹⁵ Section 1503(a)

⁸L Solum and S Marzen “Truth and uncertainty: Legal control of the destruction of evidence” (1987) *Emory Law Journal* Vol 36 1110.

⁹F Schmallegger *Criminal Law Today: An introduction with capstone cases* 2 ed (2001) 457.

¹⁰Scheb and Scheb *op cit* (n 5) 320.

¹¹Sections 1501 to 1518 of Title 18 of the United States Code, (1994).

¹²Lou *op cit* (n 1) 930 and JM Fedders and LH Gutterplan “Document retention and destruction: Practical legal and ethical consideration” (1980) *Notre Dame Law Review* Vol 56 32-53.

¹³CJ Cooper “ ‘A perjurer in the White House?’: The constitutional case for perjury and obstruction of justice as high crimes and misdemeanours” (1999) *Harvard Journal of Law and Public Policy* Vol 22 621.

¹⁴18 United States Code.

¹⁵18 United States Code.

provides:¹⁶

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavours to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such a juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs or impedes, or endeavours to influence, or to obstruct, or to impede, the due administration of justice, shall be punished as provided in subsection (b).

It is said that section 1503 cannot be construed as proscribing conduct which takes place wholly outside the context of an ongoing judicial proceeding.¹⁷ Some academic writers also say that the statutory offence of obstruction of justice may be committed only once judicial proceedings are “pending.”¹⁸ The question is when are judicial proceedings regarded as pending in order to invoke section 1503? There is no consensus among the circuit courts as to when judicial proceedings are pending for the purposes of section 1503 and there is no guidance, as yet, from the United States Federal Court. In 1987, for example, in *United*

¹⁶United States Code Title 18 Crimes and Criminal Procedure Vol 19 (1994). See also N Abrams and SS Beale *Federal Criminal Law and its Enforcement* 2ed (1993) 654. Before 1982, section 1503 read:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavours to influence, intimidate, or impede any witness in or of any court of the United States, or before any United States commissioner other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceedings before any United States commissioner, other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such a juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or [(2)] corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavours to influence, or obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

¹⁷United States Code Annotated, Title 18, Crimes and Criminal Procedure sections 1361-1950. It is said that the words in section 1503 “... other proceeding before any United States magistrate judge ...” mean that there must be judicial proceedings in progress before this section can be invoked.

¹⁸A Berg and J Levinson “Obstruction of justice”(2000) *American Criminal Law Review* Vol 37 No 2 761, Solum and Marzen *op cit* (n 8) 1111 and K Palfin and S Prabhu “Obstruction of Justice” (2003) *American Criminal Law Review* Vol 40 No 2 878.

*States v Ellis*¹⁹ the court refused to establish pendency where a federal grand jury was empanelled, but no subpoenas had been issued and the grand jury had not been apprised of the investigation. According to Palfin and Prabhu,²⁰ judicial proceedings are pending when an investigation is undertaken to secure presently contemplated evidence for presentation before a grand jury or as soon as an indictment is issued.²¹ Some circuit courts²² held that an investigation conducted by the grand jury *per se* constitutes judicial proceedings for the purposes of the provisions of section 1503.²³ According to another point of view, the offence of obstruction of the course of justice can only arise when justice is being administered,²⁴ in other words section 1503²⁵ applies only to pending judicial actions.²⁶ According to this view, the proscription of section 1503 does not begin until a grand jury has issued a subpoena in a criminal investigation, or a plaintiff has filed a complaint in a civil action.²⁷ Most circuit courts agree that the obstruction of pending judicial proceedings is a prerequisite for conviction under section 1503.²⁸

Unlike English law,²⁹ it seems that for the prosecution to succeed with a charge of obstruction of the course of justice in terms of section 1503 there must be pending “judicial proceedings.” However, there is also authority for the proposition that the accused may be

¹⁹652 F Supp 1415 (SD Miss 1987) at 1453. See Lou *op cit* (n 1) 934.

²⁰Palfin and Prabhu *op cit* (n 18) 879.

²¹*Ibid.*

²²The First, Second, Fourth, Fifth and Tenth Circuit Courts.

²³Palfin and Prabhu *op cit* (n 18) 879.

²⁴United States Code Annotated, Title 18, Crimes and Criminal Procedure sections 1361-1950.

²⁵The provisions of section 1503 are discussed *supra*, text at note 16.

²⁶Fedders and Gutterplan *op cit* (n 12) 20.

²⁷Solum and Marzen *op cit* (n 8) 1112.

²⁸Palfin and Prabhu *op cit* (n 18) 878.

²⁹In English law judicial proceedings need not be in progress for the crime of obstructing the course of justice to be committed. This matter is discussed *supra* under 3.2, text at note 22.

convicted of obstruction of justice for interfering with the following proceedings:

- (a) a grand jury investigation,³⁰
- (b) investigation by the United States Probation Officer (USPO),³¹
- (c) investigations by the Federal Bureau of Investigations (FBI),³² and
- (d) investigations by the Internal Revenue Service (IRS).³³

Section 1512(b)³⁴ prohibits tampering with witnesses in “official proceedings.”³⁵ Section 1512³⁶ provides:

(b) [W]hoever knowingly uses intimidation, or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to —

- (1) influence, delay or prevent the testimony of any person in an official proceeding;
- (2) cause or induce any person to—
 - (A) withhold testimony or withhold a record, document or other object, from an official proceeding;
 - (B) alter, destroy, mutilate or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding;
 - (C) evade legal process summoning that person to appear as a witness, or to produce a record, document or other object, in an official proceeding or
 - (D) be absent from an official proceeding to which such person has been summoned by legal process ...

shall be fined under this title or imprisoned not more than 20 years, or both.

³⁰Palfin and Prabhu *op cit* (n 17) 978.

³¹*United States v Novak* 217 F 3d 566 (8th Cir 2000).

³²See *United States v Cueto* 151 F 3d 620 (7th Cir 1998). The case is discussed *infra* under 6.3.2.3, text at note 167.

³³See *United States v Ladum* 141 F 3d 1328 (9th Cir 1998). This case is discussed *infra* under 6.3.1.2.1, text at note 89.

³⁴18 United States Code.

³⁵See Palfin and Prabhu *op cit* (n 18) 897.

³⁶United States Code (2000 and Supp II (2002) Titles 1- 18 (02 January 2001 to 06 January 2003).

In section 1515(a)(1),³⁷ an “official proceeding” is defined as:

(i) a proceeding before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a judge of the United States Tax Court, a special trial of the Tax Court, a judge of the United States Claims Court, or a Federal grand jury;³⁸

(ii) proceeding before the Congress;

(iii) a proceeding involving the business of insurance before any insurance regulatory official or agency.

For the purposes of section 1512(b) an “official proceeding” need not be pending or about to be instituted at the time of the offence.³⁹ Section 1512⁴⁰ provides:

(e) For the purposes of this section-

(1) an official proceeding need not be pending or about to be instituted at the time of the offence.

In 1996, in *United States v Morrison*⁴¹ the court observed that if the defendant realised that a federal proceeding might be commenced and acted in such a manner so as to affect the potential testimony, a conviction under section 1512 was permissible. The conduct must be accompanied by the intent to interfere with the witness.

It is unclear as to when the course of justice terminates in terms of the crime of obstruction

³⁷18 United States Code.

³⁸A grand jury is a type of a jury which determines if there is enough evidence for a trial. Grand juries carry out this duty by examining evidence presented to them by a prosecutor and issuing indictments, or by investigating the alleged crimes and issuing presentments. A grand jury is traditionally larger and distinguishable from a petit jury, which is used during a trial. See at <http://en.wikipedia.org/wiki/Grand-jury>, (accessed on 12 July 2007).

³⁹Section 1512(e)(1).

⁴⁰18 United States Code (2002).

⁴¹*United States v Morrison* 98 F 3d 619 (DC Cir 1996) at 630. See L Raffer and J Teper “Obstruction of justice” (1998) *American Criminal Law Review* Vol 35 No 3 1009.

of justice for the purposes of section 1512(b) of the Code. There is, however, authority to the effect that the scope of the course of justice has been extended to include post-trial proceedings. It is said that for the purposes of section 1503, criminal action remains pending in court until disposition is made of any direct appeal taken by the accused on the error of law that could result in a new trial.⁴²

In 2000, in *United States v Novak*,⁴³ there was a dissenting view on the pendency of “judicial proceeding” requirement in order to invoke section 1503. The court observed that, on the face of it, there was nothing in the statute that required a judicial proceeding to be pending. The facts of this case were as follows: Novak entered a conditional guilty plea to a charge of bank fraud for misrepresenting pledged collateral. He was convicted and sentenced to five months’ imprisonment, followed by two years of supervised release with certain conditions, which included the monthly submission of a written, truthful and complete report to the United States Probation Officer (USPO) and that Novak must undertake to truthfully answer all inquiries by the Probation Officer. During the period of supervised release, Novak violated the conditions of his release. He admitted, *inter alia*, that he attempted to hide his employment, income and assets from the USPO in order to avoid payment of the court ordered restitution and provided false information to the United States Probation Officer in 1997. He was charged, *inter alia*, with the violation of section 1503 of Title 18 of the United States Code (1994) emanating from the false monthly supervisory reports he submitted to the United States Probation Officer.⁴⁴

Novak argued that his misconduct occurred during his term of supervised release and, therefore, was not covered by section 1503, because there was no pending “judicial

⁴²United States Code Annotated, Title 18, Crimes and Criminal Procedure sections 1361-1950.

⁴³*United States v Novak supra* (n 31).

⁴⁴At 569.

proceeding” when the misconduct took place.⁴⁵ The court held:⁴⁶

While the instant prosecution may be unusual, there is nothing on the face of section 1503 requiring a pending proceeding nor precluding its use in targeting those who make knowing and fraudulent misrepresentation to the USPO in violation of the court order during a period of supervised release.

However, having said that, on the face of it, there was nothing in section 1503 that required a pending “judicial proceeding.” The court had to consider whether this case satisfied the requirement of a pending “judicial proceeding”, assuming, arguably, the existence of such a requirement. The court conceded that there was relatively little case law in the United States of America that addressed this question. The court observed that a few cases have determined when a judicial proceeding begins for the purposes of section 1503, but no authority existed as to when a proceeding terminates.⁴⁷ Nevertheless, the court agreed with the trial court that Novak’s misconduct occurred while a judicial proceeding was “pending.” The reason for the court’s decision was that the relevant conduct occurred after sentencing, but within the period to file a motion to reduce the sentence pursuant to the federal rules of criminal procedure.⁴⁸ Having reviewed all of Novak’s arguments the court found no basis to reverse the trial court’s finding and the appeal was dismissed.⁴⁹

It is submitted that the importance of the *Novak* decision lies in the observation made by the court that, on the face of it, there was nothing in section 1503 that required the judicial proceeding to be pending. Following the *Novak* case in 2001, in *United States v Steele*,⁵⁰

⁴⁵At 571.

⁴⁶At 571-72.

⁴⁷At 572.

⁴⁸*Ibid.* This federal rule of criminal procedure permits the government to make a motion to the district court, within one year after sentence is imposed, to reduce the defendant’s sentence to reflect that he or she gave subsequent and substantial assistance to the investigation or prosecution of another person.

⁴⁹At 578.

⁵⁰241 F 3d 302 (3rd Cir 2001) at 306. This case is discussed *infra* under 6.3.1.2.3, text at note 105.

the United States Court of Appeals concluded that no formal act was required to establish that a grand jury investigation is pending for the purposes of a charge of obstruction of justice that arises in response to a subpoena for investigation.

The circuit courts that have addressed the issue as to when the proceedings cease to be “pending” agree that, for purposes of section 1503, proceedings are pending after sentencing and until the disposition is made of any direct appeal that would result in a new trial.⁵¹ Finally, as in English law,⁵² the Eighth⁵³ and Eleventh⁵⁴ Circuit Courts have asserted that no judicial proceedings were required in order to invoke section 1503.⁵⁵

6.3 CONDUCT WHICH CONSTITUTES THE STATUTORY OFFENCE OF OBSTRUCTION OF JUSTICE IN TERMS OF SECTIONS 1503, 1507, 1512 AND 1513 OF THE UNITED STATES CODE

Chapter 73 of the United States Code⁵⁶ regulates the federal statutory crime of obstruction of the course of justice. The following conduct constitutes the federal statutory offence of obstructing the course of the course in terms of sections 1503, 1507, 1512 and 1513 of the Code:⁵⁷

⁵¹See *Lou op cit* (n 1) 934 and *Palfin and Prabhu op cit* (n 18) 879.

⁵²See *Card* at 537 *op cit* Chapter 3 under 3.2, text at note 23 and *Smith and Hogan* at 752 *op cit* Chapter 3 under 3.2, text at note 21.

⁵³*United States v Novak supra* (n 31) at 572.

⁵⁴*United States v Veal* 153 F 3d 1233 (11th Cir 1998) at 1250.

⁵⁵*Palfin and Prabhu op cit* (n 17) 879.

⁵⁶18 United States Code.

⁵⁷MC Bassiouni *Substantive Criminal Law* (1977) 422-25, JU De Marco “A funny thing happened on the way to the court house: Mens rea, document destruction and the federal obstruction of justice statute”(1992) *New York University Law Review* Vol 67:570, No 67 573 and RM Perkins *Perkins on Criminal Law* 2ed (1969) 495, CE Torcia *Wharton’s Criminal Law* 15ed Vol 4 (1996) 252-66, HB Rothblatt *Criminal Law of New York the Revised Penal Law* (1993) 315-19, Gammage and Hemphill *op cit* (n 1) 300-01, Scheb and Scheb *op cit* (n 5) 321 and Schmallegger *op cit* (n 9) 457-58.

- a. Tampering with the jury or judge.⁵⁸
- b. Concealment, alteration or destruction of documents.⁵⁹
- c. Encouraging or rendering false testimony.⁶⁰
- d. Picketing or parading or using sound amplifiers with intent to disrupt or influence judges, jurors, or witnesses.⁶¹
- e. Tampering with witnesses.⁶²
- f. Intimidating, using physical force or threats against a witness.⁶³

Many states have also created crimes of “endeavouring to obstruct justice” and “conspiring to obstruct justice,”⁶⁴ but this thesis will discuss only the conduct which constitutes the federal statutory offence of obstruction of justice. Conduct that constitutes the federal statutory offence of obstructing the course of justice discussed hereunder will commence with the conduct which is punishable in terms of section 1503.

6.3.1 Conduct which constitutes the offence of obstructing the course of justice in contravention of section 1503 of the Code

6.3.1.1 Tampering with a jury or a judge

In the United States of America, to corruptly influence any grand or petit juror or officer of the court by threats, force, letter or communication, is a punishable offence in terms of section 1503 of the Code.⁶⁵ Furthermore, it is also punishable to corruptly endeavour to

⁵⁸Section 1503 of 18 United States Code.

⁵⁹Sections 1503 and 1512(c)(2) of 18 United States Code.

⁶⁰Section 1503 of 18 United States Code.

⁶¹Section 1507 of 18 United States Code.

⁶²Section 1512 of 18 United States Code.

⁶³Section 1513 of 18 United States Code.

⁶⁴Schmallegger *op cit* (n 9) 458.

⁶⁵Palfin and Prabhu *op cit* (n 17) 876.

influence, obstruct and impede the due administration of justice. The latter conduct is prohibited by the omnibus provision⁶⁶ of section 1503.⁶⁷ It is said that the omnibus clause is essentially a “catch-all” provision that permits prosecutions for obstruction of justice even if the perpetrator’s actions were not specifically enumerated within section 1503 or some other section of Chapter 73 of the United States Code.⁶⁸ The provision protects the grand and petit jurors as well as judicial officers from threats, intimidation and retaliation. The omnibus provision of section 1503 has also been applied to acts of obstruction of justice that affect witnesses in federal judicial proceedings, and thereby complements the prohibition of witness tampering in terms of section 1512.⁶⁹ Some academic writers say that the provision is applied to both civil and criminal proceedings, and it applies to both actual and attempted obstruction of justice.⁷⁰ It is also said that some courts even allowed prosecution of perjury under the omnibus clause of the federal obstruction of justice statute in terms of section 1503.⁷¹

Section 1503(a) protects the judicial process in two distinctive ways. Firstly, it prohibits conduct which corruptly influences any grand or petit juror or officer of the court by threats or force, or by letter or communication.⁷² Secondly, the concluding portion of section 1503, the omnibus clause, is essentially a “catch-all” provision that generally prohibits conduct that interferes with the due administration of justice or an “endeavour to interfere” with the

⁶⁶The omnibus clause of section 1505 of Title 18 of the United States Code commences from “corruptly endeavour[ring to influence, obstruct or impede], or endeavour[ing] to influence, or to obstruct, or to impede, the due administration of justice.”

⁶⁷18 United States Code.

⁶⁸18 United States Code. See TM Riley “Tampering with witness tampering: Resolving the quandary surrounding 18 United States Code sections 1503, 1512” (1999) *Washington University Law Quarterly* Vol 77 254.

⁶⁹See Lou *op cit* (n 1) 930–31.

⁷⁰*Ibid.* See also Palfin and Prabhu *op cit* (n 18) 877.

⁷¹LC Harris “Perjury defeats justice” (1996) *The Wayne Law Review* Vol 42 1760.

⁷²United States Code Title 18 Crimes and Criminal Procedure Vol 19 (1994).

due administration of justice.⁷³

In 1995, in *United States v Aguilar*,⁷⁴ the accused was charged with corruptly endeavouring to influence, obstruct and impede the grand jury investigation in violation of the omnibus clause of section 1503.⁷⁵ The facts of this case were as follows: Aguilar was a United States District Judge. He was convicted of illegally disclosing the presence of a wiretap⁷⁶ in violation of section 2232(c) of 18 United States Code.⁷⁷ The authorization for the particular wiretap had expired before the disclosure was made. However, because he lied to the agents of the Federal Bureau of Investigations (FBI) during a grand jury investigation, he was, in addition, convicted of endeavouring to obstruct the due administration of justice under section 1503. The prosecution argued that Aguilar understood that his false statements would be provided to the grand jury and that he made the statements with intent to thwart the grand jury investigation and not only the FBI.⁷⁸ The Court of Appeals concluded that the prosecution could not convince, on the trial of fact, that Aguilar knew that his false statement would be provided to the grand jury, and that the evidence showed only that Aguilar gave false testimony to an investigating agent. The Court of Appeals held that the prosecution did not show that the agents acted as an arm of the grand jury, or indeed, that the grand jury had even summoned the testimony of those

⁷³Palfin and Prabhu *op cit* (n 18) 876; Lou *op cit* (n 1) 932 and Berg and Levinson *op cit* (n 18) 760.

⁷⁴*United States v Aguilar* 515 S Ct 2357 (1995).

⁷⁵At 2362. See also Palfin and Prabhu *op cit* (n 18) 876-77; Lou *op cit* (n 1) 932-33 and Berg and Levinson *op cit* (n 17) 760.

⁷⁶A wiretap is a device used to connect to, and eavesdrop upon, a telegraph or telephone wire in order to obtain information secretly. See *Collins English Dictionary* at 1842 *op cit* Chapter Four under 4.4.3.4, text at note 246.

⁷⁷Disclosure of a wiretap after its authorization expires violates section 2232(c), which provides criminal penalties for anyone who, “[1] having knowledge that a Federal ... officer has been authorized or has applied for authorization ... to intercept a wire ... communication, [2] in order to obstruct, impede, or prevent such interception, [3] gives notice or attempts to give notice of the possible interception to any person.” See *United States v Aguilar supra* (n 74) at 2359.

⁷⁸*United States v Aguilar supra* (n 74) at 2362.

particular agents.⁷⁹ In setting aside both convictions, the Court of Appeals held that uttering false statements to an investigating agent, who might or might not testify before a grand jury, was not sufficient to make out a violation of section 1503.⁸⁰

The importance of this case lies in the fact that the Ninth Circuit Court of Appeals refused to accept that the scope of section 1503 included the investigations of agents of the FBI.

6.3.1.2 Concealment, alteration or destruction of documents

It often happens that friends or relatives of the accused are present at the crime scene. These people may, with the accused, do something that could render them guilty of destroying or suppressing evidence. When, for example, someone present at the crime scene removes the tire tracks of a getaway vehicle to prevent an accurate comparison with the actual vehicle, his or her conduct constitutes the crime of obstructing the course of justice.⁸¹

Concealment, alteration or destruction of documents is an offence in the United States and falls foul of section 1503. There is academic opinion to the effect that, although the statute generally protects against such abuse of documentary evidence in both civil and criminal proceedings, traditionally, section 1503 did not apply to concealing or withholding discoverable documents in civil litigation.⁸²

6.3.1.2.1 Alteration of documents

Alteration of documents falls within the enumerated acts which obstruct the course of

⁷⁹*Ibid.*

⁸⁰At 2359.

⁸¹Gammage and Hemphill *op cit* (n 1) 300.

⁸²Berg and Levinson *op cit* (n 18) 767; Palfin and Prabhu *op cit* (n 18) 884 and Raffer and Teper *op cit* (n 41) 996-97.

justice. The defendant who alters or destroys corporate records, knowing they are sought by a grand jury investigating the company's activities, could be convicted of obstructing justice in terms of section 1503.⁸³ In *United States v Craft*⁸⁴ the United States Court of Appeals ruled that acts that distort evidence to be presented, or that otherwise impede the administration of justice, are violations of the statute that prohibit obstruction of justice. It was further ruled that an act of altering or fabricating documents that are used, or are to be used, in judicial proceedings would fall within the scope of section 1503⁸⁵ if the intent to deceive the court were proved.

In 1998, in *United States v Lundwall*,⁸⁶ the federal judge of the Southern District of New York went against the traditional approach that section 1503 was not applicable to concealment, alteration, etc., of documents in civil litigation and extended the statute to the discovery process of a civil proceeding.⁸⁷ Thus, destruction of documents after a complaint is filed, but before any order has been entered, is said to violate section 1503.⁸⁸

*United States v Ladum*⁸⁹ was another case which dealt with matters that emanated from civil litigation. It was observed in this case that an obstruction of justice conviction was supported by evidence that the accused told witnesses to lie and alter documents before presenting them to a grand jury. Evidence revealed that the accused directed witnesses to

⁸³See Palfin and Prabhu *op cit* (n 18) 884-85; Solum and Marzen *op cit* (n 8) 1085; Lou *op cit* (n 1) 939; Berg and Levinson *op cit* (n 18) 767-68 and Fedders and Gutterplan *op cit* (n 12) 19-20.

⁸⁴105 F 3d 1123 (6th Cir 1997) at 1124.

⁸⁵18 United States Code, section 1503.

⁸⁶1 F Supp 2d 249 (SDNY 1998) at 254-55.

⁸⁷JF Thompson "Spoliation of evidence: A troubling new tort" (1989) *University of Kansas Law Review* Vol 37 566.

⁸⁸DA Oesterle "A private litigant's remedies for an opponent's inappropriate destruction of relevant documents" (1983) *Texas Law Review* Vol 61 No 7 1206.

⁸⁹*United States v Ladum supra* (n 33) at 1338.

backdate documents.⁹⁰ The facts of the case were as follows: In a jury trial, the accused were convicted of various tax and bankruptcy fraud, and money laundering, charges. They appealed against such convictions. Robert Ladum, and the other accused, opened and operated seven second-hand stores, among others. They concealed their ownership interests in these stores so that they could avoid paying tax on their income. They used nominees who presented themselves as the “owners” of the stores.⁹¹ In order to prevent the Internal Revenue Service (IRS) uncovering this tax fraud scheme in which he was involved, Ladum instructed the nominees to be as obstructive and uncooperative as possible and to refuse to give information to officials. When the Internal Revenue Service agents approached the nominees, they falsely stated that they were the sole owners of the businesses. In 1993, Ladum became aware of a grand jury investigation into his business affairs and he advised the nominees to lie to the grand jury. He also approved plans to fabricate the records regarding the ownership of the stores and he assisted in the preparation of false tax returns and in the completion of false income tax returns.⁹²

Allegedly, Ladum declared himself bankrupt. He omitted from his petitions the second-hand stores, the real property where they were located and the lodge he owned. In 1995, the grand jury issued a second superseding indictment charging the accused with, *inter alia*, contravention of section 1503 for obstructing and defeating the IRS investigations to correctly ascertain, compute, assess and collect Ladum’s income tax.⁹³ The jury found the accused guilty of contravention of section 1503 of the Code.

On appeal, Ladum argued that the court erred in convicting him on a charge of “corruptly

⁹⁰At 1329.

⁹¹At 1333.

⁹²At 1333-34.

⁹³At 1334.

[endeavouring] to influence, obstruct and impede the due administration of justice” in violation of section 1503 of Title 18 United States Code. He argued that section 1503 did not prohibit witness tampering. The court upheld the conviction of the accused on contravention of section 1503.⁹⁴

6.3.1.2.2 Concealment of documents

Just as to alter documents falls foul of section 1503, so does the concealment of documentary information. It is said that before it may convict the accused of obstruction of justice for concealing subpoenaed documents, the grand jury must have been engaged in the due administration of justice,⁹⁵ meaning that the grand jury must have been empanelled. The accused must have known that the grand jury investigation was in progress and what documents were covered by the subpoena. He or she must have wilfully concealed or endeavoured to conceal such documents from the grand jury.⁹⁶

6.3.1.2.3 Destruction of documents

In the United States of America it also amounts to the crime of obstructing the course of justice to stifle, suppress or destroy evidence, knowing that it may be wanted in a judicial proceeding or is being sought by investigating officers. Such conduct contravenes section 1503.⁹⁷ According to Perkins,⁹⁸ in such a situation the individual cannot turn him- or herself, into a court and make a decision as to what records are admissible or inadmissible. An individual must be prepared to bring the documents to court and let the court make its

⁹⁴At 1349.

⁹⁵United States Code Annotated *op cit* (n 17) at 145.

⁹⁶*Ibid.*

⁹⁷18 United States Code. See Oesterle *op cit* (n 88) 1191; Berg and Levinson *op cit* (n 18) 767 and Palfin and Prabhu *op cit* (n 18) 884-85.

⁹⁸Perkins *op cit* (n 57) 499.

own determination.⁹⁹ A person who intentionally withholds or destroys tangible evidence, knowing very well that the grand jury investigation may need it, can reasonably be said to have corruptly obstructed or impeded or endeavoured to influence, obstruct or impede the due administration of justice in contravention of 1503. A person who knows that a federal grand jury is busy investigating certain possible violations of federal law and who has reason to believe that a certain incriminating document is likely to come to the grand jury's attention and who intentionally causes the destruction of the said document in order to prevent the grand jury's access to it, may be properly convicted of obstructing the course of justice.¹⁰⁰ It is said that even if the documents were not deliberately destroyed, shipping them out of the country so that they cannot be brought into court on a prosecution subpoena also amounts to obstructing the course of justice. This removal of evidence from the reach of the court is regarded to be as damaging as if the documents were deliberately burnt.¹⁰¹

In civil actions, as in criminal proceedings, the destruction of documents is a wrongful interference with a plaintiff's probable expectancy of prevailing in a civil action. Such destruction can effectively eliminate a party's ability to prevail on a claim or defence and thereby impede the administration of justice.¹⁰² According to Palfin and Prabhu,¹⁰³ for the accused to be convicted of obstructing the course of justice for having concealed or altered or destroyed evidence, the following is necessary:

- (i) the documents must have been subpoenaed,
- (ii) X must have knowledge of the pending grand jury investigation, and

⁹⁹*Ibid.*

¹⁰⁰United States Code Annotated *op cit* (n 17) at 146.

¹⁰¹Gammage and Hemphill *op cit* (n 1) 300.

¹⁰²See Thompson *op cit* (n 87) 564.

¹⁰³Palfin and Prabhu *op cit* (n 18) 884.

(iii) X must have wilfully concealed or endeavoured to conceal them from the jury, or, must have wilfully altered or endeavoured to alter the documents before their presentation to the grand jury.

However, Raffer and Teper¹⁰⁴ say that destruction of documents, even if they are outdated, *in anticipation of a subpoena* also constitutes the obstruction of justice. In 2001, in *United States v Steele*,¹⁰⁵ the United States Court of Appeals¹⁰⁶ concluded that no formal act was required to establish that a grand jury investigation is pending for the purposes of an obstruction of justice charge. The facts of this case were as follows: Charles Steele was indicted in April 1996 for mail fraud that emanated from a scheme to over-bill his law firm's clients and for obstruction of justice for submitting altered documents to a grand jury subpoena.¹⁰⁷ The jury found him guilty of mail fraud and four counts of obstruction of justice. In January 1999, Steele filed a motion to appeal his sentence. His contention was that the evidence to support the counts of obstruction of justice was insufficient to meet the standard set forth in *United States v Nelson*.¹⁰⁸ In the *Nelson* case, it was said that not every investigation in which grand jury subpoenas are issued ripens into a pending grand jury investigation. The basis of Steele's claim, therefore, was that the prosecution did not prove that the subpoena had been issued as part of an actual grand jury investigation. The United States Court of Appeals was called upon to consider:¹⁰⁹

(1) whether Steele was entitled to an evidentiary hearing on his motion in the light of

¹⁰⁴Cf Raffer and Teper *op cit* (n 41) 998.

¹⁰⁵*United States v Steele supra* (n 50) at 306.

¹⁰⁶Third Circuit.

¹⁰⁷*United States v Steele supra* (n 50) at 303.

¹⁰⁸852 F 2d 706 (3rd Cir 1988).

¹⁰⁹*United States v Steele supra* (n 50) at 304.

United States v Nelson's¹¹⁰ mandate that the accused be afforded an opportunity to question whether the United States Attorney secured the subpoena in furtherance of a then present contemplation that the subpoenaed evidence would be presented to a grand jury, and

(2) if so, and if the facts in this case ultimately showed that the subpoena was not secured in furtherance of a then present contemplation that the subpoenaed evidence would be presented to a grand jury, whether he was actually innocent of the four counts of obstruction of justice.

Addressing these questions the court found out that the deputy chairperson had signed the subpoena documents which were sent to Steele, and this document gave Steele's law firm the option to send a representative to appear personally before the grand jury to present the records. It was alleged that Steele's partner waived that right. The court was convinced that a grand jury was in existence when the subpoena was issued and that the subpoena was issued as part of a grand jury investigation.¹¹¹ The court held, as matter of law, that the evidence before it did indeed warrant the rejection of Steele's claim.¹¹²

Overlapping with section 1503 regarding destruction of documents is section 1512(c)(2).¹¹³ It is said that in the aftermath of several high profile corporate scandals, Congress enacted this section as part of a large effort to clamp down on corporate wrongdoing.¹¹⁴

¹¹⁰*United States v Nelson supra* (n 108).

¹¹¹*United States v Steele supra* (n 50) at 304-05.

¹¹²At 306.

¹¹³18 United States Code (2002). The provisions of section 1512(c)(2) are discussed *infra* under 6.3.4.2, text at note 238.

¹¹⁴*Palfin and Prabhu op cit* (n 18) 898-89.

6.3.1.3 Encouraging or rendering false testimony

In terms of section 1503, the following conduct is sufficient to support a conviction of obstructing the course of justice:

a. **Giving false testimony that may influence judicial proceedings.** If the accused intentionally gives evasive evidence or testimony to the jury, designed to conceal his or her true knowledge of the facts, he or she may be convicted of the crime of obstructing the course justice.¹¹⁵ In *United States v Russo*,¹¹⁶ the circuit court ruled that the accused lied to a grand jury with intent to impede the due administration of justice, which amounted to obstruction of the course of justice. The facts of this case were as follows: Congressman Rostenkowski placed “ghost employees” on the Congress payroll, and in 1993, the grand jury investigated this irregularity. Russo, a part-time employee of the Congressman, was subpoenaed. The grand jury granted him immunity from prosecution. In his testimony he told the grand jury that he worked as a cleaner in Congressman Rostenkowski’s Chicago District office five days a week. He asserted that he was the only person who cleaned those offices during the ten year period he worked there. Evidence put before the court directly contradicted Russo’s grand jury testimony. It transpired that he actually worked on alternate Tuesdays, and sometimes on other evenings, but by no means did he work there every day. The prosecution showed that Russo did not work for the money which was paid to him for 11 years from the Congressman’s office. He was indicted and convicted of perjury and obstruction of justice in contravention of section 1503.¹¹⁷ Russo appealed against his conviction on the count of obstruction of justice, by falsely and evasively testifying to the grand jury concerning the nature and extent of work he did for Rostenkowski’s Congressional office. He argued that the mere giving of false testimony to

¹¹⁵Berg and Levinson *op cit* (n 18) 768 and Palfin and Prabhu *op cit* (n 18) 886.

¹¹⁶104 F 3d 431 (DC Cir 1997) at 435.

¹¹⁷Under 18 United States Code, section 1503. See *United States v Russo supra* (n 116) at 432.

the grand jury did not contravene section 1503.¹¹⁸ The question to be answered was whether lying to the grand jury could be prosecuted under both section 1503 and perjury. Under section 1503, the state had to prove not only that the accused had lied to the grand jury but also that he had lied with intent to obstruct the due administration of justice.¹¹⁹ The Court of Appeals held, *inter alia*, that evidence that the accused had lied before the grand jury with intent to impede the due administration of justice supported the obstruction of justice conviction.¹²⁰ It is said that when Russo was granted immunity from prosecution, the district court warned him that if he lied to the grand jury he could be prosecuted for obstruction of justice.¹²¹ The court held that anyone who intentionally lies to a grand jury is on notice that he may be corruptly obstructing the grand jury's investigation.¹²² The conviction was confirmed.¹²³ This case shows that there is a distinction between lying before a grand jury in order to obstruct the course of justice and giving false testimony under oath before the court. The elements of these offences are not the same. In a section 1503 violation, it has to be proved that telling lies to the grand jury was done with intent to impede the due administration of justice.¹²⁴

b. **Refusing to testify before a grand jury.**¹²⁵ A person who refuses to testify before a grand jury, impedes the proper functioning of the grand jury and the due administration of justice and therefore contravenes the provisions of section 1503.¹²⁶

¹¹⁸*United States v Russo supra* (n 116) at 435.

¹¹⁹*Ibid.*

¹²⁰At 431.

¹²¹At 436.

¹²²*Ibid.*

¹²³At 437.

¹²⁴*United States v Russo supra* (n 116) 453.

¹²⁵Berg and Levinson *op cit* (n 18) 769 and Palfin and Prabhu *op cit* (n 18) 886.

¹²⁶Palfin and Prabhu *op cit* (n 18) 886.

c. **Encouraging a potential witness to give false evidence.**¹²⁷ Encouraging a prospective witness to render false testimony may lead to indictment under section 1503.¹²⁸

d. **Making offers to witnesses.**¹²⁹ According to Berg and Levinson,¹³⁰ an accused may violate the federal statute by making offers to witnesses testifying in an investigation other than one involving a grand jury, for example, a witness in Bureau of Alcohol, Tobacco and Firearms investigation.

e. **Tricking grand jury witnesses into giving false testimony.** According to Berg and Levinson,¹³¹ tricking grand jury witnesses into giving false testimony is also a contravention of section 1503. The leading case in this regard is *United States v Bucey*.¹³² Wesley Bucey was convicted of multiple related offences arising out of an elaborate money laundering scheme designed ostensibly to legitimise the source of illegally obtained cash and to evade tax. His conviction was based on an indictment of twelve counts that charged him, *inter alia*, with contravention of section 1503¹³³ following an attempt to obstruct the administration of a grand jury. He appealed against his conviction on all counts.¹³⁴ It was alleged that he, “well knowing of the existence of the said federal grand jury investigation, did corruptly endeavour to influence and impede the due administration of justice by advising, counselling and encouraging a person known to him as ‘James O’Brien’ to give

¹²⁷Berg and Levinson *op cit* (n 18) 769 and Palfin and Prabhu *op cit* (n 18) 886.

¹²⁸18 United States Code.

¹²⁹Berg and Levinson *op cit* (n 18) 769 and Palfin and Prabhu *op cit* (n 18) 886.

¹³⁰Berg and Levinson *op cit* (n 18) 769.

¹³¹Berg and Levinson *op cit* (n 18) 769 and Palfin and Prabhu *op cit* (n 18) 886.

¹³²876 F 2d 1297 (7th Cir 1989).

¹³³18 United States Code.

¹³⁴*United States v Bucey supra* (n 132) at 1298-99.

false and misleading testimony when appearing before a grand jury.”¹³⁵ Allegedly, he counselled the witness on how to role-play his grand jury testimony with his attorney and instructed the witness to provide false and misleading testimony to the grand jury. On appeal, Bucey’s challenge was twofold. Firstly, he alleged that the prosecution failed to prove that he had the requisite corrupt intent to impede the grand jury investigation. Secondly, he alleged that his actions were incapable of interfering with the administration of justice since the putative grand jury witness was a fictional character.¹³⁶ It should be noted that O’Brien, the witness that Bucey attempted to influence, was in fact an undercover government agent. In confirming Bucey’s conviction, the court held:¹³⁷

We do not think the fact that O’Brien (agent Dembitz’ pseudonym) was a fictional grand jury witness precludes an obstruction of justice conviction. The statute proscribes the endeavour to influence or obstruct the administration of justice; thus, the impossibility of accomplishing the goal of an obstruction of justice does not prevent a prosecution for the endeavour to accomplish the goal ... Thus, Dembitz’ fictitious identity as a grand jury witness does not exonerate Bucey from his “endeavour” to influence the proper administration of the grand jury.

It is submitted that Bucey’s second contention that his actions were incapable of interfering with the administration of justice since the putative grand jury witness was a fictional character was misdirected. This contention implies that the section 1503 offence is an inchoate offence. The section 1503 offence may be committed even if it is impossible for X to accomplish the goal of obstruction of justice.¹³⁸ It may be committed, for example, even if the grand jury witness is a fictional character assumed by an undercover government agent. The court expressed this when it held that “the impossibility of accomplishing the goal of an obstruction of justice does not prevent a prosecution for the endeavour to accomplish the goal.”¹³⁹

¹³⁵At 1313.

¹³⁶At 1313-14.

¹³⁷At 1314.

¹³⁸*Ibid.*

¹³⁹*Ibid.*

6.3.1.4 Elements of the section 1503 offence

For X to be convicted for contravening section 1503, the state is required to prove the following elements:¹⁴⁰

- a. A nexus between X's conduct and the pending federal judicial proceedings.
- b. That X knew of or had notice about the proceedings.
- c. That X acted corruptly with intent to obstruct or interfere with the proceedings or due administration of justice.¹⁴¹

6.3.1.4.1 Pending judicial proceedings

Most circuit courts state that it is a prerequisite for a conviction in terms of section 1503 that there be pending judicial proceedings. In other words, there must be a nexus between the accused's conduct and pending federal judicial proceedings.¹⁴² Obstruction of the due administration of justice in any court of the United States, corruptly or by threats or force, is a criminal offence. The offence of obstruction of the course of justice can only arise when justice is being administered,¹⁴³ in other words section 1503¹⁴⁴ applies only to pending judicial actions.¹⁴⁵ It is said that section 1503 cannot be construed to proscribe conduct, which takes place wholly outside the context of an ongoing judicial proceeding.¹⁴⁶ Unlike the English law, for the prosecution to succeed with the charge of obstructing the

¹⁴⁰Palfin and Prabhu *op cit* (n 18) 877-88; Lou *op cit* (n 1) 932; Berg and Levinson *op cit* (n 18) 760-66 and Raffer and J Teper *op cit* (n 41) 992-97.

¹⁴¹*United States v Collis* 128 F 3d 318 (6th Cir 1997) and *United States v De La Rasa* 171 F 3d 215 (5th Cir. 1999) at 220-21.

¹⁴²Palfin and Prabhu *op cit* (n 18) 877.

¹⁴³United States Code Annotated, Title 18, Crimes and Criminal Procedure sections 1361-1950.

¹⁴⁴The provisions of section 1503 are discussed *supra* under 6.2, text at note 16.

¹⁴⁵Fedders and Gutterplan *op cit* (n 12) 20.

¹⁴⁶United States Code Annotated Title 18 Crimes and Criminal Procedure sections 1361-1950. The words, in section 1503, "... other proceeding before any United States magistrate judge ..." mean that there must be judicial proceedings in progress before this section can be invoked.

course of justice against X in terms of section 1503, there must be pending judicial proceedings. Most circuit courts agree that obstruction of pending judicial proceedings is a prerequisite for conviction under section 1503.¹⁴⁷

There are academic commentators who suggest that independent government investigations, such as those of the FBI or any official proceedings not connected with pending judicial proceedings, are generally excluded from the ambit of section 1503.¹⁴⁸ In 1995, however, the circuit court in *United States v Maloney*¹⁴⁹ held that if the investigation was conducted to secure “presently contemplated presentation of evidence before the grand jury,” such an investigation qualifies as a pending judicial proceeding.¹⁵⁰

However, there is no consensus among the circuit courts as to when judicial proceedings are pending for purposes of section 1503 and there is no guidance, as yet, from the Federal Court.¹⁵¹ As has been said above, one circuit court refused to establish pendency where a federal grand jury was empanelled, but no subpoenas had been issued and the grand jury had not been apprised of the investigation.¹⁵² In 1986, the Ninth Circuit Court ruled that proceedings are pending as soon as an indictment is issued or a complaint (in civil matters) has been filed.¹⁵³ In some circuit courts¹⁵⁴ it is said that an investigation conducted by the

¹⁴⁷*Palfin and Prabhu op cit* (n 18) 878.

¹⁴⁸*Palfin and Prabhu op cit* (n 18) 878-79 and *Lou op. cit.* (n 1) 933. It is said that the Federal Bureau of Investigations is an investigating arm rather than a judicial arm of the government. See United States Code, Title 18 Crimes and Criminal Procedure Sections 1361 to 1950.

¹⁴⁹71 F 3d 645 (7th Cir. 1995) at 647. See also *Lou op cit* (n 1) 933-34.

¹⁵⁰See *Lou op cit* (n 1) 934.

¹⁵¹As indicated in the discussion *supra* under 6.2.

¹⁵²See *supra* note 19.

¹⁵³In *United States v Wash Water Power Co.* 793 F .2d 1079 (9th Cir. 1986) at 1085. See also *Palfin and Prabhu op cit* (n 18) 879.

¹⁵⁴The First, Second, Fourth, Fifth and Tenth Circuits.

grand jury *per se* constitutes a judicial proceeding for purposes of the provisions of section 1503.¹⁵⁵ As in English law,¹⁵⁶ the Eighth¹⁵⁷ and Eleventh¹⁵⁸ Circuits have asserted that no judicial proceedings were required in order to invoke section 1503.¹⁵⁹

Finally, the circuit courts that have addressed the issue as to when the proceedings cease to be “pending” agree that for purposes of section 1503, proceedings are pending after sentencing and until the disposition was made of any direct appeal that would result in a new trial.¹⁶⁰

6.3.1.4.2 Notice of judicial proceedings

It is a requirement that X must know or be aware of the existence of the pending judicial proceedings. In 1997, in *United States v Monus*,¹⁶¹ the Court of Appeals observed that to sustain its burden of proof for a conviction for the crime of corruptly endeavouring to influence, obstruct or impede the due administration of justice, the prosecution should prove that there was pending judicial proceedings and that the accused knew that the proceedings were pending and that he or she then corruptly endeavoured to influence, obstruct or impede the due administration of justice.¹⁶²

¹⁵⁵Palfin and Prabhu *op cit* (n 18) 879.

¹⁵⁶See Card at 537 *op cit* Chapter Three under 3.2, text at note 23 and Smith and Hogan at 752 *op cit* Chapter Two under 3.2, text at note 93.

¹⁵⁷*United States v Novak supra* (n 31) at 572.

¹⁵⁸*United States v Veal supra* (n 54) at 1250.

¹⁵⁹Palfin and Prabhu *op cit* (n 18) 879.

¹⁶⁰See Lou *op cit* (n 1) 934 and Palfin and Prabhu *op cit* (n 18) 879.

¹⁶¹128 F 3d 376 (6th Cir 1997) at 377.

¹⁶²In violation of 18 United States Code, section 1503.

6.3.1.4.3 Acting corruptly with intent

According to Berg and Levinson,¹⁶³ section 1503 limits the scope of liability to those who corruptly and intentionally act to obstruct a pending judicial proceeding or the due administration of justice or to endeavour to interfere with the proceedings.¹⁶⁴ X's conduct must have the natural and probable effect of interfering with the due administration of justice.¹⁶⁵ The United States courts have ruled that since section 1503 was designed to forbid all corrupt methods of obstructing the course of justice, the use of force or intimidation is not an essential element of a corrupt endeavour to influence the juror.¹⁶⁶

In *United States v Cueto*,¹⁶⁷ the court held that this provision does not specifically prohibit the means employed by the accused, but rather his or her corrupt endeavour, which motivated his or her action. Some academic writers are of the view that the accused need not be a party to the pending judicial proceedings in order to be convicted of contravening section 1503.¹⁶⁸ The facts of the *Cueto* case were as follows: Y, the owner of a vending and amusement business operated an illegal video gambling business through a pattern of racketeering activities and illegal gambling payouts, in contravention of state and federal anti-gambling and racketeering laws. Y requested X, an attorney, to represent both Y and the tavern owners in the event of any arrests and/or criminal charges for their participation in the illegal gambling operation. Throughout the investigation, and prior to the owner's indictment, X served as Y's lawyer and advisor, but he was not Y's attorney of record

¹⁶³Berg and Levinson *op cit* (n 18) 763; Raffer and Teper *op cit* (n 41) 994; Palfin and Prabhu *op cit* (n 18) 880 and Lou *op. cit.* (n 1) 935.

¹⁶⁴18 United States Code, section 1503(a) (2000). “[W]hoever ... endeavours to influence ... shall be punished.” “Endeavour” is defined as any attempt or effort aimed at obstructing justice. See Lou *op cit* (n 1) 935 and Berg and Levinson *op cit* (n 18) 764.

¹⁶⁵Berg and Levinson *op cit* (n 18) 764.

¹⁶⁶Palfin and Prabhu *op cit* (n 18) 883.

¹⁶⁷*United States v Cueto supra* (n 32) at 631.

¹⁶⁸Berg and Levinson *op cit* (n 18) 767 and Lou *op cit* (n 1) 938.

during the trial. Nevertheless, the record indicated that Y continued to rely on X's advice throughout the prosecution of the racketeering case.

The investigation disclosed that X and Y had developed more than a professional attorney-client relationship. They had entered into various financial and business deals, some of which involved secret partnerships.¹⁶⁹ Y was indicted, prosecuted and ultimately convicted for operating an illegal gambling enterprise.

A few months after the racketeering convictions, the grand jury indicted X, Y and Z. Count 1 of the indictment charged X with conspiracy to defraud the United States in that he misused his office as an attorney, and unlawfully and intentionally conspired with Y and Z to impede, impair, obstruct and defeat the lawful function of the FBI, the grand jury and the federal district court in connection with the investigation, indictment and prosecution of Y in the illegal gambling and racketeering case.¹⁷⁰ In the first part of the conspiracy it was alleged that X conspired to impede and delay the FBI investigation primarily by attacking the reputation of the Illinois Liquor Control Commission (ILCC) agent, Robinson, and by urging the St Clair County State's Attorney to investigate, indict and prosecute Robinson for alleged extortion. It was further alleged that X conspired to influence and hinder the functioning of the grand jury by filing false motions, which attacked the operations of the FBI. The third aspect of the conspiracy focused on X's attempt to obstruct the proceedings of the federal district court by persuading Y's defence counsel to file various motions, including a motion to disqualify the district court judge to hear the racketeering case.¹⁷¹

X was convicted of the counts mentioned above and he appealed. On his appeal he

¹⁶⁹*United States v Cueto supra* (n 32) at 627.

¹⁷⁰At 628.

¹⁷¹*Ibid.*

contended, *inter alia*, that each conviction for obstructing the course of justice in contravention of section 1503¹⁷² was invalid because the omnibus clause of this section was unconstitutionally vague as applied to the conduct charged in the indictment.¹⁷³ On the constitutional challenges of the omnibus clause of section 1503¹⁷⁴ the court held:¹⁷⁵

This clause was intended to ensure that criminals could not circumvent the statute's purpose by devising novel and creative schemes that would interfere with the administration of justice but would nevertheless fall outside the scope of section 1503's specific prohibition ... We are not persuaded by Cueto's constitutional challenges, and his focus is misplaced.

The court confirmed Cueto's convictions and the sentence imposed by the district court.¹⁷⁶

The significance of the *Cueto* decision can be summarised as follows:

- Firstly, the court confirmed the constitutionality of the omnibus clause of section 1503.¹⁷⁷
- Secondly, the court confirmed that a lawyer's misconduct and criminal acts are not absolutely immune from prosecution. Lawyers do not have a privilege to commit crimes.¹⁷⁸ It is said that a lawyer should represent a client zealously within the bounds of the law.¹⁷⁹
- Lastly, that investigations conducted by the FBI form part of the course of justice.

¹⁷²18 United States Code.

¹⁷³*United States v Cueto supra* (n 32) at 629.

¹⁷⁴18 United States Code.

¹⁷⁵*United States v Cueto supra* (n 32) at 630-31.

¹⁷⁶At 639.

¹⁷⁷18 United States Code.

¹⁷⁸BA Green "The criminal regulation of lawyers" (1998) *Fordham Law Review* Vol 67 240.

¹⁷⁹MJ Kaufman "The role of lawyers in civil litigation: Obstructers rather than facilitators of justice" (1988) *Illinois Bar Journal* Vol 77 202-3.

There is no consensus among the circuit courts as to the meaning of the term “corruptly” in the statute. The term varies in meaning based on the context of the prosecution. Some courts have held that the offender must be prompted, at least in part, by a corrupt motive.¹⁸⁰ In *United States v Brady*,¹⁸¹ the court found that the corrupt element in section 1503 must have some content beyond mere knowledge of consequences because only a corrupt purpose creates guilt.¹⁸² Other circuit courts have held that they understand the term “corruptly” to mean specific intent. Some academic commentators say that the act must be committed with the purpose of obstructing justice.¹⁸³

In *United States v Russell*,¹⁸⁴ the court observed that when the accused lied in affidavits in order to exonerate drug dealers, he had the specific intent to influence the judicial proceedings. The facts of this case were as follows: The accused, Russell, was convicted of obstructing the course of justice and he appealed. Russell was hired by the Arkansas state police to act as an informant in an undercover drug operation. The state police and the FBI paid him to identify drug dealers and bring those who bought drugs under the supervision of an Arkansas State Trooper. As part of the arrangement, Russell was expected to testify at the trials of those arrested for undercover drug deals.

In one of the first trials, Russell testified that he had purchased crack cocaine from the accused, Steve Block, who was in court for drug related charges. However, after Block’s conviction, Russell signed an affidavit stating that he had never, at any time, purchased drugs from Block. This led to an investigation which revealed that Russell had signed

¹⁸⁰Palfin and Prabhu *op cit* (n 18) 881; Lou *op cit* (n 1) 936; Berg and Levinson *op cit* (n 18) 765 and Raffer and Teper *op cit* (n 41) 994.

¹⁸¹168 F 3d 574 (1st Cir 1999) at 578.

¹⁸²*Ibid.*

¹⁸³Palfin and Prabhu *op cit* (n 18) 881; Lou *op cit* (n 1) 936; Berg and Levinson *op cit* (n 18) 765 and Raffer and Teper *op cit* (n 41) 995-96.

¹⁸⁴234 F 3d 404 (8th Cir 2000) at 407.

affidavits exonerating ten other accused likewise charged. As a result, the United States Attorney dismissed the pending indictments against the fifteen accused, because Russell was the only person who could identify the accused as drug dealers. In addition to signing affidavits exonerating Block and the other accused on other charges, Russell later testified in the federal court and directly contradicted his earlier testimony that he had never purchased drugs from Block.¹⁸⁵

As a result of these events, he was charged with, and convicted of, obstruction of the course of justice (under the omnibus clause of section 1503) and of perjury. He argued, *inter alia*, that he lacked any intent to interfere with the due administration of justice as required for an obstruction of justice conviction.¹⁸⁶ Russell's girlfriend testified that Russell claimed that he signed the affidavits for Block and the other accused, which helped them get out of their drug charges, in exchange for payment. The United States Court of Appeals found that there was sufficient evidence to support Russell's conviction for obstructing the course of justice. The conviction was sustained.¹⁸⁷ The Court of Appeals held that there was sufficient evidence to show that Russell had lied in affidavits that exonerated alleged drug dealers and that he had the requisite intent to influence a judicial proceeding.¹⁸⁸

It is submitted that this case is authority for the proposition that it is not only a person who bribes a witness or a potential witness who obstructs the due administration of justice, but also a witness who accepts a bribe in order to obstruct the due administration of justice.

Academic writers¹⁸⁹ agree that an actual obstruction of justice is not necessary to sustain a

¹⁸⁵At 406.

¹⁸⁶At 406-7.

¹⁸⁷At 408.

¹⁸⁸At 404.

¹⁸⁹See Palfin and Prabhu *op cit* (n 18) 882-83; Lou *op cit* (n 1) 937-38; Berg and Levinson *op cit* (n 18) 765-66 and Raffer and Teper *op cit* (n 41) 996-97.

conviction under section 1503. They say that an “endeavour”¹⁹⁰ to obstruct justice is sufficient. It is said that the term “endeavour” means any effort or purpose to obstruct the course of justice.¹⁹¹ In *United States v Wood*,¹⁹² it was observed that the attempt by the accused to obstruct the course of justice need not necessarily succeed, but the conduct must be such that its natural and probable effect would be to impede the due administration of justice. The facts of this case were the following: In 1989, the FBI and a federal jury were investigating allegations of political corruption involving one Peter MacDonald, Chairperson of the Navajo Nation of Indians. Wood, the accused, was a general manager of a construction company doing business with the Navajo. The FBI interviewed Wood in his office regarding his dealings with MacDonald. Allegedly, during the interview, Wood made some false or misleading statements. He was subsequently charged for making false statements to the FBI and with obstructing justice contrary to section 1503.¹⁹³ He applied for acquittal stating that the indictment failed to state a criminal offence. The trial court held that because the FBI agents were acting under the auspices of the grand jury, their discussions with Wood were part of a judicial proceeding, thereby falling within the “judicial function.”¹⁹⁴ As for contravening section 1503, the court ruled that the unsworn statements of the accused would not, as a natural probable consequence, impede the due administration of justice. The court also noted a number of policy reasons why section 1503 would not apply to statements of that nature given by accused. Therefore, the court dismissed the charge,¹⁹⁵ and the prosecution appealed.

¹⁹⁰See *Lou op cit* (n 1) 937.

¹⁹¹See *United States v Brady supra* (n 181) at 578.

¹⁹²6 F 3d 692 (10th Cir 1993) at 695.

¹⁹³At 693.

¹⁹⁴At 694.

¹⁹⁵*Ibid.*

On appeal, the prosecution alleged that the FBI had asked Wood to explain the circumstances surrounding his lending of a car to MacDonald. He allegedly said that he had recently purchased the car for his daughter, but MacDonald had borrowed it for a drive. The prosecution alleged that Wood had purchased the car and intended to give it to MacDonald, and that the car had “clocked” only 150 miles, not 1200 miles, as he had previously claimed.

The United States Court of Appeals, in a split decision, held:¹⁹⁶

We conclude that defendant’s unsworn exculpatory statements given in his own office to interviewing FBI agents did not have a natural and probable effect of impeding the due administration of justice in the sense required by *18 USC*, section 1503, and the prosecution under that section is therefore barred.

6.3.2 Conduct which constitutes the offence of obstructing the course of justice in contravention of section 1507 of the Code

6.3.2.1 Picketing or parading

Obstruction of justice may involve activities such as picketing or parading or the use of sound amplifiers with intent to disrupt or influence judges, jurors, or witnesses.¹⁹⁷ This conduct is punishable in terms of section 1507.¹⁹⁸ This section provides:

Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or such officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both.

This section punishes the actions of picketing or parading in, or near, the court or house of the judge or jury or witness or court official in order to influence either of the mentioned

¹⁹⁶At 697.

¹⁹⁷*Ibid.*

¹⁹⁸18 United States Code.

people when performing their official duties. It punishes, *inter alia*, what was in common law is referred to as embracery,¹⁹⁹ which means to tamper or interfere with a juror or jury.

6.3.3 Conduct which constitutes the offence of obstructing the course of justice in contravention of section 1512 of the Code

6.3.3.1 Tampering with witnesses

The offence of obstruction of justice in the United States of America may also be committed by tampering with a witness or witnesses in contravention of section 1512.²⁰⁰ As if the omnibus obstruction provision²⁰¹ was inadequate for protecting witnesses, the Congress enacted further legislation in 1982²⁰² in order to provide greater protection for witnesses than under section 1503 and other federal obstruction of justice laws.²⁰³ By enacting the 1982 legislation the Congress intended that intimidation and harassment of witnesses should thereafter be prosecuted under section 1512 of the Federal Code and no longer under section 1503. Under the 1982 legislation all references to witnesses under section 1503 had been deleted²⁰⁴ and appear only in section 1512. The Victim and Witnesses Protection Act (VWPA) contains both criminal and civil remedies. The former

¹⁹⁹Embracery consisted of tampering with jurors by attempting to influence their decisions. See NC Chameli and KR Evans *Criminal Law for Policemen* (1971) 209.

²⁰⁰18 United States Code.

²⁰¹18 United States Code, section 1503.

²⁰²The Victim and Witnesses Protection Act 1982.

²⁰³Palfin and Prabhu *op cit* (n 18) 891; Lou *op cit* (n 1) 945; Berg and Levinson *op cit* (n 18) 776-77; Raffer and Teper *op cit* (n 41) 1002-03 and KR Taylor "The obstruction of justice requirement after Arthur Andersen and Sarbanes-Oxley (2008) *Cornell Law Review* Vol 93 No 2 409.

²⁰⁴Riley *op cit* (n 68) 257-58.

is found in sections 1512 and 1513²⁰⁵ of the Federal Code. It is also important to note that protection in terms of this Act lasts throughout the course of the judicial proceedings, from grand jury hearings to retrials. It protects witnesses not only against the accused, but also against any individual who engages in the prohibited conduct.²⁰⁶ This section protects witnesses both prior to, and during, formal proceedings.²⁰⁷ Section 1512 (b)²⁰⁸ is said to be the most frequently invoked provision of section 1512.²⁰⁹ Section 1512(e)(1) does not require that there must be a pending official proceeding.²¹⁰ For instance, if X realises that a federal proceeding might be commenced and acts in a manner that affects testimony, he may be convicted in terms of section 1512.²¹¹

The following conduct constitutes the offence of tampering with witnesses in terms of section 1512:²¹²

- a. To influence, delay or prevent any person in official proceedings.²¹³
- b. To cause or induce any person to withhold testimony or a record, document or other object from official proceedings.²¹⁴

²⁰⁵18 United States Code. See Palfin and Prabhu *op cit* (n 18) 892.

²⁰⁶Palfin and Prabhu *op cit* (n 18) 891; Lou *op cit* (n 1) 945 and Berg and Levinson *op cit* (n 18) 776-77.

²⁰⁷TA Pesce “Defining witness tempering under 18 USC, section 1512” (1986) *Colombian Law Review* Vol 86 1417.

²⁰⁸The provisions of section 1512(b) are discussed *supra* under 6.2, text at note 36.

²⁰⁹See Palfin and Prabhu *op cit* (n 18) 893.

²¹⁰United States Code Title 18 Crimes and Criminal Procedure Vol 19 (1994); Palfin and Prabhu *op cit* (n 18) 897 and Berg and Levinson *op cit* (n 18) 783. See the provisions of section 1512(e)(1) *supra* under 6.2, text at note 40.

²¹¹Berg and Levinson *op cit* (n 18) 783.

²¹²18 United States Code.

²¹³Section 1512(b)(1).

²¹⁴Section 1512(b)(2)(A).

c. To cause or induce any person to alter, destroy, mutilate or conceal an object with intent to impair the object's integrity or availability for use in official proceedings.²¹⁵ A recent case involving destruction of evidence by large corporations and their advisors is *Arthur Andersen LLP v United States*.²¹⁶ This case began with the collapse of the energy trading enterprise, Enron Corporation, which at one time was the seventh largest corporation in America. Arthur Andersen LLP was one of the biggest accounting corporations in the United States and the long-standing auditor of Enron. In 2001, Enron filed for bankruptcy protection. This resulted in Arthur Andersen LLP, as Enron's auditor, instructing its employees to destroy documents in accordance with its document retention policy. Arthur Andersen LLP was indicted on one count of contravening section 1512(b)(2)(A) and (B).²¹⁷ Seeking to cover up their misconduct, Andersen's employees started to shred sensitive documents and to delete critical e-mails and other computer-based records. These actions led to a Department of Justice inquiry.²¹⁸ The Securities and Exchange Commission (SEC) opened its formal investigations in 2001. In 2002, the Andersen firm was indicted on one count of obstruction of justice, because of its alleged destruction of documents and electronic data.²¹⁹ The indictment alleged that Andersen LLP "did knowingly, intentionally and corruptly persuade ... other persons, to wit: [the petitioner's] employees, with intent to cause" them to withhold documents from, and alter documents for use in, 'official proceedings and investigations.'²²⁰ One of Arthur

²¹⁵Section 1512(b)(2)(B).

²¹⁶555 US 1(2005). At www.google.co.za/search?h/=en&ie=ISO-8859-i&e=supreme+courts+of+the+United+States+Arthur+Andersen+v+the+United+States&btnG=Gooble+Search&meta= (accessed on 20 October 2006). See also S Landsman "Death of an accountant: The jury convicts Arthur Andersen of obstruction of justice" (2003) *Chicago-Kent Law Review* Vol 78 No 3 1203.

²¹⁷18 United States Code

²¹⁸*Arthur Andersen LLP v the United States supra* (n 216) at 4.

²¹⁹At 5. See also Landsman *op. cit.* (n 216) 1208.

²²⁰*Arthur Andersen LLP v United States supra* (n 216) at 5.

Andersen's defences was that its employees had no idea that there might be a Securities Exchange Commission investigation. If no investigation was anticipated, then there could be no intent to obstruct justice by shredding or deleting documents.²²¹ The auditor, Andersen, was nevertheless convicted of obstruction of justice. The Court of Appeals for the Fifth Circuit upheld the verdict.²²² It held that the court *a quo*'s instructions to the jury properly conveyed the meaning of the words "corruptly persuades" and "official proceeding" as they are used in section 1512(b) of the Code.²²³ It further held that it was not necessary for the jury to find any intention of wrongdoing on the side of the accused and that the court *a quo* did not err.²²⁴ Then Arthur Andersen petitioned the Supreme Court. The Supreme Court's attention was focused on what it meant by the words "to knowingly ... corruptly persuade" another person and "with intent to cause" that person to "withhold" documents from or to "alter" documents for use in an "official proceeding"²²⁵ as required by section 1512(b)(2)(A) and (B) of the Code. The Supreme Court held that document retention policies that are created, in part, to keep certain information from getting into the wrong hands, including the government's hands, were common practice in business.²²⁶ The Supreme Court found that the instructions to the jury regarding "corruptly," led the jury to believe that it did not have to find any nexus between the "persuasion" to destroy documents and any particular proceeding.²²⁷ The court held that a "knowingly" ... "corrupt" persuader cannot be someone who persuades others to shred documents under a document retention policy when he did not have in contemplation any particular official

²²¹Landsman *op cit* (n 216) 1230-31.

²²²Arthur Andersen LLP v United States *supra* (n 216) at 1 and 5.

²²³See the provisions of section 1512(b) *supra* under 6.2, text at note 36.

²²⁴Arthur Andersen LLP v United States *supra* (n 216) at 5-6.

²²⁵At 6.

²²⁶At 7.

²²⁷At 9-10.

proceeding in which those documents might be material.²²⁸ The Supreme Court followed its previous decision in *United States v Aguilar*²²⁹ where it held that section 1503 requires a nexus between the obstructive conduct and the proceeding, and that if the accused lacked knowledge that his actions were likely to affect the judicial proceedings, he lacked the requisite intent to obstruct the course of justice.²³⁰ The court required the same nexus for contravention of section 1512 as previously decided in *United States v Aguilar* in regard to 1503. In a unanimous decision the Supreme Court overturned Arthur Andersen's conviction and remanded the case for further proceedings consistent with the opinion.²³¹

This case provides authority for the proposition that the words “knowingly” and with “intent,” in section 1512(b)(2)(A) and (B)²³² require that there must be a specific intent to persuade another person to destroy the said documents and that must be done *in contemplation of an official proceeding*. In other words there must be a nexus between the corrupt persuasion and an official proceeding. If the nexus is lacking, it cannot be said that the accused contravened section 1512(b)(2)(A) and (B).

d. To cause or induce any person (Y) who has been summoned to appear as a witness or to produce a record, document or other object in an official proceeding to evade such legal processes.²³³

e. To cause or induce any person to be absent from an official proceeding to which Y

²²⁸At 11.

²²⁹See the discussion of *United States v Aguilar supra*, under 6.3.1.1, text at note 74.

²³⁰*Arthur Andersen LLP v United States supra* (n 216) at 11.

²³¹At 11-12.

²³²18 United States Code.

²³³Section 1512(b)(2)(C).

has been summoned as a witness.²³⁴ X commits an offence when he or she influences witness Y to leave the court's jurisdiction so that he or she cannot testify. It is not a defence that he or she consented thereto.²³⁵ This offence may be committed by attempting in any other way to prevent him or her from attending court or from testifying. It is not important whether the witness had been served with a subpoena or not, as long as it was known that he or she is a potential witness. Kidnapping and holding witnesses till the trial is over or beating them or intimidating them by threats of serious violence may amount to tampering with witnesses. It is immaterial whether their testimony would have been unimportant or irrelevant.²³⁶ It is said that witnesses must have been tampered with to such an extent that they deliberately absented themselves from "official proceedings."²³⁷

6.3.3.2 Destruction, mutilation or concealment of records or documents

Section 1512(c)(2)²³⁸ provides:

[W]hoever corruptly (i) destroys, mutilates or conceals a record, document or other object or attempts to do so, with intent to impair the object's integrity or availability for use in an official proceeding or (ii) otherwise obstructs or impedes any official proceeding or attempts to do so, shall be fined under this title or imprisoned.

Any wilful destruction or rendering illegible or incapable of identification of any book, document or other thing of any kind which is or may be required in evidence in official proceedings, with intent to prevent it from being used in evidence, is punishable in terms of section 151(c)(2). This section also punishes any attempt to do what is mentioned above.

²³⁴Section 1512(b)(2)(D).

²³⁵Perkins *op cit* (n 57) 498.

²³⁶Gammage and Hemphill *op cit* (n 1) 301.

²³⁷*Ibid.*

²³⁸18 United States Code.

6.3.3.3 The elements of the section 1512 offence

Section provides comprehensive protection to witnesses. It provides more protection than provided by the section 1503 omnibus clause. This section extends its protection to any person²³⁹ and applies to all types of witness tampering, not just coercive acts. In order to succeed on a charge of witness tampering in terms of section 1512(b), the prosecution must prove the following four elements:²⁴⁰

- a. that X knowingly
- b. engaged in intimidation, physical force, threats, misleading conduct, or corrupt persuasion toward another person,
- c. with intent to influence, delay, or prevent testimony or cause any person to withhold a record, object, document or testimony,
- d. from official proceedings.

6.3.3.3.1 Knowingly

Firstly, the accused must knowingly commit the prohibited conduct. It is not necessary that he or she acts with a corrupt purpose. It is enough that he or she performs one of the listed acts with intent to influence, prevent or delay testimony. In addition, the prosecution is not required to prove that the accused knew of the federal nature of the proceedings with which he or she was tampering.²⁴¹ In 2000, in *United States v Kellington*,²⁴² the court observed that the violation of section 1512(b) was a crime of specific intent.²⁴³ The facts of this case were as follows: Kellington was an attorney who, in 1996, was tried and convicted of

²³⁹The term 'the courts' has been construed broadly to include potential grand jury and excused witnesses.

²⁴⁰*Palfin and Prabhu op cit* (n 18) 893; *Lou op cit* (n 1) 946 and *Berg and Levinson op cit* (n 18) 778.

²⁴¹*Palfin and Prabhu op cit* (n 18) 893-94; *Lou op cit* (n 1) 946-47; *Berg and Levinson op cit* (n 18) 778 and *Raffer and Teper op cit* (n 41) 1005.

²⁴²217 F 3d 1084 (9th Cir 2000).

²⁴³At 1098.

obstruction of justice and conspiracy to obstruct justice for conduct arising from his representation of a client who was apprehended for being a convicted drug trafficker. In 1994, Kellington received a call from a client, MacFarlane, who was in custody. Kellington knew MacFarlane only as "Richard Parker." He allegedly consulted with him in custody and MacFarlane confirmed that "Parker" was a pseudonym.

MacFarlane requested Kellington to pass instructions to Young, one of MacFarlane's employees, to remove some personal property from his house. Kellington agreed. MacFarlane then wrote out a list of the personal property he wanted Young to remove from his house. He also wrote out instructions to Young telling him to retrieve and destroy an envelope that was hidden in a chair in the bedroom, and for Young to meet MacFarlane on a specified day to discuss other business. Kellington read the list, discussed the priority of each task with MacFarlane, and entered numbers on the list to indicate MacFarlane's sense of urgency.²⁴⁴ He took the list back to his office. He called the said Young and read the instructions to him. Young asked Kellington how he should destroy the envelope. Kellington suggested that he could burn it. Young asked if he could get into trouble for executing the instructions, and Kellington said no.

Young removed the listed items and loaded them on a truck. He burnt the envelope. He came across a driver's license with MacFarlane's photograph on it, but the driver's name was recorded as "Branon." Young was alarmed when he recalled that the name Branon had appeared on the "official looking" papers he had already burnt. After talking it over with his wife, he resolved to drive back to MacFarlane's house and return the property. While there, he met the police who had returned to the house to execute a search warrant. Young explained to the police that he had been instructed by MacFarlane's attorney, Kellington, to remove the property from the house and to destroy the contents of the envelope. Kellington

was detained. He and MacFarlane were charged with obstructing justice by “knowingly engaging in misleading conduct towards another person, with intent to alter, destroy, mutilate or conceal an object with intent to impair the object’s integrity or availability for the use in an official proceeding” in contravention of section 1512(b)(2)(B)²⁴⁵ and conspiring to obstruct justice.²⁴⁶

The prosecution had to prove that Kellington knew that he was participating in the concealment or destruction of objects useful to an official proceeding.²⁴⁷ The court held:²⁴⁸

This is a specific intent crime, so in the absence of an instruction on deliberate ignorance, the government was obliged to establish that Kellington knew the property Young removed/destroyed was useful to an official proceeding and that Kellington intended to impair the availability of those objects for use in the proceeding.

The Court of Appeals remanded the case for a new trial. The importance of this case lies in the explanation of the type of intent required by section 1512(b)(2)(B). This section constitutes a specific intent crime as opposed to the prosecution’s theory of criminal intent that “any reasonable person and especially an attorney, would have known that he was being asked to impair the availability of objects for use in an official proceeding.”²⁴⁹ The section required the prosecution to establish that Kellington knowingly caused or induced Young to alter, destroy, mutilate or conceal an object with intent to impair that object’s integrity or availability for use in an official proceeding.

6.3.3.3.2 Engaging in prohibited acts

²⁴⁴At 1088.

²⁴⁵18 United States Code.

²⁴⁶*United States v Kellington supra* (n 242) at 1089.

²⁴⁷At 1091.

²⁴⁸At 1098.

²⁴⁹At 1100.

The second requirement is that the accused must have engaged in some certain acts. The following acts by the accused fall foul of section 1512(b):

- a. Intimidation or threats.
- b. Misleading conduct.
- c. Corrupt persuasion.

a. **Intimidation or threats.** Intimidating and threatening witnesses is not only a statutory offence in the United States, but it also leads to double counting of sentence.²⁵⁰ In *United States v Amsden*,²⁵¹ the accused was convicted of violating section 876 of the Code.²⁵² He was remanded in custody while waiting to be sentenced. While in prison, he pleaded guilty on two counts of mailing threatening communications to the witness in violation of section 1512(b). He was convicted of contravention of section 1512(b).²⁵³ The trial court found that the accused “indirectly” attempted to influence the recipient of the letter not to testify at his sentencing hearing and his sentence was increased in terms of the Sentencing Guidelines. He appealed against the sentence. The United States Court of Appeals disagreed with the *court a quo* with regard to the increase in sentencing. The court held:²⁵⁴

After careful review of the record, we are left with the definite and firm conviction that the district court was mistaken in its determination that the letter was an attempt to obstruct justice. It seems to us that it is far more likely that the letters in question were actually a continuation of the illegal conduct for which Mr Amsden was convicted. In reaching this conclusion, we found it important that the letter did not refer, directly or indirectly, to testimony or even to any court proceeding.

²⁵⁰“Double counting occurs when one part of the Sentencing Guidelines is applied to increase the defendant’s punishment on account of a kind of harm that has already been fully accounted for by the application of another part of the Guidelines.” See *United States v Amsden* 213 F 3d 1014 (8th Cir 2000) at 1014.

²⁵¹*United States v Amsden supra* (n 250) at 1015.

²⁵²18 United States Code. This section is not relevant to the crime of obstructing the course of justice.

²⁵³18 United States Code.

²⁵⁴*United States v Amsden supra* (n 250) at 1015.

Although the court said that there was nothing in the record to indicate that the accused believed that the victim might testify in his sentencing hearing, the importance of this case lies in the fact that the courts in the United States of America may, in terms of the federal Sentencing Guidelines, increase the sentence of the convicted person from one level to another if the accused obstructed justice.

b. **Misleading conduct.** Section 1515²⁵⁵ defines “misleading conduct” as:

... knowingly making a false statement or intentionally omitting information from a statement or intentionally concealing a material fact with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, on an object that is misleading in a material respect or knowingly using a trick, scheme with intent to mislead.

Palfin and Prabhu²⁵⁶ submit that “misleading conduct” focuses on the accused’s actions, not on his or her intent. It occurs only when he or she resorts to coercive and deceptive conduct. In 2000, the Second Circuit Court, in *United States v LaFontaine*,²⁵⁷ ruled that a witness tampering charge does not require physical force or threats. The facts of this case were as follows: The accused, LaFontaine and her husband, faced 17 counts of mail fraud, health care fraud, engaging in monetary transactions with criminally derived property, conspiracy and witness tampering in connection with their activities in the cosmetic surgery clinic they owned.²⁵⁸ She and her colleagues committed health care fraud by submitting false claims to health insurers for procedures that they did not perform. Those procedures they did perform were purely for cosmetic purposes or were not performed by licensed physicians. Lafontaine was arrested and her husband absconded to Canada. During her bail application several pre-trial release conditions were imposed. This included a

²⁵⁵18 United States Code.

²⁵⁶Palfin and Prabhu *op cit* (n 18) 895.

²⁵⁷210 F 3d 125 (2nd Cir 2000) at 133.

²⁵⁸At 127.

prohibition on contacting certain witnesses.

In February 2000, the prosecution submitted a letter²⁵⁹ to the court requesting the revocation of LaFontaine's bail. Firstly, it was alleged that there was clear and convincing evidence that LaFontaine contacted one of the witnesses. Therefore, she had violated her bail conditions. Secondly, the prosecution alleged that there was probable cause to believe that she had also committed the crime of witness tampering in terms of section 1512(b)(1)²⁶⁰ by attempting to influence the testimony of Reyes Jr, a witness.²⁶¹

The prosecution contended that, contrary to her bail conditions, LaFontaine and Reyes Jr had met on several occasions in 1999. Allegedly, on one occasion she asked Reyes Jr to "remind" her mother that she had a hernia operation and a procedure on her nose at the clinic, even though LaFontaine knew this to be false. She actually tried to influence Reyes Jr's testimony, hence the charge of witness tampering. It was alleged that she knew that Reyes Jr was likely to be called as a prosecution witness. The hearing was held on the prosecution's motion to revoke bail and both sides had an opportunity to present arguments and evidence to the court. In addition to the letter, the prosecution led evidence showing that LaFontaine had shredded documents, attempted to contact other witnesses and intimidated a doctor at a certain clinic. It was argued on behalf of the prosecution that there was a danger of future obstruction by LaFontaine, both of Reyes Jr and other witnesses.

The judge accepted the prosecution's letter and concluded, *inter alia*, that there was

²⁵⁹The letter was submitted to the court *ex parte* because the prosecution feared that the accused might flee if she learned of the prosecution's motion.

²⁶⁰18 United States Code. See *United States v LaFontaine supra* (n 257) at 126.

²⁶⁰18 United States Code.

²⁶¹*United States v LaFontaine supra* (n 257) at 129.

probable cause to believe that LaFontaine had committed the crime of witness tampering.²⁶² The judge ordered that bail be revoked.²⁶³ LaFontaine applied for review of her bail revocation. She contended, *inter alia*, that the argument should have been rejected because she was not accused of any violent or threatening behaviour towards witnesses. The court held:²⁶⁴

The witness tampering statute plainly does not require “physical force” or “threats” to support a tampering charge; corrupt influence is sufficient.

It observed that corrupt influence was sufficient to invoke section 1512(b)(1).²⁶⁵ It was further held that the district court did not err in revoking LaFontaine’s bail and the order of the district court was confirmed.²⁶⁶ It is important to note that in this case “official proceeding”²⁶⁷ included such pre-trial proceedings as bail applications.

c. **Corrupt persuasion.** There is academic opinion, which states that corrupt persuasion includes any behaviour that falls short of coercion and communications that are not misleading but still show an attempt to influence testimony.²⁶⁸

6.3.3.3 Intent to influence, delay or prevent testimony

In order to prove that the accused had the intent to influence, delay or prevent testimony, the prosecution need only prove that he or she was aware that the natural and probable consequences of his or her actions would be to influence the testimony of a witness. It is

²⁶²18 United States Code.

²⁶³*United States v LaFontaine supra* (n 257) at 130.

²⁶⁴At 133.

²⁶⁵At 126.

²⁶⁶At 135.

²⁶⁷As contemplated in 18 United States Code, section 1512(i).

²⁶⁸*Palfin and Prabhu op cit* (n 18) 896 and *Berg and Levinson op cit* (n 18) 781.

said that it is immaterial whether the accused actually influenced the testimony.²⁶⁹ One of the leading cases dealing with the intent requirement was *United States v Gabriel*.²⁷⁰ The facts of this case were as follows: Following a jury trial, the accused were convicted of various counts of mail fraud, wire fraud, making false statements within the jurisdiction of federal agency and witness tampering in connection with misrepresentations by the accused about jet engine repairs.

The accused, James Gabriel and Gerard Vitti were both executive vice presidents at Chromalloy Research and Technology Division (CRT). CRT was one of the United States' largest jet engine repair stations and it serviced most of the world's airlines. In 1992, the government learnt that Chromalloy Research and Technology was misrepresenting the nature of some of its jet engine repairs. An investigation was conducted and it led to the indictment of the accused for fraud. Gabriel was indicted separately for witness tampering. It was alleged that when the grand jury began investigating Gabriel's involvement in the 1990 repair of a low-pressure turbine (LPT) case from Qantas Airline, Gabriel falsely stated that he had previously disclosed to Qantas that the low-pressure turbine case was only partially serviceable. In an attempt to support his story, he then sent a facsimile to Donald Mealing, the Qantas representative with whom Gabriel had dealt. Gabriel was charged with witness tampering for sending that facsimile. The prosecution alleged that Gabriel attempted to mislead Mealing into believing that he, Gabriel, had previously disclosed to Qantas that the low-pressure turbine case was partially serviceable and that he intended Mealing to believe that lie and to repeat it to the grand jury.²⁷¹ He was convicted of contravention of section 1512(b)(1).²⁷²

²⁶⁹*Palfin and Prabhu op cit* (n 18) 897; *Lou op cit* (n 1) 949 and *Berg and Levinson op cit* (n 18) 782.

²⁷⁰125 F 3d 89 (2nd Cir 1997).

²⁷¹At 93-4.

²⁷²See 18 United States Code, which makes it a crime to:
... corruptly persuade [] another person, or attempt[] to do so, or engage[] in misleading conduct

On appeal, Gabriel contended that the prosecution was required to prove that his actions were likely to affect Mealing's grand jury testimony. He further contended that because Mealing was in Australia, and beyond the grand jury's jurisdiction, there was not enough evidence to prove that Mealing was likely to testify. Therefore, there was not enough evidence to prove that Gabriel's actions were likely to affect Mealing's testimony.²⁷³ He relied on the Supreme Court's decision in *United States v Aguilar*²⁷⁴ which required that a "likely to affect" requirement be incorporated into section 1503. In dismissing this contention and upholding the conviction the court held:²⁷⁵

[...] the government was not required to prove that Mealing was likely to testify or that Gabriel's actions were likely to affect Mealing's testimony. Rather, the government was required to prove only that Gabriel endeavoured corruptly to persuade or mislead Mealing with the intent of influencing Mealing's potential testimony before a grand jury.

Gabriel's crime was completed when he sent the facsimile to a potential witness "knowingly" and with intent to influence that witness's testimony. Whether or not his actions were likely to affect Mealing's testimony was irrelevant because section 1512 protects witnesses even prior to formal proceedings,²⁷⁶ as was the case when Gabriel sent the facsimile to the witness.

6.3.3.3.4 Official proceedings

Section 1512(b) prohibits tampering with witnesses, with intent to prevent, delay or hinder testimony in an "official proceeding."²⁷⁷ In section 1515(a)(1),²⁷⁸ an "official proceeding"

toward another person, with intent to-

influence ... the testimony of any person in an official proceeding.

²⁷³*United States v Gabriel supra* (n 270) at 102.

²⁷⁴*United States v Aguilar supra* (n 74).

²⁷⁵*United States v Gabriel supra* (n 270) at 103.

²⁷⁶*Pesce op cit* (n 207) 1421.

²⁷⁷18 United States Code (1994) 321.

is defined as:

- (i) a proceeding before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a judge of the United States Tax Court, a special trial of the Tax Court, a judge of the United States Claims Court, or a Federal grand jury;
- (ii) a proceeding before the Congress;
- (iii) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency.

In 1997, the Third Circuit Court in *United States v Bell*²⁷⁹ had to deal with the interpretation of “an official proceeding.” The facts of this case were as follows: The accused, Bell and others, were facing charges of murder and/ or intimidation of a witness. These charges related to the killing of Ms Proctor, an informant of a Drug Task Force.²⁸⁰ Allegedly, in April 1992, Ms Proctor was to testify against Tyler, Bell’s boyfriend, in a drug related trial. On the day of the trial, it was alleged that Tyler, Bell and several others kidnapped Ms Proctor and killed her.²⁸¹ Bell’s co-conspirators were convicted of murder and/ or intimidation of a witness, but Bell was acquitted.

The federal authorities then began their own investigation into Proctor’s murder, which led to a new trial and to Bell’s conviction.²⁸² At the second federal prosecution trial, Bell was again charged with and convicted of, *inter alia*, murder of a witness in contravention of

²⁷⁸18 United States Code.

²⁷⁹113 F 3d 1345 (3rd Cir 1997) 1349.

²⁸⁰The Task Force was comprised of local, state and federal investigators.

²⁸¹*United States v Bell supra* (n 279) at 1347.

²⁸²*Ibid.*

section 1512(a)(1)(A) and (C),²⁸³ use of physical force and threats against a witness in contravention of section 1512(b)(1)-(3).²⁸⁴ Bell appealed against her conviction.

In order to prevail on the charges of murder of a witness, use of physical force and threats against a witness in terms of section 1512(b)(1)-(3), the prosecution had to prove that:²⁸⁵

- (1) the accused killed or attempted to kill a person;
- (2) he or she was motivated by a desire to prevent the communication between that person and the law enforcement authorities concerning the commission or possible commission of an offence;
- (3) the offence was actually a federal offence; and
- (4) the accused believed that the person in (2) above might communicate with the federal authorities. The prosecution need not prove any state of mind on the part of the accused with respect to the federal character of the proceeding or officer.

The questions upon which the disposition of this appeal were based were:

- (i) whether the jury could have concluded that at least part of Bell's motivation in killing the deceased was to prevent her from communicating further with the Task Force,
- (ii) and, if so, whether the jury could have concluded that at least one of the deceased's further communications with the Task Force would have been with a federal officer.²⁸⁶ The court found that at least part of Bell's motivation in killing Proctor was to prevent such

²⁸³18 United States Code.

²⁸⁴18 United States Code.

²⁸⁵*United States v Bell supra* (n 279) at 1348-49.

²⁸⁶At 1349.

communications because she was so heavily implicated in the drug trade trial. The court also gave an affirmative answer to the second question.²⁸⁷

This case highlighted the necessity of the motive of murder in order to invoke obstruction of justice in terms of section 1512. If the accused intentionally kills a person in a fight over drugs, he or she could be charged and convicted of murder. There is no obstruction of the course of justice in this instance. However, if, in killing another person, the accused was motivated by preventing the deceased from disclosing another crime that the accused had committed, he or she can be charged with both murder and obstructing of the course of justice.²⁸⁸

It is said that an “official proceeding” exists when at least one of the law enforcement officer’s communications, which the accused sought to prevent, would have been with a federal officer.²⁸⁹ An “official proceeding” need not be pending or about to be instituted at the time of the offence in order to secure a conviction. In 1996, in *United States v Morrison*,²⁹⁰ the court observed that if the accused realised that a federal proceeding might be commenced and acted in such a manner so as to affect the potential testimony, a conviction under section 1512 was permissible. It must also be mentioned that an investigation by a federal agency,²⁹¹ like the FBI, may constitute an “official proceeding,” but an investigation by a state agency like the Tennessee Human Rights Commission is generally not considered as an “official proceeding” under section 1512.²⁹² It is said that the

²⁸⁷At 1350.

²⁸⁸In contravention of 18 United States Code, section 1512(a)(1)(C).

²⁸⁹*Palfin and Prabhu op cit* (n 18) 897.

²⁹⁰*United States v Morrison supra* (n 41) at 630. See also *Raffer and Teper op cit* (n 41) 1009.

²⁹¹*United States v Frankhauser* 80 F 3d 641 (1st Cir 1996) at 650-51.

²⁹²*Palfin and Prabhu op cit* (n 18) 898; *Raffer and Teper op cit* (n 41) 1008-09 and 18 United States Code (2002), section 1515(a)(1).

intimidation of witnesses who were supposed to testify before the Tennessee Human Rights Commission did not amount to interference with an “official proceeding.”²⁹³

6.3.4 Conduct which constitutes the offence of obstructing the course of justice in contravention of section 1513 of the Code

Section 1513 protects witnesses, victims or informants against retaliation by the accused as a result of them having testified or given other evidence in an official proceeding. Section 1513²⁹⁴ provides:

- (a)(1) Whoever kills or attempts to kill another person with intent to retaliate against any person for-
- (A) the attendance of a witness or party at an official proceeding or any testimony given or any record, document or other object produced by a witness in an official proceeding,
- shall be punished as provided in paragraph (2).
- (b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person or threatens to do so, with intent to retaliate against any person for-
- (1) the attendance of a witness or party at an official proceeding or any testimony given or any record, document or other object produced by a witness in an official proceeding,
- shall be fined under this title or imprisoned not more than ten years, or both.

The prosecution may charge the accused solely under this section but, in practice, the accused is often charged with a section 1513 violation in addition to a charge under section 1512. To succeed in terms of a section 1512 prosecution, the prosecution must also prove that:

- (1) the accused killed or attempted to kill another person
- (2) with intent to prevent either testimony or the production of evidence and
- (3) at an official proceeding.²⁹⁵

²⁹³See *Puckett v Tenn. Eastman Co*, 889 F.2d 1481 (6th Cir. 1989) at 1489-90. This case is cited with approval in *Palfin and Prabhu op cit* (n 18) 898.

²⁹⁴18 United States Code.

²⁹⁵18 United States Code, section 1512(a) (2002). See *Palfin and Prabhu op cit* (n 18) 898.

6.4 OVERLAPPING OF SECTIONS 1503 AND 1512 OF TITLE 18 OF THE UNITED STATES CODE

Prior to the 2002 legislative amendment of section 1512 of Title 18 of the United States Code, the issue among the appellate courts was whether section 1512 was the exclusive tool to apply to witness tampering or whether section 1503 still played a role. When enacting section 1512²⁹⁶ in 1982, all references to witnesses under section 1503 had been excluded.²⁹⁷ Some academic commentators interpret that Congress's action of deleting of all references to witnesses from section 1503, while enacting section 1512, was an attempt to take witness protection out of the reach of section 1503.²⁹⁸ On the other hand, some academic writers construed Congress's decision to leave the omnibus clause of section 1503 untouched, and its failure to include a similar provision in section 1512, as an attempt to leave witnesses *within* the reach of section 1503's omnibus clause.²⁹⁹ According to Riley,³⁰⁰ as a result, some prosecutors use only section 1512 for witness tampering while others continue to use the omnibus clause of section 1503 to bring charges of witness tampering. Others charge the accused with both sections. This conflict has been recognised by the courts, but, regrettably, they have failed to resolve it with a uniform solution.

6.5 SUMMARY

Owing to the influence of English common law upon the legal system of the United States of America, it was a common law crime to commit an act obstructing, or tending to obstruct public justice. In 1831, Congress confirmed the power of the judiciary to punish contempt

²⁹⁶18 United States Code. See the provisions of this section *supra* under 6.2, text at note 36.

²⁹⁷Riley *op cit* (n 68) 257-8.

²⁹⁸Riley *op cit* (n 68) 258.

²⁹⁹Riley *op cit* (n 68) 258-59.

³⁰⁰Riley *op cit* (n 68) 259.

of court and codified the common law crime of obstructing justice. Both the states' and the federal governments introduced legislation to punish acts which amounted to obstruction of justice. It may either be a felony or misdemeanour, depending on the seriousness of the offence. As the statutory law came into being, some common law offences which had been prosecuted as crimes of obstructing the course of justice, for example, prison escape and resisting arrest, came to be dealt with as distinct crimes.

At present, a comprehensive federal statute forbids obstruction of the course of justice and protects the integrity of proceedings before the federal judiciary and other government bodies. Obstructing the due administration of justice in any court of the United States, corruptly or by threats or force, is a criminal offence and is punishable in terms of section 1503 of Title 18 of the United States Code. Tampering with witnesses is punishable in terms of section 1512 of the Code. There is academic opinion which suggests that the statutory offence of obstruction of justice in terms of section 1503 may be committed only once "judicial proceedings" are pending. According to this view, section 1503 cannot be construed to proscribe conduct which takes place wholly outside the context of an ongoing judicial proceeding. An investigation conducted by the grand jury *per se* constitutes a judicial proceeding for the purposes of the provisions of section 1503.

Generally, it is said that the proscription of section 1503 does not begin until a grand jury has issued a subpoena in a criminal investigation, or a plaintiff has filed a complaint in a civil action. Most circuit courts agree that the obstruction of pending judicial proceeding is a prerequisite for conviction under section 1503, but there is no consensus among the circuit courts as to when "judicial proceedings" are pending for the purposes of section 1503. Some courts, for example, refused to establish pendency where a federal grand jury was empanelled, but no subpoenas had been issued and the grand jury had not been appraised of the investigation. It has been said that a "judicial proceeding" is pending when

an investigation is undertaken by the police to secure presently contemplated presentation of evidence before a grand jury, or as soon as an indictment is issued. But there is also a different view on the “pendency of judicial proceeding” requirement in order to invoke section 1503. This view suggests that, on the face of it, there is nothing in the statute that requires “pending” judicial proceedings. Therefore, obstruction of the due administration of justice may be committed as soon as the principal crime has been committed, even before the police have undertaken an investigation. Nevertheless, for the purposes of section 1503, criminal action remains pending in court until disposition is made of any direct appeal taken by the accused assigning error that could result in a new trial.

Section 1512(b) punishes tampering with witnesses in “official proceedings.” In terms of section 1512(e)(1), for purposes of section 1512(b) an *official proceeding* need not be pending or about to be instituted at the time of the offence. In section 1515(a)(1), “official proceeding” is defined as:

- (i) proceedings before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a judge of the United States Tax Court, a special trial of the Tax Court, a judge of the United States Claims Court, or a Federal grand jury;
- (ii) a proceeding before Congress;
- (iii) proceedings involving the business of insurance before any insurance regulatory official or agency.

There is judicial authority to the effect that the proceedings of a Drug Task Force and an investigation by a federal agency, like the FBI, may constitute “official proceedings.” There is also authority to the effect that this crime may be committed for tampering with witnesses in respect of

- (a) a grand jury investigation,
- (b) investigations by a United States Probation Officer (USPO), and
- (c) investigations by the Internal Revenue Service (IRS).

It is not clear as to when the course of justice ceases for purposes of the crime of obstruction of justice in terms of section 1512(b) of the Code, but there is authority to the effect that the scope of the course of justice has been extended to include the post-trial proceedings. The circuit courts that have addressed the issue as to when the proceedings cease to be “pending,” agree that for purposes of section 1503, proceedings are pending after sentencing and until the disposition was made of any direct appeal that would result in a new trial.

Section 1513 of the 18 United States Code punishes retaliation against a witness, victim or an informant. This section requires that the accused must have killed or caused bodily injury to any person or to have caused any damage to the property of any person or to have

threatened to do so for, *inter alia*, attending as a witness or party at an “official proceeding.”

The following conduct constitutes the federal statutory offence of obstructing the course of justice in terms of sections 1503, 1507, 1512(b) and 1513 of the United States Code:

- a. Tampering with the jury or judge (section 1503).
- b. Concealment, alteration or destruction of documents (sections 1503 and 1512(c)(2)).
- c. Encouraging or rendering false testimony (section 1503).
- d. Picketing or parading or the use of sound amplifiers with intent to disrupt or influence judges, jurors, or witnesses (section 1507).
- e. Tampering with witnesses in official proceeding (section 1512).
- f. Intimidation, using physical force or threats against a witness in official proceeding (section 1513).

Section 1503 specifically prohibits the following acts:

(i) **Tampering with the jury or judge.** Corruptly influencing any grand or petit juror or officer of the court by threats or force or by communications is an offence prohibited by the omnibus clause of section 1503 of Title 18 of the United States Code. There is consensus among academic writers that section 1503 applies in both criminal and civil proceedings and that it applies to both actual and attempted obstruction of the course of justice. There is judicial authority to the effect that section 1503, the omnibus clause, serves as a “catch-all” provision because it is more general in scope than the earlier clauses in the statute.

(ii) **Concealment, alteration or destruction of evidence.** Some academic writers are of

the view that, although the statute generally protects against document abuse in both civil and criminal proceedings, traditionally, section 1503 had not been extended to apply to concealing or withholding discoverable documents in civil litigation. However, the United States Federal Court went against this traditional approach and extended the statute to the discovery process of a civil proceeding. Therefore, destruction of documents after a complaint is filed, but before any order has been entered is said to violate section 1503.

(iii) **Encouraging or rendering false testimony.** This offence can be committed in the following ways:

- (1) Giving false testimony that may influence judicial proceedings. If the accused intentionally gives evasive evidence or testimony to the jury, designed to conceal his or her true knowledge of the facts he or she may be convicted of obstructing the course of justice in terms of section 1503.
- (2) Refusing to testify before a grand jury may also be sufficient to support an obstruction of the course of justice conviction.
- (3) Encouraging a potential witness to give false evidence.
- (4) Making an offer to witnesses testifying in an investigation other than one involving a grand jury.
- (5) Tricking grand jury witnesses into giving false testimony.

For the accused to be convicted of the offence in terms of section 1503, the state must

prove the following elements of the offence:

a. A nexus with the pending judicial proceedings. There is no consensus among the circuit courts as to when “judicial proceedings” are pending for the purposes of section 1503 and there is no guidance, as yet, from the United States Federal Court. Some courts, for example, refused to establish that there was “pendency” where a federal grand jury was empanelled, but no subpoenas had been issued and the grand jury had not been appraised of the investigation. There is also judicial authority to the effect that “judicial proceedings” are pending as soon as the indictment is issued or a complaint in civil matters has been filed. Some circuit courts have held that an investigation conducted by the grand jury *per se* constitutes a judicial proceeding for the purposes of the provisions of section 1503.

b. That the accused knew of and had notice about the proceedings. The circuit courts which require that there must be pending “judicial proceedings” in order for the state to succeed on the charge of contravention of section 1503, also require the prosecution to show that the accused knew of the pending “judicial proceedings.” If the accused lacked the knowledge that his or her actions were likely to affect judicial proceedings, he or she lacked the requisite intent to obstruct justice.

c. That the accused acted corruptly and with intent to obstruct or interfere with judicial proceedings. This means that there must be a specific intent to obstruct the course of justice. Section 1503 limits the scope of liability to those who corruptly and intentionally act to obstruct a pending proceeding or the due administration of justice or to endeavour to interfere with the proceedings. This provision does not specifically prohibit the means employed by the defendant, but rather his or her corrupt endeavour, which motivated his or her action.

Witness tampering is prohibited by section 1512 of Title 18 of the United States Code, but section 1512(e)(1) does not require that there should be a pending official proceeding at the time of the offence. However, tampering with witnesses should have been in respect of official proceedings. This offence may be committed by:

- (1) inducing or attempting to induce another person (Y) to abscond from court where he or she is legally bound to appear as a witness;
- (2) attempting to prevent a witness from testifying. It is not important whether or not a witness has been subpoenaed;
- (3) spiriting away a witness so that he or she cannot testify;
- (4) endeavouring to intimidate a witness; and
- (5) endeavouring to procure false testimony.

The most serious incidents of witness tampering, like retaliating against a witness, a victim or an informant are covered by section 1513 of Title 18 of the United States Code. Whoever kills or attempts to kill any person with intent to retaliate against that person for having testified or given a record or a document or other object in an official proceeding contravenes section 1513 of 18 United States Code.

Similar to Canadian and Australian law, but unlike English law, the United States of America has comprehensive federal statutory law to punish any conduct which attempts or endeavours to obstruct the due administration of justice. As in the English and Canadian jurisdictions, but not in Australia, police investigations of a commission of a crime form part of the judicial proceedings and thus the course of justice. As is the position in

Australia, where the crime of perverting the course of justice is codified, the last part of section 1503 of Title 18 of the United States Code contains a catch-all provision. The omnibus provision of section 1503 ensures that criminals cannot circumvent the statute by devising novel and creative schemes that would interfere with the administration of justice, but would nonetheless fall outside the scope of section 1503 prohibitions. The omnibus clause punishes any conduct which is not enumerated in the Code and which attempts or endeavours to obstruct the due administration of justice. Like in English and Canadian law, this thesis could not find any case law or academic opinion to the proposition that an omission may give rise to liability for obstruction of the due administration of justice in terms the American law.

Unlike English, Australian and Canadian law, it is not clear under American law whether any attempt or endeavour to commit the crime of obstructing the course of justice is a substantive offence or an inchoate offence.

CHAPTER SEVEN**SOUTH AFRICAN LAW****7.1 GENERAL**

This chapter will examine the crime of obstructing or defeating the course of justice in South Africa. The time when the course of justice is considered to begin and end is discussed, as are the elements of the crime of obstructing the course of justice. Those statutory provisions that are akin to the crime of obstructing the course of justice are also analysed.

South African academic writers define the crime of obstructing the course of justice as consisting in unlawfully engaging in conduct which defeats or obstructs the course or the due administration of justice¹ or unlawfully committing an act which is intended to defeat or obstruct and which does defeat or obstruct the due administration of justice.² This crime developed from the provisions of the Roman and Roman-Dutch *lex Cornelia de falsis*, the *lex Calumnia* and the *lex Remmia*. It now has a wider scope than under Roman and Roman-Dutch law,³ where an act which obstructed the course of justice was regarded as falsity and falsity was defined broadly as alteration, suppression or counterfeiting of the truth committed with wrongful intent to harm and prejudice another.⁴ In our law there is no single definition of this crime. Firstly, some writers refer to it as “conduct” which defeats

¹See CR Snyman *Criminal Law 5ed* (2008) 338.

²See Gardiner and Lansdown *op cit* Chapter Two (n 167) 817; FG Gardiner and CWH Lansdown *South African Criminal Law and Procedure: being a treatise upon the law and practice in criminal matters in the Union of South Africa 3ed Vol II* (1930) 756; Hunt *op cit* Chapter Two (n 7) 143; N Boister “Refusing to allow the taking of a blood sample: Is it defeating or obstructing the administration of justice?” (1994) *SACJ* Vol 7 No 1 115 and Burchell and Milton *op cit* Chapter Two (n 148) 939-40.

³Hunt *op cit* Chapter Two (n 7) 141; Snyman *op cit* Chapter Two (n 151) 337 and Burchell and Milton *op cit* Chapter Two (n 148) 939-40.

⁴D 48.10.1. See the discussion of this offence *supra* in Chapter Two under 2.1.1, text at note 3.

and obstructs the course of justice.⁵ Snyman's⁶ definition of this crime, for instance, uses the word "conduct" which can either be a positive act or a failure to do something (an omission). He confirms that the crime may be committed by either a positive act or an omission.⁷ There is also case law to support this view. For instance in *S v Gaba*⁸ it was observed that an omission, in appropriate circumstances, might lead to a conviction of attempt to defeat or obstruct the course of justice. It was found that where a detective was aware of the identity of a detainee, he had a legal duty to impart this knowledge to his fellow investigating officers. Such an omission could amount to an attempt to defeat or obstruct the course of justice. The facts of this case were the following: The accused, Gaba (a detective), stood trial in the regional court on a charge of attempting to defeat or obstruct the course of justice. Allegedly, two police officers, Mofokeng and Mokoena arrested and interrogated, in Gaba's presence, one Amos Vilakazi with reference to a series of murder cases in Bethlehem. The state alleged that when the accused was asked whether he knew who the "Godfather" was, and whether he was aware that Amos Vilakazi was the "Godfather" who was a member of a gang which made a living by robbing and stealing from people and selling alcohol illegally on trains, he, with the intent to defeat or obstruct the course of justice, omitted to mention to Detective Constables Mofokeng and Mokoena that Amos Vilakazi was in reality the Godfather.⁹ Therefore, the case against the accused was fundamentally that he was aware that the police were looking for the Godfather in connection with certain serious crimes, and that he, as a member of the investigation team, was aware who "Godfather" was, but failed to pass that information to other police

⁵Snyman *op cit* Chapter Two (n 151) 337.

⁶*Ibid.* There is Roman-Dutch authority that people were punished for falsity for failure to prevent falsity when they were able to do so. See D 48.10.1 *op cit* Chapter Two (n 80).

⁷Snyman *op cit* Chapter Two (n 151) 339.

⁸1981 (3) SA 745 (O) at 746.

⁹At 747.

members.¹⁰

Mofokeng testified that Gaba entered the office where Amos Vilakazi was being interrogated and that he, Mofokeng, had asked Gaba if he knew this Amos Vilakazi. Allegedly, Gaba did not reply. “He just kept quiet and went out.”¹¹ Mokoena also testified that Gaba knew before the date of Amos Vilakazi’s arrest and interrogation that the police were looking for a certain “Godfather.”¹²

During trial it was argued on behalf of the accused that the charge sheet did not reveal a crime because “the crime of defeating the ends of justice per definition cannot be committed through omission.”¹³ It was further argued on Gaba’s behalf that even if the mentioned crime could be committed through omission, the charge sheet was defective because it did not allege that a legal duty rested on him, Gaba, to reveal his alleged knowledge to the two police officers.¹⁴ The court *a quo* found that the charge sheet was not defective simply because it did not contain an allegation that the accused had a legal duty to convey his knowledge about Godfather to his fellow police officers.¹⁵ Gaba was convicted as charged.

On appeal, it was argued on Gaba’s behalf that the defect in the charge sheet was brought to the attention of the court at the beginning of the trial but the state did not amend it and the

¹⁰At 749-50.

¹¹At 747.

¹²At 748.

¹³*Ibid.*

¹⁴At 747.

¹⁵At 749.

defect was also not cured by evidence¹⁶ as required by the provisions of section 88 of Act 51 of 1977,¹⁷ the trial court erred in convicting him. On the issue of the existence of a legal duty the court held:¹⁸

I am of the opinion that the legal conviction of the community definitely demands that a detective should reveal his knowledge under such circumstances to his fellow investigation officer and that therefore he had a moral obligation to do so. In the event that the state evidence is accepted, it appears that appellant's silence actually led to Godfather's release. By doing so the police investigation was defeated or at least delayed, because Godfather was arrested the following day by other members of the police force in a neighbouring town and handed again to the team who originally detained him for interrogation. Thereafter he was charged and found guilty on a charge that arose from the investigation referred to above. My finding is therefore that in relevant circumstances an action can lead to a finding of guilt of attempting to defeat or obstruct the course of justice.¹⁹

The court found that notwithstanding the fact that the defect in the charge sheet was brought to the attention of the court by the accused's legal representative at the start of the trial, the charge sheet was never amended. In the court's opinion, the provisions of section 88 of the Criminal Procedure Act are clear and unambiguous and essentially that the state could argue that the evidence led had cured the defect.²⁰ As the charge sheet was defective the court unanimously allowed the appeal and the guilty finding and sentence were set aside.²¹

Other academic writers use the words "an act," meaning that this crime can, generally, only be committed through a positive act and not through omission.²² Secondly, in some

¹⁶*Ibid.*

¹⁷Section 88 of the Criminal Procedures Act provides:

Where a charge is defective due to the omission of an allegation, which is an essential element of the relevant crime, the defect is, unless it is brought to the attention of the court before the judgement, restored by evidence at the trial which proves the alleged matter.

¹⁸*S v Gaba supra* (n 8) at 751.

¹⁹[My translation].

²⁰*S v Gaba supra* (n 8) at 752.

²¹At 753.

²²Burchell and Milton *op cit* Chapter Two (n 148) 939 and Hunt *op cit* Chapter Two (n 7) 143.

definitions it is said that X's conduct must be intended to defeat or obstruct the due administration of justice. Thirdly, sometimes this crime is referred to as "defeating" the course of justice, sometimes as "obstructing" the course of justice,²³ sometimes as defeating and obstructing the course of justice,²⁴ sometimes as defeating or obstructing the course of justice²⁵ and sometimes as defeating the ends of justice.²⁶ The words "defeating" and "obstructing" the course of justice will now be discussed hereunder.

(1) According to Hunt²⁷ and Burchell and Milton,²⁸ the actual defeating of the course of justice, in the context of criminal cases, occurs when the accused's act causes:

- (i) Y who is guilty, to escape conviction either because the prosecution is induced to decline to prosecute or because the court is compelled to acquit him or her (or else to impose a punishment which would have been different but for the act or acts); or
- (ii) Y who is innocent, to be convicted.

In the context of civil proceedings, defeating connotes the obtaining of a judgment different from that, which would otherwise have been given.²⁹ According to Burchell and Milton,³⁰

²³*S v Tanoa* 1955 (2) SA 613 (O); *R v Nhlapo* 1958 (3) SA 142 (T); *S v Binta* 1993 (2) SACR 553 (C) and *S v Kiti* 1994 (1) SACR 14 (E).

²⁴*Queen v Foye and Carlin supra* Chapter Two under 2.4.2, text at note 162.

²⁵*R v Watson* 1961 (2) SA 283 (R) 286; *S v Greenstein* 1977 (3) SA 220 (RAD); *S v Gaba supra* (n 8); *S v Mene* 1988 (3) SA 641 (A) and *S v Bazzard* 1994 (1) SACR 302 (NC) at 303.

²⁶*S v Saueman* 1978 (1) SA 1073 (N); *R v Bekker* 1956 (2) SA 279 (AD) and GE Devenish "Defeating the ends of justice" (1979) *SALJ* 30.

²⁷Hunt *op cit* Chapter Two (n 7) 150.

²⁸Burchell and Milton *op cit* Chapter Two (n 148) 941.

²⁹Hunt *op cit* Chapter Two (n 7) 144.

³⁰Burchell and Milton *op cit* Chapter Two (n 148) 941.

“defeating” is more serious than “obstructing” because it means that justice has not been done; it has been defeated. It is said that “obstructing” has a less drastic meaning than “defeating” and criminal proceedings are obstructed if either the investigation by the police or the court proceedings themselves are prolonged or otherwise delayed or disturbed.³¹ There were also cases where the accused were charged with attempting to defeat the ends of justice³² or attempting to defeat or obstruct the course of justice.³³ There is authority that some courts prefer the use of “attempt to defeat the ends of justice” to “defeating the ends of justice.” In *R v Cowan and Davies*³⁴ Solomon, J held:³⁵

It appears to me that the proper way of designating the offence is not “defeating the ends of justice,” but “an attempt to defeat the ends of justice,” because I do feel that in the majority of cases – in almost every case – it would be very difficult, if not impossible, to prove that the ends of justice have been actually defeated. Take the strongest case which one can imagine, where there is only one witness against a criminal, and that witness has been induced to leave the country so as not to give evidence; there again it may be said that the ends of justice had been defeated, but it would be impossible to prove it, because *non constat* if the witness had given evidence the result might have been the same. It seems to me almost impossible to prove positively in any case that the ends of justice have been defeated.

Therefore, it is preferable to charge X with an inchoate offence (an attempt to defeat or obstruct) rather than with a choate offence (an actual defeating or obstructing).³⁶ According to Hunt,³⁷ the words of Solomon, J, in *R v Cowan and Davies* may be construed in one of two ways. Firstly, it may be construed to mean a choate crime of attempting to defeat or

³¹*S v Greenstein supra* (n 25) at 225E.

³²*Duuring v R supra* Chapter Two under 2.4.3, text at note 191; *S v Naidoo* 1977 (2) SA 123 (N) and B Clark “Attempting to defeat the ends of justice” (1989) *SALJ* Vol 106 33.

³³*S v Mdakani* 1964 (3) SA 311 (T). This case is discussed *infra* under 7.4.3, text at note 200. See also *S v Van Niekerk* 1972 (3) SA 711 (AD). This case is discussed *infra* under 7.4.9, text at note 359.

³⁴*R v Cowan and Davies* at 798 *supra* Chapter Two under 2.4.3, text at note 182.

³⁵At 804.

³⁶Burchell and Milton *op cit* Chapter Two (n 148) 941.

³⁷Hunt *op cit* Chapter Two (n 7) 153.

obstruct the administration of justice.³⁸ Hunt³⁹ refers to the decision of the English Court of Appeal, in *R v Rowell*⁴⁰ where the court held that attempt to pervert the course of justice is a choate offence. Secondly, the words may be interpreted to mean that it is preferable (indeed mandatory) to charge X with an inchoate offence (an attempt to defeat or obstruct) rather than with a choate offence (an actual defeating or obstructing). Snyman says that a charge of defeating or obstructing the course of justice (or attempting to do so) is one single offence, not one involving two distinct alternative offences.⁴¹ This is construed to mean that a charge of defeating or obstructing the course of justice (or attempting to do so) is a choate offence. In the same vein, Burchell and Milton⁴² seem to support the view that the crime should be charged as an attempt to defeat or obstruct the course of justice. They say that the charging of this crime as an attempt to defeat or obstruct the course of justice (in their view, an inchoate crime) alleviates the agony, on the prosecution's part, of proving that justice was in fact defeated or even obstructed by the accused's act or series of acts.⁴³ According to Snyman,⁴⁴ the correct designation of the crime in the charge sheet will depend upon the nature of the act, which the accused is alleged to have committed. He also submits that a reference to "ends of justice" in the description of this crime should be avoided because it unduly restricts the ambit of the crime which deals with interference in the course of the administration of justice and which can be committed even though justice does triumph in the end. It is also said that the crime of defeating or obstructing the course of justice may overlap with crimes like contempt of court, perjury, fraud, extortion and

³⁸*Ibid.*

³⁹*Ibid.*

⁴⁰See *R v Rowell* at 671 *supra* Chapter Three under 3.3, text at note 47. See also Card and Hogan *op cit* Chapter Two under 2.3, text at notes 95 and 96.

⁴¹Snyman *op cit* Chapter Two (n 151) 338.

⁴²Burchell and Milton *op cit* Chapter Two (n 148) 941.

⁴³*Ibid.*

⁴⁴Snyman *op cit* Chapter Two (n 151) 337.

many others.⁴⁵

It is submitted that when Solomon, J said that the offence should be charged as “attempting to defeat the ends of justice”⁴⁶ he was referring to “attempting to defeat the ends of justice” as an inchoate offence, not as choate offence.⁴⁷ However, attempting to pervert the course of justice is a choate offence under English,⁴⁸ Australian,⁴⁹ and Canadian law.⁵⁰ It is said that the use of the word “attempt” in the designation of the offence is misleading because the attempt itself is the choate offence.⁵¹ Snyman agrees with this point of view,⁵² although Hunt says that as a general rule in South Africa attempting to defeat or obstruct the course of justice is regarded as an inchoate offence.⁵³ This leads us to the next question, namely, the meaning of “obstructing the course of justice.”

(2) It is said that, “obstructing,” means less than “defeating.”⁵⁴ “Obstruction” occurs if the proceedings are impeded or interfered with in a more than trifling degree. It is further said that this kind of interference may occur before proceedings are pending or after the

⁴⁵Snyman *op cit* Chapter Two (n 151) 338 and Hunt *op cit* Chapter Two (n 7) 185.

⁴⁶*R v Cowan and Davies* at 804 *supra* Chapter Two under 2.4.3, text at note 182

⁴⁷This inference is drawn from the judge’s words, “in the majority of cases — in most every case — it would be very difficult, if not impossible, to prove that ends of justice have been actually defeat.”

⁴⁸Card *op cit* Chapter Two (n 91) 427 and Smith and Hogan *op cit* Chapter Two (n 93) 751.

⁴⁹See also *Healy v The Queen* at 106D *supra* Chapter Four under 4.3.1.1, text at note 246.

⁵⁰See Greenspan and Rosenberg *op cit* Chapter Five (n 11) CC/261.

⁵¹See *supra* Chapter Two under 2.3, text at notes 95 and 96.

⁵²See *supra* (n 41).

⁵³Cf Hunt *op cit* Chapter Two (n 7) 153.

⁵⁴Snyman *op cit* Chapter Two (n 151) 338.

proceedings are pending.⁵⁵ Hunt⁵⁶ submits that the issue of *mens rea* leads to interpreting “obstructing” more widely than “defeating.” He says that if these terms were synonymous, the *mens rea* required for an attempt to commit the crime, as for the crime *per se*, must be a foreseeable possibility that the course of justice may be defeated. It must then follow that if X commits his *actus* in the certainty (stemming perhaps from great experience of judicial proceedings) that what he does will eventually make no difference, but will cause considerable delay, he cannot be convicted either of defeating or obstructing or an attempt thereto.⁵⁷ Hunt⁵⁸ says, however, that such a result would be most undesirable with regard to the interests in the unimpaired administration of justice which this crime exists to protect. He suggests that such a result can be avoided only by interpreting “obstructing” more widely than “defeating” for only then can the *mens rea* be interpreted as foresight of the possibility of something less than a defeat (in the above case).⁵⁹

Considering the existence of the view that defeating is more serious than obstructing,⁶⁰ it is submitted that the discrepancies in the designation of this crime may cause legal uncertainty because prosecutors are not sure whether to charge the accused with defeating or obstructing the course of justice. The accused is placed at the mercy of the specific prosecutor as it depends on the specific prosecutor how the charge sheet is drawn up. This may lead to a situation where two accused (X1 and X2) commit a similar offence, for example, they both dissuaded state witnesses not to testify in their respective trials, and yet are charged with different offences. X1, for example, might be charged with defeating the

⁵⁵See Burchell and Milton *op cit* Chapter Two (n 148) 941 and Hunt *op cit* Chapter Two (n 7) 151.

⁵⁶Hunt *op cit* Chapter Two (n 7) at 151-52.

⁵⁷Hunt *op cit* Chapter Two (n 7) 152.

⁵⁸*Ibid.*

⁵⁹*Ibid.*

⁶⁰Burchell and Milton *op cit* Chapter Two (n 148) 941 and Hunt *op cit* (n 7) 151.

course of justice and X2 might be charged with obstructing the course of justice. The discrepancy in the designation of the crime is not an ideal state of affairs. This crime subverts the same judicial processes on which the rule of law so virtually depends,⁶¹ and so there must be certainty regarding its designation.

7.2 WHEN DOES THE COURSE OF JUSTICE BEGIN?

It has been said that the conduct element of the common law offence of defeating or obstructing the course of justice requires that the accused defeats or obstructs the “administration of justice.”⁶² When does the administration of justice begin so that it could be defeated or obstructed? Once the matter is before the court, justice is clearly being administered. What about pre-trial processes like obstructing the police in their investigations? Hunt⁶³ says that for purposes of this crime the term “administration of justice” means the judicial administration of justice in civil or criminal proceedings. There is judicial authority and academic opinion that say that if it is quasi-judicial proceedings which are obstructed or defeated then the crime is not committed.⁶⁴ In *S v Thompson*,⁶⁵ the court refused to extend the scope of the crime to include proceedings of a quasi-judicial nature and set aside a conviction where the accused was convicted of defeating or obstructing the course of justice in relation to a disciplinary enquiry conducted by the South African Medical and Dental Council.

The facts of this case were as follows: Accused number 1, Thompson, was a medical

⁶¹Cooper *op cit* Chapter Six (n 13) 621.

⁶²Burchell and Milton *op cit* Chapter Two (n 148) 940; Hunt *op cit* Chapter Two (n 7) 143 and Snyman *op cit* Chapter Two (n 151) 337.

⁶³Hunt *op cit* Chapter Two (n 7) 148.

⁶⁴*Ibid.* See also *S v Thompson and Another* 1968 (3) SA 425 (E).

⁶⁵*S v Thompson and Another supra* (n 64) at 429B-E.

practitioner, while accused number 2 was a retired bank manager who assisted Thompson with his accounts and certain secretarial duties. Allegedly, the accused were supposed to appear before an enquiry conducted by the South African Medical and Dental Council into an allegation of improper and disgraceful conduct by Thompson. It was alleged that a certain Ms Gous was to testify against the accused at this inquiry and with intent to defeat or obstruct the course of justice, the accused approached her and attempted to persuade her to falsely declare that she had in fact been Thompson's patient and had been examined by him.⁶⁶ Thompson and the bank manager were charged with defeating or obstructing the course of justice. In the court *a quo* the defence counsel took exception to the indictment on the ground that it did not disclose an offence recognised by the court.⁶⁷ It was contended that the crime of attempting to defeat or obstruct the course of justice could only be committed in respect of proceedings before a court of law and that neither the Medical Council nor its disciplinary committee were courts of law, nor were they in any way concerned with the administration of justice, and that consequently any attempt to interfere with its functions or to obstruct it could not amount to an attempt to defeat the course of justice.⁶⁸ The court rejected this contention and convicted the accused of defeating or obstructing the course of justice.⁶⁹ The accused appealed.⁷⁰

On appeal the court held that although it is a statutory body, it is clear that the Medical and Dental Council is not an ordinary court of law. The council, in conducting the enquiry, is not bound by the strict rules of evidence and is only required to act in a quasi-judicial manner. No appeal lies from its decisions although its proceedings are subject to review by

⁶⁶At 425F-G.

⁶⁷*Ibid.*

⁶⁸At 425H-426.

⁶⁹*Ibid.*

⁷⁰*Ibid.*

the Supreme Court according to the general principles governing review.⁷¹ In setting aside the conviction the court held:⁷²

To extend the scope of the offence of defeating the ends of justice to include the proceedings before ... or to disciplinary enquiries before the Medical Council would, to my mind, be flying in the face of the very clear definition of this offence ...

Hunt⁷³ notes that South African courts are still in the process of delimiting the ambit of the crime of obstructing or defeating the course of justice. Although it is said that in relation to criminal matters the crime of defeating or obstructing the course of justice may be committed only once the proceedings are pending, this does not seem to be the preferred view of our courts and academic writers.⁷⁴ It is said that South African courts have extended the scope of this crime to include the pre-trial aspects of the administration of justice.⁷⁵ In particular there is a tendency to hold that conduct which interferes with police investigations of crimes or police efforts to prevent the commission of crimes may amount to obstructing or defeating of the due administration of justice.⁷⁶ According to Boister,⁷⁷ obstructing the police in their investigations has become an accepted form of the crime of obstructing the course of justice. This means that the course of justice begins immediately when a crime is committed and the police are investigating it and even before investigation has started.⁷⁸ South African courts have not restricted the scope of the crime to the

⁷¹At 427C-F.

⁷²429B-C.

⁷³Hunt *op cit* Chapter Two (n 7) 141.

⁷⁴Hunt *op cit* Chapter Two (n 7) 149 and Snyman *op cit* Chapter Two (n 151) 339.

⁷⁵Hunt *op cit* Chapter Two (n 7) 141.

⁷⁶Hunt *op cit* Chapter Two (n 7) 141 and Neil Boister "Where the administration of justice begins" (1993) *SALJ* Vol 110 No 2 204.

⁷⁷Boister *op cit* (n 76) 204.

⁷⁸For example, in *S v Daniels* 1963 (4) SA 623 (E) at 624B the accused was convicted of attempting to defeat the course of justice for conduct he did before the police could investigate the principal offence. This case is discussed in detail *infra* (n 90).

defeating or obstructing of pending proceedings and have held that the crime may be committed even where, at the time of the unlawful conduct, proceedings were not even contemplated.⁷⁹ Hunt⁸⁰ maintains that the principle of legality is violated when conduct which does not fall within the provisions of the *lex Cornelia de falsis* is treated as punishable. According to him, although it seems correct and necessary to regard police activities as falling within the scope of the concept of the administration of justice, only those activities which relate to the investigation of crimes and the collection of evidence relating to such crimes should come within the ambit of the concept of the administration of justice.⁸¹ He submits that routine police activities which are not connected with the investigations of crimes, are essentially of an administrative nature and thus fall outside the ambit of the crime of defeating or obstructing the administration of justice.⁸²

However, it is said that our courts have paid little attention to defining the precise limits of the concept of “administration of justice.”⁸³ Our courts have convicted accused for defeating or obstructing the course of justice following their attempts to interfere with police investigations of crime or police efforts to prevent the commission of crime.⁸⁴ If the course of justice begins when the police start with their investigations, the question to be asked is, what will happen if, before the police could start with their investigations, X threw away his murder weapon after killing Y or physically removed a potential witness away so that he or she could not be called to testify? It is submitted that the commencement of police investigations should not be the determinative moment for the crime to be

⁷⁹Hunt *op cit* Chapter Two (n 7) 143.

⁸⁰Hunt *op cit* Chapter Two (n 7) 142.

⁸¹*Ibid.*

⁸²*Ibid.*

⁸³Boister *op cit* (n 76) 204.

⁸⁴See *S v Naidoo supra* (n 32).

committed.

Snyman⁸⁵ submits that it is not a requirement for the crime that the conduct allegedly constituting it should have been committed in relation to a specific pending case. He says that it is not even necessary that the police or private litigants envisage a court case at the time of the accused's conduct.⁸⁶ It is said that it is sufficient that the accused subjectively foresees the possibility that his conduct may lead to a case being prosecuted or being investigated by the police.⁸⁷ By stating that "no pending case" is necessary, it is submitted that Snyman means that there is no requirement that there must be "pending judicial proceedings" *before* the crime of defeating or obstructing the course of justice could be committed.

Lansdown, Hoal and Lansdown⁸⁸ say that to constitute an attempt to defeat the course of justice it is not essential that the judicial proceedings which are said to be obstructed should have commenced or be pending. It is said that it is sufficient that the accused contemplated or should have contemplated them.⁸⁹

In *S v Daniels*,⁹⁰ the accused was convicted of attempting to defeat the course of justice for misleading the police in order not to detect the crime that was committed. The facts of this case were as follows: Daniels appeared before the court on three charges, among them, a

⁸⁵CR Snyman *Criminal Law* (1984) 303 and CR Snyman. *Strafreg* 2ed (1986) 387.

⁸⁶*Ibid.*

⁸⁷*Ibid.*

⁸⁸CHW Lansdown, WG Hoal and AV Lansdown *Gardiner and Lansdown South African Criminal Law and Procedure* 6ed (1957) 1114.

⁸⁹*Ibid.*

⁹⁰*S v Daniels supra* (n 78).

charge of an attempt to defeat the course of justice. Allegedly, he collided with another car while driving an unlicensed and uninsured motor vehicle. It was alleged that at the scene of the accident, before the arrival of the police, Daniels asked one Holstein to bring up another vehicle owned by Daniels. They exchanged the car registration numbers with those of the vehicle that was involved in the collision. Later, it was found that the license disc and third party insurance disc of Daniels's second vehicle had been attached to the windscreen of the unlicensed and uninsured vehicle. The only inference that could be drawn from the facts was that Daniels, after the collision, deliberately sought to convey a false representation to members of the police who would be called upon to investigate the circumstances of the accident that the vehicle which he was driving at the time was licensed and insured as required by law.⁹¹ In this case the suspected offence that would be under investigation was one of culpable homicide.

On appeal, it was submitted on behalf of Daniels that his conduct did not constitute the crime of an attempt to defeat the course of justice.⁹² It was argued on behalf of the accused that whether or not the suspected driver's vehicle was licensed and insured could have no bearing on the question of whether the suspect was or was not guilty of 'an unlawful homicide.'⁹³ The court held:⁹⁴

Police investigation into deaths caused in road accidents embraces examination of the qualifications of the drivers concerned and the conditions of their vehicles. Such examination may disclose the commission of offences not directly concerned with the death of a person, and it appears to me that anyone who knowingly endeavours to mislead the police in order to prevent detection of a crime that might otherwise be revealed is guilty of the offence of which the appellant was convicted.

⁹¹At 624H.

⁹²At 624-25H.

⁹³At 625D.

⁹⁴At 625C-E.

The appeal was dismissed.⁹⁵ The conviction and the dismissal of the appeal imply that the course of justice commences when the initial crime is committed and even before the police could detect it. It is submitted that when X commits a crime that may lead to police investigations and later to judicial proceedings, the course of justice is initiated. It is further submitted that any conduct (act or omission)⁹⁶ by X with intent to defeat or obstruct the due course of justice falls within the scope of this crime. Therefore, as Hunt puts it, the interference may occur before proceedings are ‘pending’ as where the police are put to the trouble of investigating the truth of a false statement which is made to them in connection with the matter which is being investigated.⁹⁷ Conduct that interferes with quasi-judicial proceedings falls outside the scope of the due administration of justice.⁹⁸

Authority from our case law could not be found for when “the course of justice” ends. However, there are two academic opinions as to when the administration of justice ends. Hunt⁹⁹ says that the judicial administration of justice is completed after the court has pronounced its judgment and anything which delays or obstructs the execution of judgment is not proper subject matter for a criminal charge of defeating or obstructing the course of justice. Lansdown, Hoal and Lansdown¹⁰⁰ submit that the crime of defeating or obstructing the course of justice may be committed in respect of proceedings which have been concluded, for instance, where a person contriving the release of X, a convicted prisoner, wilfully and falsely files an affidavit that Y and not X committed the crime.

⁹⁵*Ibid.*

⁹⁶See *S v Gaba supra* (n 8) at 746 and Snyman *op cit* Chapter Two (n 151) 339.

⁹⁷Hunt *op cit* Chapter Two (n 7) 151.

⁹⁸Hunt *op cit* Chapter Two (n 7) 141.

⁹⁹Hunt *op cit* Chapter Two (n 7) 149.

¹⁰⁰Cf Lansdown, Hoal and Lansdown *op cit* (n 88) 1114.

7.3 ELEMENTS OF THE OFFENCE

The essential elements of this offence are¹⁰¹

- (1) defeating or obstructing
- (2) the administration of justice
- (3) unlawfully
- (4) intentionally.

7.3.1 Conduct—defeating or obstructing

Some courts refer to this crime as defeating or obstructing the course of justice, defeating or obstructing the administration of justice and others as defeating the ends of justice.¹⁰²

Hunt¹⁰³ says that there is a difference between the notion “ends of justice” on the one hand, and the “course” or “administration of justice” on the other. The “ends of justice” is a restrictive concept connoting at most the due and proper disposal either of a civil or criminal matter by the courts of law. The “course” or “administration of justice” is a wider concept comprehending the various stages of the process of administering justice. This means the crime can be committed not in relation to the work of the courts but also in relation to the work of other agencies (such as the police) involved in the administration and enforcement of the law.¹⁰⁴

The conduct element of the common law offence of “defeating or obstructing the course of justice” requires that X defeats or obstructs the due administration of justice.¹⁰⁵ The accused must do something or omit to do something (omission) in order for the crime to be

¹⁰¹Burchell and Milton *op cit* Chapter Two (n 148) 940 and Snyman *op cit* Chapter Two (n 151) 337.

¹⁰²Hunt *op cit* Chapter Two (n 7) 143.

¹⁰³*Ibid.*

¹⁰⁴*Ibid.*

¹⁰⁵Burchell and Milton *op cit* Chapter Two (n 148) 940; Hunt *op cit* Chapter Two (n 7) 143; Snyman *op cit* Chapter Two (n 151) 337 and Boister *op cit* (n 76) 204.

committed.¹⁰⁶ An example of an act which defeats or obstructs the course of justice is to interfere with witnesses. Most commonly X requests a person whom he foresees may be a witness in a trial, but who need not have been subpoenaed, to give false evidence.¹⁰⁷ A possible example of an omission is as follows: Y, a senior police official, is involved in a car accident. X, another police official who is also Y's subordinate, arrives at the scene of the accident. Suspecting that his boss is drunk, he neither conducts a breathalyser test nor takes a blood sample from Y. At the end Y cannot be charged with drunk driving. X, as a police officer has a legal duty to order Y to have his or her blood sample taken or conduct a breathalyser test on Y to ascertain whether or not the alcohol level in his blood is above the legal limit. It is submitted that in this situation the crime of obstructing the course of justice through omission has been committed.

However, our courts¹⁰⁸ have held that an accused who, when requested to give a sample of his or her blood, merely refuses and does not perform any positive act, cannot be convicted of the crime of defeating or obstructing the course of justice. One of the earliest cases that dealt with refusal to allow blood sample to be taken was *S v Oberbacher*. The facts of *S v Oberbacher* were as follows: The accused was arrested for being suspected of driving while under the influence of alcohol. He was taken to a state hospital in order that a blood sample be taken from him in terms of section 267 of Ordinance 34 of 1963 as amended by section 12 of Ordinance 4 of 1968.¹⁰⁹ However, the accused refused to allow the doctor to

¹⁰⁶*S v Gaba supra* (n 8) at 746 and *Snyman op cit* Chapter Two (n 151) 339.

¹⁰⁷*Hunt op cit* Chapter Two (n 7) 155.

¹⁰⁸*Cf S v Oberbacher* 1975 (3) SA 815 (SWA) at 815H; *S v Binta supra* (n 23) at 553g and *S v Kiti supra* (n 23) at 14b-c.

¹⁰⁹Section 267 of Ordinance 34 of 1963 as substituted by section 12 of Ordinance 4 of 1968 reads:

Any peace officer may take or cause to be taken the finger prints, palm prints, and foot prints of any person arrested upon any charge and may make or cause to be made available such person for identification in such condition, position or apparel as such peace officer may determine, and the medical officer of any prison or any district surgeon or (except in a case of a woman) any peace officer

take a blood sample from him.¹¹⁰ The arresting officer was instructed to use force if necessary in order to obtain the blood sample from the accused. Dr Koning refused to take the blood sample if force was to be used.¹¹¹ Nevertheless, the accused was charged with (1) driving a motor vehicle while under the influence of liquor and (2) the crime of defeating the ends of justice for refusing to allow the doctor to draw blood from him, thus rendering it impossible for the state to properly prosecute the charge of drunk driving against him. The court *a quo* convicted the accused on both charges. He appealed.¹¹²

On appeal it was argued on behalf of the accused that Dr Koning was neither a medical officer of any prison nor a District Surgeon, therefore he was not vested with powers in terms of Section 267 of Ordinance 34 of 1963 as amended by section 12 of Ordinance 4 of 1968, to draw a blood sample from the accused.¹¹³ It was also argued that there was no provision in the *Ordinance*, which compelled any person charged with any offence relating to driving a vehicle under the influence of liquor to allow a blood sample to be taken from him or her.¹¹⁴ According to the court, an act connotes something more than mere passivity on the part of the accused.¹¹⁵ The court also found that in this matter the accused, when requested to allow a blood sample to be taken from him, did nothing. He merely said “no.” The court held:¹¹⁶

may take or cause to be taken such steps, including (except in the case of a peace officer) any blood test, as he may deem necessary in order to ascertain whether the body of any such person bears any mark, characteristics or distinguishing feature or shows any condition or appearance.

¹¹⁰*S v Oberbacher supra* (n 108) at 817A.

¹¹¹*Ibid*

¹¹²At 816D.

¹¹³At 817 H.

¹¹⁴At 817F.

¹¹⁵At 818D.

¹¹⁶At 818 E.

There must be something more than mere mental determination – the latter must be accompanied by some overt conduct before what was only an intention becomes an act...Nowhere in the cases do I find that a negative attitude by a suspect or accused...has been construed as an act intended to defeat or obstruct the course of justice.

The court allowed the appeal and on the charge of defeating the ends of justice and set aside both the conviction and sentence.¹¹⁷

In *S v Binta*¹¹⁸ and *S v Kiti*,¹¹⁹ the *Oberbacher* decision was relied upon when the accused were charged with defeating or obstructing the course of justice for refusing requests to give samples of their blood samples as envisaged by section 37(2)(a) of the Criminal Procedure Act.¹²⁰

In 1993, in *S v Binta*,¹²¹ the court set aside the conviction of X for obstructing the course of justice by pulling his arm away whilst an attempt was being made to draw blood from him. The facts of this case were the following: The accused, Binta, was arrested on the following charges:

- (1) drunken driving,
- (2) defeating the ends of justice, and
- (3) assault.

¹¹⁷At 819G.

¹¹⁸*S v Binta supra* (n 23).

¹¹⁹*S v Kiti supra* (n 23).

¹²⁰The Criminal Procedure Act 51 of 1977. This section provides:

Any medical officer of any prison or a district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse may take such steps, including taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in para (a)(i) or (ii) of ss (1) has any mark, characteristics or distinguishing feature or shows any conditions or appearance.

¹²¹*S v Binta supra* (n 23).

He was taken to the local District Surgeon, Dr Van Niekerk. The latter was requested to perform an examination on the accused and to draw blood from him for analysis. This analysis was crucial in order to determine the accused's state of sobriety and also to determine the level of alcohol, if any, in his blood. In respect of count 2, allegedly, the accused unlawfully and with the intention of obstructing and defeating the course of justice, refused to have blood drawn from him and in so doing obstructed and defeated the ends of justice.¹²² During trial, Dr Van Niekerk testified that the accused had refused to allow him to draw blood from him and even to examine him. It was submitted on behalf of the accused, on the strength of the *Oberbacher*¹²³ case, that an arrested person's refusal to allow blood to be drawn from him or her, inasmuch as it involves a mere omission, does not constitute the crime of obstructing or defeating the ends of justice or an attempt to do so.¹²⁴ It was argued that in order to constitute this offence a positive act is required.¹²⁵ Ackermann, J, noted that one of the essential elements of the offence i.e. "an act of defeating or obstructing the ends of justice" was missing in this case.¹²⁶ The court held that "there are no statutory provisions compelling a person under sanction of penalty to submit to the taking of a sample of his blood."¹²⁷ The court further held that the provisions of section 37(2)(a) of the Criminal Procedure Act did not place a legal duty on any person to allow a blood sample to be taken from him or her when requested by either the district surgeon or any other person indicated in the Act.¹²⁸ But according to Ackermann, J, the provisions of section 37(2)(a) could hardly be construed to apply only to those cases where

¹²²At 554d.

¹²³See *S v Oberbacher supra* (n 108).

¹²⁴*Sv Binta supra* (n 23) at 559e.

¹²⁵*Ibid.*

¹²⁶At 560b.

¹²⁷At 561h-i.

¹²⁸*Ibid.*

the other person voluntarily consented to the particular acts being performed.¹²⁹ Such a construction would render the relevant provisions redundant, because at common law, according to the court, the consent of X would make lawful what would otherwise be an assault. In the court's view, the provisions of section 37(2)(a) also apply where X refuses to submit to have his blood sample taken or drawn.¹³⁰ But according to the court, there is no fundamental difference in principle between the case of a person refusing to answer questions put by the police in an investigation and the case of the police wishing to obtain a blood sample.¹³¹ The court held that the legal conviction of the community does not require that a mere omission by X in refusing to allow the taking of his or her blood sample should be the object of criminal sanction.¹³² Therefore, a person who refuses such a request cannot be found guilty of obstructing the course of justice or attempting to defeat the ends of justice.¹³³ The accused's conviction of the crime of defeating or obstructing the course of justice was set aside.¹³⁴

The facts of the *Kiti* decision were the following: The accused, Kiti, was arrested and charged with drunken driving. He was taken to the police station and the District Surgeon was called out to take a sample of his blood for analysis. Allegedly, Kiti was uncooperative and he refused to allow the district surgeon to take a blood sample. When the police and the district surgeon attempted to take his blood by force the accused actively resisted by pulling his arm away, making it impossible for them to draw his blood.¹³⁵ He was charged

¹²⁹At 562a-b.

¹³⁰At 562b-c.

¹³¹At 564a.

¹³²At 564c-d.

¹³³At 564f.

¹³⁴At 564g.

¹³⁵*S v Kiti supra* (n 23) at 14h-i.

with driving a motor vehicle while under the influence of liquor. He was also charged with the common law offence of obstructing the course of justice. The latter charge arose out of his refusal to allow a blood sample to be taken.¹³⁶ He was convicted on both charges.¹³⁷

On appeal, it was argued on behalf of the accused that it is not a wrongful act to refuse to consent to allow a blood sample to be taken and to actively resist if an attempt is made to take a blood sample by force.¹³⁸ It was further argued that section 37(2)(a) of the Criminal Procedure Act does not compel the person whose bodily condition is the subject of the investigation to agree that his or her blood sample be taken. Therefore, it is not a criminal offence to refuse.¹³⁹ Jones, J, held that there is nothing in section 37(2)(a) which makes it a criminal offence of obstructing the course of justice to refuse to allow a blood sample to be taken from the suspect or the accused.¹⁴⁰ The court set aside both the conviction and the sentence on the charge of obstructing the course of justice.¹⁴¹

The difference between the *Kiti* and *Oberbacher* decisions is that in the latter case, X passively resisted an attempt to take his blood sample. In the former case, X actively resisted an attempt to take a blood sample from his arm. However, X was acquitted on the ground that he had not acted unlawfully in resisting an attempt to obtain his blood sample.

In South Africa there is legislation that prohibits driving while under the influence of intoxicating liquor or a drug having narcotic effect in one's blood or breath. Section 65 of

¹³⁶At 15a.

¹³⁷*Ibid.*

¹³⁸At 15c.

¹³⁹At 15i.

¹⁴⁰At 19f-i.

¹⁴¹At 20d.

the National Road Traffic Act (NRTA)¹⁴² provides:

- (1) No person shall on a public road
- (a) drive a vehicle; or
 - (b) occupy a driver's seat of a motor vehicle the engine of which is running, while under the influence of intoxicating liquor or a drug having a narcotic effect.

Section 65(9) of the Act¹⁴³ provides that no person shall refuse that a specimen of blood or a specimen of breath be taken from him or her. In terms of section 37(2)(a) of the Criminal Procedure Act¹⁴⁴ the district surgeon, a registered nurse or a prison medical officer will take a specimen of an arrested driver's blood, which is then submitted to a state laboratory for scientific analysis. That analysis enables experts to ascertain the presence and estimated quantity of alcohol in the person's blood at the time of the examination.¹⁴⁵ Notwithstanding the provisions of section 65(9) of the NRTA and section 37(2)(a) of the Criminal Procedure Act, South African High Courts¹⁴⁶ are still reluctant to confirm the accused's conviction of attempting to defeat or obstruct the course of justice for refusing to allow a blood sample to be taken from them when they were suspected of driving or occupying a drivers' seats of motor vehicles the engines of which were running while under the influence of intoxicating liquor or a drug having a narcotic effect on a public road.

¹⁴²Act 93 of 1996.

¹⁴³National Road Traffic Act (NRTA) 93 of 1996.

¹⁴⁴Act 51 of 1977. See the provisions of section 37(2)(a) of this Act *supra* Chapter Seven (n 120).

¹⁴⁵If the specimen is taken within two hours of the commission of the alleged offence then, if the alcohol concentration of the specimen is not less than 0,05g per 100ml, the alcohol concentration in the blood at the time of the alleged offence will be presumed to have been not less than 0,05g per 100ml. In terms of the amendment to the *National Road Traffic Act*, the same presumption is made where the concentration of any alcohol in any specimen of breath exhaled by a person is not less than 0,38mg per 1000ml. However, the concentration in any breath specimen shall be ascertained by using the prescribed equipment. For this reason, the blood specimen will almost always be taken within two hours after the arrest.

¹⁴⁶See *S v Oberbacher supra* (n 108); *S v Kiti supra* (n 23) and *S v Binta supra* (n 23).

According to some academic writers, refusal to allow a blood sample to be taken from oneself, refusing to answer questions or give information to the police or to refuse to cooperate with the police in obtaining evidence against oneself or another person is not regarded as obstruction of the due administration of justice.¹⁴⁷ One's refusal or omission does not constitute an *actus* sufficient to make one's conduct a crime.¹⁴⁸

It has been said, above¹⁴⁹ that "obstructing," means less than "defeating." "Obstruction" occurs if the proceedings are impeded or interfered with in a more than trifling degree. Attempt to defeat or obstruct the course of justice occurs when someone (X) deliberately supplies the police (Y) with false information which is, however, immediately disbelieved and not acted upon by Y. So X neither defeats nor obstructs the course of justice. Nevertheless, his or her conduct constitutes an attempt to defeat or obstruct the course of justice.¹⁵⁰ An attempt to defeat or obstruct the course of justice may be described as unlawfully committing an act in the furtherance of an intention to defeat or obstruct the administration of justice, provided the act is one of execution and not one of preparation.¹⁵¹ If, for example, X persuades Z to agree to approach Y in order to induce him or her (Y) to give false evidence in contemplated proceedings, X is guilty of an attempt to defeat or obstruct the course of justice even though Z does not try to influence Y to give false evidence.¹⁵²

¹⁴⁷Hunt *op cit* Chapter Two (n 7) 160.

¹⁴⁸*Ibid.*

¹⁴⁹See *supra* (n 30-31).

¹⁵⁰Snyman *op cit* Chapter Two (n 151) 341.

¹⁵¹*Ibid.* See also Burchell and Milton *op cit* Chapter Two (n 148) 942 and Hunt *op cit* Chapter Two (n 7) 153.

¹⁵²Hunt *op cit* Chapter Two (n 7) 153.

7.3.2 The administration of justice

Burchell and Milton¹⁵³ point out that administration of justice means judicial administration of justice in both civil and criminal proceedings and not quasi-judicial or administrative proceedings. The course of justice that is required to be obstructed in order to constitute a crime is the process which is destined to eventuate in a court case concerning an actual or intended suit between parties or between the state and its subjects.¹⁵⁴

7.3.3 Unlawfulness

Hunt¹⁵⁵ and Burchell and Milton¹⁵⁶ are of the opinion that a false denial of guilt, though it obstructs the course of justice, is not unlawful. They say that to hold otherwise would be indirectly to require the accused to admit that he or she is guilty and nullify the common law and the constitutional principle that an accused has a right to remain silent.¹⁵⁷ The right to remain silent is now a constitutional right found in section 35(1)(a) of the Constitution.¹⁵⁸ These writers also submit that in the absence of some statutory provision, it is not unlawful for an ordinary person to refuse to assist the police in the investigation of crimes even though by so doing he or she may defeat or obstruct the administration of justice.¹⁵⁹

An obstruction of justice may be lawful in certain circumstances,¹⁶⁰ for example, if an

¹⁵³Burchell and Milton *op cit* Chapter Two (n 148) 943.

¹⁵⁴See *S v Bazzard supra* (n 25) at 303a and Snyman *op cit* Chapter Two (n 151) 340.

¹⁵⁵Hunt *op cit* Chapter Two (n 7) 144.

¹⁵⁶Burchell and Milton *op cit* Chapter Two (n 148) 940.

¹⁵⁷*Ibid.*

¹⁵⁸The Constitution of the Republic of South Africa of 1996.

¹⁵⁹Burchell and Milton *op cit* Chapter Two (n 148) 940 and Hunt *op cit* Chapter Two (n 7) 144.

¹⁶⁰Hunt *op cit* Chapter Two (n 7) 145.

attorney suspects that his client is guilty, he or she may advise him or her not to testify for the defence. By doing so, the attorney is not guilty of defeating or obstructing the course of justice. This is because it is lawful for the attorney to give legal advice to his or her client and inform his or her client of his right to remain silent. However, if the attorney exceeds the permissible limits of the law and of professional ethics, and, for example, counsels his or her client falsely to deny statements the client has already made, or makes up a false story for the client to tell in evidence, he or she is guilty of defeating or obstructing the course of justice.¹⁶¹

7.3.4 Intention

The accused must intend to defeat or obstruct the course of justice. He or she must subjectively foresee the possibility that his or her conduct may lead to defeating or obstructing the course of justice.¹⁶² X must have been aware of the fact that his or her conduct might thwart or interfere with judicial proceedings which were to take place in the future, or would at least hamper or forestall the investigation of an offence.¹⁶³ It is said that if intention in this sense is present, it is immaterial whether X's motive is good or bad.¹⁶⁴

7.4 CATEGORIES OF THE ACTUS REUS OF THE OFFENCE

The course of justice may be defeated or obstructed in various ways. Some of these acts overlap with crimes like perjury, contempt of court, bribery of public officers, fraud, etc.¹⁶⁵

¹⁶¹*Ibid.*

¹⁶²Snyman *op cit* (n 1) 342; Hunt *op cit* Chapter Two (n 7) 145 and Burchell and Milton *op cit* Chapter Two (n 148) 944.

¹⁶³Snyman *op cit* (n 1) 342.

¹⁶⁴Hunt *op cit* Chapter Two (n 7) 145 and Burchell and Milton *op cit* Chapter Two (n 148) 944.

¹⁶⁵Hunt *op cit* Chapter Two (n 7) 155.

Just like in other jurisdictions,¹⁶⁶ South African common law punishes certain acts or a series of acts or conduct as defeating or obstructing the course of justice and sometimes as an attempt to defeat or obstruct the course of justice. The following acts or conduct (which do not amount to *numerus clausus*) are said to obstruct or defeat the course of justice:¹⁶⁷

- a. Interfering with witnesses.
- b. A witness demands money for giving or not giving evidence.
- c. Tampering, altering, fabricating, concealing and destroying evidence.
- d. Laying of false charges.
- e. Interfering with the police in the execution of their duties.
- f. Making false statements to the police or someone else.
- g. Lying to the police.
- h. Misleading the police in order to prevent the detection of a crime.
- i. Interfering with the judiciary.
- j. Improperly influencing a party to a civil case.
- k. Unlawful releases of a prisoner.

7.4.1 Interference with witnesses

There are several forms of interference with witnesses.¹⁶⁸ The most common way is for the accused to request another person whom he foresees to be a witness in his or someone else's trial, but who need not have been subpoenaed yet, either to give false evidence¹⁶⁹ or

¹⁶⁶In English law, see Card *op cit* Chapter Two (n 230) 442-43. The conduct is discussed *supra* in Chapter Two under 2.4, text at note 267.

¹⁶⁷Lansdown, Hoal and Lansdown *op cit* (n 88) 1114-15; Burchell and Milton *op cit* Chapter Two (n 148) 942-43; Hunt *op cit* Chapter Two (n 7) 155-62 and Snyman *op cit* Chapter Two (n 151) 338-39.

¹⁶⁸Hunt *op cit* Chapter Two (n 7) 155.

¹⁶⁹*R v Zackon supra* Chapter Two under 2.4.5, text at note 200 and *R v Hirschhorn* 1934 TPD 178.

falsely deny a statement¹⁷⁰ or to deny the voluntary nature of a statement already made. Hunt¹⁷¹ says that it is essential in these cases that the statement, evidence or denial must be false. X lacks *mens rea* unless he or she foresees the possibility of this falsity.¹⁷² He says that it is immaterial whether or not the witness agrees to do what X asks.¹⁷³ In some cases X does not make a direct approach to the witness (Z), but persuades another person (Y) to do this. He (X) is then guilty of an attempt to defeat or obstruct the course of justice even if Y does not actually approach Z to make the request. However, if Y does not agree to approach Z, X is guilty of incitement, not attempt to defeat the course of justice.¹⁷⁴ The other way in which this form of the *actus reus* manifests itself is the unlawful physical removal of a material witness from the court's jurisdiction or inducing a witness to abscond so that he or she cannot give testimony, with intent to defeat or obstruct the due administration of justice.¹⁷⁵ It is also irrelevant whether or not the witness has already been subpoenaed. A witness who enters into an agreement to do the above also commits the crime.¹⁷⁶ This offence can also be committed by unlawfully soliciting a complainant to withdraw charges.¹⁷⁷

Court decisions where forms of witness interference were dealt with are now discussed. In *R v Hirschhorn*¹⁷⁸ it was observed that on a charge of attempting to defeat the course of

¹⁷⁰*S v Mtshizana* 1965 (1) PH H80 (AD). This case is cited with approval in Hunt *op cit* Chapter Two (n 7) 155.

¹⁷¹Hunt *op cit* Chapter Two (n 7) 155-56.

¹⁷²Hunt *op cit* Chapter Two (n 7) 155-66.

¹⁷³Hunt *op cit* Chapter Two (n 7) 156.

¹⁷⁴*Ibid.*

¹⁷⁵See *Queen v Foye and Carlin supra* Chapter Two under 2.4.2, text at note 162.

¹⁷⁶*R v Cowan and Davies* at 798 *supra* Chapter Two under 2.4.3, text at note 182.

¹⁷⁷*S v Vittee* 1958 (2) PH H347 (T) and *S v Du Toit* 1974 (4) SA 679 (T).

¹⁷⁸*R v Hirschhorn supra* (n 169).

justice by inciting prosecution witnesses to give false testimony in a criminal prosecution, it is no defence for the accused to prove that the prosecution in question was bound to fail owing to the invalidity of an industrial agreement.¹⁷⁹

The facts of this case were as follows: Hirschhorn was initially charged with contravening certain clauses of an industrial agreement framed under certain legislation. While the case against him was still pending on the latter charge, it was alleged that he attempted to incite prosecution witnesses to give false testimony at his trial and he was charged with attempting to defeat the course of justice.¹⁸⁰ He was convicted of attempting to defeat the course of justice,¹⁸¹ but, while the case was still pending, the Supreme Court declared the industrial agreement that led to the initial trial, not to be binding between the parties. As a result the prosecution against him was withdrawn.¹⁸² He appealed against his conviction for attempting to defeat the course of justice on the ground that the prosecution for the original crime was bound to fail. The court held:¹⁸³

[A]s *dolus malus* or *mens rea* was proved on the part of the appellant, the present case falls within these definitions. The fact that the original prosecution could not succeed owing to the invalidity of the industrial agreement is irrelevant.

What can be learnt from this decision is that the “course of justice” does not need the judicial proceedings against the accused to succeed for it to be defeated or obstructed. There may be a punishable attempt to defeat or obstruct the due administration of justice by interfering with a witness even if the judicial proceedings are bound to fail, or where the accused has been charged with contravening certain provisions under a piece of legislation

¹⁷⁹At 181.

¹⁸⁰At 178.

¹⁸¹*Ibid.*

¹⁸²*Ibid.*

¹⁸³At 181.

that does not exist or has been repealed.

In *R v Kramer*,¹⁸⁴ the court held that it is not an offence of obstructing or defeating the course of justice if X takes witnesses to his attorneys and induces them to speak the truth. The facts of this case are as follows: The accused was charged and convicted of a crime of attempting to defeat or obstruct the course of justice. Allegedly, the accused had sold liquor from his licensed premises earlier than 10 o'clock in the morning and aided and abetted two other persons, M and K, to commit the offence of selling liquor without the necessary licence. It was further alleged that M and K were necessary and material witnesses for the state upon the said charges against X. It was alleged that X unlawfully and with intent to defeat or obstruct the course of justice, induced the said M and K to appear at the office of the accused's attorneys, and there to state to his attorneys that he, X did not sell liquor to them before 10 o'clock in the morning.¹⁸⁵ When the matter was heard in court the accused raised objection to the indictment in that it did not state that what he (the accused) induced the witnesses to state to his attorneys was false and further, that it was false to his knowledge.¹⁸⁶ The objection was overruled.¹⁸⁷ However, on appeal the court held:¹⁸⁸

The objection taken in the magistrate's court was a perfectly sound one because clearly it is not the offence of obstructing the course of justice if an accused person takes witnesses to his attorneys and induces them to speak the truth. The essence is that he [accused] induced them to make a false statement, and that such statement was false to his knowledge.

This decision is authority to the proposition that the crime of attempting to obstruct or

¹⁸⁴1936 CPD 144.

¹⁸⁵At 145.

¹⁸⁶*Ibid.*

¹⁸⁷*Ibid.*

¹⁸⁸At 145-46.

defeat the course of justice cannot be committed by inducing witnesses to tell the truth. Therefore, in order for the accused to be convicted of the crime of attempting to defeat or obstruct the course of justice, the state must prove that the statement the accused induced to the witness is false and that the accused knows that it is false.

One of the cases where the accused was charged with defeating the ends of justice following his attempt to induce a complainant to withdraw charges against him is now discussed. In *S v Du Toit*,¹⁸⁹ the trial court convicted the accused of defeating the ends of justice following an attempt to persuade the complainant in a theft case, to withdraw the charge by offering money.

The facts of this case were as follows: The accused (Du Toit) and another person were both charged with theft of meat and of defeating the course of justice (*regsverydeling*). Although Du Toit pleaded not guilty, he was found guilty on both charges. He appealed against the conviction and sentence on the second charge (defeating the course of justice).¹⁹⁰ The state alleged that he and his co-accused, after they were arrested and while the theft charges were pending, attempted to offer a R100 bribe to the complainant so that the theft charges against them could be withdrawn.¹⁹¹ It was submitted on behalf of the accused that he and his co-accused believed that they were entitled to enquire from the complainant whether he could withdraw the charges and that the R100 offer was not made with the intention of buying the charges.¹⁹²

¹⁸⁹*S v Du Toit supra* (n 177) at 679.

¹⁹⁰At 680E.

¹⁹¹At 680G-H.

¹⁹²At 680-81H.

On appeal the court said that, according to the testimony that it had received, Du Toit had indeed attempted, by improper means, to make an offer to prevent the serious charge against him from running its normal course.¹⁹³ In other words the court was satisfied that Du Toit had attempted to prevent the smooth running of the course of justice. The court confirmed the finding and sentence of the trial court and the appeal was dismissed.¹⁹⁴

7.4.2 A witness who demands money for giving or not giving evidence

As under the Roman and Roman-Dutch *lex Cornelia de falsis*,¹⁹⁵ a person commits this crime when he or she, as a potential witness, demands that he or she be paid money for absconding or not absconding or for giving false or true evidence.¹⁹⁶ This conduct is punished in order to prohibit witnesses from accepting money in respect of testimony, so that evidently no serious suspicion of false testimony should arise from the fact that it was given for sordid gain. In *R v Cowan and Davies*,¹⁹⁷ the accused were convicted of attempting to defeat the ends of justice following an attempt to accept money from the accused so that they could leave the country in order not to give testimony against accused.

What is clear from both the case law and academic writings is that receiving money in order to give or not to give evidence constitutes the crime of defeating or obstructing the course of justice. What is not clear is whether a person who gives money to potential witnesses in order to give or not to give evidence with intent to defeat the course of justice, commits the crime of defeating or obstructing the course of justice or an attempt thereto.

¹⁹³At 681-82H.

¹⁹⁴At 682D-E.

¹⁹⁵Van der Keessel *op cit* (n 4) 48.10.8. See the discussion of this crime *supra* in Chapter Two under 2.2.2.3, text at note 61.

¹⁹⁶Snyman *op cit* Chapter Two (n 151) 339.

¹⁹⁷*R v Cowan and Davies supra* Chapter Two under 2.4.3, text at note 182.

The writer has found neither precedent nor authority in our law which deals with this situation. It is submitted that there is no reason why such conduct cannot be punished at least as an attempt to defeat or obstruct the course of justice.

7.4.3 Tampering with evidence

Tampering with evidence that could be used in judicial proceedings constitutes the crime of obstructing the course of justice. Tampering with evidence may take the form of fabricating or destroying or altering or concealing documents or exhibits such as goods.¹⁹⁸ According to Hunt,¹⁹⁹ the most serious manifestation of tampering with evidence is the fabrication of evidence. In *S v Mdakani*,²⁰⁰ the accused concocted a chain of evidence that included falsified documents to implicate an innocent person in certain subversive activities and organisations. The facts of this case were the following: Mdakani, a police officer, was accused of attempting to defeat or obstruct the course of justice. He was convicted and he appealed against his conviction.²⁰¹ The course of action which led to this was a family feud that developed between the relatives of Mdakani's wife and one Cornelius Hlatshwayo's family at Vlakpoort in the Amersfoort district. Allegedly, on a certain occasion when Mdakani's wife and young children were visiting at Vlakpoort, they were nearly burnt to death when the hut in which they were sleeping was deliberately set alight by Cornelius and his brother, Mishak, who was facing a charge of attempted murder. Mdakani decided to take vengeance on the Hlatshwayo family.

It was alleged that he telephoned the Railway Police, and under an assumed name, reported

¹⁹⁸Hunt *op cit* Chapter Two (n 7) 156.

¹⁹⁹*Ibid.*

²⁰⁰*S v Mdakani supra* (n 33).

²⁰¹At 312.

that he had information to the effect that Mishak was the leader of the gang that was responsible for the burning of trains and that he would try to obtain Mishak's address. On the following day, he phoned and used a different assumed name, and stated that he had received information that Mishak was an agitator and that he was distributing subversive pamphlets.²⁰² On the third occasion he called the Railway Police to tell them that Mishak was responsible for the burning of trains and that he had posted a letter to Cornelius containing information in regard to the killing of whites planned to take place on a specific date, but which had to be deferred to another date. He requested the police officer to intercept the letter.

In the meantime Mdakani had typed or caused to be typed, an envelope addressed to Cornelius at Vlakpoort and purporting on the outside thereof to come from Mishak in Johannesburg and also two documents which purported to emanate from the African National Congress (ANC) which was a banned political organisation.²⁰³

The police decided to act on Mdakani's last anonymous telephone call. On the following day, two police officers, accompanied by Cornelius, went to Vlakpoort Post Office and Cornelius took delivery of the letter which the police immediately impounded. The police arrested Cornelius and they investigated the possible charges against the two Hlatshwayo brothers (Cornelius and Mishak) arising out of the telephone calls but concluded that they were actually innocent. They were consequently not charged.²⁰⁴

²⁰²At 312D-G.

²⁰³At 312G-E.

²⁰⁴At 313D-F.

It was proved that Mdakani had fabricated the evidence against Cornelius and Mishak by creating the spurious documents and sending them to Cornelius, and then arranging that Cornelius should be caught either in the act of receiving them or in their possession. There was no doubt that he intended such evidence to be used against the two Hlatshwayo brothers, not only for their arrest but also in their prosecution.²⁰⁵ He was then charged and convicted of attempting to defeat or obstruct the course of justice. He appealed against his conviction.²⁰⁶ On appeal, counsel for Mdakani maintained that the conviction was bad in law because:²⁰⁷

(1) no charge had been preferred against the Hlatshwayo brothers or no prosecution had been instituted against them at any time and

(2) all Mdakani did in effect, was to lay a false charge against the Hlatshwayo brothers which by reason of *R v Chipo*,²⁰⁸ was no longer an offence in our law.

In reaching its decision the court cited both academic work²⁰⁹ and case law²¹⁰ and found that the scope of the crime of defeating or obstructing the course of justice had been widened considerably to include acts which were done before judicial proceedings had actually commenced. It also concluded that if the acts were intended and had the tendency to defeat or obstruct the course of justice, a charge of attempt to defeat or obstruct the

²⁰⁵At 313H-14C.

²⁰⁶At 311C-D.

²⁰⁷At 314C-D.

²⁰⁸See *R v Chipo* 1953 (4) SA 573 (AD). See a detailed discussion of this case *infra* (n 228).

²⁰⁹*S v Mdakani supra* (n 33) at 314E citing with approval Lansdown, Hoal and Lansdown *op cit* (n 88) 1113.

²¹⁰*R v Cowan and Davies* at 804 *supra* Chapter Two under 2.4.3, text at note 182 and *R v Hirschhorn supra* (n 169) at 64A.

course of justice could succeed even if the intent could not be fulfilled.²¹¹ In dismissing the appeal, the court held:²¹²

In the present case the accused not merely laid false charges against the Hlatshwayos but in addition he manufactured false evidence and documents in support of those charges and maliciously arranged for the police to come into possession thereof. Those acts went far beyond mere *calumnia* and in my view constituted an attempt to defeat or obstruct the due administration of justice.

The court found that Mdakani's conduct, 'went far beyond mere *calumnia*.' The court's decision will now be analysed in two respects, starting with *calumnia* and then fabrication of evidence. Mdakani committed the crime of *calumnia* when he called the Railway Police and falsely implicated the Hlatshwayo brothers of having committed a certain crime and planning to commit others, while knowing very well that they were innocent.²¹³ He intended that they be arrested, charged and convicted for the offences he falsely accused them of having committed. His acts were intended and had the tendency to obstruct the course of justice. It is submitted that the fact that the Hlatshwayo brothers were never charged and convicted for the alleged offences was immaterial.

He did not stop at phoning the police to lay false charges against the Hlatshwayo brothers. He went further and concocted false incriminating evidence against them. He wrote a letter purporting to have been written by one of the brothers, Mishak, addressed to Cornelius and he fabricated some documents which purported to have emanated from the African National Congress.²¹⁴ When he concocted that evidence he had judicial proceedings in mind. He thought that the two Hlatshwayo brothers would be charged and convicted of

²¹¹*S v Mdakani supra* (n 33) at 314H-315B.

²¹²At 318G.

²¹³D 48.10.1.1 and Van der Keessel *op cit* (n 4) 48.10.8. This crime is discussed *supra* in Chapter Two under 2.1.4 and 2.2.2.3, text at notes 27 and 71.

²¹⁴*S v Mdakani supra* (n 33) at 312G-H.

some serious offences. *The Queen v Vreones*²¹⁵ was an English case similar to Mdakani's case in the sense that it also dealt with the fabrication of evidence. In that case the accused had falsified samples of wheat, which had been taken from a cargo and sealed for the use in the event of a dispute. In our law, it is not required that the judicial proceedings be pending.²¹⁶

Another case where the accused was charged with an attempt to defeat or obstruct the course of justice following the concoction of false evidence to be presented in court was *S v Mtshizana*.²¹⁷ In this case the accused, an attorney, counselled his clients to deny statements they had previously made to the police and made up a false story for them to tell in evidence. The facts of this case are as follows: Mtshizana was convicted of an attempt to defeat or obstruct the course of justice for advising his clients, who were charged under the Suppression of Communism Act, to deny the truth of the original statements they made to the police and to say that they were made under coercion.²¹⁸ The accused knew that the incriminating statements made to the police would be inadmissible as evidence whether or not they had been made under compulsion, and that any confession made by the accused to the court would likewise be inadmissible if not voluntarily made. The court found that the real reason Mtshizana gave such advice to his clients was to prevent the clients from becoming witnesses for the state against other co-accused, thereby attempting to defeat or

²¹⁵*The Queen v Vreones supra* Chapter Two (n 116). See the discussion of this case *supra* in Chapter Two under 2.3.1, text at note 116.

²¹⁶Snyman *op cit* Chapter Two (n 151) 339.

²¹⁷*S v Mtshizana supra* (n 170).

²¹⁸At 199.

obstruct the course of justice. The court dismissed the appeal.²¹⁹

Other conduct which constitutes the common-law crime of obstructing the due course of justice in relation to evidence, is when X conceals his or her criminal actions in order to evade detection. In 2007, in *Pakane and Others v S*,²²⁰ the Supreme Court of Appeal confirmed the accused's convictions of murder and defeating the course of justice after he had killed another person and concealed his actions in order to evade detection. The facts of the case were as follows: In the early hours of the 13th December 1999, the accused, Pakane, Sigagayi and Mahogo, who were police officers, were sent to investigate a shooting incident at Coffee Bay in the Eastern Cape. Allegedly, they shot and killed one Mr Louis Fourie, a local resident. They did not report the shooting incident to their superiors.²²¹ The police investigated the murder case and two innocent people were arrested in connection with the murder and were kept in custody for two years before they were released without being charged.²²² Regarding the crime of defeating the course of justice, the state alleged that Sigagayi, after the shooting incident, swapped the weapon (R4 rifle number 295) which was used during the shooting incident and had torn some pages from the occurrence book. He also instructed one Mr Ngxumza to rewrite entries in the occurrence book without informing his superior officer about the state of the book.²²³ The court *a quo* convicted accused number 2 of murder and obstructing the course of justice. The two other accused were convicted only of being accessories after the fact.²²⁴ They

²¹⁹At 200.

²²⁰2008 (1) SACR 418 (SCA).

²²¹At para 16.

²²²At para 12.

²²³At para 34.

²²⁴At para 2.

appealed.²²⁵ It was argued on Sigagayi's behalf that the state failed to prove that he (Sigagayi) had tampered with the occurrence book or had tried to conceal the fact that rifle number 295 (murder weapon) was in his possession when the shooting incident took place. In dismissing the appeal against the conviction on the charge of defeating the course of justice, the court, per Maya, JA, held:²²⁶

I agree with the conclusion of the court below that he tampered with the occurrence book to remove proof that he had booked out rifle 295, which, very conveniently, was subsequently not sent for a ballistics test. Therefore, his conviction for defeating the course of justice was proper.

This thesis, respectfully, agrees with the court *a quo* and the Supreme Court of Appeal, that concealing one's criminal actions in order to evade detection, investigation, arrest and prosecution constitutes the common law crime of obstructing the due course of justice.

7.4.4 Laying of false charges

Notwithstanding the fact that in Roman and Roman-Dutch law it was an offence to lay false charges against an innocent person,²²⁷ this crime received a very cold reception especially in our courts. In 1953, in *R v Chipo*,²²⁸ the Appellate Division said that in South African law the crime of laying false charges against another person was obsolete.²²⁹

The facts of this case were as follows: The accused (four youths whose ages ranged from 14 to 16 years) reported to the police that, after they had complained about the conditions of their employment, their employer had twice fired a rifle towards them. Two of the accused

²²⁵At para 1.

²²⁶At para 38.

²²⁷See D 48.10.1.1; D 48.16.1.1 and Van der Keessel *op cit* (n 4) 48.10.8. This crime was referred to as *calumnia* and it was punished terms of the *lex Cornelia de falsis* and the *lex Remmia*. See the discussion of this crime *supra* in Chapter Two under 2.1.4, text at notes 27 and 28.

²²⁸*R v Chipo supra* (n 208).

²²⁹At 579E-D.

said that he did not want to kill them, but rather that he wished to frighten them into going back to work. Others expressed no opinion, but said that one of the bullets struck the tree six feet from where they were sitting on the ground. Police investigated the complaints. They found that the allegations were false and the employer was not prosecuted. The accused were then jointly tried and convicted on a charge of having committed criminal *injuria* against their employer.²³⁰ The records of proceedings were submitted for review to the High Court. In a majority judgment the court quashed the convictions and sentences. The Minister of Justice, Southern Rhodesia (now Zimbabwe) appealed against the decision of the High Court.²³¹ The Appellate Division in a judgment delivered by Hoexter, JA, held:²³²

It appears therefore that in the Roman and Roman-Dutch law the malicious laying of a false criminal charge, although it might have been classed as a criminal *injuria*, was treated as a specific crime known as *calumnia*. But in our modern textbooks of criminal law and in the law reports of Southern Rhodesia and the Union I can find no reference to the specific crime of *calumnia*. The obvious inference is that this crime has become obsolete.

On the strength of the crime of *calumnia* being obsolete the Appellate Division confirmed the High Court's decision to quash the convictions and sentences in the case and the appeal was dismissed.²³³

Where did the court go wrong in the *Chipo* decision? In trying to answer this question this decision is examined from two points of view. Firstly, the criminal *injuria* charge laid in the court *a quo* and secondly, the fact that *calumnia* was viewed as obsolete in our law. The accused were alleged to have falsely laid a complaint against another person. They were charged with a crime of criminal *injuria*, not with a specific crime known as

²³⁰At 575G-H.

²³¹At 575F-H.

²³²At 577H-78. This case was cited with approval by De Beer, JP, in 1954, in *R v Leballo* 1954 (2) SA 657 (O) at 660H.

calumnia. It is respectfully submitted that from the onset the crime was wrongly charged because in Roman and Roman-Dutch law, to maliciously lay a false charge fell under the broad crime of criminal *injuria* but it was specifically charged under *calumnia*.²³⁴ It is respectfully submitted that the state was not supposed to have charged the accused with criminal *injuria* but with obstructing the course of justice in the form of *calumnia*. The High Court should have used its inherent powers of quashing the convictions and refer the matter back to the trial court for a new trial on a charge of obstructing or defeating the course of justice. The court did not see it that way. It dismissed the convictions.

The Appellate Division correctly observed the fact that maliciously laying of a false charge against another person constituted *calumnia* but the court declared the crime obsolete. It is submitted that the court erred in declaring the crime of *calumnia* obsolete in our law only on the strength that there was no reference to the crime in our textbooks and law reports. In terms of the principle of legality, especially the *ius acceptum* principle,²³⁵ courts do not have the powers to create a new crime. But, it is submitted nevertheless that courts should be hesitant to declare certain crimes obsolete. This thesis supports Van der Merwe's²³⁶ views that *R v Chipo* was only authority for the proposition that the laying of a false criminal charge could not constitute criminal *iniuria*. But it constitutes the crime of defeating or obstructing the course of justice.

The decision in *R v Chipo* left its mark also in *S v Sauerman*²³⁷ where the Appeal Court

²³³At 579D-E.

²³⁴D 48.10.1.1; D 48.16.1.1 and Van der Keessel *op cit* (n 4) 48.10.8. Under Roman and Roman-Dutch law this crime is discussed *supra* in Chapter Two under 2.1.4 and 2.2.2.3, text at notes 27 and 71.

²³⁵For the definition of the principle of legality and the *ius acceptum* principle see CR Snyman *Criminal Law* 3ed (1995) 34.

²³⁶A Van der Merwe "Laying a false criminal charge – A crime or not?" (1988) *SACJ* Vol 1 No 3 525.

²³⁷*S v Sauerman supra* (n 26).

quashed the accused's conviction on a charge of attempt to defeat or obstruct the course of justice. The court was of the opinion that something more than the laying of a false criminal charge was required before it could be punishable in our law.²³⁸ The facts of this case were as follows. The charge against Sauerman alleged that he unlawfully and with intent to defeat or obstruct the course of justice, arrested one Bhengu and took him to the police station and made a statement to the South African Police setting out the circumstances in which an alleged theft took place. On the strength of this false statement, he then laid a false charge of theft with the police against Bhengu, knowing full well that Bhengu had not stolen his watch. Sauerman was later charged and convicted of attempting to defeat or obstruct the course of justice. After the Natal Provincial Division dismissed his appeal,²³⁹ Sauerman appealed to the Appellate Division. The Appellate Division was of the opinion that to commit the crime something more than the laying of a false criminal charge was required before it could be punishable in our law. The court held:²⁴⁰ *'Dit vereis egter iets meer as slegs die blote anhangigmaking van 'n valse klag, voor dit in ons reg strafbaar is.'*

The decision of the Appellate Division was heavily criticized in academic circles.²⁴¹ According to Snyman,²⁴² this judgment was based solely on the fact that the case was indistinguishable from *R v Chipó*,²⁴³ and that the court was bound by the latter case to hold that such conduct was no longer a crime in our law.

²³⁸Van der Merwe *op cit* (n 236) 525.

²³⁹*S v Sauerman supra* (n 26) at 1081F.

²⁴⁰At 767B.

²⁴¹CR Snyman "Laying a false criminal charge" (1978) *SALJ* Vol 95 455 and Snyman *op cit* (n 85) 387.

²⁴²Snyman *op cit* (n 241) 455.

²⁴³*R v Chipó supra* (n 208).

Snyman²⁴⁴ says that the court erred in coming to this conclusion. He says that *calumnia* is a form of *iniuria*, and the court in *R v Chipo* confined itself to investigating whether the form of *iniuria* known as *calumnia* was still part of our law. According to him, laying of a false criminal charge was punishable, not only as a form of *iniuria*, but also as a form *falsitas*.²⁴⁵ He says that ‘just as the due administration of justice demands that guilty persons be convicted, so it must equally ensure that the innocent shall not be prosecuted or convicted.’²⁴⁶ It is said the outcome of *S v Sauerman* has been to create a gap in our criminal law which only the legislature could close.²⁴⁷ It is further said that the ‘gap could have been avoided had the Appellate Division properly applied the principles of our common law, as well as the principles underlying the crime of defeating or obstructing the course of justice.’²⁴⁸

In 1988, the Appellate Division in *S v Mene*,²⁴⁹ overruled its previous decision in *R v Chipo* where it had decided that the crime of laying false charges against someone else (*calumnia*) was obsolete in our law. It accepted that the conduct constitutes an attempt to defeat or obstruct the course of justice. The facts of this case were the following: The accused, who were police officers, together with certain other members, were on patrol in certain townships in Port Elizabeth. During the course of the morning pupils who had been boycotting classes had gathered at one of the schools to discuss certain matters and were singing songs. A mini-bus in which the accused were driving stopped beyond the school’s boundary fence and the accused got out of the bus. It was alleged that, as the school gate

²⁴⁴Snyman *op cit* (n 241) 455.

²⁴⁵*Ibid.*

²⁴⁶Snyman *op cit* (n 241) 456.

²⁴⁷Snyman *op cit* (n 241) 458.

²⁴⁸*Ibid.*

²⁴⁹*S v Mene supra* (n 25).

was locked, they jumped the gate, approached one of the teachers and requested the keys. They slapped one of the teachers and approached the students who then ran away in various directions. The accused fired a number of shots and it was then discovered that two students were fatally injured. They later died. The post mortems showed that the deceased had died of gunshot wounds.²⁵⁰

The accused off-loaded the other members who had been with them and damaged their vehicle and made false reports stating that the school children had attacked and damaged the vehicle and that they had shot them when trying to arrest them. They then opened a police docket of public violence ostensibly against those people who had allegedly damaged the above-mentioned vehicle, knowing very well that the information was false.²⁵¹ The opening of the docket against those who had allegedly damaged the vehicle and the filing of a false statement led to the charge namely, laying a false criminal charge with intent to defeat or obstruct the course of justice (*calumnia*).²⁵²

The accused police officers were charged and found guilty of, *inter alia*, attempt to defeat the course of justice (count 8) and they appealed against such convictions.²⁵³ Following this appeal, the Appellate Division was again called upon to answer the question of whether or not it is an offence in South African law to lay a false criminal charge against an innocent person.²⁵⁴

The court started by examining the correctness of the legal proposition of the *Sauerman*

²⁵⁰At 643H-I.

²⁵¹At 643I-44C.

²⁵²At 641C.

²⁵³At 642H-I.

²⁵⁴Van der Merwe *op cit* (n 236) 524.

case and considering how the crime of defeating or obstructing the course of justice was defined in our courts prior to this case. The useful starting point was *Queen v Foye and Carlin*²⁵⁵ where it was observed that the means by which justice is defeated must vary with the facts of each particular case. The court also found guidance in *R v Cowan and Davies*²⁵⁶ and *R v Zackon*.²⁵⁷ After considering these cases the court concluded²⁵⁸ that a finding to the effect that the laying of a false charge with intent to obstruct the course of justice did not constitute a crime in our law would have important practical implications and would be fraught with serious consequences for the due administration of justice in this country. The court overruled its earlier decision in the *Sauerman* case which stated that the offence of laying a false charge against an innocent person was obsolete. Hoexter, JA, held:²⁵⁹

[I] nevertheless entertain the firm opinion that in the *Sauerman* AD case the Court was palpably mistaken in interpreting *Chipo*'s case as it did; and that it is the duty of this Court not to abide by that decision but to overrule it.

Having overruled its previous decision, the Appellate Division found that the “appellants were rightly convicted by the trial court of the crime of attempting to defeat the ends of justice.”²⁶⁰ It is submitted that *S v Mene* correctly reflects the norms of our current society where laying of false charges against innocent persons cannot be tolerated as this would lead to chaos and the collapse of the due administration of justice.

²⁵⁵*Queen v Foye and Carlin* at 125 *supra* Chapter Two under 2.4.2, text at note 162.

²⁵⁶*R v Cowan and Davies supra* Chapter Two under 2.4.3, text at note 182.

²⁵⁷*R v Zackon supra* Chapter Two (n 200).

²⁵⁸*S v Mene supra* (n 25) at 664A-B.

²⁵⁹At 665H.

²⁶⁰At 665H-I.

It was said that to lay false charges to the police is a crime as it involves the making of false statements to the police and as such amounted to defeating or obstructing the due administration of justice.²⁶¹ Hunt²⁶² argues that there are two possible reasons as to why laying of a false charge could be punished as an obstruction of justice: (1) Police could become involved in making abortive investigations and that could result in wasteful employment of their resources. He says that such reactions amount to obstructing or defeating the administration of justice. (2) In laying a false complaint against another person, the accused foresees the possibility that the other person (Y) could and might be wrongly prosecuted and even convicted. It is said that such a result would amount to obstructing the course of justice. Hunt²⁶³ argues that in South African law *calumnia* does constitute the crime of defeating or obstructing the course of justice. The *S v Mene*²⁶⁴ decision vindicated the views of some of our academic writers who maintained that the wrongful laying of a false charge against an innocent person, knowing very well that he or she is innocent, constitutes the offence of defeating or obstructing the course of justice.

The crime of obstructing or defeating the course of justice by laying false charges against an innocent person may be also be committed through a conspiracy. In 1937, in *R v Cilliers*,²⁶⁵ the accused, a police officer, was charged with conspiracy to defeat or obstruct the course of justice. The facts of this case are as follows: Allegedly, Cilliers and four other *socii criminis* conspired with two persons, Opperman and Basson, to defeat or obstruct the course of justice by trapping a certain Abelson (a proprietor of a bottle store)

²⁶¹Hunt *op cit* Chapter Two (n 7) 157.

²⁶²*Ibid.*

²⁶³*Ibid.*

²⁶⁴*S v Mene supra* (n 25).

²⁶⁵1937 AD 278.

and cause him to be fined.²⁶⁶ In pursuance of this conspiracy, Opperman and Basson caused charges to be preferred against Abelson in the magistrate's court for selling liquor outside authorised hours.²⁶⁷ Allegedly, during Abelson's trial, Opperman and Basson gave false evidence in court. They accused Abelson of having supplied liquor outside authorised hours. In consequence of such evidence Abelson was convicted of contravening some sections of Act 30 of 1928.²⁶⁸ The court *a quo* found a conspiracy between Cilliers and Opperman not to be proved, though proof of conspiracy between Cilliers and Basson was essential. Cilliers could only have been responsible for the acts of the other co-accused if he had been proved to be a conspirator. Had it not been alleged that he was a conspirator, he could not have been tried jointly with the other accused.²⁶⁹ This case serves as authority to the proposition that conspiracy to obstruct or defeat the course of justice is a crime in our law.

The accused were convicted of conspiracy to defeat or obstruct the course of justice. The court *a quo* reserved the question of law as to "whether there was any legal evidence to support the finding of the court that the accused was guilty as found."²⁷⁰ On appeal, in answering this question of law, the Appellate Division found that the court *a quo* could not

²⁶⁶At 282.

²⁶⁷*Ibid.*

²⁶⁸*Ibid.*

²⁶⁹At 279.

²⁷⁰At 287.

have convicted Cilliers.²⁷¹ The conviction and sentence were set aside.²⁷²

7.4.5 Interfering with police in the execution of their duties

Police are civil servants whose duty is to investigate alleged offences; and to see to it that offenders are properly tried in public courts. The police investigate alleged offences and submit the docket to the Director of Public Prosecutions (DPP); he or she decides whether or not a prosecution should be instituted. It is a serious offence to prevent an investigation from taking place.²⁷³ It is also an offence to attempt to influence an investigation after it has commenced or attempt to influence the course of a trial in order to obtain the accused's acquittal.²⁷⁴ The first-mentioned conduct, the prevention of a police investigation, amounts to defeating or obstructing the course of justice.²⁷⁵ Any person who tries to prevent the investigation of suspected offences commits the crime of defeating or obstructing the course of justice.²⁷⁶

Other conduct that constitutes the offence of defeating or obstructing the course of justice in relation to interfering with police duties is to interfere with a speed trap.²⁷⁷ According to Snyman,²⁷⁸ a motorist who warns the oncoming motorists of the presence of a speed trap by flashing his or her lights interferes with the due administration of justice. In *S v Naidoo*,²⁷⁹

²⁷¹At 295-96.

²⁷²At 296.

²⁷³Hunt *op cit* Chapter Two (n 7) 141.

²⁷⁴*Ibid.*

²⁷⁵*Ibid.*

²⁷⁶*Ibid.*

²⁷⁷*S v Mene supra* (n 25).

²⁷⁸*Ibid.*

²⁷⁹*S v Naidoo supra* (n 32).

the conviction of the accused on a charge of attempting to defeat the ends of justice after he (the accused) and the passenger warned other motorists of the presence of a speed trap in the vicinity was confirmed on review.²⁸⁰

The facts of this case were the following: A traffic inspector who was called as a witness, told the court that while driving on his way to assume duty at a speed trap, he noticed a vehicle approaching from the opposite direction. Its lights were flashing at all the oncoming vehicles far ahead of him. The officer stated that he could see the brake lights of the vehicles travelling in front of him coming on as they slowed down. It was alleged that the inspector made a “U” turn and followed that vehicle and stopped it. He asked the driver to explain his actions and the driver said that it was not him who had flashed the lights but his passenger who was with him in the vehicle. Allegedly, the passenger was intoxicated. The driver of the car was then charged with attempting to obstruct the ends of justice but the nature of the alleged offence was not outlined to the accused.²⁸¹ It was held that in order to sustain a conviction, the court of first instance had to be satisfied beyond reasonable doubt,²⁸² (1) that the accused associated himself with the actions of his passenger, that is, that the accused was a *socius criminis* and (2) that to flash a motor vehicle’s headlights in the circumstances constituted an attempt to defeat the ends of justice. On review the court held:²⁸³

I do not think there can be any doubt that an actual interference with the work of those involved in the speed trap would constitute an “obstruction of the due administration of justice.” By actual Interference, I contemplate acts committed while the trap is in operation, such as tampering with the timing mechanism employed, threatening, man-handling or assaulting the traffic officers, destroying their records, and so on.

²⁸⁰See GE Devenish “Attempt to defeat the ends of justice” (1977) *SALJ Vol 94* 277 for a discussion of this case.

²⁸¹*S v Naidoo supra* (n 32) at 127A.

²⁸²At 125A-B.

²⁸³At 126A-B.

On review the court observed²⁸⁴ that it was not a crime to warn a person who was not committing an offence to desist from doing so but the conduct of the accused and his passenger, the court said, could not be treated solely as a general warning to others not to speed. In the court's view, what the accused and his passenger did was to warn the approaching drivers of the existence of the speed trap. In so doing the work of the speed trap was likely to be frustrated and that amounted to an attempt and intentional interference with the due administration of justice. For these reasons the court confirmed the conviction of the accused.²⁸⁵

Hunt²⁸⁶ submits that the police in operating a speed-trap are engaged in law enforcement which is a function distinct and distinguishable from the administration of justice by the courts of law. He submits that hampering the police in the performance of their duties ought to be charged as a statutory offence of obstructing the police in the performance of their duties, not as defeating or obstructing the administration of justice.²⁸⁷

In *S v Perera*,²⁸⁸ the proposition in *S v Naidoo*²⁸⁹ that the mere act of warning another of the existence of a speed trap without more was an offence has been dissented from as stating the law too widely.²⁹⁰ The short version of *S v Perera* was as follows:²⁹¹ It was alleged that the accused had warned an oncoming motorist of the proximity of a speed trap

²⁸⁴At 128A-C.

²⁸⁵At 128.

²⁸⁶Hunt *op cit* Chapter Two (n 7) 161.

²⁸⁷*Ibid.*

²⁸⁸1978 (3) SA 523 (T).

²⁸⁹*S v Naidoo supra* (n 32).

²⁹⁰See Hunt *op cit* Chapter Two (n 7) 161. Citing *S v Perera supra* (n 288) at 527H.

²⁹¹As discussed in Devenish *op cit* (n 26) 30-31.

on the road between Middelburg and Belfast.²⁹² Following that conduct, the accused was charged with attempting to defeat the ends of justice. The accused pleaded guilty to the charge and was convicted. The Supreme Court reviewed the case and posed the question as to whether in the circumstances of the case, a crime had in fact been committed. The magistrate furnished reasons for his decision and then the matter was argued before the full bench of the Transvaal Provincial Division.²⁹³ Trengove, J, held:²⁹⁴

Hieruit volg dit, na my mening, dat waar 'n motoris geen rede om te glo dat die bestuurder van 'n aangekomende voertuig besig is om die snelheidsgrens te oorskry nie, en ook geen rede om te vermoed dat so 'n bestuurder van voornemens is om dit te doen nie, sou hy hom nie aan poging tot regsverdeling skuldig maak nie indien hy die bestuurder van die snelstrik waarsku nie.

This is the preferable view amongst academic writers.²⁹⁵ It says that where the accused has no reason to believe that the oncoming motorist was exceeding the speed limit and no reason to presume that he or she intended to do so, he or she did not attempt to defeat the course of justice by warning other motorists about the presence of a speed trap.

7.4.6 Making false statements to the police

There is case law²⁹⁶ and academic writings²⁹⁷ which support the proposition that the act of misleading, or attempting to mislead the police by making exculpatory or inculpatory statements could amount to defeating or obstructing the course of justice. It is said that this offence could be committed when an investigation was being made into a suspected crime

²⁹²*S v Perera supra* (n 288) at 524.

²⁹³*Devenish op cit* (n 26) 31.

²⁹⁴*S v Perera supra* (n 288) at 528A-B.

²⁹⁵*Devenish op cit* (n 26) 31; *Hunt op cit* Chapter Two (n 7) 161 and *Snyman op cit* Chapter Two (n 151) 339.

²⁹⁶*R v Watson supra* (n 25) at 283 and *R v Adey and Hancock* 1938 (1) PH H75 (C).

²⁹⁷*Boister op cit* (n 76) 205; *Burchell and Milton op cit* Chapter Two (n 148) 942; *Hunt op cit* Chapter Two (n 7) 158-59 and *Snyman op cit* Chapter Two (n 151) 338.

and X persuaded Y to make a false statement which tended to show that he or she (X) was not guilty of the suspected crime.²⁹⁸ X also commits the offence where he falsely incriminates him- or herself in order to shield Y from prosecution.²⁹⁹ Hunt³⁰⁰ says that it is not clear, however, whether X commits the crime where he or she makes a false statement in order to exculpate him- or herself.

In 1938, in *R v Adey and Hancock*,³⁰¹ the accused (Adey and Hancock) were charged with attempting to defeat the due course of justice.³⁰² It was alleged that they wrongfully, unlawfully and with intent to defeat or obstruct the due course of justice induced and persuaded C to make a false statement to the South African Railway and Harbour (SAR & H) Police that exonerated H who was being investigated for suspected theft of a tin of oil.³⁰³ Allegedly, C falsely informed the investigating officer that he (C) had supplied a tin of oil to the said H so that the latter could not be prosecuted for theft. For inducing and persuading C to make false statements to the police, Adey and Hancock were then charged with the crime of attempting to defeat the due course of justice. Counsel for the accused took exception to the indictment on the ground that it did not disclose an offence known in our law.³⁰⁴ It was contended on behalf of the accused that before it could be said that the crime of attempting to defeat the due course of justice was committed, it had to be alleged either that criminal proceedings had actually commenced at the time that the attempt was alleged to have been made, or that criminal proceedings were contemplated in respect of the

²⁹⁸Hunt *op cit* Chapter Two (n 7) 159.

²⁹⁹*Ibid.*

³⁰⁰*Ibid.*

³⁰¹*R v Adey and Hancock supra* (n 296).

³⁰²At 80.

³⁰³*Ibid.*

³⁰⁴*Ibid.*

commission of a crime.³⁰⁵ In dismissing the exception to the indictment *Centlivres, J*, held:³⁰⁶

[W]hen an investigation was being made into a suspected crime, and a person persuaded another to make a false statement, which tended to show that the suspected criminal was not guilty of the suspected crime, he was thus interfering with the due course of justice... It would be lamentable if the court were to lay down that when the police were investigating a suspected crime anybody who tried to obstruct or thwart the administration of justice by persuading people to put false information before the police was not liable to be charged with the crime of attempting to defeat the due course of justice.

In *S v Burger*,³⁰⁷ the accused negligently ran down a pedestrian. He abandoned his vehicle and fled the scene of the accident. It was alleged that he went to the police and made a false statement claiming that his car had been stolen shortly before the occurrence of the accident.³⁰⁸ He did not implicate a specific person as was the case in *R v Chipo*.³⁰⁹ Instead, this was a case of fabrication of important information outside the court and before any court proceedings had commenced and even before a charge of culpable homicide had been laid against him.³¹⁰ He was charged and convicted of an attempt to obstruct the course of justice. He appealed against his conviction on the ground that because such conduct was not punishable in terms of Roman-Dutch law it was also not punishable as the crime in South African law.

The Court of Appeal ruled that the conduct of the accused did not amount to *calumnia* because it did not implicate an identifiable person of having committed an offence. However, the court held that the crime could be committed also by making a false

³⁰⁵*Ibid.*

³⁰⁶At 81.

³⁰⁷1975 (2) SA 601 (C).

³⁰⁸At 601C. See also Hunt *op cit* Chapter Two (n 7) 159.

³⁰⁹*S v Burger supra* (n 307) at 604G-H, referring to *R v Chipo supra* (n 208).

³¹⁰At 605B.

statement to the police containing allegations which are intended to lead them off the track of the true offender. It pointed out that there are many examples in South African law where the crime had been found to have been committed where a person did something to prevent the further investigation of an alleged offence by the police. The court referred to, *inter alia*, the case of *S v Neethling*.³¹¹ In that case, a police sergeant, who drove an official car into a tree, persuaded his passenger, a colleague to say at a police investigation that the motor car had been stolen and that he did not know about the accident. Neethling was convicted of an attempt to obstruct the course of justice even if there was no pending charge against him at the relevant time. According to the court in *Burger*,³¹² the principle that emerges from *Neethling's* case is that if a person has reason to believe that he had committed an offence and realises that legal steps may possibly be taken against him and that a police investigation will be launched, and he intentionally does something with intent to obstruct or prevent such investigation, he is guilty of the offence of an attempt to obstruct the course of justice. In the court's view, it makes no difference if the guilty person, who wants to avoid criminal proceedings against him, persuades a friend to give false information to the police or, do it himself.³¹³

The court made the following important statement regarding the ambit of the offence:³¹⁴

Dit is dus, myns insiens, duidelik dat die misdaad waaraan appellant skuldig bevind is nie noodwendig in 'n hof gepleeg moet word nie; dit staan nie noodwendig in verband met hofverrigtinge nie; dit behels nie noodwendig die fabrisering van valse (mondelikse) getuienis of dokumente nie; dit behels nie noodwendig 'n geknoei met getuies of die afkoop van getuies nie; die verloop van die gereg kan, soos deur SCHREINER, A.R., geë is, "be defeated in many ways" (R. v. Bekker, 1956 (2) S.A. 279 (A.A.) op bl. 281E); en na my mening is 'n valse verklaring aan die polisie, bevattende bewerings wat bedoel is om hulle van die spoor van die ware misdadiger af te bring, maar een daarvan. Die gereg

³¹¹1965 (2) SA 165 (O) referred to at 612C-E in the *Burger* decision.

³¹²*S v Burger supra* (n 307) at 612H.

³¹³The court also referred to *S v Daniels supra* (n 78) and pointed out that the facts in that case were very similar.

³¹⁴*S v Burger supra* (n 307) at 616F-617B.

duld geen optrede wat of daartoe sal lei dat 'n persoon, aan 'n misdryf skuldig of moontlik skuldig, uit 'n hof gehou sal word; of wat, nadat hy voor die hof gebring is'n behoorlike verhoor sal voorkom. Die beginsels soos in die gewysdes uiteengesit, is wat belangrik is, nie die spesifieke voorbeelde van die misdaad regsverdeling wat ek genoem het nie. Die gereg groei en ontwikkel met die verloop van tyd; hy staan nie stil nie. Sedert die tyd van die Romeins-Hollandse skrywers het daar groot ontwikkelinge plaasgevind op gebied van die strafreg. Een van die belangrikste ontwikkelings op hierdie gebied is dat daar vandag Staatsampnare aangestel is wie die plig op 'n verdagte misdaad te ondersoek; en om te sorg dat hulle daar in die openbaar behoorlik verhoor word. Die ondersoek van verdagte misdaad word deur die polisie uitgevoer; die dossier word voor die Prokureur-generaal gelê; hy besluit of daar vervolg sal word al dan nie. Dit is net so ernstig om te verhoed 'n ondersoek plaasvind as om te probeer om die ondersoek te beïnvloed nadat dit eers'n aanvang geneem het, of om die verloop van die verhoor te probeer beïnvloed ten einde die vryspreek van die beskuldigde te bewerkstelling. In wese is aldrie tipes van optrede ondermyning van die gereg. Eerste gemelde optrede, die voorkoming van 'n ondersoek deur die polisie, is 'n geval waa r die regspleging ab initio gefnuik word. As dit gevind word dat'n poging tot die voorkoming van die ondersoek van 'n misdaad gemaak is, sal die howe onder geen omstandighede ledig bly staan nie. Dit is die opnebare belang dat alle verdagte misdade onmiddellik ondersoek word; en enige persoon wat sodanige ondersoek probeer voorkom, maak hom aan poging tot regsverdeling skuldig.

According to Hunt, lies told to the police by X in order to avoid incriminating himself should not be punishable as defeating or obstructing the course of justice. He says that to hold otherwise would be to deny X the benefit of the common-law privilege against self-incrimination.³¹⁵ Hunt points out that *Burger's* case “is against the view that there is a difference between false statements made in order to avoid self-incrimination and false statements made to mislead the police as to the criminal responsibility of one other than the maker of the statement.”³¹⁶ This is because the court said that it makes no difference whether the guilty person who wishes to escape criminal proceedings, persuades a friend to give false information to the police or whether he or she does so him- or herself.³¹⁷ However, Hunt submits that the case can be distinguished on the ground that what Burger did was in fact to *fabricate false evidence* in the form of the statement to the police which could be used to “prove” that he was not the driver of the vehicle which was involved in an accident.³¹⁸ It is submitted that the court was correct in dismissing Burger's appeal because when he went to the police to report that his car had been stolen before the accident, he

³¹⁵Hunt *op cit* Chapter Two (n 7) 159.

³¹⁶*Ibid.* Hunt is referring to Baker, J, in *R v Burger supra* (n 307) at 614E.

³¹⁷*Ibid.*

³¹⁸*Ibid.*

intended to mislead the police investigation of the accident and he had foreseen that his false statement would mislead the police in their investigation. The false statement was not made in order to avoid self-incrimination (like a mere denial), but to obstruct the due administration of justice. Therefore, his conduct constituted the crime of defeating or obstructing or attempt to defeat or obstruct the course of justice. It is submitted that a distinction must be drawn between false statements made in order to avoid self-incrimination (for example, a mere denial of liability) and false statements made to mislead the police with a view to obstruct the course of justice and to prevent an investigation. In the former case, X's conduct cannot be viewed as an *unlawful* obstruction of justice because his right against self-incrimination should be accorded more weight. But in the latter case, X's conduct amounts to punishable obstruction of justice.

In *S v Sauerman*,³¹⁹ it was held that merely to make a false statement to the police without doing anything else, does not constitute the crime of defeating or obstructing the justice.³²⁰ However, *S v Mene*³²¹ overruled the *Sauerman*³²² decision. But it is said that refusing to answer questions or to give information to the police or to refuse to co-operate with the police in obtaining evidence against oneself or another person does not amount unlawful obstruction of the administration of justice.³²³ Hunt³²⁴ submits that where this point has come up for consideration it is usually disposed of on the basis that X's refusal or omission does not constitute an *actus* sufficient to make his conduct a crime.

³¹⁹*S v Sauerman supra* (n 26).

³²⁰See Hunt *op cit* Chapter Two (n 7) 160.

³²¹*S v Mene supra* (n 25).

³²²Hunt *op cit* Chapter Two (n 7) 160.

³²³*Ibid.*

³²⁴*Ibid.*

In *S v Cassimjee*,³²⁵ the court confirmed the proposition that a false denial of guilt by the accused, though it obstructs or defeats the course of justice is not unlawful. In this case, a collision occurred between a truck and a motor car. Police investigated a possible charge of reckless and negligent driving against Cassimjee. The accused, Cassimjee, furnished a statement to the police and denied that he was the driver of the truck at the time of the accident. This statement formed part of the charge of attempting to defeat the ends of justice.³²⁶ The state argued that the accused's denial that he was the driver of the truck at the time of the accident was false. The trial court found that the denial was false and convicted the accused of attempting to defeat the ends of justice.³²⁷ On appeal, Wallis, AJ, held:³²⁸

The statement in the present case was nothing more nor less than a simple denial that the appellant was the driver of the truck at the time. I do not think that anything is added to that statement by the fact that in making that denial he falsely implicated someone else as the driver. That is a necessary implication of the denial. In my view, it follows that, in the circumstances of this case, the statement made by the appellant, albeit false, was not unlawfully made.

In the court's view, the accused did not commit the crime as charged. The conviction and sentence were set aside.³²⁹

7.4.7 Lying to the police that a crime has been committed

There is academic opinion which suggests that lying to the police that a crime has been committed constitutes obstruction of the due administration of justice.³³⁰ However, the

³²⁵1989 (3) SA 729 (N).

³²⁶At 729F-G.

³²⁷At 729G-H.

³²⁸At 730D-E.

³²⁹At 730E.

³³⁰Burchell and Milton *op cit* Chapter Two (n 148) 942.

crime is not committed by merely wasting the police officials' time and energy³³¹ or by refusing to answer questions put by the police or to refuse to co-operate with the police in obtaining evidence against oneself or another, because in most cases, there is no legal duty on the individual to assist the police.³³²

According to Boister³³³ and Burchell and Milton,³³⁴ the crime of obstructing the course of justice is not committed by merely wasting the police officials' time and energy. The court in *S v Bazzard*³³⁵ has confirmed this proposition. The facts of this case were the following: The accused, Bazzard, while under the influence of dagga called the police and informed them that he had kidnapped a young girl. He demanded a ransom for her to be released or else he would kill her.³³⁶ The police conducted a search. They traced the accused in order to establish the truth of the allegations. They found him and discovered that he did not kidnap any girl as he had alleged.³³⁷ As a result of the search the police wasted time and energy.³³⁸ He was charged and convicted of defeating or obstructing or attempt to defeat or obstruct the course of justice.³³⁹

The question to be determined by the review court was whether a false report made to the police that a crime has been committed constitutes the common law crime of defeating or

³³¹Boister *op cit* (n 76) 205 and Burchell and Milton *op cit* Chapter Two (n 148) 942.

³³²Burchell and Milton *op cit* Chapter Two (n 148) 942-43.

³³³Boister *op cit* (n 76) 205.

³³⁴Burchell and Milton *op cit* Chapter Two (n 148) 942.

³³⁵*S v Bazzard supra* (n 25) at 303a-b.

³³⁶At 303g.

³³⁷At 303h.

³³⁸*Ibid.*

³³⁹At 303 d.

obstructing the course of justice.³⁴⁰ The court found that the course or administration of justice connotes that the crime can be committed not only in relation to the work of the courts but also in relation to the work of agencies (like the police) involved in the administration of law enforcement.³⁴¹ The court in *Bazzard* distinguished this case from the *S v Mene*³⁴² decision. In the latter case the accused laid a false charge against specific individuals knowing that they were innocent. That constituted the crime of *calumnia*.³⁴³ In *S v Bazzard* the accused did not lay a false charge against a specific individual thereby exposing a certain individual to the risk of arrest, imprisonment, possible conviction and sentence.³⁴⁴ As the accused implicated himself, he did not defeat or obstruct the course of justice.³⁴⁵ The court held that the accused's report to the police also did not amount to an attempt to conceal any crime as in the *Burger* case.³⁴⁶ However, the court did not think that the crime should be limited to instances where an innocent person had been implicated, or where a crime had been concealed.³⁴⁷ The court explained the application of the offence as follows:³⁴⁸

Ek dink egter nie dat die voorbeelde noodwendig beperk moet word tot die verdoeseling van die misdaad of die implisering van 'n onskuldige persoon nie. Daar mag moontlik ander gevalle ook wees, byvoorbeeld iemand wat inmeng met die uitvoering van die polisie se pligte by die arrestasie van verdagte met die doel om aan die verdagte die geleentheid te gee om te ontsnap, kan, volgens my oordeel, ook skuldig wees aan belemmering, of 'n poging tot die belemmering van die regspleging.

Die wese van die betrokke misdaad is dat daar met die 'regspleging' gepeuter word. Die 'regspleging' in hierdie sin bestaan uit 'proses' waartydens sekere handeling deur landsburgers verrig word en die daaropvolgende uitvoering van sekere pligte deur verskeie amptenare, byvoorbeeld

³⁴⁰At 303i.

³⁴¹At 304e.

³⁴²See *S v Mene supra* (n 25).

³⁴³*S v Bazzard supra* (n 25) at 305i.

³⁴⁴At 307c.

³⁴⁵At 307c-d.

³⁴⁶At 307d.

³⁴⁷At 306b.

³⁴⁸At 306b-f.

die getuie wat kennis dra van die pleging van misdaad (of wat iemand valslik wil impliseer by die pleging van werklike of denkbeeldige misdaad) maak 'n rapport aan die polisie; die polisie ondersoek die beweerde misdaad; die Prokureur-generaal se personeel besluit of daarin vervolging ingestel gaan word of nie; waar die beskuldigde vervolgd word, beslis die hof aan die eind van hofgeding oor die skuld of onskuld van die aangeklaagde.

Die uitdrukking 'regspiegling' in die misdaadsomskrywing het dus te make met daardie proses wat daarop gerig is om uiteindelik sy voltooiing te vind by die beregting in hofgeding van 'n werklike of vermeende geskil tussen partye onderling of tussen die Staat en sy onderdane. Enige handeling wat daardie proses wederregtelik en opsetlik aan die gang sit, deur byvoorbeeld die lê van vals aanklag (Rv Tanoa 1955 (2) SA 613 (O); S v Mdakani 1964 (3) SA 311(T)), of enige handeling wat die voortsetting of voleinding van daardie proses wederregtelik en opsetlik belemmer of verydel of poog om dit te doen, kan strafbaar wees onder die betrokke misdaad.

Daarenteen is die blote mors van die tyd en energie in die algemeen van sekere van die amptenare, byvoorbeeld die polisie of die Prokureur-generaal se personeel, nie belemmering van die 'regspiegling' in voormelde sin nie.

The court accordingly set aside the conviction.

Boister says that *calumnia* involves the false implication of a specific person.³⁴⁹ Where X does not falsely accuse anyone but rather implicates him- or herself the crime is not committed because wasting police time is different from exposing other individuals to the operation of the criminal law.³⁵⁰ It is submitted that the academic writers who hold the view that a mere wasting of police time and energy does not constitute the crime of defeating or obstructing the course of justice are correct.³⁵¹ The daily administrative work of police cannot be equated with the administration of justice.³⁵²

Therefore, a mere misrepresentation made by a person in the form of a hoax report to the

³⁴⁹Boister *op cit* (n 76) 207.

³⁵⁰*Ibid.*

³⁵¹Boister *op cit* (n 76) 205 and Burchell and Milton *op cit* Chapter Two (n 148) 942.

³⁵²*Ibid.*

police that led the police to waste their time, energy and resources in investigating a fictitious crime falls within the ambit of normal police duties.³⁵³ It does not constitute the crime of defeating or obstructing the course of justice. But it is submitted that if the hoax report may lead to the arrest or detention and trial of an innocent person, then the conduct of X (the maker of the hoax report) amounts to obstructing the course of justice. X, for example, phones the police and reports that her daughter and her granddaughter have been hijacked.³⁵⁴ The police rush to the first suspect, Y, and arrest him. After a day or two later, it becomes clear that X's daughter and her child are alive and well and are staying at the house of the daughter's boyfriend and were never hijacked. In this case an innocent person was arrested. It is submitted that, like laying a false charge against an innocent person, X may be guilty of obstructing the course of justice if the state can prove that X had *dolus eventualis* — that he or she (X) had foreseen that somebody may be arrested and had reconciled him- or herself to this possibility.

7.4.8 Misleading the police in order to prevent the detection of a crime

Another way of committing the crime of defeating or obstructing the course of justice is by misleading (or attempting to mislead) the police in order to prevent the detection of a crime, which might otherwise be revealed to the police.³⁵⁵ This can be done where a person (X) has committed an offence by, for example, stealing a computer from his office and selling it to another person. The police are called in to investigate. X, in an endeavour to prevent the detection of the initial offence, purchases another computer and puts it in Y's office so that it appears as if the computer was never missing but that Y used it in his office. In this

³⁵³Hunt *op cit* Chapter Two (n 7) 150 and Burchell and Milton *op cit* Chapter Two (n 148) 942.

³⁵⁴See this example in Hamman "Cellphone technology, human rights and the Criminal Justice System" 2005 Criminal Justice 10th Conference Consolidating Transformation at <http://www.csrvr.org.za/comfpaps/human.htm> (accessed on 20 April 2007).

³⁵⁵Snyman *op cit* Chapter Two (n 151) 339.

situation X has misled the police in order to prevent the detection of a crime. In *S v Daniels*,³⁵⁶ the court dismissed the accused's appeal following his conviction for attempt to defeat the course of justice after he had made endeavours to mislead the police investigating one crime in order to prevent detection of another crime.

7.4.9 Interfering with the judiciary

Any attempt by the accused to influence the judiciary by, for example, exhorting them not to give any credence to certain types of evidence contrary to their duties,³⁵⁷ amounts to the common law offence of attempt to defeat or obstruct the course of justice. It may also be charged as corruption or as contempt of court or as a statutory contravention, depending on the circumstances of the case.³⁵⁸ The case where an accused was charged with attempting to defeat the course of justice following exhorting the judiciary not to give credence to certain evidence was *S v Van Niekerk*.³⁵⁹

The facts of this case were the following: Van Niekerk was a Professor of Law at the University of Natal, and was charged both with contempt of court and with attempting to defeat or obstruct the course of justice. These charges had arisen out of a public protest meeting held in the city hall directed against certain aspects of the Terrorism Act,³⁶⁰ especially the detention for interrogation without trial, solitary confinement and to the circumstance that various people had died while detained under the Act. At the time of the meeting a much-publicised trial under the Act was under way. It was alleged that Van Niekerk had personally invited counsel appearing in that trial to attend the meeting.

³⁵⁶*S v Daniels supra* (n 78). This case is discussed *supra* (n 90).

³⁵⁷Hunt *op cit* Chapter Two (n 7) 161 and Snyman *op cit* Chapter Two (n 151) 338-39.

³⁵⁸Hunt *op cit* Chapter Two (n 7) 161-62.

³⁵⁹*S v Van Niekerk supra* (n 33).

³⁶⁰Act of 1967.

Allegedly, he had spoken from a typewritten speech and a copy of it had been handed to the press. In it, he supported a demand that there be a judicial enquiry into possible abuses under the Terrorism Act. In his speech, he further criticised what he considered to be reprehensible inaction on the part of lawyers and the judiciary to the suppressive provisions in the Act. He advanced a “solution” in which he had advised the judiciary to adopt, including an advice to all judges that they should, in effect, ignore the testimony of all witnesses who had previously been detained under the Act.³⁶¹ Allegedly, in his speech Van Niekerk did mention the *R v Hassim* trial which was going on in Pietermaritzburg.³⁶²

Following his speech at that meeting, Van Niekerk was charged with the crime of contempt of court and of attempting to defeat or obstruct the course of justice. He was convicted on the first mentioned charge and acquitted on the charge of attempting to defeat or obstruct the course of justice.³⁶³ In an appeal against the conviction, the state reserved the question of law as to “whether the facts found by the court to have been proved and the facts not put in issue did not in law constitute the crime of attempting to defeat or obstruct the course of justice.”³⁶⁴ The court observed:³⁶⁵

[C]riticism of these, and other, provisions of the Act is readily understandable and, provided it be expressed within legitimate bounds, constitutes no contravention of the criminal law. Nor are either individual judges or the Judiciary above all criticism. A radical distinction, however, exists between on the one hand, legitimate criticism and, on the other hand, the generic crime of defeating or

³⁶¹*S v Van Niekerk supra* (n 33) at 711D-F.

³⁶²At 711E.

³⁶³At 711D.

³⁶⁴*Ibid.*

³⁶⁵At 719H-20H.

obstructing (or attempting to defeat or obstruct) the course of justice and the species of that crime designated contempt of court.

In answering the reserved question the court found that a certain paragraph attached as Annexure A to the indictment, exhorted the judiciary not to give credence to the evidence of all witnesses who had previously been detained under the Terrorism Act.³⁶⁶ In the court's opinion, it plainly constituted an attempt to defeat or obstruct the course of justice as averred in the second count of the indictment.³⁶⁷ Factually, the court said that the exhortation was directed to the judiciary in general and as such, it applied to all future cases involving detainee evidence.³⁶⁸ It was further held that the exhortation extended beyond the then pending *R v Hassim* case and aptly fell within the ambit of the crime of attempting to defeat or obstruct the course of justice. The court submitted that the question of law reserved should be answered in favour of the state.³⁶⁹

This decision can be viewed in the following respects: Firstly, whether any reference to the *Hassim* case constituted the crime of defeating or obstructing or attempting to defeat or obstruct the course of justice. Secondly, does "the course of justice" include future cases; if yes how long into the future does this course run and does it not reach closure?

In Roman and Roman-Dutch law this crime could be committed by corrupting or attempting to corrupt a judge³⁷⁰ or by fraudulently preventing a judge from deciding as he should.³⁷¹ It is clear that for this manifestation of the crime to be committed there must be

³⁶⁶Act of 1967. See *S v Van Niekerk supra* (n 33) at 725C.

³⁶⁷At 725D.

³⁶⁸At 725B.

³⁶⁹At 725C-26A.

³⁷⁰D 48.10.12. See *supra* Chapter Two under 2.1.2 (n 13) and Hunt *op cit* Chapter Two (n 7) 137-38.

³⁷¹Hunt *op cit* Chapter Two (n 7) 137.

corruption or attempted corruption or fraud by the accused and it must be intended to influence the judge. The general academic-political statements made by Van Niekerk and the reference to the *Hassim* case could not be said to have amounted to corrupting or attempting to corrupt a judge or fraudulently preventing a judge from deciding as he should. It is said that Van Niekerk attempted to influence the judiciary not to give credence to certain evidence; he never corrupted or attempted to corrupt the judiciary. It is submitted that by accepting that such an exhortation or attempt to influence the judiciary not to give credence to certain evidence, constitutes the common law crime of defeating or obstructing the course of justice, the court extended the common law crime of judicial interference outside the ambit of the original *lex* in the Roman and Roman-Dutch law.

Regarding the latter question, it is respectfully submitted that X's alleged conduct of exhorting or attempting to influence the judiciary in "all future cases involving detainee-evidence"³⁷² is not sufficient for the crime of attempt to defeat or obstruct the course of justice because there is no principal offence committed as yet. There is no possibility of a real court case ensuing. Although Snyman³⁷³ says that it is not a requirement for the crime of defeating or obstructing the course of justice that the conduct allegedly constituting it should have been committed in relation to a specific pending case, he cautions that there must be a possibility of a real court case, ensuing:³⁷⁴

[] it is, in fact, not even necessary that a court case be envisaged by the police or a private litigant at the time of X's conduct. It is sufficient that X subjectively foresees the possibility that his conduct may, in the ordinary course of events, lead to the case being prosecuted or at least being investigated by the police. However, there must be a possibility of a real court case, either civil or criminal, ensuing, because, ... the crime is not committed if X merely plays the fool with the police by telling them that a crime has been committed whereas X knows that no crime has in fact been committed.

³⁷²See *S v Van Niekerk supra* (n 33) at 275B.

³⁷³Snyman *op cit* Chapter Two (n 151) 339.

³⁷⁴Snyman *op cit* Chapter Two (n 151) 339-40.

In English law it is said that the “course of justice” commences and may be obstructed when the proceedings are “active.”³⁷⁵ It is further noted that it is not necessary that proceedings should have been started or even that the tribunal should be in existence but if proceedings are not in being, they must be imminent or an investigation, which might bring about proceedings must be in progress.³⁷⁶ Our law has adopted this view, as the course of justice does not require any pending judicial proceedings.³⁷⁷ But any reference to “all future cases involving detainee-evidence” suggests that there were not even judicial proceedings which were imminent in order to have commenced the course of justice. Therefore, the fountain-source of the course of justice was not there. A comparative legal study demonstrates that in English law there should be an investigation in progress or at least a violation of a legal rule that would lead to an investigation. It is respectfully submitted that in *S v Van Niekerk*, regarding “all future cases involving detainee-evidence,” there was neither an investigation in progress nor a violation of a legal rule that might have led to an investigation nor judicial proceedings which were imminent. It is respectfully submitted that the court, in the quest to protect the integrity of the judiciary against criticism, tried to widen the scope of the course of justice to unimaginative limits. If by “future detainee-evidence” the court meant also cases which will take place in the 21st century that would create a limitless ambit of the course of justice.

It is acknowledged that courts have a secondary lawmaking function which involves, *inter alia*, the development of the common law to adapt to the modern circumstances.³⁷⁸ Such development of the common law together with creative judicial discretion must always be

³⁷⁵Smith and Hogan *op cit* Chapter Two (n 87) 752.

³⁷⁶Smith and Hogan *op cit* Chapter Two (n 87) 752-53.

³⁷⁷Snyman *op cit* Chapter Two (n 151) 339-40. See *supra* Chapter Two under 2.3, text at notes 246 and 247.

³⁷⁸C Botha *Statutory Interpretation: An Introduction for Students* 3ed (1998) 14.

based on legal rules and principles. There is a principle of legality, which requires that a court should interpret the definition of a crime narrowly rather than broadly (*ius strictum* the principle). It is respectfully submitted that the court overstepped its lawmaking function by widening the scope of the crime to include future cases. Section 35 of our Constitution has endorsed this principle.³⁷⁹ Section 35 of the Constitution provides:

- (3) Every accused person has a right to a fair trial, which includes the right–
 - (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.

The constitutional principle of legality is discussed in more detail in Chapter Eight. From the perspective of the Constitutional Court's jurisprudence it can be argued that this decision violates the right to freedom of expression as endorsed by section 16 of the Constitution³⁸⁰ especially freedom to receive and impart information and ideas. Section 16 provides:

- (1) Everyone has a right to freedom of expression, which includes–
 - (a) freedom of the press and other media;
 - (b) freedom to receive and impart information and ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to –
 - (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Freedom of expression has been universally recognised in all democracies as pivotal to the

³⁷⁹The Constitution of the Republic of South Africa of 1996.

³⁸⁰The Constitution of the Republic of South Africa of 1996.

growth and enhancement of the constitutional state and vital to the progress and development of humankind.³⁸¹ In 1996, the Constitutional Court, per Mokgoro, J, in *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*³⁸² observed that freedom of expression is one of a “web of mutually supporting rights” in the Constitution. Freedom of expression lies at the heart of our democracy.³⁸³ Our Constitution protects the rights of individuals not only individually to form and express opinions of whatever nature, but also to establish associations and groups of like-minded people to foster and propagate such opinions.³⁸⁴

The most serious and unprecedented allegation of interference with the judiciary since the coming into being of our constitutional democracy in 1994 was an alleged attempt by a certain judge of the High Court to improperly influence two judges of the Constitutional Court to decide cases pending in that court in favour of one of the parties in those cases. The case in point here is *Thint (Pty) Ltd and Another v Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others*.³⁸⁵ This case concerns various search and seizure warrants issued by a judge in terms of section 29 of the National Prosecuting Authority Act³⁸⁶ by a judge. It concerns the validity of the terms of those warrants and the lawfulness of the manner of their execution. Finally, it raises the question about the appropriate relief for an unlawful search and seizure operation in the context of the fight against serious, complex and organised crime. The two

³⁸¹*Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC) at 3.

³⁸²1996 (5) BCLR 609 (CC) at para 27.

³⁸³*NM and Others v Smith and Others* 2007 (7) BCLR 751 (CC) at para 66.

³⁸⁴*South African National Defence Union v Minister of Defence and Another* 1999 (6) at para 8 and *The Islamic Unity Convention and Others v The Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 (CC) at para 26.

³⁸⁵2008 (2) SACR 421 (CC).

³⁸⁶Act 32 of 1998.

applications before the Constitutional Court were heard together at the direction of the Chief Justice. They were applications for leave to appeal against two judgments handed down by the Supreme Court of Appeal on 8 November 2007.³⁸⁷ In both judgments, the Court held, by a majority, that the application for issue and execution of the respective warrants were lawful. The orders respectively overturned the judgment of Hurt J in the Durban High Court³⁸⁸ and confirmed the judgment of Du Plessis J in the Pretoria High Court.³⁸⁹ The applicants then applied to the Constitutional Court to have the two orders of the Supreme Court of Appeal set aside.

Allegedly, after judgment was reserved in these cases on 13 March 2008, Hlophe, J, approached two judges of the Constitutional Court and attempted to improperly influence them to decide these cases in favour of Mr J.Z. Zuma.³⁹⁰ This resulted in a complaint being lodged with the Judicial Service Commission (JSC) by the judges of the Constitutional Court against Hlophe, JP. The latter in turn lodged a counter-complaint against the judges of the Constitutional Court alleging improper conduct on their part which amounted to a violation of his constitutional rights. The basis of his complaint is that the judges of the Constitutional Court issued a statement to the media about their complaint before it was lodged with the JSC.

At the time of writing this thesis, the JSC was busy investigating the alleged misconduct³⁹¹

³⁸⁷*Thint (Pty) Ltd v National Director of Public Prosecutions* 2008 (1) All SA 229 (SCA) and *National Director of Public Prosecutions v Zuma and Another* 2008 (1) All SA 197 (SCA).

³⁸⁸*Zuma and Another v National Director of Public Prosecutions and Others* 2006 (1) SACR 468 (D); 2006 (2) All SA 91 (D).

³⁸⁹*Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* Case No 268/2006 of the Pretoria High Court, 4 July 2006, unreported.

³⁹⁰At para 4.

³⁹¹In terms of section 177 of the Constitution of the Republic of South Africa of 1996 the JSC is the forum which is empowered to decide whether or not a judge is guilty of gross misconduct. If the JSC makes a

by Hlophe, JP, after the latter approached the High Court and sought an order declaring that the lodging of a complaint of gross misconduct against him by all the judges of the Constitutional Court of South Africa violated the judicial authority of the Constitutional Court of South Africa.³⁹² Hlophe further sought orders to declare that the publication of a media statement by the judges of the Constitutional Court of untested allegations of gross misconduct against him (Hlophe) made by two of the judges of the Constitutional Court was unlawful, and unreasonably and unjustifiably violated his constitutional rights to human dignity, privacy, right to a fair hearing, right to equality and his right to access to courts.³⁹³ Further he sought an order to declare that the decision by the Constitutional Court judges to lodge a complaint with the Judicial Services Commission was unlawful and legally incompetent.³⁹⁴

The writer is mindful of the fact that the allegations against Hlophe, JP, are still untested, but these allegations are very serious especially as they are made against a member of the judiciary. It is submitted that allegations of such serious misconduct against a judge may erode the confidence of the public in the integrity and impartiality of our judiciary. An independent and impartial judiciary is indispensable to the South African justice system. According to Manyane,³⁹⁵ the allegations and attendant controversy surrounding Hlophe, JP, presents South Africa with a potential constitutional crisis. He says that it also highlights problems relating to the failure of having a practical mechanism to deal with

finding of gross misconduct and the national Assembly by two-thirds majority calls for the removal from office of the judge concerned, the must remove him or her.

³⁹²See *Hlophe v The Constitutional Court of South Africa and Others* (08/22932) [2008] ZAGPHC289 (25 September 2008) at para 1 (accessed on 26 September 2008).

³⁹³At para 1.

³⁹⁴*Ibid.*

³⁹⁵S Mpanyane "Our last hope against judicial impropriety: ISS today: on last hope against judicial impropriety" (10 July 2008) 1 at http://www.iss.co.za/index.php?link_id=24&slink_type=6264&link_type=12&slink_type=12&tmpl_id=3

judicial impropriety. He says that if the allegations against Hlophe, JP, are true, there is a strong case of interference with due administration of justice. This would clearly undermine the independence of the judiciary. The writer agrees with Manyane's views that South Africa's judicial system finds itself in an untenable position. Members of the Constitutional Court appealed against the decision of the Johannesburg High Court (now South Gauteng High Court) that found that members of the Constitutional Court had infringed Hlophe's rights by briefing the media about his alleged misconduct before they approached the JSC.

In *Langa and Others v Hlophe*,³⁹⁶ the Supreme Court of Appeal has upheld the appeal by members of the Constitutional Court. Hlophe, JP, has approached the Constitutional Court and appealed against the decision of the Supreme Court of Appeal after it (the Supreme Court of Appeal) ruled in favour of members of the Constitutional Court. The question is, who will judge the judges as Hlophe has appealed to the Constitutional Court? That will lead the country into a constitutional crisis because the current judges of the Constitutional Court, as interested parties in the matter, will have to *recuse* themselves. Will such *recusal* create a vacancy or vacancies which will necessitate the JSC to interview other judges who will preside over the case? No. These judges will be still in office. The *recusal* of the Constitutional Court judges would be unprecedented.

In Roman law, to fraudulently prevent a judge from deciding as he should, was a contravention of the *lex Cornelia de falsis* and the *lex Julia de vi publica*.³⁹⁷ Therefore, it is further submitted that the conduct of attempting to improperly influence members of the

(accessed on 30 May 2009).

³⁹⁶(697/08) [2009] ZASCA 36 (13 MARCH 2009) at 20, available at <http://www.saflii.org/za/cases/ZASCA/2009/36.rtf> (accessed on 14 April 2009).

³⁹⁷See a detailed discussion of these Roman law crimes op cit chapter two under 2.16, text at notes 32 and 33.

judiciary or fraudulently preventing members of the judiciary from deciding as they should by basing their decisions on the strength of evidence before them is not only in conflict with the judicial code of conduct, which embraces the highest standards of ethical conduct, but it also constitutes the common law crime of obstructing or defeating the course of justice. If the alleged conduct by Hlophe, JP, took place, it would constitute both misconduct and a criminal offence. As a crime was allegedly committed, it is respectfully submitted that members of the Constitutional Court should have reported the matter to the police as well, who would then investigate it. The investigations by the JSC and the police can run concurrently because the former has powers to investigate any misconduct by a member of the judiciary and the latter has powers to investigate the criminal part of the judge's alleged misconduct.

7.4.10 Improperly influencing a party to a civil case

Improperly influencing a party to a civil case to drop the case constitutes the crime of defeating or obstructing the course of justice.³⁹⁸ In civil proceedings a party, for instance, the defendant can persuade the other party, for instance, the plaintiff or the applicant, not to come to court. It must be clear that in this example there are no witnesses involved, only parties to the proceedings. In *R v Pokan*³⁹⁹ it was observed that this crime could also be committed in relation to a party to the proceedings who may or may not be a witness in the civil proceedings.

The facts of the case were as follows: Pokan was charged with the crime of defeating or obstructing the course of justice. It was alleged that the plaintiff, Singh's Stores (Pty) Limited, had issued civil summons from the magistrate's court of Cape Town calling upon

³⁹⁸Snyman *op cit* Chapter Two (n 151) 338.

³⁹⁹(1945) CPD 169.

the defendant, one Van Vuuren, to answer a claim for an order of eviction from the premises he occupied. Singh's Stores (Pty) Limited had applied for judgment against Van Vuuren and he was called upon to appear before the court on a specific day to be cross-examined under oath in connection with the said application for judgment. It was alleged that the accused (Pokan) wrongfully and intentionally and with intent to defeat and obstruct the due course of justice and to prevent Van Vuuren from being cross-examined under oath as aforesaid, induced and persuaded Van Vuuren to refrain from attending the court.⁴⁰⁰

Pokan was convicted of defeating or obstructing the course of justice. He appealed against such conviction.⁴⁰¹ Firstly, it was argued on Pokan's behalf that the indictment as it stood did not disclose an offence. It was said that there should be something in the nature of fraud alleged in the indictment. Secondly, it was argued that the facts in the case did not substantiate the charge as it was laid. It was said that there was no duty or obligation on the part of Van Vuuren to come to court. It was further argued that he might as well, without having been induced to do so, had stayed away and that the offence was not, therefore, committed.⁴⁰²

Regarding the first argument, the court concluded that all that was needed to be alleged in the indictment was an act which was done with intent to defeat or obstruct the course of justice and that it did defeat or obstruct the due administration of justice. Whether the act was one which was fraudulent was found to be irrelevant.⁴⁰³ The court did not see any force in the second argument either. The court observed that the crime of defeating or

⁴⁰⁰At 170.

⁴⁰¹*Ibid.*

⁴⁰²At 171.

⁴⁰³At 170-71.

obstructing the course of justice is usually committed in relation to a witness who might be called to give testimony in a case but that it could also be committed in relation to a party to the proceedings who might or might not be a witness to them.⁴⁰⁴ The court upheld the conviction and dismissed the appeal.⁴⁰⁵

It can be said that this case has highlighted the following three vital issues:

- (1) that the designation of the crime is never consistent. The accused was charged with defeating and obstructing the course of justice⁴⁰⁶ but throughout the case reference was made to defeating or obstructing justice;⁴⁰⁷
- (2) that the crime of defeating or obstructing the course of justice can be committed in both civil and criminal proceedings;⁴⁰⁸ and
- (3) that sometimes it is required that “the course of justice” must, in fact, have been obstructed or defeated.⁴⁰⁹ The latter proposition is not supported by some academics who are of the opinion that this crime can be committed even though justice does triumph at the end.⁴¹⁰

⁴⁰⁴At 171.

⁴⁰⁵At 172.

⁴⁰⁶See *R v Pokan supra* (n 399) at 170.

⁴⁰⁷At 171.

⁴⁰⁸Burchell and Milton *op cit* Chapter Two (n 148) 943.

⁴⁰⁹*R v Pokan supra* (n 399) at 171.

⁴¹⁰Snyman *op cit* Chapter Two (n 151) 337.

7.4.11 Unlawful releasing a prisoner

There is academic opinion to the effect that the accused commits the crime of defeating or obstructing the course of justice by unlawfully releasing a prisoner *awaiting trial*.⁴¹¹ It is submitted that unlawfully releasing a prisoner awaiting trial prisoner so that he or she cannot stand trial has a tendency to defeat or obstruct the course of justice. It is further submitted that this should be limited only to unlawful release of a prisoner awaiting trial and not to prisoners who are serving sentences.⁴¹² The reason is that the legal hostilities and the due administration of justice cease to exist immediately after the accused has been either acquitted or convicted and sentenced unless there is an appeal. Extending the course of justice beyond the appeal process to include the unlawful release of a prisoner who is serving a sentence cannot be justified because there is no interference with judicial proceedings as such an act would fall within executive functions. Under the Canadian law, however, the scope of the course of justice was expanded beyond post-trial issues. According to *R v Baldsdom*,⁴¹³ the course of justice may be obstructed after judicial proceedings have terminated as where the police are interfered with in the execution of a warrant of committal for non-payment of a fine following a conviction.

7.5. THE COURSE OF JUSTICE AND BAIL APPLICATIONS

It has been said above that any attempt to interfere with witnesses or conceal or destroy evidence constitutes the crime of defeating or obstructing or attempt to defeat or obstruct the course of justice.⁴¹⁴ It is submitted that any attempt to interfere with witnesses or to conceal or destroy evidence undermines or jeopardises the objectives or the proper

⁴¹¹Snyman *op cit* Chapter Two (n 151) 339.

⁴¹²See also Hunt *op cit* Chapter Two (n 7) 162.

⁴¹³*R v Baldsdom* at 144 *supra* Chapter Five under 5.2, text at note 25.

⁴¹⁴See *supra* notes 167 and 198.

functioning of the administration of justice. Therefore, in the criminal justice system, X may be refused bail if there is a likelihood that he or she, if released on bail, may, *inter alia*, attempt to influence or intimidate witnesses or conceal or destroy evidence.⁴¹⁵ Section 60(4) of the Criminal Procedure Act⁴¹⁶ empowers the courts not to grant bail to X if there is the likelihood that if X were released on bail he or she will:

- (a) endanger the safety of state witnesses;
- (b) attempt to evade her trial;
- (c) attempt to influence or intimidate witnesses or conceal or destroy evidence; and
- (d) undermine the criminal justice system.

In *S v Hlongwa*,⁴¹⁷ the Appellate Division (now the Supreme Court of Appeal) held that if there is a reasonable possibility that the accused would tamper with state witnesses if he were released on bail, he might be refused bail. The court further held that the accused would have failed to discharge the *onus* if, on all the evidence, there was a possibility that he would tamper with witnesses if he were released.⁴¹⁸ The past record of the accused, especially if it includes a conviction for defeating or obstructing or attempt to defeat or obstruct the course of justice by interfering with state witnesses is relevant during bail application.⁴¹⁹

In *S v Yanta*,⁴²⁰ the court refused to grant bail to the accused because there was a possibility

⁴¹⁵Section 60(4)(c) of the Criminal Procedure Act 51 of 1977. See also E du Toit *et al Commentary on the Criminal Procedure Act* (ed) (2007) 9-30.

⁴¹⁶Act 51 of 1977.

⁴¹⁷1979 (4) SA 112 (AD) at 113H.

⁴¹⁸*Ibid.*

⁴¹⁹*Ibid.*

⁴²⁰2000 (1) SACR 237 (Tk) at 242.

that the accused, if released, would interfere with witnesses. The facts of this case were as follows. Allegedly, the accused (Yanta) entered into an agreement with other people to murder one Mr Sixesha who was a witness against the accused in another case.⁴²¹ The accused was charged with Mr Sixesha's murder. The magistrate refused to grant her bail.⁴²² She appealed against the magistrate's refusal to grant bail.⁴²³ Since the accused was charged with a schedule 6 offence the provisions of section 60(11)(a) of the Criminal Procedure Act⁴²⁴ were applied. The effect of these provisions is to shift the *onus* to the accused to convince the court on a balance of probabilities of the existence of exceptional circumstances which make it in the interests of justice for the accused to be released on bail.⁴²⁵ The court held that in deciding whether the interests of justice permit the release on bail of an awaiting trial prisoner, courts must look at the broad factors mentioned in section 60(4)(a)-(d) of the Act.⁴²⁶ In dismissing the appeal the court held:⁴²⁷

Acknowledging the appellant's entrenched (but qualified) right to personal freedom ..., and weighing these factors against those found by the magistrate to militate against the granting of bail, such as the prospects of her endangering the safety of state witnesses or of interfering with state witnesses, I am not persuaded that the appellant discharged the onus of satisfying the court of first instance that exceptional circumstances exist which in the interest of justice permit her release from custody.

The appeal was dismissed.⁴²⁸ The importance of this case is the recognition of the

⁴²¹At 247.

⁴²²At 240.

⁴²³*Ibid.*

⁴²⁴Act 51 of 1977. Section 60 provides:

(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to —

(a) in schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;....

⁴²⁵*S v Yanta supra* (n 420) at 241. See also *Gade v S* 2007 (1) All SA 43 (NC) at 43.

⁴²⁶At 244.

⁴²⁷At 250.

⁴²⁸At 251.

importance of the fight against the possible commission of the offence of obstructing or defeating the course of justice. In this case there was a possibility that the accused, if granted bail, would interfere with witnesses. In order to prevent the accused from such witness interference, the court may be justified in limiting the accused's right to personal freedom.

7.6 LEGISLATION

In South Africa conspiracy to commit a crime is not a common law crime.⁴²⁹ In 1914, legislation⁴³⁰ was passed to criminalise conspiracy to commit either a common law offence or a statutory offence. In 1956, Parliament passed legislation,⁴³¹ which repealed the 1914 legislation. Section 18(2)(a) of the Riotous Assemblies Act⁴³² provides:

Any person who-

- (a) conspires with any other person to aid or to procure the commission of or to commit; or ... any offence, whether at common-law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actual committing that offence would be liable.

Hunt⁴³³ says that it is now possible, though perhaps slightly unusual, to charge a person with the crime of conspiracy to defeat or obstruct the course of justice rather than attempt to defeat or obstruct the course of justice. For instance in 1929, in *R v Smith*,⁴³⁴ the accused was charged with the statutory offence of inciting, instigating, etc, to defeat or obstruct the course of justice in contravention of section 15(2)(a) of Act 27 of 1914 as amended by

⁴²⁹Hunt *op cit* Chapter Two (n 7) 162.

⁴³⁰Section 15(2)(a) of the Riotous Assemblies and Criminal Law Amendment Act 27 of 1914.

⁴³¹Section (18)(2)(a) of the Riotous Assemblies Act 17 of 1956.

⁴³²Act 17 of 1956.

⁴³³Hunt *op cit* Chapter Two (n 7) 162.

⁴³⁴1929 AD 377.

section 4 of Act 39 of 1926 for conspiring with a certain Mthethwa to bring a false charge against a certain Monaghan of unlawfully supplying them with liquor.⁴³⁵ The accused (Smith) was charged with the crimes of (1) defeating or obstructing the due course of justice or alternatively inciting, instigating, commanding or procuring the commission of the crime of defeating or obstructing the course of justice.⁴³⁶ Allegedly, the accused wrongfully and intentionally, falsely and corruptly, with intent to defeat or obstruct the course of justice, incited, counselled, instigated, commanded, induced or procured one Mthethwa, a police officer to plant a marked ten shilling note under the bed of one Monaghan and to bring a bottle of liquor from the house. Their intention was to make it appear as if the said Monaghan sold liquor to Mthethwa in contravention of the liquor laws.⁴³⁷ Smith then had the said Monaghan charged with contravening the liquor laws which charge Smith knew to be false.⁴³⁸ The accused also fabricated evidence against Monaghan while knowing it to be false. He was found guilty.⁴³⁹ Mthethwa was the only witness for the state but in order for the court to convict the accused there should have been two witnesses in terms of section 284 of Act 31 of 1917.⁴⁴⁰ The accused applied to the Appellate Division citing irregularity in his conviction based on evidence of a single witness.⁴⁴¹ The Appellate Division refused the application.⁴⁴²

⁴³⁵At 381.

⁴³⁶In contravention of 15(2)(b) of Act 27 of 1914 as amended by section 4 of Act 39 of 1936.

⁴³⁷*R v Smith supra* (n 434) at 378.

⁴³⁸*Ibid.*

⁴³⁹At 379.

⁴⁴⁰*Ibid.* This section which precluded a conviction for perjury on the evidence of any one witness unless there was an addition some other evidence as to the accused's guilt had no application to a trial upon a charge of defeating the course of justice even where such charge involved a charge of perjury as a necessary ingredient.

⁴⁴¹In terms section 370 of Act 31 of 1917. In terms of this section the court at a criminal trial should grant a request for a special entry made under section 370 of Act 31 of 1917 unless such request obviously constitutes an abuse of the court process.

⁴⁴²*S v Smith supra* (n 434) at 381.

Another case where conspiracy to defeat the course of justice in contravention of section 15(2)(a) of the Riotous Assemblies and Criminal Law Amendment Act⁴⁴³ was charged, was *R v Fourie and Another*.⁴⁴⁴ The facts of this case were the following: One Beyers was charged with stealing a box containing a quantity of gold bullion which belonged to the Standard Bank of South Africa Limited and which was in the lawful custody of the Administration of the South African Railways and Harbours.⁴⁴⁵ Fourie who was accused number one in this case, was investigating the theft case against Beyers. It is alleged that whilst Beyers was out on bail Fourie and Friedman, with intent to defeat the ends of justice, conspired with Beyers to dispose of the said gold bullion to the personal advantage of themselves and so prevented the due administration of justice in contravention of section 15(2)(a).⁴⁴⁶ Alternatively, they were charged with incitement. Regarding the alternative charge it was alleged that the accused wrongfully and unlawfully and corruptly incited or instigated or procured the said Beyers to sell, deal in, dispose of, etc, the gold bullion with intent to defeat or obstruct the course of justice in contravention of section 15(2)(b). The accused were convicted on the alternative charge of contravening section 15(2)(b).⁴⁴⁷

In South Africa there is also legislation which prohibits conduct that defeats or obstructs the due administration of justice. The provisions that prohibit the defeat or obstruction of the due administration of justice are found in certain sections of various enactments that were not promulgated with legislating against the crime of defeating or obstructing the course of justice as their primary objective. These Acts are the following:

⁴⁴³Act 27 of 1914.

⁴⁴⁴1937 AD 31.

⁴⁴⁵At 38.

⁴⁴⁶At 36.

⁴⁴⁷At 37.

- a. Sections 30, 31, 36(1) and 49 of the Military Discipline Code.⁴⁴⁸
- b. Sections 36-40 of the Transkeian Penal Code.⁴⁴⁹
- c. Sections 8, 9 and 11 of the Prevention and Combatting of Corrupt Activities Act.⁴⁵⁰

7.6.1 First Schedule of the Defence Act 44 of 1957

- a. Section 30 of the Military Discipline Code (MDC)⁴⁵¹ prohibits any act or conduct which is intended to deceive, alter, deface, suppress, etc any document which is intended to be used for official purposes. Section 30 provides:

Any person who

- (d) with intent to deceive, alters, defaces, suppresses or makes away with any document required, made, kept or issued for official purposes.

shall be guilty of an offence ...

- b. The Code also punishes those who make false accusations or statements against a member who is subject to it (the Code). This means that in order to convict X of contravening section 31 he must have made false accusations against a member of the Defence Force. Section 31⁴⁵² provides:

Any person who makes any false accusation or statements against or concerning any other person subject to this *Code*, shall be guilty of an offence ...

- c. Section 36(1)⁴⁵³ provides:

⁴⁴⁸First Schedule of the Defence Act 44 of 1957. This Act has been repealed and replaced by the Defence Act 42 of 2002. The latter Act retained the First Schedule of its predecessor.

⁴⁴⁹The Transkeian Penal Code, Act 9 of 1983 (Tk).

⁴⁵⁰The Prevention and Combating of Corrupt Activities Act 12 of 2004.

⁴⁵¹The Military Discipline Code is found in the First Schedule of the Defence Act 44 of 1957.

⁴⁵²Military Discipline Code.

⁴⁵³Military Discipline Code.

Any person who—

- (b) being present at preliminary investigation, summary trial or board of inquiry after being duly summoned or warned to attend as a witness, fails, refuses to be sworn in or to affirm;
- (c) when giving evidence at a preliminary investigation, summary trial or board of inquiry, refuses to answer any questions which in law he could be compelled to answer, or refuses or fails to produce any document or thing in his possession or under his control which in law he could be compelled to produce;

shall be guilty of an offence.

Like section 139(2) of the Canadian Criminal Code,⁴⁵⁴ where someone who refuses to testify at a preliminary inquiry could be charged with obstructing justice,⁴⁵⁵ the provisions of section 36(1) of the Military Discipline Code prohibits the suppression of the truth by a witness who refuses to answer questions that by law he or she is compelled to answer or by refusing to produce any document or a thing under his or her control. The *actus reus* of this offence is refusal to answer questions or failure to produce a document or a thing which by law he or she is compelled to produce at the preliminary investigation or board of inquiry.

d. Section 49⁴⁵⁶ provides:

Any person, who with intent to defeat or obstruct the course of justice, assists or harbours any person who to his knowledge has committed an offence under this *Code*, shall be guilty of an offence ...

It is submitted that the one who harbours or who assists in harbouring a wanted fugitive so that he or she cannot be brought to book has done no less than the one who attempted to spirit away a witness so that the witness cannot give testimony in judicial proceedings. Both these acts have a tendency to defeat or obstruct the course of justice.

⁴⁵⁴RSC 1985 c C-46. See the provisions of this section *supra* in Chapter Five, text at note 13.

⁴⁵⁵*R v Mercer* at 347 *supra* in Chapter Five under 5.4.2, text at note 106.

⁴⁵⁶Military Discipline Code.

7.6.2 Current legislation in the Transkei territory

As has been said earlier in this thesis,⁴⁵⁷ the statutory crime of defeating or obstructing the course of justice was founded in the Transkeian Penal Code of 1868,⁴⁵⁸ which was repealed in 1983 and replaced by a new Penal Code,⁴⁵⁹ which shall now be discussed. This legislation prohibits the fabrication of evidence,⁴⁶⁰ the removal or intentional destruction of possible exhibits⁴⁶¹ and the intentional committing an act that defeats the course of justice.⁴⁶²

7.6.2.1 Fabrication of evidence

In the old Transkei territory, fabricating evidence in order to mislead any court or judicial proceedings was prohibited in terms of Section 36 of the Penal Code.⁴⁶³ Section 36 provides–

Any person who, with intent to mislead any court or person holding any judicial proceedings, fabricates or contrives evidence by any means other than perjury and subornation of perjury, or knowingly makes use of such fabricated evidence, shall be guilty of an offence.

This section criminalizes, *inter alia*, fabrication of evidence. It also punishes anyone who knowingly uses fabricated evidence even if he or she is not the one who fabricated it.

⁴⁵⁷See the discussion of this Penal Code *supra* in Chapter Two under 2.4.7, text at note 219.

⁴⁵⁸The Transkeian Penal Code Act 24 of 1886.

⁴⁵⁹The Transkeian Penal Code, 1983 (Act 9 of 1983 (Tk)): Transkei (SA) Statute Law 1983 (UNISA) 81-82. Although the legislation of Transkei, Bophuthatswana, Venda and Ciskei (the former “independent” homelands) or “TBVC states” did not form part of the South African legislation, this legislation remains valid as part of South African law in the area where it previously applied, because in 1994, these states were re-incorporated into the Republic of South Africa. See Botha *op cit* (n 349) 10.

⁴⁶⁰Section 36.

⁴⁶¹Section 37.

⁴⁶²Section 40.

⁴⁶³Act 9 of 1983 (Tk).

The elements of this offence are

- (a) fabrication of evidence or knowingly making use of fabricated evidence;
- (b) wrongfulness; and
- (c) intention to mislead the court or person holding any judicial proceedings.

7.6.2.2 Removal or destruction of possible exhibits

Section 39 of the Penal Code⁴⁶⁴ also makes it an offence to, *inter alia*, remove or destroy possible exhibits which may be required in evidence in judicial proceedings. Section 39 provides—

Any person who, knowing that any book, document or thing of any kind whatsoever, is or may be required in evidence in a judicial proceeding; wilfully removes or destroys it or renders it illegible or unidentifiable, with intent thereby to prevent it from being used in evidence, shall be guilty of an offence.

The elements of this offence are

- (a) removing or destroying documents;
- (b) wrongfulness; and
- (c) intention to prevent that it being used as evidence.

7.6.2.3 Acts with intent to defeat the course of justice

In addition to the acts which have the tendency to obstruct the course of justice and which

⁴⁶⁴Act 9 of 1983 (Tk).

are prohibited in terms of sections 36 and 39 of the Penal Code, there is a section⁴⁶⁵ which creates a broad crime of defeating the course of justice. Section 40 provides:

Any person who–

- (a) accuses any person falsely of any crime or does anything to obstruct, prevent, pervert or defeat the course of justice; or
- (b) in order to obstruct the due course of justice, dissuades by any means, or hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so; or
- (c) obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal,

shall be guilty of an offence: Provided, however, that where the offence has caused the conviction and execution of an innocent accused, such person may be sentenced to imprisonment for life.

It is clear that subsection (a) codifies the common law crime of obstructing the course of justice by making provision for laying a false charge against an innocent person (*calumnia*).⁴⁶⁶ On the other hand, subsection (b) prohibits any dissuasion or hindrance or prevention of witnesses from attending and giving evidence in judicial proceedings. It also prohibits any endeavour to dissuade, hinder or prevent witnesses from attending judicial proceedings. It is submitted that the words “in order to obstruct the course of justice” show that there must be an intention to obstruct the due administration of justice.

7.6.3 Legislation pertaining to the prevention and combating, of corrupt activities

To some extent, corruption overlaps with the crime of obstructing the course of justice where there are two persons involved. Corruption is a different crime and protects different interests, namely, public welfare. The crime of obstructing the course of justice protects the due administration of justice. Not all conduct, which is charged as corruption will

⁴⁶⁵Section 40 of Act 9 of 1983 (Tk).

⁴⁶⁶The common law crime is discussed *supra* in this Chapter under 7.4.4, text at notes 227, 232 and 244.

necessarily obstruct the course of justice and *vice versa*.

In 2004, Parliament passed legislation⁴⁶⁷ to prevent and combat corrupt activities. This Act is South Africa's first comprehensive anti-corruption legislation. It replaced the Corruption Act 94 of 1992.⁴⁶⁸ It is said that corruption is a major hindrance to sustainable development, as it has a disproportionate impact on poor communities and corrodes the very fabric of the society.⁴⁶⁹ Furthermore, corruption impedes economic growth and is extremely costly for business.⁴⁷⁰ Therefore, corruption is a crime against the public welfare.⁴⁷¹ Snyman⁴⁷² says that the offence of corruption has two forms: (1) that committed by the corruptor (active corruption) and (2) that committed by the corruptee (passive corruption). Each form may be committed in respect of an act of corruption to be performed ('future corruption') or already performed ('past corruption').⁴⁷³

7.6.3.1 Corrupt activities relating to judicial officers

Section 8(1) of this Act criminalises certain actions by judicial officers, namely, judges and magistrates. The purpose of this section is to prevent judicial officers from directly or indirectly accepting or agreeing to accept any gratification from any other person. This section also prohibits any person from directly or indirectly giving or agreeing or offering

⁴⁶⁷The Prevention and Combating of Corrupt Activities Act 12 of 2004.

⁴⁶⁸O Sibanda "The South African corruption law and bribery of foreign public officials in international business transactions: A comprehensive analysis" (2005) *South African Journal of Criminal Justice* Vol 18 No 1 1.

⁴⁶⁹United Nations Global Compact "Transparency and anti-corruption," at <http://www.unglobalcompact.org/aboutTheGC/TheTenPrinciples/anti-corruption.html> (accessed on 21 May 2007).

⁴⁷⁰*Ibid.*

⁴⁷¹Snyman *op cit* Chapter Two (n 151) 376.

⁴⁷²*Ibid.*

⁴⁷³JRL Milton and MG Cowling *South African Criminal Law and Procedure* Vol III 2ed 1997 D3-3.

to give any gratification to a judicial officer. In terms of section 8(2) the acts which constitute the offence of corrupt activities relating to judicial activities in terms of section 8(1) above include the following:

- a. performing or not adequately performing a judicial function;
- b. making decisions affecting life, freedoms, rights, duties, obligations and property of persons;
- c. delaying, hindering or preventing the performance of judicial function;
- d. aiding, assisting or favouring any particular person in conducting judicial proceedings or judicial functions;
- e. showing any favour or disfavour to any person in the performance of a judicial function; or
- f. exerting any improper influence over the decision making of any person, including another judicial officer or a member of the prosecuting authority, performing his or her official functions.

Section 8 requires that X (the judicial officer) must directly or indirectly have accepted or agreed to accept or offered to accept any gratification. What will happen if Z approaches X who is the presiding judicial officer in a trial against Y, on a charge of murder, without any offer of any gratification with a request to delay or hinder or prevent the performance of a judicial function? It is submitted that if there was no acceptance or agreement or offer to accept any gratification, the state cannot invoke section 8(1) against X. Therefore, the law is silent where X did what he or she did without accepting any gratification or agreement or offer to accept any gratification or where X acted of his or her own accord and obstructed the course of justice. In such cases X can be charged with the crime of obstructing or defeating the course of justice.

7.6.3.2 Corrupt activities relating to members of the prosecuting authority

Section 9(1) of the Act⁴⁷⁴ is aimed at preventing members of the prosecuting authority from, *inter alia*, corruptly continuing or discontinuing of criminal proceedings, delaying, hindering or preventing the performance of a prosecutorial function and exerting any improper influence over the decision-making of any person, including another member of the prosecuting authority or a judicial officer, performing his or her official functions.⁴⁷⁵

Section 9 provides that

(1) Any—

(a) member of the prosecution authority who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person;

(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a member of the prosecution authority, whether for the benefit of that member or for the benefit

of another person in order to act, personally or by influencing another person so to act, in a manner-

(i) that amounts to the –

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of an offence of corrupt activities relating to members of the prosecuting authority.

Section 9 is silent on the situation where X, who is a member of the prosecuting authority,

⁴⁷⁴The Prevention and Combating of Corrupt Activities Act 12 of 2004.

⁴⁷⁵Section 9(2)(a)(i),(b) and (e).

without accepting any gratification from anybody, delays or hinders or prevents the performance of prosecutorial function. It is submitted that the state cannot invoke section 9(1) where there is nobody who directly or indirectly gives or agrees or offers to give any gratification and X did what he or she did without a second person being involved. In such cases X can be charged with the crime of obstructing or defeating the course of justice.

7.6.3.3 Corrupt activities relating to witnesses and evidential material during certain proceedings

Firstly, section 11(1)⁴⁷⁶ makes it an offence for any person to directly or indirectly accept any gratification from another person in exchange for testifying in a particular manner or in an untruthful manner in a trial, hearing or other judicial proceeding; withholding testimony or a record or document, etc, to such judicial proceedings or altering, destroying, mutilating or concealing a record or document and absconding from a trial, hearing or proceedings. Secondly, section 11(2)⁴⁷⁷ makes it an offence for any person to directly or indirectly give or agree to give any gratification to any other person with the intent to do all the acts mentioned in subsection (1) above.

A close look at section 11 reveals that there must be at least two people involved in the commission of this offence, that is, the one who accepts or agrees to accept a gratification (the corruptee)⁴⁷⁸ and the one who gives away or agrees to give away a gratification (the corruptor).⁴⁷⁹ This section does not address the situation where X, without an agreement or

⁴⁷⁶The Prevention and Combating of Corrupt Activities Act 12 of 2004.

⁴⁷⁷The Prevention and Combating of Corrupt Activities Act 12 of 2004.

⁴⁷⁸Section 11(1).

⁴⁷⁹Section 11(2).

promise of receiving any gratification from anybody, testifies in a particular manner in a trial, hearing or other proceeding or withholds testimony, a record, document, etc, or fabricates, destroys, mutilates or conceals a record, document or any other object to be used at such trial, hearing or proceedings or absconds from the trial, hearing or proceedings.

7.7 SUMMARY

The crime of obstructing the course of justice developed from the provisions of the Roman and Roman-Dutch *lex Cornelia de falsis*, the *lex Calumnia* and the *lex Remmia*. It now has a wider scope than under Roman and Roman-Dutch law. In South Africa, this crime is sometimes referred to as “defeating the course of justice”, sometimes as “obstructing the course of justice,” sometimes as defeating and obstructing the course of justice, sometimes as defeating or obstructing the course of justice and sometimes as defeating the ends of justice. There are also situations where the accused is charged with attempting to defeat the ends of justice or attempting to defeat or obstruct the course of justice. It is said the charging of this crime as *attempt* to defeat or obstruct the course of justice alleviates the agony, on the prosecution’s part, of proving that justice was in fact defeated or even obstructed by the accused’s act or series of acts of the accused. It is also said that the correct designation of the crime in the charge sheet will depend on the nature of the act or conduct which the accused alleged committed. According to this view, a reference to “ends of justice” in the description of this crime should be avoided because it unduly restricts the ambit of the crime which deals with interference with the course of the administration of justice and can be committed even though justice does triumph in the end. The discrepancies in the designation of this crime may cause legal uncertainty because prosecutors are not sure whether to charge the accused with defeating or obstructing the course of justice. The accused is placed at the mercy of that specific prosecutor as much

will depend on how the charge sheet is drawn up by that specific prosecutor. This may lead in a situation where two accused persons (X1 and X2) who have committed the similar offences, for example, dissuading state witnesses not to testify in their respective trials, being charged with different offences. X1, for example, might be charged with defeating the course of justice and X2 might be charged with obstructing the course of justice.

In our law the administration of justice means the judicial administration of justice in both civil and criminal proceedings, but not in quasi-judicial proceedings. Our courts have refused to extend the scope of the crime to include quasi-judicial proceedings. The scope of this crime has, however, been extended to include any conduct which interferes with police investigation of crimes. Our courts have convicted accused persons of defeating or obstructing or attempting to defeat the course of justice for misleading the police in order prevent them from detecting that a crime was committed. This means that the course of justice begins to run and may immediately be obstructed, upon the commission of the principal crime; and while the police are *investigating the crime and even before investigation has started*. Although it seems correct and necessary to regard police activities as falling within the scope of the concept of the administration of justice, only those activities which relate to the investigation of crimes and the collection of evidence relating to such crimes come within the ambit of the concept of administration of justice. Interference with routine police activities that are not connected with the investigations of crimes are regarded as of essentially administrative nature and thus fall outside the ambit of the crime of defeating or obstructing the administration of justice.

This thesis could not find any authority in case law which addresses the question as to when the administration of justice comes to an end. Academic opinion varies as to when the administration of justice ends. Firstly, it is said that the judicial administration of justice is

completed after the court has pronounced its judgement (including all appeals) and anything which delays or obstructs the execution of judgement is not a proper subject matter for a criminal charge of defeating or obstructing the course of justice.

Secondly, it is said that the crime of defeating or obstructing the course of justice may also be committed where proceedings have been concluded, for instance, where a person contriving the release of X, a convicted prisoner, wilfully and falsely files an affidavit that Y and not X committed the crime.

In order to succeed with the prosecution of the crime of obstructing or defeating the course of justice the state must prove the following elements:

- a. Defeating or obstructing
- b. the course of justice
- c. Unlawfully and
- d. Intentionally.

The conduct element of the common law offence of defeating or obstructing the course of justice requires that the accused defeats or obstructs or attempts to defeat or obstruct the administration of justice.

The following are examples of acts which amount to “defeating or obstructing the course of justice:

- a. **Interference with witnesses.** One of the ways of interfering with a witness is when X requests Y, who is a potential witness, to give false evidence during the trial, but, in order

for the accused (X) to be convicted of the crime of attempting to defeat or obstruct the course of justice the state must prove that the statement the accused induced the witness to give is false and that the accused knows that it is false.

b. **A witness demands money for giving or not giving evidence.** Our courts have convicted witnesses of attempting to defeat the ends of justice following an attempt by them to accept money from the accused persons so that they could leave the country in order to avoid giving give testimony against them. What is clear from both case law and academic commentary is that receiving money in order to give or not to give evidence constitutes the crime of defeating or obstructing the course of justice. The law is silent on whether a person who gives money to potential witnesses in order to give or not to give evidence commits the crime of defeating or obstructing the course of justice. However, this may be treated as general interference with witnesses or an attempt to influence witnesses which amounts to the common law offence of defeating or obstructing the course of justice.

c. **Tampering, altering, fabricating, concealing and destroying evidence.** Tampering with evidence may take the form of fabricating or destroying or altering or concealing documents or exhibits such as goods. It is said that the most serious manifestation of the way in which the crime is committed is the fabrication of evidence, for example, where the accused concocted a chain of evidence including false documents, that implicate another person as guilty of unlawful activities, he or she commits the crime of defeating or obstructing the course of justice.

d. **Falsely accusing someone of having committed a crime.** In 1988, the Supreme Court of Appeal overruled its previous decision where it had decided that the crime of laying false charges against someone else (*calumnia*) was obsolete in our law. It accepted

that the conduct constitutes an attempt to defeat or obstruct the course of justice and therefore is a crime in our law.

e. **Interference with police in the execution of their duties.** One of the ways of committing this type of offence is to interfere with a speed trap. Some academic writers are of the view that a motorist who warns the oncoming motorists of the presence of a speed trap by flashing his or her lights interferes with the due administration of justice. The court on review confirmed the conviction of the accused on a charge of attempting to defeat the ends of justice after the accused and the passenger warned other motorists of the presence of a speed trap in the vicinity. It depends on X's intent. Warnings of police speed traps will only be punished as obstructing or defeating the course of justice or an attempt thereto where X's intent is to enable an offender to escape detection and capture, arrest and punishment. However, where the accused had no reason to believe that the oncoming motorist was exceeding the speed limit and no reason to presume that he or she intended to do so, he or she did not intend to defeat the course of justice by warning other motorists about the presence of a speed trap. This is also the preferable view amongst academic writers. The police, in operating a speed trap, are engaged in law enforcement that is a function distinct and distinguishable from the administration of justice by the courts of law. Hampering the police in the performance of their duties ought, generally, to be charged as a statutory offence of obstructing the police in the performance of their duties, not as defeating of obstructing the administration of justice.

f. **Making false statements to the police or someone else.** The act of misleading, or attempting to mislead the police by making exculpatory or inculpatory statements could amount to defeating or obstructing the course of justice. This offence is, for instance, committed when an investigation is being made into a suspected crime and X persuades Y

to make a false statement which tends to show that he (X) is not guilty of the suspected crime. X also commits this offence where he falsely incriminates himself in order shield Y from prosecution.

There is academic opinion which says that X does not commit this offence when, in order to avoid incriminating himself, he lies to the police. It is said that lies told to the police by X in order to avoid incriminating himself should not be punishable as defeating or obstructing the course of justice except in instances where a person incriminates somebody else or falsely incriminates himself in order to protect the real offender. It is said that to hold otherwise would be to deny X the benefit of the common law privilege against self-incrimination. In the *Burger* case, however, the Court of Appeal held that if a person has reason to believe that he had committed an offence and realises that legal steps may possibly be taken against him and that a police investigation will be launched, and he intentionally does something with intent to obstruct or prevent such investigation, he is guilty of the offence of an attempt to obstruct the course of justice. In the court's view, it makes no difference if the guilty person, who wants to avoid criminal proceeding against himself persuades a friend to give false information to the police, or do it himself.

However, this thesis submits that a mere denial of liability does not amount to an unlawful obstruction of justice. It is submitted that a distinction must be drawn between false statements made in order to avoid self-incrimination (for example, a mere denial of liability) and false statements made to mislead the police with a view to obstruct the course of justice and to prevent an investigation. In the former case, X's conduct cannot be viewed as an *unlawful* obstruction of justice because his right against self-incrimination should be accorded more weight. But in the latter case, X's conduct amounts to punishable obstruction of justice.

g. **Lying to the police that a crime has been committed.** Lying to the police that a crime has been committed constitutes the crime of obstructing the course of justice. The crime is not committed by merely wasting the police officials' time and energy or by refusing to answer questions put by the police or to refuse to co-operate with the police in obtaining evidence against oneself or another because in most cases, there is no legal duty on the individual to assist the police. However, in the case of a hoax report which may lead to the arrest or detention of an innocent person (Y) such conduct may amount to obstruction of the course of justice or an attempt thereto.

h. **Misleading the police in order to prevent detection of a crime.** Misleading the police with intent to prevent the detection of a crime constitutes defeating or obstructing the course of justice. In *S v Daniels*, the accused was convicted with the crime of attempting to defeat or obstruct the course of justice after he had made endeavours to mislead the police in order to prevent them from detecting a crime which he had committed.

i. **Interfering with the judiciary.** Any attempt by the accused to influence the judiciary in any way, for example, by exhorting them not to give any credence to certain types of evidence, contrary to their duties amounts to the common law offence of attempting to defeat or obstruct the course of justice.

j. **Improperly influencing a party to a civil case.** Improperly influencing a party to a civil case constitutes the crime of defeating or obstructing the course of justice. This crime could also be committed in relation to a party to the proceedings who may or may not be a witness in civil proceedings.

k. **Unlawfully releasing a prisoner.** An unlawful release of a prisoner *awaiting trial* so

that he or she cannot stand trial may amount to the crime of defeating or obstructing the course of justice, or an attempt thereto.

Bail application

In our criminal justice system, X may be refused bail if there is a likelihood that he or she, if released on bail, may, *inter alia*, attempt to influence or intimidate witnesses or conceal or destroy evidence. Section 60(4) of the Criminal Procedure Act empowers the courts not to grant bail to X where there is a likelihood that he or she (X), if he or she were released on bail will, *inter alia*, attempt to influence or intimidate witnesses or conceal or destroy evidence. In *S v Yanta*, the court held that in deciding whether the interests of justice permitted the release on bail of an awaiting trial prisoner, the courts must take the broad considerations mentioned above into account.

Statutory offences

Conspiracy or incitement to commit a crime, including the common law crime of defeating or obstructing the course of justice is a statutory offence. It is punishable in terms of section 18(2)(a) of the Riotous Assemblies Act 17 of 1956. A statutory crime of obstructing the course of justice is found in Act 9 of 1983 (Tk) which is applicable only in Transkei. The First Schedule of the Defence Act 44 of 1957, which is applicable only to members of the Defence Force, creates offences reminiscent to the common law offence of obstructing the course of justice. It is clear that there is only one piece of national legislation which partly overlaps with conduct which is intended to and has the tendency of obstructing the course of justice, that is the Prevention and Combating of Corrupt Activities Act 12 of 2004. Firstly, section 8(1) prevents judicial officers from directly or indirectly accepting or agreeing to accept any gratification from any other person in order to

- a. perform or not adequately perform a judicial function;
- b. make decisions affecting life, freedoms, rights, duties, obligations and property of persons;
- c. delay, hinder or prevent the performance of judicial function;
- d. aid, assist or favour any particular person in conducting judicial proceedings or judicial functions;
- e. show any favour or disfavour to any person in the performance of a judicial function;
or
- f. exert any improper influence over the decision-making of any person, including another judicial officer or a member of the prosecuting authority, in the performance of his or her official functions.

This section also prohibits any person from directly or indirectly giving or agreeing or offering to give any gratification to a judicial officer. Section 8 requires that X must directly or indirectly have accepted or agreed to accept or offered to accept any gratification in order to do the above-mentioned conduct. If there was no acceptance or agreement or offer to accept any gratification, the state cannot invoke section 8(1) against X. This statutory crime overlaps with the common law crime of defeating or obstructing the course of justice but it requires at least two parties to be involved in its commission.

Secondly, section 9(1) of the Act is aimed at preventing members of the prosecuting authority from, *inter alia*, corruptly continuing or discontinuing with criminal proceedings, delaying, hindering or preventing the performance of a prosecutorial function and exerting any improper influence over the decision-making of any person, including another member of the prosecuting authority or a judicial officer, performing his or her official functions.

Again, Section 9 is silent about the situation where X, who is a member of a prosecuting authority, without accepting any gratification from anybody or agrees or offers to accept, delays or hinders or prevents the performance of prosecutorial function. The state cannot invoke section 9(1) where there is nobody who directly or indirectly gives or agrees or offers to give any gratification and X did what he did without a second person involved.

Thirdly, section 11(1) punishes any person who directly or indirectly accepts or agrees or offers to accept, any gratification from another person in exchange for testifying in a particular manner or in an untruthful manner in a trial, hearing or other proceeding, withholding testimony or a record or document, etc, to such judicial proceedings, altering, destroying, mutilating or concealing a record or document and absconding from a trial, hearing or proceedings. Section 11(2) makes it an offence for any person to directly or indirectly give or agree to give any gratification to any other person with the intent to do all the acts mentioned above. This section does not address the situation where X, without an agreement or promise of receiving any gratification from anybody, testifies in a particular manner in a trial, hearing or other proceeding or withholds testimony, a record, document, etc, or fabricates, destroys, mutilates or conceals a record, document or any other object to be used at such trial, hearing or proceeding or absconding from a trial, hearing or proceeding.

Lastly, this Act partly addresses matters regarding interference with witnesses but it does not address the issue of witness intimidation, which is one of the most common ways of obstructing the course of justice.

Comparative analysis

As with the law of two Australian states, Victoria and the Australian Capital Territory, in South African law the crime of obstructing the course of justice is punishable in terms of the common law. This differs from jurisdictions like Canada, the United States of America and the remaining Australian States which have comprehensive legislation to regulate all the manifestations of the crime of obstructing, preventing or perverting the course of justice.

Like the English common law, the scope of this crime has been extended in South African law to include the investigative stage of the principal crime. This differs from the Australian law where police investigations, as a general rule, do not form part of the course of justice and interference with them does not constitute the offence of perverting the course of justice.

In South Africa, proceedings of an administrative nature or quasi-judicial nature cannot be the subject of a charge of defeating or obstructing the due administration of justice. This differs from the Canadian and the American law. In the former jurisdiction, a Coroner's enquiry may be the subject of the charge of perverting the course of justice and in the latter jurisdiction, investigations by the Internal Revenue Service (IRS) and the United States Probation Officer (USPO) may also be the subject of a charge of perverting the course of justice. Also, under the English law, the proceedings in an arbitration form part of the administration of justice. The crime of perverting the course of justice can be committed also in relation to these proceedings.

Unlike Canada, where the concept of "the course of justice" was extended to include post-trial activities, there are no judicial decisions in South Africa as to when the "administration of justice" terminates.

As in Australian law, where some states have a statutory crime of perverting the course of justice, in South Africa according to some case law and academic opinion, this crime may also be committed by omission. For instance, in *S v Gaba*, an omission was recognised to constitute the crime of defeating or obstructing the course of justice because there was a legal duty on the accused to act positively on the ground of his official capacity. However, other case law and academic opinion maintain that this crime can generally only be committed by “positive acts” and not by omission. According to case law, for example, an arrested person’s refusal to allow a blood sample to be taken, inasmuch as it involves a mere omission, does not constitute the offence of defeating or obstructing the course of justice or an attempt to do so. Generally, in English, Canadian and American law the crime cannot be committed by mere omission. In these jurisdictions, an omission does not give rise to liability unless there is a legal duty to act positively imposed by either common law or by statute.

Unlike in other jurisdictions, in South Africa, the crime of an attempt to obstruct or to defeat the course of justice is not treated as a substantive offence. It is treated as an inchoate offence.

CHAPTER EIGHT

THE RELEVANT CONSTITUTIONAL PRINCIPLES

8.1 GENERAL

South Africa's past has been described as that of "a deeply divided society characterized by strife, conflict, untold suffering and injustice" which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.¹ The coming into being of the new order in South Africa in 1994 brought political, legal and socio-economic changes to the country. The establishment of a new legal order was initiated with the adoption of South Africa's first democratic Constitution² which was, for the first time, the supreme law of the land. The Interim Constitution was established through the Multi-Party Negotiating Process (MPNP). The process was informed by the reports of a number of technical committees and the final draft that came out from the MPNP was adopted by Parliament.³ Therefore, the Interim Constitution was the product of negotiation and compromise among parties with competing and conflicting interests with regard to conceptions on how the South African future legal and social order ought to be.

The adoption of the Interim Constitution was described as a stepping-stone to negotiating a Final Constitution for the Republic of South Africa.⁴ One of the principal purposes of the

¹*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 775 (CC) at 776; E Mureinik "A bridge to where? Introducing the interim Bill of Rights" (1994) *SAJHR* Vol 10 1 31; S Hoctor "The right to freedom of expression and the criminal law – The journey thus far" (2005) *Obiter* Vol 26 3 460-61 and AS Butler "The 1996 Constitutional Bill, its amending power, and the Constitutional Principles" (1996) *The Human Rights Constitutional Law Journal of Southern Africa* Vol 1 3 27.

²The Constitution of the Republic of South Africa, Act 200 of 1993. See N Steytler *Constitutional Criminal Procedure* (1998) 1; John C Mubangizi "The role of the National Human Rights institutions in the promotion and protection of human rights in Uganda and South Africa: A comparative evaluation" (2006) *Obiter* Vol 27 3 456 and C Rautenbach "A commentary on the application of the Bill of Rights to customary law" (1999) *Obiter* Vol 20 1 114.

³See J Kentridge and D Spitz "Interpretation," *Revision Service* 5 (1999) 6 at: http://www.chr.up.ac.za/centre_publications/constitutionallaw/pdf/11-Interpretations.pdf (accessed on 12 August 2008); G Devenish "The Interim Constitution in the making" (1997) *THRHR* Vol 60 622 and *S v Makwanyane and Another* 1995 (3) SA 391(CC) at 406-07.

⁴L Jordaan *Aspects of Double Jeopardy*, Unpublished LLD Thesis, University of South Africa (1997) 656-57.

Interim Constitution was to set out the procedures for the drafting and adoption of the Final Constitution.⁵ After the adoption of the 1996 Constitution,⁶ the Interim Constitution was replaced and fell away.⁷ In order to appease all political parties that were involved in the multi-party negotiations, it was agreed that the Final Constitution must include the fundamental values and principles contained in the Interim Constitution.⁸ The Constitutional Court was required to certify that all provisions of the text of the new Constitution passed by the Constitutional Assembly complied with the constitutional principles.⁹ The certification proceedings were held to determine whether or not the new constitutional text adopted by the Constitutional Assembly in 1996 to replace the Interim Constitution, was consistent with the 34 constitutional principles by which the Constitutional Assembly was bound.¹⁰ The court's task was an unprecedented and extraordinary exercise of judicial review.¹¹

The Constitution of South Africa is the supreme law of the Republic. Section 2 of the Constitution¹² provides:

The Constitution of the Republic of South Africa is the supreme law of the Republic; law or conduct

⁵In particular, section 71(1)(a) of the Interim Constitution required that the new constitutional text should comply with the constitutional principles set out in Schedule 4 of the Interim Constitution.

⁶The Constitution of the Republic of South Africa of 1996.

⁷I Currie and J De Waal *The Bill of Rights Handbook* 5ed (2005) 2.

⁸M Chaskalson and D Davis "Constitutionalism, the Rule of Law, and the first certification judgement: *Ex parte Chairperson of the Constitutional Assembly in Re: Certification of the Constitution of the Republic of South Africa 1996*, 1996 (4) SA 744 (CC) (1997) *SAJHR* Vol 13 No 1 430.

⁹Section 71(2) of the Constitution of the Republic of South Africa, Act 200 of 1993. See also B de Villiers and J Sindane *Managing Constitutional Change* (1996) 31 and D van Wyk, J Dugard, B de Villiers and D Davis "Rights and constitutionalism: The new South African legal order" (1995) *TSAR* Vol 3 628.

¹⁰*Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) at 666F-G and IM Rautenbach and EFJ Malherbe *Constitutional Law* 3ed (1999) 321. In the first certification, the Constitutional Court held that certain provisions of the new constitutional text did not comply with all the constitutional principles and accordingly declined to certify the text.

¹¹See *Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa supra* (n 1) at 775; Currie and De Waal *op cit* (n 7) 6 and Rautenbach and Malherbe *op cit* (n 10) 31.

¹²The Constitution of the Republic of South Africa of 1996.

inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

The Interim and the Final Constitutions have affected profoundly not only constitutional law in South Africa, but every other branch of law as well.¹³ The coming into being of the 1996 Constitution also impacted on both common law and statutory crimes. So, for example, any law (both common law and legislation) which criminalises any conduct is invalid if it is in conflict with certain rights in the Bill of Rights.¹⁴ Crimes do not exist in a vacuum, they bear relevance to the Constitution and they protect certain core values found in the Constitution. The constitutional relevance of crimes requires legal scholars to determine which core values an individual crime seeks to protect.

Like any other crime, the crime of obstructing the course of justice protects certain core values found in the Constitution. This chapter discusses the crime of obstructing or defeating the course of justice from a constitutional perspective. Firstly, it looks at the core values guaranteed in the Constitution that are relevant to the administration of justice in general. Secondly, it looks at the crime of obstructing the course of justice in particular. It discusses the core values that this crime strives to protect. It considers the doctrines of constitutional supremacy and separation of powers and the effect that these doctrines have on the administration of justice. Lastly, this chapter investigates whether any or some rights in the Bill of Rights may be limited in order, *inter alia*, to protect the due administration of justice. If this question is answered in the affirmative, it is considered whether such limitation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

¹³M Dendy "In the light of the Constitution –1: The supremacy of the Constitution: (2009) *De Rebus*, (January/February) 60.

¹⁴See *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (6) BCLR 729 (CC). This is a South African Constitutional Court case decided on October 9, 1998 that resulted in a landmark decision regarding sodomy laws. Basing itself on South Africa's 1996 post-apartheid Constitution — which was the first Constitution ever to explicitly ban discrimination based on sexual orientation — the court unanimously overturned as unconstitutional the law banning sexual activities between consenting male adults.

8.2 CORE VALUES OF THE CONSTITUTIONAL DISPENSATION

8.2.1 Constitutional supremacy

Before the coming into being of the 1993 Constitution,¹⁵ South Africa had never had any legislative instrument even vaguely reminiscent of a supreme Constitution with a Bill of Rights. South African constitutional law had been premised upon the British concept of parliamentary supremacy or parliamentary sovereignty.¹⁶ According to this doctrine, Parliament can make or unmake any law, and that no person or body¹⁷ is recognized by law as having a right to override or supersede parliamentary legislation.¹⁸ The consequence of this is that the judiciary has an inferior status to the democratically elected Parliament and also to the executive.¹⁹ Sometimes the word “sovereignty” is used in a political rather than in a strictly legal sense.²⁰ Dicey²¹ observes:

But the word “sovereignty” is sometimes employed in a political rather than in a strictly legal sense. That body is “politically” sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps, in strict accuracy, independently of the King and the Peers, the body in which sovereign power is vested ... But this is a political, not a legal fact ... The political²² sense of the word “sovereign” is, it is true, fully as important as the legal sense or more so. But the two significations, though intimately connected together, are essentially different ...

Parliamentary supremacy was the fundamental principle of South African law. It is said

¹⁵The Constitution of the Republic of South Africa, Act 200 of 1993.

¹⁶LM du Plessis and JR de Ville “Bill of Rights interpretation in the South African context (1): Diagnostic observations” (1993) *Stell LR* Vol 1 63; W le R de Vos “The impact of the new Constitution upon civil procedural law” (1995) *Stell LR* Vol 6 135 and PD Glavovic “Human rights and environmental law: the case for a conservation Bill of Rights” (1988) *CILSA* Vol 21 65-66.

¹⁷J Dugard (ed) *Human Rights and the South African Legal Order* (1978) 28 and GE Devenish “The doctrine of parliamentary sovereignty and the proposed new Constitution” (1979) *THRHR* Vol 42 86.

¹⁸Z Motala “Independence of the judiciary, prospects and limitations of judicial review in terms of the United States model in the new South African order: towards an alternative judicial structure” (1991) *CILSA* Vol 24 290-91; CR Munro *Studies in Constitutional Law* 2ed (1999) 131; I Currie *et al The New Constitutional and Administrative Law* 1ed (2001) 13 and I Mahomed “The impact of a Bill of Rights on law and practice in South Africa” (1993) *De Rebus* 460.

¹⁹DM Davis “Administrative justice in a democratic South Africa” (1993) *Administrative Law Reform* 26 and HWR Wade and CF Forsyth *Administrative Law* 7ed (1994) 29.

²⁰AV Dicey *Introduction to the Study of the Constitution* 10ed (1959) 73-74.

²¹*Ibid.*

²²G Bindman *South Africa and the Rule of Law* (1988) 7.

that as long ago as in the 1890s a constitutional crisis in the South African Republic prompted President Paul Kruger to denounce judicial review on the ground that the testing right is a principle of the devil. To him judicial intrusion on Parliament's sovereignty was "ungodly."²³ The period between 1910 and 1961, when South Africa became a Republic, led to the expansion of the powers of Parliament. As a result, civil liberty and the rule of law were sacrificed on the altar of parliamentary supremacy to the idol of apartheid. All previous South African Constitutions restricted the Supreme Court's competency to decide on the validity or invalidity of acts of Parliament and section 34(2) read with section 34(3) of the 1983 Constitution²⁴ confirmed that. According to Dugard,²⁵ in England, parliamentary supremacy was controlled by political tradition, convention and the rule of law, whereas in South Africa it was taken to its logical and brutal conclusion at the expense of human rights. When the Interim Constitution came into force in 1994 it marked a turning point for South Africa. The new Constitution did away with the doctrine of parliamentary sovereignty²⁶ and replaced it with a system where the Constitution became the supreme law of the country and any law or conduct inconsistent with it was invalid.²⁷ As a result, the courts have a conclusive veto²⁸ over legislation or the common law because they have powers to pronounce on the validity or invalidity of any legislation or the common law. The Interim Constitution was a transitional Constitution. There is academic opinion that the 1996 Constitution represents a less dramatic development of our legal

²³S Ellmann (ed) *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992) 12.

²⁴Act 110 of 1983. The aim of this Constitution was chiefly to accommodate the political aspirations of Coloureds and Indians by including them in a Parliament consisting of three Houses, the tri-cameral Parliament. The House of Assembly was for Whites, the House of Representatives was for Coloured people and the House of Delegates was for Indian people. See D Marais *South Africa: Constitutional Development: A Multidisciplinary Approach* 2ed (1993) 255 and Bindman *op cit* (n 22) 6.

²⁵Dugard *op cit* (n 17) 36.

²⁶KE Klare "Legal culture and Transformative constitutionalism" (1998) *SAJHR* Vol 14 147. According to this doctrine, Parliament could make any law it wished and no person or institution, including the courts, could challenge any Act of Parliament.

²⁷Pius Langa 'A delicate balance: The place of the judiciary in the constitutional democracy' (2006) *SAJHR* Vol 22 14 and Currie and de Waal *op cit* (n 7) 5.

²⁸PW Hogg *Constitutional Law of Canada* 3ed (1992) 802.

system than the Interim Constitution, which created a new legal *grundnorm*.²⁹ According to this view, the 1996 Constitution represented more the development of the Interim Constitution.³⁰ There is another view, which says that the coming into being of the 1996 Constitution led to a new constitutionalism³¹ which placed new core values at a centre stage. These core values are³² human dignity and the achievement of equality, the protection of human rights and freedoms, non-racialism and non-sexism, a democratic system of governance and the supremacy of the Constitution and the rule of law.³³ Wessels³⁴ says that these constitutional values represent the source from which our human rights dispensation was derived and they give guidance when conflicting rights are balanced. According to Motshekga,³⁵ the principle of constitutional supremacy is reinforced by an independent and impartial judiciary which has the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights. It is submitted that in the South African constitutional context the phrase “constitutional supremacy”, unlike the Diceyan doctrine of parliamentary supremacy,³⁶ is used in a legal rather than in a political sense. Our Constitution is the supreme law of the land and any law or conduct inconsistent with it is invalid. It is a legal instrument, not a political document. It is capable of giving rise to individual rights capable of enforcement in a court of law.³⁷

²⁹See D Davis “The Constitution of the Republic of South Africa, 1993, Act 108 of 1996” (1997) *SAJHR* Vol 13 No 1 1.

³⁰*Ibid.*

³¹Constitutionalism is the idea that government should derive its powers from a written or unwritten constitution and that its powers should be limited to those set out in the constitution. See Currie and De Waal *op. cit.* (n 7) 8 and H Barnett *Constitutional and Administrative Law* 5ed (2004) 5.

³²Section 1 (a)-(d) of The Constitution of the Republic of South Africa of 1996.

³³Section 1(a)-(c) of The Constitution of the Republic of South Africa of 1996.

³⁴L Wessels *My Rights! Your Rights? Let's Talk!* 1ed (2007) 25.

³⁵MS Motshekga *Concepts of law and justice and the Rule of Law in the African context*. Unpublished LLD thesis. University of South Africa (1994) 507.

³⁶Cf Dicey *op cit* (n 20) 73-74.

³⁷*S v Zuma and Another* 1995 (2) SA 642 (CC) at para 14. See: <http://www.saflii.org.za/za/cases/ZACC/1995/1.html> (accessed on 13 August 2008).

8.2.2 The rule of law

Since the Norman Conquest, the political institutions of England were characterised by two features: The undisputed supremacy of the central government and the rule or supremacy of law.³⁸ According to Mathews,³⁹ the rule of law is frequently used to denote the existence of public order in a given society. In this sense it means rule backed by established authority. The doctrine of the rule of law was popularised by Dicey. According to Dicey,⁴⁰ the doctrine of the rule of law is based on the following principles:

- a. The principle of legality, which states that no person may be deprived of rights and freedoms through the arbitrary exercise of wide discretionary powers by the executive.
- b. The principle of equality, which states that no person is above the law and every person is subject to the jurisdiction of the courts.
- c. The rights of individuals are effectively protected by the action and decisions of the courts rather than by guarantees contained in a constitution.

According to Yardley,⁴¹ the Diceyan concept of equality before the law is flawed because there are situations where people are not equal before the law; for example, foreign sovereigns and diplomats enjoy special immunity from criminal prosecution or civil action and judges cannot be held civilly liable for anything said or done in the course of their office. He agrees that it is impossible to iron out all inequalities. According to Motshekga,⁴² the weakness of the Diceyan concept of the rule of law was that the

³⁸Dicey *op cit* (n 20) 183-84.

³⁹AS Mathews *Law, Order and Liberty in South Africa*, Unpublished LLD Thesis, University of Natal, (1970) 3.

⁴⁰Dicey *op cit* (n 20) 187-195 and 202-203. See also G Wilson *Cases and Materials on Constitutional and Administrative Law* 2ed (1976) 557-58.

⁴¹D Yardley *Introduction to Constitutional and Administrative Law* 8ed (1995) 102-103.

⁴²Motshekga *op cit* (n 35) 528-29.

individual was allowed the enjoyment of his or her civil liberties by the mercy of the sovereign parliament. Motshekga propagates a dynamic concept of the rule of law. Motshekga's⁴³ dynamic concept of the rule of law, unlike the Diceyan concept of the rule of law, is not derived from the culture and traditions of any particular country. It derives from the principle of humanity [*ubuntu*] which provides that the legal values of freedom and equality and the corollaries of justice and right to democratic governance are inherent in the worth and dignity of the human personality.

The rule of law is one of the central values on which the new constitutional order in the Republic of South Africa is founded.⁴⁴ It is also one of the core values relevant to the discussion of the crime of obstructing or defeating the course of justice. Section 1 of the Constitution⁴⁵ provides:

- (1) The Republic of the South Africa is one sovereign democratic state founded on one of the following values:
 - (a) Human dignity, the achievement of equality and advancement of human rights and freedoms.
 - (b) Non-racialism and non-sexism.
 - (c) Supremacy of the Constitution and the rule of law.

- (d) Universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

⁴³Motshekga *op cit* (n 35) 529.

⁴⁴IM Rautenbach and EFJ Malherbe *Constitutional Law* 5ed (2008) 10.

⁴⁵The Constitution of the Republic of South Africa of 1996.

Section 39(1) of the Constitution⁴⁶ provides that when interpreting the Bill of Rights, a court, tribunal or forum, must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Obstruction of the due administration of justice is quintessentially against the South African democratic system of government. Such conduct subverts the very judicial process on which the rule of law so vitally depends.⁴⁷

According to Feldman,⁴⁸ once legal rules have been made and promulgated, the doctrine of the rule of law means that it is the courts' function to ensure, *inter alia*, that people are able to exercise their freedoms and that the boundaries between the public and private spheres are not overstepped especially by the state. It is submitted that the rule of law depends, *inter alia*, on the smooth running of the judicial process without any interference by any person or organ of state. Any conduct by X that subverts the judicial process undermines one of the core values of our Constitution, namely, the rule of law. The following conduct subverts the judicial process and therefore has a direct bearing on the rule of law: intimidation of witnesses or judicial officers, destruction of documents to be used in a judicial proceeding, etc. It is submitted that by punishing any conduct that interferes with a judicial process or proceeding, such as intimidation of witnesses, alteration of such documents, etc., the crime of obstructing the course of justice protects and upholds the rule of law.

8.2.3 The doctrine of separation of powers

The doctrine of separation of powers (*trias politica*), together with the rule of law and the

⁴⁶The Constitution of the Republic of South Africa of 1996. See *infra* the discussion of the provisions of section 39(1) under 8.5, text at note 117.

⁴⁷Cooper *op cit* Chapter Six (n 13) 621.

⁴⁸D Feldman (ed) *Civil Liberties and Human Rights in England and Wales* (1993) 33.

value of constitutional supremacy, run like a thread throughout the South African Constitution. The doctrine of separation of powers requires that the functions of government be classified into legislative, executive and judicial legs and that separate branches of government perform each separate function.⁴⁹ The powers of various branches of government are set out in chapters four to eight of the Constitution.⁵⁰ It is said that the purpose of separating the functions of government in this manner is to prevent excessive concentration of power in a single person or body.⁵¹ According to Chemerinsky,⁵² the division of powers among these branches was designed to create a system of checks and balances and to lessen the possibility of tyrannical rule. This doctrine is employed to ensure that the new system of government contains within it checks and balances to uphold the core values of the Constitution.⁵³ However, there is no universal model of separation of powers and there is no separation that is absolute because the relationship between the different branches of government and the power or influence that one branch of government has over the other differs from one country to another.⁵⁴ The principle of separation of powers is based on the idea of the rule of law.⁵⁵ This leads us to the principle of judicial

⁴⁹J De Waal, I Currie and G Erasmus *The Bill of Rights Handbook* 4ed (2001) 20 and F Venter “Requirements for a new constitutional text: The imperatives of the constitutional principles” (1995) *SALJ* Vol 112 No 1 39; Yardley *op cit* (n 41) 61; C Hoexter *Administrative Law in South Africa* (ed) (2007) 22-23 and K Malan “The Unity of powers and the independence of the South African judiciary” (2005) *De Jure* Vol 1 102.

⁵⁰The Constitution of the Republic of South Africa of 1996.

⁵¹De Waal, Currie and Erasmus (n 49) 20 and Barnett *op cit* (n 31) 97.

⁵²E Chemerinsky *Constitutional Law: Principles and Policies* 2ed (2002) 1. See also Yardley *op. cit.* (n 38) 61 and JH Garvey and TA Aleinikoff (eds) *Modern Constitutional Theory: A Reader* (1989) 178.

⁵³Langa *op cit* (n 27) 4.

⁵⁴*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa supra* (n 1) 810.

⁵⁵P De Vos “A bridge too far? History as context in the interpretation of the South African Constitution” (2001) *SAJHR* Vol 17 1 26.

independence.

8.2.4 Independence of the courts

The judicial authority of the Republic of South Africa is vested in the courts⁵⁶ which are independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice.⁵⁷ Section 165 of the Constitution⁵⁸ provides:

- (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of courts.
- (5) An order or decision issued by a court binds all persons and organs of state to which it applies.

The existence and operation of an independent judiciary dispensing justice without fear or favour and free from political pressure or influence constitutes an important element of the rule of law.⁵⁹ Judicial independence simply means the right and the duty of judges to perform the function of judicial adjudication through the application of their own integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any other person or institution.⁶⁰ It is said that the principle of an independent judiciary goes to the very heart of sustainable democracy based on the rule of

⁵⁶Section 165(1) of The Constitution of the Republic of South Africa of 1996.

⁵⁷Section 165(2). See also MA Fouche *Legal principles of contracts and commercial law* 6ed (2007) 15-16 and C Theophilopoulos *et al Fundamental Principles of Civil Procedure* (ed) 2006 7.

⁵⁸The Constitution of the Republic of South Africa of 1996.

⁵⁹HG Mwakyembe *Tanzania's Eighth Constitutional Amendment and its Implications on Constitutionalism, Democracy and the Union Question* (ed) (1995) 131.

⁶⁰I Mahomed "The role of the Judiciary in a constitutional state" (1998) *SALJ* Vol 115 112.

law.⁶¹ No person or organ of state⁶² may interfere with the functioning of the courts.⁶³ This is interpreted to mean the judicial functioning which takes place during judicial proceedings, as opposed to the administrative functioning of the courts. Section 165(3) of the Constitution created a constitutional imperative that courts should function free from interference from any person or organ of state. An example of interference that is prohibited by section 165(3) is an attempt by X to influence the judiciary by, for example, exhorting them not to give any credence to certain types of evidence, contrary to their duties. This kind of conduct amounts to the common law offence of attempt to defeat or obstruct the course of justice.⁶⁴ The rule against interference with the functioning of the courts guarantees one of the founding values of our Constitution, the rule of law, and elevates the common law crime of obstructing the course of justice by interfering with the judiciary, to a constitutional imperative. Court orders or decisions bind all persons and organs of state to which they apply.⁶⁵ Without compliance with court orders by the state and private persons, the administration of justice would fall into disrepute in the eyes of the public.⁶⁶

The Constitution accords the judicial authority of the Republic of South Africa to the

⁶¹*Ibid.* See also N Arendse “The bar, the bench and judicial independence” (2006) *Advocate*, April 3; and B Spilg “Judicial independence — impending constitutional crisis” (2006) *Advocate*, April 8.

⁶²In terms of section 239 of the Constitution of the Republic of South Africa of 1996 an organ of state means:

- (a) any department of state or administration in the national, provincial or local sphere of government;
or
- (b) any other functionary or institution-
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer ...

⁶³Section 165(3). See C Albertyn “Judicial independence and the Constitution Fourteenth Amendment Bill” (2006) *SAJHR* Vol 22 No 1 131.

⁶⁴Hunt *op cit* Chapter Two (n 7) 61 and Snyman *op cit* Chapter Two (n 151) 338-39.

⁶⁵Section 165(5).

⁶⁶GE Devenish *The South African Constitution* (2005) 328.

courts.⁶⁷ Section 165(2) of the Constitution of the Republic of South Africa provides, *inter alia*, that courts are independent and subject only to the Constitution and the law. This independence of the courts is two-fold – it consists in personal independence and functional independence. Personal independence of the judiciary means that the appointment, terms of office and conditions of service of judicial officers are not controlled arbitrarily by other government bodies.⁶⁸ This deals mainly with the question of security of tenure.⁶⁹ Functional independence of the courts means that in the exercise of their powers courts are subject only to the law.⁷⁰ According to Rautenbach and Malherbe,⁷¹ functional independence protects the objectivity of judicial bodies and prevents interference with judicial functions. This may be interpreted to mean that procedures followed during judicial proceedings and findings of the courts may not be subject to the directives of any other government body. It is also said that the legislature, executive, private persons and pressure groups may also not influence the courts.⁷² The offences of contempt of court and interference with the due administration of justice protect the courts against such interference.⁷³

⁶⁷DH van Zyl “Justice and the new constitutional dispensation in South Africa” (1998) *De Jure* Vol 31 51; S Jagwanth “The constitutional roles and responsibilities of lower courts” (2002) *SAJHR* Vol 18 No 1 202; Devenish *op cit* (n 66) 327 and Rautenbach and Malherbe *op cit* (n 10) 244.

⁶⁸Rautenbach and Malherbe *op cit* (n 10) 246.

⁶⁹B Spilg “Judicial independence — a dummy’s guide” (2005) *Advocate*, August 18 and Mwakyebwe *op cit* (n 59) 131. It is said that with every single decision a judge creates friends and enemies. Where the “created” enemy is powerful and rich (e.g. the Executive) and where the judiciary enjoys no security of tenure, the judge concerned may be summarily dismissed at the pleasure of the Executive.

⁷⁰Rautenbach and Malherbe *op cit* (n 10) 249.

⁷¹*Ibid.*

⁷²Devenish *op cit* (n 66) 344.

⁷³*Ibid.* See also J Burchell and J Milton *Principles of Criminal Law* 1ed (1991) 627.

8.3 POWERS OF COURTS IN CONSTITUTIONAL MATTERS

South African courts, as constitutional adjudicators, play a critical role in the law reform sphere.⁷⁴ The courts perform a policymaking function in the process of developing the common law and adjusting it to ever-changing needs of society.⁷⁵ Section 172 of the Constitution⁷⁶ empowers South African courts, when deciding a constitutional matter, to declare any law or conduct which is inconsistent with the Constitution invalid. Section 172 of the Constitution⁷⁷ provides:

- (1) When deciding a constitutional matter within its power, a court-
 - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including-
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
- (2)
 - (a) The Supreme Court of Appeal, a High Court, or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
 - (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of a Constitutional Court on the validity of that Act or conduct.
 - (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
 - (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

The 1996 Constitution did away with the doctrine of parliamentary supremacy, which prevented the courts from declaring an Act of Parliament invalid, and replaced it with constitutional supremacy. In terms of the Constitution, the courts have powers to enquire

⁷⁴MM Corbett “Aspects of the role of policy in the evolution of our common law” (1987) *SALJ* Vol 104 54

⁷⁵*Ibid.*

⁷⁶The Constitution of the Republic of South Africa of 1996.

⁷⁷The Constitution of the Republic of South Africa of 1996.

into the validity of any Act of Parliament and any conduct of the President, but an order of constitutional invalidity has to be confirmed by the Constitutional Court in order to have any force. In this regard, the Constitutional Court, in *Amod v Multilateral Motor Vehicle Accidents Fund*,⁷⁸ held:

When a constitutional matter is one which turns on the direct application of the Constitution and which does not involve the development of the common law, considerations of costs and time may make it desirable that the appeal be brought directly to this Court. But when the constitutional matter involves the development of the common law, the position is different. The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a 'constitutional matter' are of particular importance. Assuming, as Mr Omar contends, that this Court's jurisdiction to develop the common law in constitutional matters is no different to that of the Supreme Court of Appeal, it is a jurisdiction which ought not ordinarily to be exercised without the matter having first been dealt with by the Supreme Court of Appeal.

Section 173 of the Constitution⁷⁹ read with section 39(2)⁸⁰ empowers the courts to develop the common law appropriately where it is deficient in promoting the section 39(2) objectives when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. It may be argued that our courts have a secondary lawmaking function which is enshrined in the Constitution.⁸¹ Section 173 of the Constitution vested our courts with the constitutional power to be the custodians of our common law, including the common law crime of obstructing the course of justice. Section 173 provides:

The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

⁷⁸1998 (10) BCLR 1207 (CC) at para 33. See also *Fourie and Another v Minister of Home Affairs and Another* 2003 (5) 301 (CC) at para 12 and *Masiya v Director of Public Prosecutions and Another* 2007 (5) SA 30 (CC) at para 17. The latter case is discussed *infra* under 8.7, text at note 183.

⁷⁹The Constitution of the Republic of South Africa of 1996.

⁸⁰The provisions of section 39(2) are discussed *infra* under 8.5, text at note 117.

⁸¹The Constitution of the Republic of South Africa of 1996.

The Constitutional Court in *Carmichele v Minister of Safety and Security and Another*⁸² held⁸³ that in exercising their powers to develop the common law, courts should be mindful of the fact that the major role player for law reform should be the legislature and not the judiciary. It is submitted that judge-made law emanates from the Constitution because the Constitution delegated some legislative function to the judiciary.⁸⁴ This happens when the court lays down new law in a case before it. The facts of this case are as follows: Carmichelle was brutally assaulted by a certain Coetzee. Coetzee had previously been convicted for housebreaking and indecent assault. In the previous year, Coetzee was serving a suspended sentence of imprisonment. At the time of Carmichelle's assault, Coetzee was facing a charge of rape.⁸⁵ It is alleged that during his bail application the prosecution did not oppose Coetzee's bail, and he was released on bail. Only a few days later he attacked the applicant, Mrs Carmichele, in her home, seriously wounding her. She brought a delictual action against the State for injuries she had sustained as a result of the attack.⁸⁶ Her case was that members of the police as well as public prosecutors involved in the rape case owed her a legal duty to act in order to prevent Coetzee from causing her harm and that they failed to comply with that duty.⁸⁷ The High Court held that there was no evidence to support the existence of the said duty and that the police and the prosecutors had acted wrongfully.⁸⁸ The Supreme Court of Appeal dismissed her appeal and she applied

for leave to appeal to the Constitutional Court.⁸⁹

⁸²2001 (4) SA 938 (CC).

⁸³At 954D.

⁸⁴Section 173 of the Constitution of the Republic of South Africa of 1996 empowers Constitutional Court, the Supreme Court of Appeal and High Courts to develop the common law. In terms of section 39(2) when developing the common law, the courts must promote the spirit, purport and objects of the Bill of Rights.

⁸⁵*Carmichele v Minister of Safety and Security and Another supra* (n 82) at 939G.

⁸⁶At 940B-C.

⁸⁷At 940C-D.

⁸⁸At 940D-E.

⁸⁹At 940D-E.

It was argued on her behalf that the police and the prosecution were among the primary agencies of the State responsible for the discharge of its constitutional duty to protect the public in general and women in particular against violent crime. Counsel for the applicant relied in particular on the constitutional obligation of the courts to develop the common law in terms of section 39(2) of the Constitution.⁹⁰ The legal question that confronted the Constitutional Court was whether the common law of delict should be developed to afford Carmichele a right to claim damages against the State if the police or the prosecutor were negligent, or whether this should be left to the High Court or the Supreme Court of Appeal to determine.⁹¹ The court held that under section 39(2) of the Constitution, concepts such as policy decisions and value judgments which reflect the wishes and the perceptions of the people and society's notions of what justice demands might well have to be replaced or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.⁹² The court held⁹³ that the investigating officer had a clear duty to bring to the prosecutor's attention any factors known to him relevant to the exercise by the magistrate of his discretion to grant Coetzee bail. Instead, the investigating officer recommended that Coetzee should be released on warning in the clear knowledge that the prosecutor would act on such recommendation. The court further held⁹⁴ that there is no reason why the prosecutor should not be held liable for the consequences of a negligent failure to bring necessary information known by him to be relevant to the magistrate's exercise of his discretion to grant or refuse bail. The court further held⁹⁵ that if the prosecutor's negligence results in the release of an accused on bail, and the accused then

⁹⁰At 940F-G. The provisions of section 39(2) of the Constitution of the Republic of South Africa of 1996 are discussed *infra* under 8.5, text at note 117.

⁹¹At 969I.

⁹²At 962D-E.

⁹³965B-C.

⁹⁴At 968E.

⁹⁵At 968E.

proceeds to commit other crimes, such prosecutor may be held liable for the damages suffered by the complainant. The Constitutional Court upheld the appeal and set aside the decisions of the Supreme Court of Appeal and the High Court.⁹⁶

The obligation of courts to develop the common law in the context of the section 39(2) objectives is not purely discretionary. Where the common law is deficient in promoting the section 39(2) objectives, courts are under a general obligation to develop it appropriately.⁹⁷ In this case the common law of delict was developed to include situations where a police officer and the prosecutor, as agents of the State, failed to comply with their legal duty to protect members of the society. They failed to oppose bail application by the suspect, which failure resulted in the release of the suspect by the magistrate.

8.4 THE BILL OF RIGHTS

The declaration of fundamental rights of citizens dates from the later part of the eighteenth century when the American and French revolutions took place.⁹⁸ Chapter two of the South African Constitution contains the Bill of Rights. The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom.⁹⁹

The Bill of Rights was aimed at safeguarding human rights, ending centuries of state

⁹⁶At 971E-F.

⁹⁷At 955F-G.

⁹⁸The American Declaration of Independence in 1776 and the Bill of Rights in 1791 provided, among other things, for the preservation of such fundamental rights as freedom of religion, speech, etc. In 1789, France followed suit and came up with French Declaration of Rights of Man. See Yardley *op. cit.* (n 41) 104-05.

⁹⁹Section 7(1) of The Constitution of the Republic of South Africa of 1996. See also G Carpenter "South Africa and the human rights experience since 1994" (2004) *Codicillus* Vol 45 1 2 and K Keddy "The equality clause in the South African Bill of Rights and accessible credit for disadvantaged communities" (2002) *TSAR* Vol 4 676.

sponsored abuse.¹⁰⁰ An amended Bill of Rights forms part of the new Constitution,¹⁰¹ which was adopted by the Constitutional Assembly in May 1996 and certified by the Constitutional Court in December 1996.¹⁰² In *S v Makwanyane and Another*,¹⁰³ Chaskalson cited with approval Justice Jackson in *West Virginia State Board of Education v Barnette*¹⁰⁴ and held:¹⁰⁵

The purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of the majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

According to Kentridge and Spitz,¹⁰⁶ Chapter Two of the Constitution is directed to the relationship between government and private persons. It secures to all persons a zone of autonomy into which neither the State nor any other person may trespass. It also gives private persons certain rights which they can claim against the State.¹⁰⁷ The Bill of Rights is the cornerstone of democracy in South Africa. The purpose of the Bill of Rights is “the unremitting protection of individual rights and liberties.”¹⁰⁸ Section 7 of the Constitution¹⁰⁹ provides:

- (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

¹⁰⁰Currie and De Waal *op cit* (n 7) 2.

¹⁰¹The Constitution of the Republic of South Africa of 1996.

¹⁰²*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997 (2) SA 97 (CC). See also South African Law Commission *The Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing*, Discussion Paper 90, Project 101 (2000) 1; South African Law Commission *The Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing: Report*, Project 101 (2001) and Jordaan *op cit* (n 4) 657.

¹⁰³*S v Makwanyane and Another supra* (n 3) at 432.

¹⁰⁴319 US 624 (1943) at 638.

¹⁰⁵*S v Makwanyane and Another supra* (n 3) at 432.

¹⁰⁶Kentridge and Spitz *op cit* (n 3) 11-11.

¹⁰⁷*Ibid.*

¹⁰⁸*Ibid.*

¹⁰⁹The Constitution of the Republic of South Africa of 1996.

- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

Of significance to the discussion of the due administration of justice are the due process rights of arrested, detained and accused persons.¹¹⁰ These rights are said to be part of the system of intrinsic values that must inevitably reshape the ‘contours of a new landscape to which the administration of justice and the fight against crime must adapt.’ The concept and practise of a fair trial has a wide jurisprudential implication and is intended to ensure that justice is done to both the accused and to the interests of the community. Any unjustified infringement of any of the rights listed in section 35 (rights of arrested, detained and accused persons) of the Constitution has the same effect as a fatal irregularity which impairs the criminal proceedings as a whole.¹¹¹

The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of State.¹¹² The scope and content of the rights in the Bill of Rights are subject to constitutional interpretation in order to seek and discover the values underlying its provisions.¹¹³ Most of the rights in the Bill of Rights are not absolute; they may be limited in terms of the limitations clause.¹¹⁴ For instance, society’s wider interest in

combating crime may necessitate the limitation of these rights.¹¹⁵ This leads us to the

¹¹⁰In particular the rights guaranteed in section 35(3)(h) and (j) and section 35(5).

¹¹¹Devenish *op cit* (n 66) 177.

¹¹²Section 8 of The Constitution of the Republic of South Africa of 1996. See also AG Nienaber “The comprehensibility of South Africa’s Bill of Rights: An empirical study” (2001) *De Jure* Vol 34 1 115.

¹¹³F Snyckers *Constitutional Law of South Africa* (1998) 27-28.

¹¹⁴D Davis, H Cheadle, and N Haysom *Fundamental Rights in the Constitution: Commentary and Cases: a commentary on chapter 3 of Fundamental Rights of the 1993 Constitution and chapter 2 of the 1996 Constitution* (1997) 304; Devenish *op cit* (n 66) 179; de Vos *op cit* (n 16) 142 and Mureinik *op cit* (n 1) 33.

¹¹⁵PM Bekker *et al Criminal Procedure* 8ed (2007) 90.

interpretation and limitation of the rights in the Bill of Rights.

8.5 INTERPRETATION OF THE BILL OF RIGHTS

The Constitution of the United States of America is one of the oldest constitutions in the world, but as it is a living legal instrument, courts in the United States of America are still involved in its interpretation. Constitutional interpretation is a dynamic process which can never be finished since circumstances, perceptions and values change.¹¹⁶ Looking at the United States' experience it is clear that South African courts will be involved in constitutional interpretation for many years to come. Section 39 of the Constitution deals specifically with the interpretation of the Bill of Rights. Section 39¹¹⁷ provides:

- (1) when interpreting the Bill of Rights, a court, tribunal or forum-
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Section 39(1) is an exhortation to the courts to seek to discover the values underlying the Bill of Rights in interpreting its provisions. It guides South African courts to the correct jurisprudential approach to the interpretation of the Constitution, in general, and the Bill of Rights in particular. South African courts are indeed enjoined by section 39 of the Constitution to interpret the Bill of Rights so as "to promote the values which underlie an open and democratic society based on freedom and equality,"¹¹⁸ and, where applicable, to have regard to relevant public international law. Section 39 also permits our courts to have

¹¹⁶C Botha *Statutory Interpretation: An introduction for students* 4ed (2005) 124.

¹¹⁷The Constitution of the Republic of South Africa of 1996.

¹¹⁸See *S v Zuma and Another supra* (n 37) at 7 para 17.

regard to comparable foreign case law.

The Constitutional Court has laid down guidelines as to how the Constitution and the Bill of Rights in particular should be interpreted. These are textual, purposive, generous and contextual interpretations.¹¹⁹

8.5.1 Textual interpretation

According to the jurisprudence of the Constitutional Court, the text of the Constitution plays an important role in determining the meaning of a provision of the Bill of Rights.¹²⁰

For instance, in the *Zuma* decision, Kentridge, AJ (as he was then) held:¹²¹

While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination ... [I] would say that a constitution embodying fundamental rights should as far as its language permits be given a broad construction.

Because the Constitution is abstract and open-ended it cannot be interpreted by looking at the literal meaning of the Constitution's provision alone. This means that constitutional interpretation involves more than the determination of the literal meaning of particular provisions. When interpreting the Constitution the proper interpretation of the provision may entail looking beyond the literal meaning.¹²²

8.5.2 Purposive interpretation

Purposive interpretation entails identifying the core values enshrined in the Constitution

¹¹⁹Currie and De Waal *op. cit.* (n 7) 147-55 and Rautenbach and Malherbe *op cit* (n 10) 40-47.

¹²⁰Currie and de Waal *op cit.* (n 7) 147 and Botha *op cit* (n 116) 122.

¹²¹*S v Zuma and Others supra* (n 37) at para 17-18.

¹²²Currie and De Waal *op cit* (n 7) 147-48 and Botha *op cit* (n 116) 122.

and preferring the interpretation of a provision that best supports and protects the core values that underpin the fundamental rights in an open and democratic society based on human dignity, equality and freedom.¹²³ This is done by analysing the purpose of the right with regard to the interests it is meant to protect. In 1985, the Supreme Court of Canada in *R v Big M Drug Mart Ltd*,¹²⁴ with reference to the Canadian Charter of Rights, held:¹²⁵

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be... a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection.

The Constitutional Court has cited with approval this decision in a number of cases¹²⁶ when interpreting the Bill of Rights. It is said that purposive interpretation tells us that once the purpose of the right in the Bill of Rights has been identified we will be able to determine the scope of the right.¹²⁷

8.5.3 Generous interpretation

Generous interpretation is interpretation in favour of the rights in the Bill of Rights and against the restriction of those rights. It entails giving a wider meaning to the language in which the rights have been drafted.¹²⁸ In the *Zuma* case the Constitutional Court expressed itself in favour of a generous interpretation of the Bill of Rights. Kentridge AJ, cited with

¹²³Currie and De Waal *op cit* (n 7) 147; Botha *op cit* (n 195) 122 and J Klaaren “Structures of government in the 1996 South African Constitution: Putting democracy back into human rights (1997) *SAJHR* Vol 13 1 18-19.

¹²⁴(1985) 1 SCR 295 at <http://scc.lexum.umontreal.ca/en/1985rcs1-295/1985rcs1-295.pdf> (accessed on 15 August 2008).

¹²⁵At para 116-17.

¹²⁶See *S v Zuma and Others supra* (n 37) at 8 and *S v Makwanyane supra* (n 3) at 403.

¹²⁷Currie and De Waal *op cit* (n 7) 149.

¹²⁸Currie and De Waal *op cit* (n 7) 150.

approval the much-quoted passage from the judgment of Lord Wilberforce in the Privy Council in *Minister of Home Affairs (Bermuda) v Fisher*¹²⁹ and held:¹³⁰

[] a generous interpretation ... suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. This is in no way to say that there are no rules of law which should apply to the interpretation of a constitution. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and the usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the constitution commences.

Again, in the *Mhlungu*¹³¹ decision, the Constitutional Court followed the international culture of constitutional jurisprudence and expressed itself in favour of a generous interpretation. Mahomed J, held:¹³²

In proceedings which might affect their lives and liberties, large numbers of South African citizens would, on purely fortuitous grounds, be unable to assert the expanding human rights guaranteed by Chapter 3 of the Constitution, including the fundamental right to a fair trial protected by section 25(3). Such a result would be inconsistent with the international culture of constitutional jurisprudence which has developed to give to constitutional interpretation a purposive and generous focus ...

The generous interpretation was also followed in the *Makwanyane* decision. Chaskalson P cited the *Zuma* decision and said that the approach followed in the *Zuma* decision should be adopted in the interpretation of the fundamental rights because, whilst paying due regard to the language that has been used, it is “ generous and purposive and gives expression to the underlying values of the Constitution.”¹³³

8.5.4 Contextual interpretation

The context in which the rights in the Bill of Rights must be read is the historical and political setting of the Constitution. The provisions of the Constitution must be read in

¹²⁹[1980] AC 319 (PC) at 328-29.

¹³⁰*S v Zuma and Others supra* (n 37) at para 14.

¹³¹*S v Mhlungu and Others* 1995 (3) SA 867 (CC).

¹³²At para 15.

¹³³*S v Makwanyane and Another supra* (n 3) 203D.

context in order to ascertain their purpose. South Africa's political history plays a crucial role in the interpretation of the Constitution.¹³⁴ In 2001, in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit*,¹³⁵ the Constitutional Court, per Langa DP (as he was then) held:¹³⁶

All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

In *S v Makwanyane*, the Constitutional Court expressed its support of contextual interpretation. For example, in dealing with the question of whether the imposition of the death sentence could be regarded as constitutional, the court treated the right to life, the right to equality and the right dignity as together giving meaning to the prohibition of cruel, inhuman and degrading punishment in section 11(2) of the Interim Constitution.¹³⁷ In *S v Mhlungu*, the Constitutional Court also expressed the importance of the text of the Constitution during interpretation. The court, per Mahomed J, held:¹³⁸

[S]uch an alternative construction would have to be based not only on the literal meaning of the words "as if this Constitution had not been passed" in isolation but, in its proper context. The relevant context would be section 241(8)¹³⁹ itself, section 241 as a whole and the larger context of

¹³⁴GE Devenish "The interpretation of the justiciable rights in South Africa's interim Constitution" (1995) *De Jure* Vol 28 266; Currie and De Waal *op cit* (n 7) 153-54 and Botha *op cit* (n 116) 122-23.

¹³⁵2001 (1) SA 545 (CC).

¹³⁶At para 21.

¹³⁷Jordaan *op cit* (n 4) 665.

¹³⁸*S v Mhlungu and Another supra* (n 131) at para 8.

¹³⁹Section 241(8) of the Interim Constitution read as follows:

All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed: Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such

the Constitution regarded as a holistic and integrated document with critical and important objectives.

Interpretation involves two enquiries. First, the meaning or scope of a right must be determined, and then it must be determined whether the challenged law or conduct violates that right.¹⁴⁰ In *Qozeleni v Minister of Law and Order*¹⁴¹ the court held that the Constitution must be interpreted so as "to give clear expression to the values it seeks to nurture for a future South Africa."¹⁴² It has been said above¹⁴³ that most of the rights in the Bill of Rights are not absolute; they are subject to limitation in terms of the limitation clause.

8.6 LIMITATION OF RIGHTS IN THE BILL OF RIGHTS

It is said that constitutional rights and freedoms are not absolute.¹⁴⁴ They may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. They have boundaries set by, *inter alia*, important social concerns such as preventing conduct that hinders or threatens to hinder the due administration of justice.¹⁴⁵

Section 36(1) of the Constitution sets out specific criteria for the limitation of fundamental rights in the Bill of Rights. No law may limit any right entrenched in the Bill of Rights except as provided in section 36(1) of the Constitution.¹⁴⁶ Section 36(1) of the

commencement shall be brought before the court having jurisdiction under this Constitution.

¹⁴⁰Currie and De Waal *op cit* (n 7) 145.

¹⁴¹1994 (3) SA 625 (E). This case arose from a criminal trial before Hugo J in the Natal Provincial Division. In court it was heard together with the case of *S v Mhlungu supra* (n 131) which also arose from a criminal trial in the Natal Provincial Division. Each of them came to this Court by way of a referral by the judge presiding over the trial. In each case the judge referred to this Court for a decision on the question of whether section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977 was inconsistent with the provisions of the Constitution of the Republic of South Africa, 1993.

¹⁴²*Qozeleni v Minister of Law and Order supra* (n 141) at 80-81.

¹⁴³See *supra* under 8.4, text at note 114.

¹⁴⁴See Devenish *op cit* (n 66) 179 and De Vos *op cit* (n 16) 142.

¹⁴⁵*S v Singo* 2002 (4) SA 858 (CC) at <http://constitutionalcourt.org.za/Archimages/567.pdf> (accessed on 31 March 2008) at 24 and Currie and De Waal *op cit* (n 7) 180.

¹⁴⁶Section 36(2) of The Constitution of the Republic of South Africa of 1996.

Constitution¹⁴⁷ provides:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

In this chapter, section 36(1)(b), which deals with the nature of the purpose of the limitation, is discussed. It is said that a limiting measure must serve a purpose that all reasonable South Africans would agree to be very important.¹⁴⁸ The importance of the purpose of the limitation is said to ask the society to determine whether the objective or purpose of the limitations serves the values of openness, democracy, human dignity, freedom, equality and other values enshrined in the Constitution.¹⁴⁹ This is based on the proportionality test set out by Chaskalson P in *S v Makwanyane*.¹⁵⁰ In this case the Constitutional Court held¹⁵¹ that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and an assessment based on proportionality. The Constitutional Court held in *S v Singo*,¹⁵² that protecting the administration of justice at its broadest is a legitimate purpose of limiting the rights in the Bill of Rights. In *Shabalala v Attorney-General (Transvaal)*¹⁵³

¹⁴⁷The Constitution of the Republic of South Africa of 1996.

¹⁴⁸Currie and De Wall *op cit* (n 7) 180.

¹⁴⁹S Woolman "Out of order? Out of balance? The limitation clause of the Final Constitution" (1997) *SAJHR* Vol 13 No 1 110.

¹⁵⁰*S v Makwanyane supra* (n 3).

¹⁵¹At 436B-G.

¹⁵²*S v Singo supra* (n 145) at 25. See also Currie and De Waal *op cit* (n 7) 180.

¹⁵³1996 (1) SA 725 (CC). See <http://www.constitutionalcourt.org.za/Archimages/2701.pdf> (accessed on 31 March 2008). See also Currie and de Waal *op cit* (n 7) 180.

the Constitutional Court found that prevention of intimidation of witnesses is one of the legitimate purposes for the limitation of rights in the Bill of Rights.

Two Constitutional Court decisions in which the protection of the administration of justice was held to be a legitimate purpose for limiting rights in the Bill of Rights are discussed here. The first is *Shabalala v Attorney-General (Transvaal)*. Firstly, it is important to note that this case was decided in terms of the Interim Constitution.¹⁵⁴ The facts of this case were as follows: Shabalala and five others were charged with murder. Before evidence was led, the accused applied for copies of relevant police dockets, including witnesses' statements and lists of exhibits in the possession of the State. The application of the accused rested on the submission that section 23¹⁵⁵ read with section 25(3) of the Constitution, entitled them to access to such information as of right. The then Attorney-General of the Transvaal and the Commissioner of the South African Police opposed the application.¹⁵⁶ The court *a quo*, per Cloete J, refused the application on the ground that the court was unable to conclude that the accused would not be given a fair trial if they did not have access to the police docket.¹⁵⁷ Notwithstanding these conclusions, the court was of the view that the Constitutional Court, on a number of constitutional questions, should consider the ruling raised by the applications made on behalf of the accused. The matter was referred¹⁵⁸ to the Constitutional Court for decision.

The crucial issue that needed to be determined by the Constitutional Court was whether the "blanket docket privilege" from the pre-constitutional era could survive in a dispensation

¹⁵⁴The Constitution of the Republic of South Africa of 1993.

¹⁵⁵Section 23 of the Constitution of the Republic of South Africa, Act 200 of 1993 provided:

Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

¹⁵⁶*Shabalala v Attorney-General (Transvaal) supra* (n 153) 1-2.

¹⁵⁷At 2-3.

¹⁵⁸In terms of section 102(8) of the Constitution of the Republic of South Africa, Act 200 of 1993.

with guaranteed fundamental rights. Was the rule constitutional? The Constitutional Court, per Mahomed DP, observed that the basic test in this matter must be whether the right to a fair trial in terms of section 25(3) included the right to have access to a police docket or the relevant part thereof.¹⁵⁹ The court further held that there was overwhelming balance in favour of the accused person's right to disclosure when there is no risk that such disclosure might lead to the disclosure of the identity of informers or State secrets or to intimidation of witnesses or obstruction of justice.¹⁶⁰ It was held that in such circumstances any refusal to disclose the docket to the accused would appear to be unreasonable, unjustifiable in an open and democratic society.¹⁶¹ The court further held¹⁶² that:

- (1) in the situation where the statements of witnesses made in circumstances where there was a reasonable risk that their disclosure might constitute a breach of the interests sought to be protected such as State secrets, methods of police investigations, the identity of the informers, etc., and
- (2) where the statements of witnesses made in the circumstances where their disclosure would constitute a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise hinder the administration of justice to afford access to such statements to the accused may indeed impede the proper ends of justice and lead to the intimidation of witnesses.

Mahomed DP held¹⁶³ that the State may resist the accused's claim for access to any document in the police docket on the ground that:

¹⁵⁹*Shabalala v Attorney-General (Transvaal) supra* (n 153) at 26.

¹⁶⁰At 39.

¹⁶¹*Ibid.*

¹⁶²At 40. See also K Malan *Fundamental Rights: Themes and Trends* (1996) E12-5.

¹⁶³*Shabalala v Attorney-General (Transvaal) supra* (n 153) at 60.

- (a) such access is not justified for the purpose of enabling the accused properly to exercise his or her right to a fair trial, or
- (b) it has a reason to believe that there is a reasonable risk that access to the relevant document would lead to the disclosure of the identity of an informer or state secrets, or
- (c) there was a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice.

In *S v Singo*,¹⁶⁴ the facts were as follows: In 1996, Singo was arrested on charges of common assault and malicious damage to property. He was released and warned to appear in court in January 1997 in terms of the provisions of section 72(1)(a) of the Criminal Procedure Act.¹⁶⁵ He failed to appear. He was arrested and dealt with in terms of section 72(4) of the Criminal Procedure Act. Section 72(4)¹⁶⁶ provides:

The court may, if satisfied that an accused referred to in subsection (2)(a) or a person referred to in subsection (2)(b), was duly warned in terms of paragraph (a) or, as the case may be, paragraph (b) of subsection (1), and that such accused or such person has failed to comply with such warning or to comply with a condition imposed, issue a warrant for his arrest, and may, when he is brought before the court, in a summary manner enquire into his failure and, unless such accused or such person satisfies the court that his failure was not due to fault on his part, sentence him to a fine not exceeding

¹⁶⁴*S v Singo supra* (n 145).

¹⁶⁵The Criminal Procedure Act 51 of 1977. Section 72(1) provides:

If an accused is in custody in respect of any offence and a police official or a court may in respect of such offence release the accused on bail under section 59 or 60, as the case may be, such police official or such court, as the case may be, may, in lieu of bail and if the offence is not, in the case of such police official, an offence referred to in Part II or Part III of Schedule 2-

- (a) release the accused from custody and warn him to appear before a specified court at a specified time on a specified date in connection with such offence or, as the case may be, to remain at the proceedings relating to the offence in question, and the said court may, at the time of such release or at any time thereafter, impose any condition referred to in section 62 in connection with such release.
- (b) in case of an accused under the age of eighteen years who is released under paragraph (a), place the accused in the care of the person in whose custody he is, and warn such a person to bring the accused or cause the accused to be brought before a specified court at a specified time on a specified date and to have the accused remain in attendance at the proceedings relating to the offence in question and, if a condition has been imposed in terms of paragraph (a), to see to it that the accused complies with that condition.

¹⁶⁶The Criminal Procedure Act 51 of 1977.

R300 or to imprisonment for a period not exceeding three months.

He told the court that the reason for his failure to comply with the section 72(1) warning was that he had settled the dispute with the complainant; that they had reconciled and that they had agreed that both would appear in court in order to have the charges withdrawn. He further told the court that owing to a misunderstanding on his part, he went to work in Namibia. The court rejected his explanation and convicted him summarily.¹⁶⁷

He successfully appealed to the Venda High Court. The court upheld his appeal and set aside the conviction and sentence.¹⁶⁸ It relied heavily upon the 2001 Constitutional Court's judgement in *S v Mamabolo (ETV) and Others Intervening*¹⁶⁹ in which the court had to consider, *inter alia*, the constitutional validity of a summary procedure in the context of contempt of court proceedings and advanced, *inter alia*, the following reasons for its judgement.¹⁷⁰ First, section 72(4) contains an impermissible reverse onus which violates the right to be presumed innocent while the summary procedure envisaged in the section is inconsistent with a right to a fair trial guaranteed in terms of section 35(3)(a), (b), (h), (i) and (j) of the Constitution. The ruling of the High Court was referred to the Constitutional Court, as the latter makes the final decision as to whether an Act of Parliament, a Provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before the order has any force.¹⁷¹

The Constitutional Court was faced with the following questions:¹⁷²

- (a) whether the summary procedure envisaged in section 72(4) limits the accused's

¹⁶⁷*S v Singo supra* (n 145) at 6.

¹⁶⁸*Ibid.*

¹⁶⁹2001 (3) SA 409 (CC).

¹⁷⁰*S v Singo supra* (n 145) at 6-7.

¹⁷¹In terms of section 167(5) of The Constitution of the Republic of South Africa of 1996.

right to a fair trial, more particularly, whether the phrase “unless such accused or such person satisfies the court that his failure was not due to fault on his part” limits the right to be presumed innocent and the right to remain silent;

(b) if the right to a fair trial is limited, whether such limitation is justifiable in terms of the limitation clause (section 36(1)) of the Constitution; and

(c) if any of the limitations imposed by section 72(4) are not justifiable, to decide upon what would be the appropriate relief.

The court, per Ngcobo J, observed that the *Mamabolo* decision was distinguishable from the present case in that it was concerned with allegedly contemptuous conduct that occurred outside the court and after the termination of the relevant court proceedings.¹⁷³ The court held:¹⁷⁴

It did not deal with the kind of conduct which disrupts the orderly progress of judicial proceedings and which usually requires swift judicial intervention. By contrast we are here dealing precisely with such conduct, conduct which requires swift intervention in order to permit the administration of justice to continue unhindered.

The court found that during section 72(4) proceedings the accused enjoys the right to be informed of the details of the charge against him or her. Therefore, the summary procedure does not limit the accused’s right to a fair trial.¹⁷⁵

The court also held that section 72(4) of the Criminal Procedure Act limits the right to be presumed innocent and to remain silent.¹⁷⁶ The question was whether the limitation was

¹⁷²*S v Singo supra* (n 145) at 7-8.

¹⁷³At 14.

¹⁷⁴At 14-15.

¹⁷⁵At 16.

¹⁷⁶At 24.

justifiable. The court observed¹⁷⁷ that the importance of effectively prosecuting conduct that obstructs the administration of justice cannot be gainsaid. Failure to appear in court manifestly hinders the administration of justice and in order to ensure the proper administration of justice, such conduct must be dealt with swiftly and effectively. The court held that “the incursion into the right to silence is justifiable”¹⁷⁸ because section 72(4) pursues a pressing social concern. It is aimed at preventing conduct that obstructs or threatens to obstruct the administration of justice.¹⁷⁹

From the perspective of the crime of obstructing or defeating the course of justice the importance of this case lies in the fact that the court stressed the importance of the proper administration of justice in determining whether the limitation of the right is justifiable. The rights in the Bill of Rights may be limited in order to prevent the obstruction of the course of justice. Therefore, the prevention of the obstruction of the due administration of justice is a constitutional imperative. In other words, prevention of the commission of the crime of obstructing or defeating the course or the ends of justice can be a valid purpose finding justification for the limitation of fundamental rights

8.7 SHOULD THE CRIME OF OBSTRUCTING THE COURSE OF JUSTICE BE EXTENDED BY THE COURTS?

It may be argued that since the courts are vested with powers to develop the common law,¹⁸⁰ they may extend the common law crime of obstructing the course of justice where the crime is inadequate to punish all conduct which has a tendency to interfere with the course of justice. However, Constitutional Court jurisprudence acknowledges that when exercising their powers to develop the common law, courts should be mindful of the fact

¹⁷⁷At 24-25.

¹⁷⁸At 26.

¹⁷⁹At 28.

¹⁸⁰In terms of section 39(2) read with section 173 of The Constitution of the Republic of South Africa of 1996.

that the major role player for law reform should be the legislature and not the judiciary.¹⁸¹ It is submitted that judge-made law emanates from the Constitution because the Constitution delegated some legislative function to the judiciary. This happens when the court lays down new law in a case before it. It is said that such a rule is an exercise of legislative power.¹⁸² The case in point here is *Masiya v Director of Public Prosecutions and Another*.¹⁸³ This case dealt with the constitutional validity of the common law definition of rape to the extent that it excluded non-consensual anal penetration and it was gender specific. The facts of this case were the following: The accused, Masiya, was charged with the rape of a nine-year old girl. Evidence established that the girl was penetrated anally.¹⁸⁴ Both the State and defence agreed that if the accused were to be found guilty he should be convicted of indecent assault.¹⁸⁵ The court *a quo*, on its own accord, considered whether the common law needed to be developed to include anal penetration in the crime of rape. The court *a quo* found that the definition of rape should be developed in order to promote constitutional objectives.¹⁸⁶ The accused was convicted of rape in terms of the extended definition and was committed to the High Court for sentencing.¹⁸⁷ The primary questions to be considered by the Constitutional Court were:¹⁸⁸

- (a) whether the previous definition of rape was inconsistent with the Constitution and whether the definition of rape needed to be developed; and
- (b) whether such development should apply retrospectively.

¹⁸¹See *Carmichele v Minister of Safety and Security and Another supra* (n 82) at 954.

¹⁸²AE van Blerk *Jurisprudence: An Introduction* 1ed (1998) 33.

¹⁸³*Masiya v Director Public Prosecutions and Another supra* (n 78).

¹⁸⁴At 36C.

¹⁸⁵At 36D.

¹⁸⁶At 36D-37D.

¹⁸⁷At 38A.

¹⁸⁸At 42B-C.

With regard to the first question, it was argued that the definition perpetuates gender inequality and promotes discrimination. The state further contended that the definition perpetuates leniency in sentencing. The court found that the development of the common law is a power that has always vested in our courts and that this power is exercised in an incremental fashion as the circumstances of each case may require.¹⁸⁹ The court also emphasised the fact that it is the legislature that has the major responsibility for law reform.¹⁹⁰ The court also warned that the courts must be astute to avoid the appropriation of the legislature's role in law reform when developing the common law.¹⁹¹ The court, per Nkabinde J, held:¹⁹²

The inclusion of penetration of the anus of a female by a penis in the definition will increase the extent to which the traditionally vulnerable and disadvantaged group will be protected by and benefit from the law. Adopting this approach would therefore harmonise the common law with the spirit, purport and objects of the Bill of Rights.

The court held¹⁹³ that the prevalence of sexual violence in our society is deeply troubling. Therefore, the extension of the definition of rape to include non-consensual anal penetration will not only yield advantages to the victim of rape, but will also express the abhorrence with which our society regards these pervasive but outrageous acts. Nkabinde J, indicated that while the court was aware of the fact that the 2003 Bill (which led to the promulgation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act)¹⁹⁴ was before Parliament, it could not delay, defer or refuse to deal with an extension of the definition of rape when the facts before it demanded such an extension and when it was clearly in the

¹⁸⁹At 47C.

¹⁹⁰At 47D.

¹⁹¹*Ibid.*

¹⁹²At 50C.

¹⁹³At 51H.

¹⁹⁴Act 32 of 1997. This Act, *inter alia*, repealed the common law offence of rape and replaced it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender.

public interest to do so. The court further held¹⁹⁵ that any further delay in or suspension of the extension of the definition of rape would constitute an injustice upon survivors of non-consensual anal penetration such as the nine-year-old complainant in this case. That result should not be countenanced.

On the legality issue, the court held that if the definition of rape were to be developed retrospectively it would offend the constitutional principle of legality.¹⁹⁶ The Constitutional Court deviated from its previous decision where in 1996,¹⁹⁷ Kentridge AJ, held:¹⁹⁸

In our Courts a judgment which brings about a radical alteration in the common law as previously understood proceeds upon the legal fiction that the new rule has not been made by the Court but merely 'found', as if it had always been inherent in the law. Nor do our Courts distinguish between cases which have arisen before, and those which arise after, the new rule has been announced. For this reason it is sometimes said that 'Judge-made law' is retrospective in its operation. In all this our Courts have followed the practice of the English Courts ... [I]t may nonetheless be said that there is no rule of positive law which would forbid our Supreme Court from departing from that practice.

The court further held¹⁹⁹ that the principle of legality must not prevent the courts from developing the common law because that would undermine the principles of our Constitution which require the courts to ensure that the common law is infused with the spirit, purport and objects of the Constitution.

The extension of the scope of the common law crime of rape by the Constitutional Court in *Masiya v Director of Public Prosecutions and Another*,²⁰⁰ to include, in addition to penile

¹⁹⁵*Masiya v Director Public Prosecutions and Another supra* (n 78) at 52A.

¹⁹⁶At 53F.

¹⁹⁷See *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at: <http://www.saflii.org/za/cases/ZACC/1996/10.rtf> (accessed on 08 August 2008).

¹⁹⁸At para 65.

¹⁹⁹*Masiya v Director Public Prosecutions and Another supra* (n 78) at 53F-G.

²⁰⁰*Masiya v Director Public Prosecutions and Another supra* (n 78).

non-consensual penetration of the complainant's vagina, such penetration of her anus, has been received with unease in academic circles, especially by Professor Snyman.²⁰¹ Criticism of the *Masiya* decision is two-fold. Firstly, it is argued that the Constitutional Court overstepped its judicial function and violated the principle of legality when it extended the scope of rape to include anal penetration. In doing so the court usurped the function of the legislature. Secondly, it is argued that the traditional definition of rape has a rational basis and does not discriminate unjustifiably against women, and therefore did not need extension.

Section 35(3)(1) of the Constitution²⁰² provides that every person has a right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted. Regarding the principle of legality, Snyman writes:²⁰³

This is part of the principle of legality in criminal law. This principle implies, *inter alia*, that courts may not create crimes. The general principle is *iudicis est ius dicere sed non dare*: the function of a judge is not to create new law, but to interpret existing law. Otherwise a court infringes upon the task of the legislature, and in so doing violates the principle that the legislative and judicial functions of the state must be separated.

According to Snyman,²⁰⁴ 'developing' in section 39(2) of the Constitution does not include any power to extend the scope of the existing crimes to encompass situations not covered by the existing definition. He argues that the principle of legality is not limited to a prohibition upon the courts against creating new crimes, but extends further to include a prohibition against extending the legal definition or scope of existing crimes to include

²⁰¹CR Snyman "Extending the scope of rape: A dangerous precedent" 2007 *SALJ* 677-78 and CR Snyman *Criminal Law* 5ed (2008) 46-47.

²⁰²The Constitution of the Republic of South Africa of 1996.

²⁰³Snyman *op cit* (n 201) 678.

²⁰⁴*Ibid.*

situations which are not covered by the existing definition.²⁰⁵ He further argues that to extend the definition of the crime by analogy leads to legal uncertainty not only in the field of sexual offences but also in the field of other common law offences.²⁰⁶

This thesis respectfully agrees with Snyman's arguments because overzealous judicial law-making encroaches upon the legislature's function and infringes the principle of legality which states that the courts' function is to interpret, not to make the law.

In 2008, Froneman J, in *S v Mshumpa and Another*²⁰⁷ agreed with Snyman. In this case, the vexing legal question was whether to shoot an unborn child with the intent of killing the child constitutes a separate crime of murder, besides the offence aimed at the mother carrying the unborn child.²⁰⁸ The court had to decide whether or not it may extend the ambit of the common law crime of murder to include the situation where X shoots the woman in the abdomen with intent to kill her unborn child. A summary of this case is as follows:²⁰⁹ Best (accused number 2) was involved in a love triangle with Ms Shelver and Ms Jacoby. Ms Shelver was 38 weeks pregnant. Best approached Tukani for assistance to get rid of Shelver's unborn child. Tukani involved Mr Mshumpa (accused number 1) in the plot. It was agreed that in order for the plot to look like a real robbery, Best would himself be shot in the shoulder during the so-called robbery. In February 2006, Mshumpa executed the plan in the manner already described above. The accused (both Mshumpa and Best) were indicted, *inter alia*, with the murder of the unborn child in the womb of its mother and attempting to defeat or obstruct the course of justice.²¹⁰ The question was whether the court

²⁰⁵Snyman *op cit* (n 201) 678-79 and Snyman *op cit* (n 201) 47-48.

²⁰⁶Snyman *op cit* (n 201) 686.

²⁰⁷2008 (1) SACR 126 (E) at http://www.legalbrief.co.za/filemgmt_data/files/Baby%20murder%202.pdf, (accessed on 10 September 2008).

²⁰⁸At 2.

²⁰⁹At 3.

²¹⁰*Ibid.*

should follow the *Masiya*²¹¹ decision where the common law crime of rape was extended to include penile penetration of the anus, and extend the definition of murder to include the killing of an unborn child in its mother's womb.²¹² The court, per Froneman J, refused to prospectively declare that the definition of murder be extended to include such instances. It held:²¹³

[W]hether I should make a prospective declaration that the definition of murder should be extended to include the killing of an unborn child. I think not ... The appropriate development in respect of appropriately punishing third parties who intentionally harm or kill unborn babies may thus in my judgment be done within the ambit of existing crimes of assault against the pregnant mother ... I am not saying that there is no merit in making the killing of an unborn child a crime, either as part of the crime of murder or as a separate offence, only that in my view the Legislature is, as major engine for law reform, ... better suited to effect that radical kind of reform than courts.

The doctrine of separation of powers requires that the functions of government be classified into legislative, executive and judicial legs and that the separate branches of government perform separate functions.²¹⁴ This prevents excessive concentration of power in any single leg of government, including the judiciary. It is respectfully submitted that giving the judiciary excessive powers to extend the definition of crimes, will be dangerous in an open and democratic society like ours. In terms of section 44 of the Constitution,²¹⁵ the legislative authority of the Republic of South Africa is vested in a democratically elected Parliament. Therefore, it is submitted that any extension of the ambit of the crime of obstructing or defeating the course of justice is primarily Parliament's constitutional responsibility. The legislature should lead the way in initiating law reform in this regard. This thesis relies on the jurisprudence of the Constitutional Court where it held:²¹⁶

²¹¹*Masiya v Director of Public Prosecutions and Another supra* (n 78).

²¹²*S v Mshumpa and Another supra* (n 207) at 28.

²¹³At 28-29.

²¹⁴See *Currie and De Waal op cit* (n 49) 20; *Venter op cit* (n 49) 39 and *Yardley op cit* (n 41) 61.

²¹⁵The Constitution of the Republic of South Africa of 1996.

In a democratic society the role of the legislature as a body reflecting the dominant opinion should be acknowledged. It is important that we bear in mind that there are functions that are properly the concern of the courts and others that are properly the concern of the legislature. At times these functions may overlap. But the terrains are in the main separate, and should be kept separate.

In a constitutional democracy such as ours, the legislature and not the courts has the major responsibility for law reform and the delicate balance between the courts' functions and powers on one hand and those of the legislature on the other should be recognised and respected.²¹⁷ The jurisprudence of the Constitutional Court²¹⁸ provides that courts must be careful to avoid the appropriation of the legislature's role in law reform when developing the common law. It is submitted therefore, that if there exists a need to extend the common law definition of the crime of obstruction of the course of justice, such reform should preferably be undertaken by the legislature.

8.8 CAN THE ACCUSED CHALLENGE THE AMBIT OF THE CRIME ON CONSTITUTIONAL GROUNDS?

What has to be established is whether the accused can challenge the ambit of the common law offence of obstructing or defeating the course of justice, because it is unconstitutionally vague and in violation of the principle of legality especially the principle which requires that crimes must be formulated clearly (*ius certum* principle). This means that crimes must not be formulated vaguely or unclearly or widely.²¹⁹ In *S v Friedman*,²²⁰ the accused challenged the constitutionality of the common law offence of fraud insofar as the courts have held that the prejudice does not have to be financial or proprietary, it may be potential and does not have to be suffered by the representee.²²¹ The facts of this case were the

²¹⁶See *Ferreira v Levin No and Others; Vryenhoek and Others v Powell No and Others* 1996 (1) SA 984 (CC) at 259, para 183 at: <http://www.saflii.org/za/cases/ZACC/1995/13.rtf> (accessed on 08 August 2008).

²¹⁷See *Du Plessis and Others v De Klerk and Another supra* (n 197) at 48 para 61.

²¹⁸See *Masiya v Director of Public Prosecution and Another supra* (n 78) at 21-22.

²¹⁹*Snyman op cit* (n 201) 36-37.

²²⁰1996 (1) SACR 181 (W).

²²¹At 183e.

following: The accused, Friedman, was one of six persons originally charged with fraud involving the smuggling of stolen, unwrought gold.²²² Allegedly, the accused stole unwrought gold and platinum and fraudulently smuggled them to the United Kingdom and Switzerland as ‘scrap silver’ and/ or ‘scrap gold.’²²³ The accused challenged the common law definition of ‘fraud’ and, in particular, the wide and vague concept of “potential prejudice,” arguing that this concept is not a just definition of the offence.

He argued that the crime would punish the dishonesty of the misrepresentation without having sufficient regard to the effects of such misrepresentation.²²⁴ It was further argued on behalf of the accused that the crime punished an individual without weighing the actual consequences of an individual’s actions. In the absence of actual prejudice which has a tangible form, like proprietary or some other species of definite harm, common law fraud amounts to an invasion of individual liberty and an infringement of his right to a fair trial as required by section 25(3) of the Interim Constitution (now section 35(3)). The defence counsel argued that the proper approaches to the boundaries of the crime of fraud are those to be found at civil law where an actionable misrepresentation requires some species of loss.²²⁵ He emphasised the causation element in civil law. It was submitted on behalf of the accused:

- (1) that actual prejudice and not merely potential prejudice be proved,
- (2) that the prejudice be patrimonial, and
- (3) that the prejudice had to have been suffered by the representee and not by third parties.²²⁶

²²²At 182c.

²²³At 183i-j.

²²⁴At 190e.

²²⁵At 190h-i.

²²⁶At 182g-h.

It was argued that presently the crime amounted to an invasion of individual liberty and an infringement of a substantive concept of a fair trial as required by section 25(3) of the Interim Constitution²²⁷ (now section 35(3)).

The court conceded that the present definition of fraud is wide, but that does not make it difficult and impossible to ascertain the type of conduct which falls within it.²²⁸ With regard to vagueness, the court held that the test for vagueness is the following:²²⁹

- (1) is the law so vague that it does not qualify as a limit prescribed by the law? This means whether the law is so obscure as to be incapable of interpretation with any degree of precision using ordinary tools, and
- (2) is it so imprecise that it is not a reasonable limit?

In dismissing the application to quash the indictment the court held:²³⁰

I do not find the breadth of the common law definition of fraud repugnant to the provisions of the Constitution to which counsel has referred. I find nothing objectionable in the approach which punishes fraud not because of the actual harm it causes, but because of the possibility of harm or prejudice inherent in the misrepresentation ... I am unaware of any groundswell of opinion in the courts, among academic writers or the public at large, for reform of the definition of fraud because of perceived unfairness as to the manner in which the law as presently defined operates.

With regard to the defence counsel's argument that the proper approaches to the boundaries of the crime of fraud are those to be found at civil law where an actionable misrepresentation requires some species of loss,²³¹ the court held that there is nothing inconsistent between the approach and the requirements of civil law. The court further held

²²⁷The Constitution of the Republic of South Africa, Act 200 of 1993.

²²⁸*S v Friedman supra* (n 220) at 194b.

²²⁹At 194d-e.

²³⁰At 194h-95d.

²³¹See *supra* note 225.

that redress at civil law is, and should be, confined to persons who have actually been prejudiced, whereas it is not the function of the criminal law to satisfy individuals who have been wronged but to punish people who have transgressed defined norms.

In *United States v Cueto*,²³² the accused challenged the constitutionality of the omnibus clause of section 1503 of the United States Code as being wide as applied in the indictment. The court ruled that the omnibus clause of section 1503 of the Code was intended to ensure that criminals could not circumvent the statute's purpose by devising novel and creative schemes that would interfere with the course of justice but would nevertheless fall outside the ambit of section 1503 prohibition.

Following these two judicial authorities it may be argued that any constitutional challenge by the accused of the scope of the common law crime of obstructing or defeating the course of justice would not succeed because:

- (1) the crime of obstructing or defeating the course of justice is not repugnant to the provisions of the Constitution, and
- (2) this crime is intended to ensure that criminals could not circumvent the law by devising novel and creative schemes that would interfere with the course of justice but would nevertheless fall outside the ambit of the current definition of this crime.

8.9 SUMMARY

Before the coming into being of the 1993 Constitution in 1994, South Africa had never had any legislative instrument even vaguely reminiscent of a supreme Constitution with a Bill of Rights and our constitutional law had been premised upon the British concept of parliamentary supremacy or parliamentary sovereignty. When the Constitution of 1993

²³²*United States v Cueto* is discussed *supra* in Chapter Six under 6.3.1.4.3, text at note 167-175.

came into force in 1994 it marked the beginning of a new legal order in South Africa. The Constitution did away with the doctrine of parliamentary sovereignty and replaced it with a system where the Constitution became the supreme law of the country and any law or conduct inconsistent with it was invalid.

(1) **The core values of the Constitution.** The advent of the 1996 Constitution has impacted on most common law and statutory crimes. Like any other crime, the crime of obstructing the course of justice protects certain core values which are found in the Constitution. The coming into being of the 1996 Constitution placed new core societal values at the centre stage. These core values are human dignity; the achievement of equality, the protection of human rights and freedoms, non-racialism and non-sexism, a democratic system of governance and supremacy of the Constitution and the rule of law. The principle of constitutional supremacy is reinforced by an independent and impartial judiciary which has the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights. Unlike parliamentary supremacy, constitutional supremacy is used in a legal rather than in a political sense. Our Constitution is the supreme law of the land and any law or conduct inconsistent with it is invalid. It is a legal instrument, not a political document.

(2) **The Rule of law.** The doctrine of the rule of law is based, *inter alia*, on the principle of equality, which states that no person is above the law and that every person is subject to the jurisdiction of the courts. The rule of law is one of the values on which the Republic of South Africa is founded. It is among the core values enshrined in our Constitution that are relevant to the crime of obstructing or defeating the course of justice. Obstruction of the due administration of justice is quintessentially against the South African democratic system of government. This crime subverts the very judicial process on which the rule of law so vitally depends. The rule of law depends, *inter alia*, on the judicial process which must run smoothly without interference from any person or organ of state. By punishing

any conduct (such as intimidation of witnesses, alteration of documents, etc.) that interferes with a judicial process or proceeding, the crime of obstructing the course of justice protects one of the constitutionally enshrined core values, the rule of law.

(3) **The doctrine of separation of powers.** The doctrine of separation of powers, together with the rule of law and constitutional supremacy, runs like a thread throughout the South African Constitution. The purpose of separating the functions of government is to prevent excessive concentration of power in a single person or body.

(4) **Independence of the courts.** The existence and operation of an independent judiciary dispensing justice without fear or favour and free from political pressure or influence constitutes an important element of the rule of law. The principle of an independent judiciary goes to the very heart of sustainable democracy based on the rule of law. Independence of the courts means that in the exercise of their powers courts are subject only to the Constitution and the law. Functional independence protects the objectivity of judicial bodies and prevents interference with judicial functions. Courts are protected from interference with the due administration of justice by, *inter alia*, the offences of contempt of court and obstruction of the due administration of justice.

(5) **Powers of the courts in constitutional matters.** The position of South African courts as constitutional adjudicators represents the high-water mark of judicial power in the sphere of law reform. Section 173 of the Constitution read with section 39(2) of the Constitution empowers the courts to develop the common law appropriately where it is deficient in promoting the section 39(2) objectives. It may be argued that our courts have a secondary lawmaking function which is enshrined in the Constitution. Section 173 of the Constitution vested our courts with the constitutional powers to be the custodians of our common law. In terms of section 173 of the Constitution, the Constitutional Court, Supreme Court of Appeal and High Courts have inherent powers to protect and regulate

their own process, and to develop the common law, taking into account the interests of justice. According to the jurisprudence of the Constitutional Court, in exercising their powers to develop the common law, the courts should be mindful of the fact that the major role player for law reform should be the legislature and not the judiciary.

(6) **The Bill of Rights.** The Bill of Rights is aimed at safeguarding human rights and bringing centuries of state sponsored abuse to an end. The Bill of Rights forms part of the new Constitution, which was adopted by the Constitutional Assembly in May 1996 and certified by the Constitutional Court in December 1996. This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The state must respect, protect, promote and fulfil the rights in the Bill of Rights. The rights in the Bill of Rights are subject to limitation in terms of section 36 of the Constitution.

Of significance to the discussion of the due administration of justice are the due process rights of arrested, detained and accused persons. These rights are said to be part of the system of intrinsic values that must inevitably reshape the contours of a new landscape to which the administration of justice and the fight against crime must adapt. Section 39 of the Constitution deals specifically with the interpretation of the Bill of Rights. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill of Rights. Section 39(1) is an exhortation to the courts to seek to discover the values underlying the Bill of Rights in interpreting its provisions. It guides South African courts to the correct jurisprudential approach to the interpretation of the Constitution, in general, and the Bill of Rights in particular. South African courts are indeed enjoined by section 39 of the Constitution to interpret the Bill of Rights so as to

promote the values which underlie an open and democratic society based on freedom and equality, and, where applicable, to have regard to relevant public international law. Section 39 also permits our courts to have regard to comparable foreign case law. The Constitutional Court has laid down guidelines as to how the Constitution and the Bill of Rights in particular should be interpreted. These are textual, purposive, generous and contextual interpretations. Constitutional rights and freedoms are not absolute. They have boundaries set by, *inter alia*, important social concerns such as preventing conduct that hinders or threatens to hinder the due administration of justice. They may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Any limiting measure must serve a purpose that all reasonable South Africans would agree to be very important. The Constitutional Court held that protecting the administration of justice at its broadest is a legitimate purpose for limiting the rights in the Bill of Rights, including the right to a fair trial. The State may resist the accused's claim for access to any document in the police docket on the ground that there is a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice. The importance of effectively prosecuting conduct that obstructs the administration of justice cannot be gainsaid. Conduct such as failure to appear in court manifestly hinders the administration of justice and in order to ensure the proper administration of justice, such conduct must be dealt with swiftly and effectively. The incursion into the accused's fundamental right to silence is justifiable if it pursues a pressing social concern such as preventing conduct that obstructs or threatens to obstruct the administration of justice. Prevention of the commission of the crime of obstructing or defeating the course or the ends of justice can be used as a yardstick when determining the purpose of the limitation of fundamental rights. If the purpose of the limitation of the right in the Bill of Right is to prevent the accused from obstructing the course of justice such limitation is justifiable.

(7) Should the crime of obstructing the course of justice be extended by the courts?

In terms of section 44 of the Constitution, the legislative authority of the Republic of South Africa is vested in a democratically elected Parliament. Constitutional Court jurisprudence confirms that in a democratic society the role of the legislature as a body reflecting the dominant opinion should be acknowledged. Such jurisprudence further emphasises that it is important that we bear in mind that there are functions that are properly the concern of the courts and others that are properly the concern of the legislature. According to the Constitutional Court, at times these functions may overlap, but their territories are in the main separate, and should be kept separate. Therefore, any extension of the ambit of the crime of obstructing or defeating the course of justice is mainly Parliament's constitutional responsibility. The legislature should lead the way in initiating law reform and legislate this crime.

(8) Can the accused challenge the ambit of the crime on constitutional grounds? It

is submitted that constitutional challenge by the accused of the scope of common law crime of obstructing or defeating the course of justice would not succeed because the crime of obstructing or defeating the course of justice as presently defined is not repugnant to the provisions of the Constitution. The current definition of the crime is intended to ensure that criminals do not circumvent the law by devising novel and creative schemes that would interfere with the course of justice, but would nevertheless fall outside the ambit of the current definition of this crime.

CHAPTER NINE

CONCLUSION

9.1 GENERAL

The study undertaken in this thesis demonstrates that any conduct aimed at the obstruction of the due administration of justice threatens core constitutional values.

These values are:

- (1) constitutional supremacy,
- (2) the rule of law,
- (3) the doctrine of separation of powers, and
- (4) the independence of the courts.

The question arises of whether the common law offence, as developed in South Africa's pre-constitutional dispensation, targets all the types of conduct that may be undertaken to defeat or obstruct the due administration of justice and so jeopardise these core values.

This comparative legal study reveals that various manifestations of conduct which have the effect of obstructing the due administration of justice have been criminalised in foreign jurisdictions in terms of comprehensive legislation.

The conclusion of this thesis is that legislation needs to be introduced in South Africa which targets all forms of conduct which may defeat or obstruct the proper administration of justice. It is submitted that such legislation is necessary to ensure the optimal protection of the relevant constitutional values. Moreover, it is important to replace the

common law offence with clearly formulated statutory offences that will provide clear guidelines to our courts, and ensure legal certainty, legality and consistency in the prosecution of the offence.

In this closing chapter, detailed proposals are made for law reforms which include draft legislation. The proposal and draft legislation are preceded by a brief discussion of the relevant constitutional imperatives.

9.2 CONSTITUTIONAL IMPERATIVES

It has been said above that, before 1994, South African constitutional law was based on the concept of parliamentary supremacy, whereby the Parliament of the day reigned supreme and the courts had no powers to review Acts of Parliament.¹ Generally speaking, judicial officers were required merely to be positivist functionaries, who applied the law without any concern or consideration for basic principles of justice or human rights.² Cases where the state was involved, for instance, and more especially cases which touched on security legislation, almost inevitably resulted in pro-executive decisions. As a result, the South African judicial system lost credibility and legitimacy.³ This changed in 1994 with the coming into being of the Interim Constitution of 1993,⁴ and later, the

¹See *supra* Chapter Eight (n 1). See also *Pharmaceutical Manufacturers Association of SA; In re: Ex parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 40.

²S Mothupi "Transformation of the judicial system: The debate continues" *Codicillus* (2006) Vol 47 No 2 6.

³*Ibid.*

⁴The Constitution of the Republic of South Africa, Act 200 of 1993.

Final Constitution⁵ in 1996. The new Constitution is the supreme law of the land.⁶ The advent of the Constitution has had a dramatic impact on crimes in general, and on the crime of defeating or obstructing the course of justice in particular. It introduced constitutionalism which places the core constitutional values at centre stage. These core values are said to represent the source from which the human rights dispensation is derived, and they give guidance when conflicting rights must be balanced.⁷ The core values which the crime of defeating or obstructing the course of justice strives to protect, and which are discussed in this thesis, are (1) constitutional supremacy, (2) the rule of law, (3) the doctrine of separation of powers, and (4) the independence of the courts. This study has demonstrated that the values of constitutional supremacy and separation of powers underpin this crime. This study has also demonstrated that some of the rights in the Bill of Rights may have to be limited in order to protect the due administration of justice.

a. **The rule of law.** In a constitutional democracy like ours, the courts play an important role. It is argued that any conduct which is aimed at emasculating the courts of their authority subverts one of the fundamental values of our Constitution, namely, the rule of law. Intimidating judicial officers is one of example of conduct which undermines the authority of the courts. The existence and operation of an independent judiciary that dispenses justice without fear, favour or prejudice is an element of the rule

⁵The Constitution of the Republic of South Africa of 1996.

⁶Section 2 of the Constitution of the Republic of South Africa of 1996.

⁷See Wessels *op cit* Chapter Eight (n 34) 52.

of law.⁸ Therefore, punishing such conduct as defeating or obstructing the course of justice demonstrates what an important role this crime plays in protecting the constitutional imperatives, in general, and the rule of law, in particular.

b. **The doctrine of separation of powers.** This doctrine refers to the division of government responsibility into distinct branches in order to limit any one branch from exercising the core functions of another. The aim is to prevent the concentration of power in a single branch and provide for checks and balances.⁹ It is argued that too much concentration of power in any one branch of government, including the judiciary, is a threat to our democracy, because the most powerful branch may end up usurping the core functions of the other branches. A powerful executive, for example, may undermine both the legislature and the judiciary by implementing policies which are opposed to the legislation passed by Parliament and policies declared as unconstitutional by the courts. Unwarranted interference by the judiciary may occur when the courts turn down pieces of legislation passed by Parliament, and when the decisions of the courts make laws beyond what is required to give full effect to the Bill of Rights. By so doing, the courts may unreasonably usurp the constitutionally mandated powers of the legislature and involve themselves in policy-making, and that amounts to a breach of the doctrine of separation of powers.¹⁰

⁸See Mahomed *op cit* Chapter Eight (n 60) 111.

⁹See at www.ncs.org/programs/legismgt/SeparationPowers.htm (accessed on 21 December 2008).

¹⁰See SA Dersso “The role of courts in the development of the common law under section 39(2): *Masiya v Director of Public Prosecutions Pretoria (The State) and Another*,” at www.saifac.org.za/docs/2007/Masiya%20Case%20note.pdf (accessed on 21 December 2008).

It has been argued above that the doctrine of the separation of powers, *trias politica*, together with the rule of law and constitutional supremacy, run like a thread throughout the South African Constitution.¹¹ This thesis further argues that this doctrine reinforces judicial independence in that no organ of state, including the legislature and the executive, may interfere with the functioning of the courts. It is said that any jeopardy to the independence of the judiciary also affects the doctrine of the separation of powers and that the Constitution is devalued when judicial independence is undermined.¹²

c. **Independence of the courts.** The independence of the judiciary is generally regarded as being an essential component of the democratic government. This is spelled out in our Constitution which gives effect to internationally accepted principles and which have been applied in judgments of the Constitutional Court.¹³ In emphasising the importance of judicial independence, Chaskalson says:¹⁴

Historically, the generally accepted core of the principle of judicial independence has the complete liberty of individual judges to hear and decide the cases that come before them: no outsider - be it government, pressure group, individual or even another judge - should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

¹¹See *supra* Chapter Eight, under 8.2.3.

¹²See South African Institute of Race Relations “Constitution devalued when judicial independence is undermined,” at www.sairr.org.za/press-official/institute-opinion/Constitution-devalued-when-judicial-independence-isundermined-html, accessed on 21 December 2008.

¹³A Chaskalson “Comments made at the Gordon Institute for Business Science Forum on the independence of the judiciary” *Legal Resource Centre (LRC)* (20 August 2008) 1, at www.lrc.co.za/Articles/Articles_Detail.asp?art_ID=462 (accessed on 18 December 2008).

¹⁴Chaskalson *op cit* (n 30) 2.

Actions by the executive that may be seen to make it seem that justice was not done are not actions which guarantee the independence of the courts.¹⁵ Section 165 of the Constitution provides that the judicial authority of the Republic is vested in the courts.¹⁶ In order for the courts to use this authority impartially, as required by the Constitution, they must be independent from any kind of influence. The independence of South African courts is guaranteed by the Constitution which is in line with various international instruments.¹⁷ They are independent and are subject only to the Constitution and the law. Courts must operate free from any interference or influence from any person, including other judges or organs of state. It is submitted that any improper interference with the functioning of the courts jeopardises the due administration of justice and may lead to the collapse of the rule of law. Currently, such conduct is punishable in terms of the common law crime of defeating or obstructing the course of justice. Again, by punishing conduct which is intended to defeat or obstruct the course of justice by interfering with the functioning of the courts, the common law crime of obstruction of justice is being elevated to a constitutional imperative.

¹⁵I Farlam “Some aspects of judicial independence” *Centre for Constitutional Rights: The FW De Klerk Foundation* (31 October 2008) 1, at www.cfc.org.za/?p=337 (accessed on 18 December 2008).

¹⁶See the provisions of section 165 of the Constitution of the Republic of South Africa of 1996 *supra* Chapter Eight (n 58).

¹⁷This is in line with article 26 of the African Charter of Human and People’s Rights (The Banjul Charter) of 1986. This article provides:

States parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

This article also imposes a strong obligation on the State. The whole notion of human rights will become useless in a society where the judiciary is not independent. Independence of the judiciary draws one’s attention to the principle of the separation of powers that should exist between the three main organs of government: the executive, the legislature and the judiciary. In order for these organs of state to function properly, they should be independent of each other. The State, and particularly the executive, is a potential violator of human rights and seldom wants or agrees to be held responsible for its acts. Therefore, only an independent judiciary can curb administrative excesses.

d. **Limitation of rights.** This study has also demonstrated that certain fundamental rights may need to be limited in order to protect the due administration of justice.¹⁸ X may be refused bail, for example, if there is a possibility that he may, *inter alia*, attempt to influence or interfere with witnesses or conceal evidence.¹⁹ This conduct at most defeats or obstructs the course of justice. The jurisprudence of the Constitutional Court also demonstrates that the protection of the due administration of justice is a legitimate purpose for limiting the rights in the Bill of Rights. In the *Singo*²⁰ case, the court held that protecting the administration of justice is a legitimate reason for limiting the rights in the Bill of Rights. Also, in the *Shabalala*²¹ case, the Constitutional Court found that the prevention of intimidation of witnesses is one of the legitimate purposes for the limitation of the rights in the Bill of Rights. In the *Mamabolo*²² case, the court observed that the importance of effectively prosecuting conduct that obstructs the due administration of justice cannot be gainsaid. Failure to appear in court manifestly hinders the administration of justice and in order to ensure the proper administration of justice, such conduct must be dealt with swiftly and effectively. The court held that “the incursion into the right to silence is justifiable”²³ in order to protect the due administration of justice.

¹⁸In terms of section 36(1) of the Constitution of the Republic of South Africa of 1996.

¹⁹See *supra* Chapter Seven under 7.5, text at notes 415 and 417.

²⁰See *S v Singo supra* Chapter Eight (n 152) at 25.

²¹See *Shabalala v Attorney-General (Transvaal) supra* Chapter Eight (n 153) at 60.

²²See *S v Mamabolo (ETV) and Others Intervening supra* Chapter Eight (n 169) at 24-25.

²³At 26.

9.3 SUGGESTED REFORM OF THE COMMON LAW CRIME OF OBSTRUCTING OR DEFEATING THE COURSE OF JUSTICE

9.3.1 The beginning and the termination of the “course of justice”

As it has been argued in this thesis, law reform is mainly the domain of the legislature, especially if the ambit of the crime is extended.²⁴ Therefore, Parliament should take the initiative and introduce legislation which criminalizes the various ways in which the offence of obstruction of justice can be committed. In the paragraphs that follow, various proposals are made for such law reforms.

A comparative study undertaken in this thesis demonstrates that in most jurisdictions the course of justice is said to begin to run and may be prevented or perverted or obstructed or defeated before judicial proceedings are pending, while they are pending²⁵ or during judicial proceedings.²⁶ This crime may be committed after the perpetration of the principal crime, but before investigations into the crime have begun. In other jurisdictions the scope of justice has been extended to include police investigations.²⁷ This trend is also followed in the United States of America. In *United States v Novak*,²⁸ the court held that there was nothing in section 1503²⁹ requiring a pending judicial

²⁴See *supra* Chapter Eight under 8.3 and 8.7.

²⁵Under English law, see *supra* Chapter Three under 3.2, text at note 22.

²⁶See the Canadian law *supra* in Chapter Four under 4.2, text at note 705.

²⁷Under English law the matter is discussed in Chapter Two *supra* under 2.3, text at notes 252 and 261. In South African law the matter is discussed *supra* in Chapter Seven under 7.2, text at note 77.

²⁸See the discussion of *United States v Novak supra* Chapter Six under 6.2, text at note 43.

²⁹18 United States Code.

proceeding. In *R v Wijesinha*,³⁰ the Supreme Court of Canada held that the phrase “course of justice” would include an investigation which could lead to legal proceedings being taken against a person. The Australian courts, on the other hand, have ruled that at common law the course of justice does not begin until the jurisdiction of a court or a competent judicial authority is invoked.³¹ Therefore, as a general rule, police investigations do not form part of the course of justice in Australia.³² This thesis argues that the prevalence of the crime of obstructing the course of justice is a menace to our criminal justice system and to the rule of law. Therefore, the scope of the crime should include interference with police investigations and conduct committed as soon as the principal crime has been committed, but even before it has been detected. Clear legislation to this effect will bring an end to the uncertainty as to this particular aspect of the crime.

It has been said above that no authority could be found in our case law where the court decided when “the course of justice” terminates for the purpose of this offence. However, there are two academic opinions as to when the administration of justice ends. Hunt³³ says that the judicial administration of justice is completed after the court has pronounced its judgment and anything which delays or obstructs the execution of judgment is not proper subject matter for a criminal charge of defeating or obstructing the

³⁰See *R v Wijesinha* at 418e-h *supra* Chapter Five under 5.2.1, text at note 29.

³¹See *The Queen v Rogerson* at 283 *supra* Chapter Four under 4.2 text at note 6 and *James v Robinson* at 606 *supra* Chapter Four under 4.2, text at note 6.

³²See *supra* Chapter Four under 4.2, text at note 7.

³³Hunt *op cit* Chapter Two (n 7) 149.

course of justice. However, Lansdown, Hoal and Lansdown³⁴ argue that the crime of defeating or obstructing the course of justice may be committed after proceedings have been concluded, for example, where a person contrives to effect the release of convicted prisoner, X, by wilfully, and falsely, filing an affidavit that states that Y and not X committed the crime.

This thesis agrees with Hunt. It is further submitted that in criminal proceedings, the course of justice terminates immediately after the court which finally deals with the matter has passed its judgment and, in cases where the accused is found guilty, after the sentence has been passed. It is submitted that in civil proceedings the course of justice terminates when the court has made its findings with regard to the liability of the respondent or defendant and, if the plaintiff or applicant prevails, after the court has made an order, unless either of the parties launches an appeal.

9.3.2 In which circumstances should an omission be punishable?

As a general rule, in South Africa, an omission is punishable only if there is a legal duty upon somebody to act positively.³⁵ If the legal duty is not created expressly in the legislation, the rule is that there is a legal duty on X to act positively if the legal

³⁴Cf Lansdown, Hoal and Lansdown *op cit* Chapter Seven under 7.2, text at note 100.

³⁵Snyman *op cit* Chapter Seven (n 1) 59 and HB Malcomess *The Possibility of a General Omissions Clause for South African Criminal Law*, Unpublished Dissertation for LLB, University of Stellenbosch, (2008) 5. For example, section 34 of Prevention and Combating of Corrupt Activities Act 12 of 2004 imposes a duty on certain persons to report corrupt activities; section 12 of the Protection of Constitutional Democracy Against Terrorist and Related Matters Act 33 of 2004 imposes a duty on a person who has reason to suspect that another person intends to commit, or has committed, a 'terrorist' offence or is aware of the presence at any place of a person who is so suspected of intending to commit or having committed such offence to report the suspicion to the police and, section 29 of the Financial Intelligence Centre Act 38 of 2001 imposes a duty on a person who carries on a business or who is employed by a business to report suspicious or unusual transactions regarding the proceeds of unlawful activities.

convictions of the community demand that there be such a duty,³⁶ but at common law there is no general duty to act positively.³⁷ Burchell points out that Parliament should not simply overturn the emphasis of the common law on individual autonomy by imposing legal duties to act positively “in a wholesale or piecemeal way so that the common law rule of no liability is completely undermined.”³⁸ He points out that a general criminal liability, for example, for failure to inform the police of the commission or suspected commission of an offence would overturn the fundamental emphasis on individual autonomy in the common law, and would result in certain fundamental rights being infringed and established fault criteria being compromised.³⁹ According to Snyman,⁴⁰ a legal duty to act may sometimes arise by virtue of the fact that a person is an incumbent of a certain office, such as lawyers, medical practitioners, police officers, etc. In *S v Gaba*,⁴¹ for example, the court held that X, a policeman, was under a duty to disclose the identity of a person who was being questioned by fellow investigation officers and who specifically asked X to identify the person. Police officers are also under a legal duty to prevent a person in their charge from being assaulted.⁴² It is submitted that a police officer’s failure to report a crime which he or she has seen being committed constitutes

³⁶See *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A-B; *S v Gaba supra* Chapter Seven (n 8) at 751 and Snyman *op cit* Chapter Seven (n 1) 59.

³⁷J Burchell “A saga of snitches and whistleblowers: The boundaries of criminal liability for breach of statutorily imposed duties especially in the context of organised crime” (2008) *Essays in honour of CR Snyman* (ed by JJ Jourbet) 25.

³⁸Burchell *op cit* (n 37) 25-26.

³⁹Burchell *op cit* (n 37) 28.

⁴⁰Snyman *op cit* Chapter Seven (n 1) 60. See also Burchell *op cit* Chapter One (n 1) 194.

⁴¹See *S v Gaba supra* Chapter Seven under (n 8) at 751. This matter is discussed under 7.1, text at note 18.

⁴²See *Minister van Polisie v Ewels supra* (n 36).

the crime of obstruction of justice if he or she intended to help the criminal to evade justice.⁴³ However, that should not be extended to an ordinary person, because that will violate an individual's autonomy.

A legal duty to act positively may also arise where a protective or a special relationship exists between the parties. A person who occupies a protective or special relationship towards another may be under a legal duty to take steps to protect that person from harm.⁴⁴ In 2001, in *Carmichele v Minister of Safety and Security and Another*,⁴⁵ the Constitutional Court held that the police owe a duty, derived from the Constitution, to protect the public, in general, and women and the vulnerable in particular. The court held that the state may be delictually liable for damages for failure by the police to bring to the prosecutor's attention any factors known to a police officer to be relevant to assist the magistrate to exercise his discretion, and failure by a prosecutor to bring necessary information known to him to be relevant to assist the magistrate to exercise his discretion whether or not to grant bail to the accused, where the magistrate released X, who was charged with rape, on his own recognisance instead of keeping X in custody where he could do no further harm.⁴⁶

⁴³See also Burchell and Milton *op cit* Chapter One (n 1) 194.

⁴⁴Burchell and Milton *op cit* Chapter One (n 1) 191 and Snyman *op cit* Chapter Seven (n 1) 60.

⁴⁵This case is discussed in detail *supra* Chapter Eight under 8.3, text at note 82. See also Burchell and Milton *op cit* Chapter One (n 1) 196-97.

⁴⁶See *supra* Chapter Eight under 8.3, text at notes 93, 94 and 95.

However, Burchell⁴⁷ says that there is a vast difference between imposing responsibilities on the State and individuals to protect persons, especially the weak and vulnerable, from violence and exploitation (or even to foster the protection of socio-economic rights) and imposing duties on the citizens of the State to assume the role of the State by reporting on the suspected and sometimes vaguely defined criminal activities of their fellow citizens on pain of criminal sanction. He is of the view that a community of coerced informers will only serve to turn citizens against one another and impose additional strains on already overcrowded prisons by a process of over-criminalisation, without solving the underlying problem of poor detection of criminal activity.

In English law, there is both academic and judicial authority to suggest that the common law offence of perverting the course of justice cannot be committed by mere omission.⁴⁸ In jurisdictions like Australia and South Africa,⁴⁹ failure to act positively (omission) may sometimes constitute the crime of perverting the course of justice if the court finds that there was a legal duty to act positively in the specific case. In Australia, the statutory crime of perverting or attempting to pervert the course of justice may be committed by both positive acts and omissions. For instance, in New South Wales and in Victoria, failure to report to the police that a serious indictable offence has been committed by another person constitutes a statutory crime of perverting the course of justice in certain

⁴⁷See Burchell *op cit* (n 37) 29.

⁴⁸See *supra* Chapter Three *supra* under 3.1, text at notes 4 and 8.

⁴⁹See *S v Gaba* at 746 *supra* Chapter Seven under 7.1, text at note 8. See also Snyman's views *op cit* Chapter Seven (n 106).

circumstances. Section 319 of the New South Wales Crimes Act⁵⁰ punishes both an act and an omission intended to pervert the course of justice. Section 105 of the Tasmanian Criminal Code⁵¹ also punishes any person who commits an act or omits to do something with intent to pervert the course of justice. In *Hatty v Pilkinton*,⁵² for instance, the full bench of the Federal Court of Australia upheld the conviction of a lawyer who did nothing to correct the impression created when his client appeared in court under a false name.

In South Africa, there are different opinions, both academically and in the case law, as to whether the crime of obstructing the course of justice may be committed by omission. Snyman confirms that the crime may be committed by either a positive act or an omission.⁵³ There is case law to support Snyman's view in *S v Gaba*⁵⁴ and *Minister van Polisie v Ewels*,⁵⁵ for instance, where it was observed that an omission might lead to a conviction of attempt to defeat or obstruct the course of justice if there was a legal duty to act positively, for instance where X acted in his official capacity. It has been demonstrated above that other academic writers prefer to use the words "act" to define this crime, meaning that it can generally only be committed through a positive act and not

⁵⁰Crimes Act of 1900 (NSW). The provisions of section 319 are discussed *supra* Chapter Four (n 143).

⁵¹Criminal Code Act 69 of 1924 (Tas). The provisions of section 105 are discussed *supra* Chapter Four (n 314).

⁵²*Hatty v Pilkinton* at 158 *supra* Chapter Four under 4.3.1.4, text at note 78.

⁵³Snyman *op cit* Chapter Seven (n 1) 340.

⁵⁴See *S v Gaba supra* Chapter Seven (n 8) at 746.

⁵⁵See *Minister van Polisie supra* (n 36).

through a mere omission.⁵⁶ This view has been followed in a number of cases, for example, this definition led to a decision in *S v Oberbacher*⁵⁷ that a “positive act by the accused” is necessary before the crime of defeating or obstructing the course of justice can be committed. In both *S v Binta*⁵⁸ and *S v Kiti*,⁵⁹ the *Oberbacher* decision was relied upon and the court, on appeal, set aside the convictions of the accused charged with defeating the course of justice for refusing to allow samples of blood to be taken from them after having been arrested for drunk driving. This thesis agrees with Snyman and the *Gaba* decision in that this crime may be committed by omission if the legal convictions of the society so require.

It is submitted that the legal convictions of the community require that a person arrested for drunk driving should also be held liable for the crime of obstruction of justice if he or she refuses to submit to a blood test. Driving while under the influence of liquor is one of the biggest threats to road safety in South Africa. Statistics from the Department of Transport indicates that 50% of the deaths on our roads involved drivers with a blood alcohol level of above 0,05 per 100 milliliters.⁶⁰ Therefore, in order to address the legal uncertainty as to whether the provisions of section 37(2)(a) placed a legal duty upon X not to refuse to allow his or her blood sample to be taken and of whether or not a mere refusal to allow a blood sample to be taken constitutes a crime, Parliament introduced

⁵⁶Cf Hunt *op cit* Chapter Two (n 7) 143 and Burchell and Milton *op cit* Chapter Two (n 148) 939.

⁵⁷*S v Oberbacher supra* Chapter Seven (n 108) at 818E- 819G.

⁵⁸This case is discussed *supra* Chapter Seven under 7.3.1, text at note 121.

⁵⁹*S v Kiti* is discussed in detail *supra* Chapter Seven under 7.3.1, text at note 135.

⁶⁰See Arrive Alive, at <http://www.arrivealive.co.za/pages.aspx?I=1259> (accessed on 13 December 2008).

legislation which prevents such refusal.⁶¹ It is submitted that police investigation into the deaths and injuries caused in road accidents embraces examination of, *inter alia*, the sobriety of the drivers concerned and the roadworthiness of their vehicles. Such examination may disclose the commission of the offence of driving a vehicle, or occupying the driver's seat of a motor vehicle with the engine running, while under the influence of intoxicating liquor or of a drug having a narcotic effect. Refusal to allow the taking of a blood sample may lead to X's acquittal in the suspected offence of drunk driving. Public justice requires not only that evidence be made available before a court and that evidence should not be concealed, but that every crime, including drunk driving, should be properly prosecuted. Therefore, whoever refuses to allow his or her blood to be taken suppresses evidence and should be found guilty of the offence of defeating or obstructing the course of justice.

As to whether or not compelling X to give a blood sample constitutes a violation of the right not be compelled to give self-incriminating evidence in terms of section 35(3)(j) of the Constitution,⁶² it is submitted that yes, it does violate that right. Nevertheless, it is further submitted that such violation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The provisions of section 65(9) of the NRTA⁶³ which prohibit the refusal to allow a blood sample to be

⁶¹Section 65(9) of the National Road Traffic Act 93 of 1996 as amended. The provisions of this section are discussed *supra* Chapter Seven under 7.3.1, text at note 142.

⁶²The Constitution of the Republic of South Africa of 1996.

⁶³The provisions of this section are discussed *supra* Chapter Seven under 7.3.1, text at note 142.

taken, and of section 37(2)(a) of the Criminal Procedure Act⁶⁴ which permits the taking of a blood sample, serve the public interest of preventing driving while under the influence of alcohol which, according to statistics, is the cause of 50% of road accidents and fatalities on our roads. It is submitted that the public's interest in the safety and security of the person should be accorded more weight in this case than the right of an accused against self-incrimination.

It is submitted that such legal duty arises also where X occupies a certain office, whether public or private, where legislation imposes a duty upon X to act positively. It is submitted that failure to prosecute such an omission may allow a guilty accused to escape conviction and that would scandalize our criminal justice system.

In conclusion it is suggested that omission be punishable as obstruction of justice in the following circumstances:

- (1) Where there is a legal duty to act positively because X is an incumbent of a certain public or private office.
- (2) Where there is a legal duty to act positively because X stands in a protective relationship towards somebody else.
- (3) Where a statute places a duty upon X to act positively.

The courts may find also, in other cases, that a legal duty exists. However, it is submitted that no general liability for omission for the offence of obstructing the due administration of justice is needed in our law. However, there are situations where failure to act positively should be punishable depending on the legal convictions of the society.

⁶⁴Act 51 of 1977. The provisions of this section are discussed *supra* under 7.3.1, text at note 120.

9.3.3 Quasi-judicial proceedings

In South Africa, conduct intended to obstruct the course of justice, but which occurs in the context of quasi-judicial proceedings is not covered by the common law crime of obstructing or defeating the course of justice. As a result, the core constitutional values this crime strives to protect do not receive full protection. In administrative matters different bodies known as boards, commissions or tribunals have quasi-judicial jurisdiction. Disputes are referred to them before they may be referred to courts. The comparative and historical study undertaken in this thesis demonstrates that any interference with either evidence or a witness during such quasi-judicial proceedings may have far-reaching consequences for the due administration of justice, especially if the decision of that quasi-judicial body is taken to court either on review or appeal. In the foreign jurisdictions considered in this study, the crime of perverting or attempting to pervert or obstruct the course of justice may be committed in respect of quasi-judicial proceedings. In *R v Vreones*,⁶⁵ the English court convicted the accused of the crime of attempting to pervert the course of justice for altering evidence to be used in an imminent arbitration process. In this case the court found that to manufacture false evidence for purposes of misleading a tribunal is a punishable offence of attempting to pervert the course of justice.⁶⁶

In Canadian law, the crime of perverting the course of justice may be committed in “judicial proceedings.” In terms of section 118(d) and (e) of the Canadian Criminal

⁶⁵See a detailed discussion of *The Queen v Vreones supra* Chapter Two (n 116).

⁶⁶At 366-67.

Code,⁶⁷ “judicial proceedings” include proceedings before an arbitrator or umpire, or a tribunal by which a legal right or legal liability may be established. For example, in *R v Wijesinha*,⁶⁸ it was held that the scope of the “course of justice” includes the disciplinary proceedings of the Law Society. The court noted that most quasi-judicial or administrative tribunals commence with an investigation and such an investigation is an essential step in a quasi-judicial proceeding which may result in a criminal prosecution. Therefore, anyone who perverts the course of that investigation commits the crime of perverting the course of justice.

In Western Australia, threats of any kind made to prevent or hinder people who are summoned to give evidence before a Royal Commission constitute the statutory crime of “perverting the course of justice.”⁶⁹

Likewise, in the United States of America, there is authority for the proposition that the accused may be convicted of obstruction of justice for interfering with the following quasi-judicial proceedings: (1) investigation by the United States Probation Officer (USPO),⁷⁰ (2) investigation by the Internal Revenue Service (IRS),⁷¹ and (3) proceedings

⁶⁷The Criminal Code of 1985. See the provisions of section 118 of the Code *supra* Chapter Five under 5.2, text at note 14.

⁶⁸See a detailed discussion of *R v Wijesinha supra* Chapter Five (n 46).

⁶⁹It is punishable in terms of section 128 of the Criminal Code Act 28 of 1913 (WA).

⁷⁰See *United States v Novak supra* in Chapter Six (n 43).

⁷¹See *United States v Ladum supra* in Chapter Six (n 89).

involving the insurance business whose activities commence before any insurance regulatory official or agency.⁷²

On the strength of the wealth of authorities mentioned above it is submitted that the ambit of the crime of defeating or obstructing the course of justice should be extended to include interference in respect of quasi-judicial proceedings where a legal right or legal liability may be established. The ambit of this crime should be extended to include interference with, *inter alia*, the following quasi-judicial proceedings:

(1) a disciplinary enquiry conducted by the South African Medical and Dental Council,

(2) Boards of Inquiry in terms of section 101 of the Defence Act,⁷³

(3) Commissions of Inquiry,⁷⁴ proceedings of the National Assembly⁷⁵ and the

⁷²Section 1515(a)(1) of 18 United States Code.

⁷³The Defence Act 42 of 2002. Section 101(1) provides:

The Minister, the Secretary for Defence, or the Chief of the Defence Force may, at any time or place, convene a board of inquiry to inquire into any matter concerning the Department, any employee thereof or any member of the Defence Force or any auxiliary service, any public property or the property or affairs of any institution or regimental or sports funds of the said Force, and to report thereon to make a recommendation.

⁷⁴Appointed in terms of section 84(2)(f) of the Constitution of the Republic of South Africa of 1996.

⁷⁵In terms of section 56 of the Constitution of the Republic of South Africa of 1996. This section provides:

The National Assembly or any of its committees may–

- (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents.

National Council of Provinces,⁷⁶ proceedings of provincial legislatures⁷⁷ and proceedings of the National Consumer Tribunal.⁷⁸

In all these proceedings, although they are quasi-judicial or administrative in nature, rights and liabilities are established. Normally, outcomes of such proceedings are referred to courts by anyone who was the subject of the proceedings and who was not happy with the outcome. Moreover, criminal prosecution may follow such proceedings. It is submitted that the due course of law is obstructed where, for example, during a disciplinary enquiry conducted by the South African Medical and Dental Council, X, persuades Y, who is a witness to such proceedings, to manufacture false evidence in such proceedings in order to exonerate X. If Y obeys X and on the strength of Y's false evidence, X is exonerated of the alleged misconduct, there is no doubt that the due administration of justice has been defeated or obstructed. It is submitted that if X and Y knew that the outcome of the current disciplinary proceedings may lead to court proceedings, and if the act or conduct was carried out with the intention to obstruct the

⁷⁶In terms of section 69 of the Constitution of the Republic of South Africa of 1996. This section provides:

The National Council of Provinces may–

- (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents.

⁷⁷In terms of section 115 of the Constitution of the Republic of South Africa of 1996. This section provides:

A provincial legislature or any of its committees may–

- (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents.

⁷⁸Established in terms the National Credit Act 34 of 2005. In terms of section 152(1) of the Act, an order of the tribunal may be served, executed and enforced as if it were an order of the High Court. Its decisions are binding, *inter alia*, on a magistrate's court.

proper administration of justice, X and Y would have committed the crime of conspiracy to defeat or obstruct the course of justice or of the attempt to defeat or obstruct the course of justice. The underlying idea is that X should be prevented from misleading any tribunal with the intention of obstructing or defeating the proper administration of justice.

9.3.4 Should wasteful employment of the police be punishable?

A comparative study has demonstrated that in English, Australian and South African law, X does not commit the crime of obstructing or defeating the course of justice by merely making statements to the police falsely averring that a crime has been committed when no specific person is implicated. In these jurisdictions the crime cannot be committed by the mere waste of police time and energy where there is no innocent individual who is placed in jeopardy of investigation, arrest and prosecution.⁷⁹ Neither is an accused person guilty of an offence for refusing to admit to the police whether he or she is guilty of any suspected crime.⁸⁰

From the above discussion it is clear that if X makes a telephone call to the police alleging that he has been hijacked and the police go out to investigate these allegations, X does not commit the offence of defeating or obstructing or attempting to defeat or obstruct the course of justice by merely wasting police time and energy. However, this thesis argues that if the police, on the strength of X's false allegations, go out, cordon off

⁷⁹See Murphy *op cit* Chapter Three (n 67) 581; *The Queen v Todd* at 326 *supra* Chapter Four (n 19); Boister *op cit* Chapter Seven (n 64) 205; Burchell and Milton *op cit* Chapter Two (n 148) 942 and *S v Bazzard* at 307d *supra* Chapter Seven (n 25).

⁸⁰Williams *op cit* Chapter Two (n 90) 417. In view of the right against self-incrimination in South African Constitution, a mere denial of guilty does not constitute unlawful obstruction of justice.

the area and search a few suspected houses, then innocent individuals *are* placed in jeopardy of investigation. Therefore, X commits the crime of attempting to defeat or obstruct the course of justice although he or she, in his or her call, did not identify the individuals he claimed hijacked him. X must at least have *dolus eventualis* – he or she must foresee the possibility that his or her conduct would place innocent individuals at risk of investigation and possible prosecution and he or she must have reconciled him– or herself to that possibility.

Under Canadian law, wasting police time and energy and any diversion that unnecessarily takes police time and effort, is considered to impede or retard the course which the operation of justice would normally take, and amounts to a statutory crime of obstruction of justice for purposes of section 139(2) of the Code.⁸¹ This offence is committed by, *inter alia*, wilfully making a false report to the police tending to show that an offence has been committed.⁸² Under English law, the common law misdemeanour of wasteful employment of the police has been codified. That conduct is now punishable in terms of section 5(2) of the Criminal Law Act.⁸³ It is submitted that in South Africa, too, we need law reform in this regard. At present, such conduct is not punishable in South Africa, so it is submitted that such conduct be made punishable as a separate crime.

⁸¹Canadian Criminal Code RSC 1985 c-C46. See the provisions of section 139(2) *supra* Chapter Five (n 13). See also Mewett and Manning *op cit* Chapter Five (n 11) 665.

⁸²Rodrigues *op cit* Chapter Five (n 11) 4-113.

⁸³Criminal Law Act of 1967. See the provisions of section 5 of this Act *supra* Chapter Three (n 182).

9.3.5 Interfering with a witness

A comparative study has revealed that in England and Australia, X does not commit any offence if he or she merely persuades a witness not to give false evidence or to persuade the witness to tell the truth, or honestly approaches a witness who has made a false or mistaken statement and by reasoned arguments supported by material facts, tries to dissuade him or her from giving perjured or erroneous testimony.⁸⁴ However, if X uses *improper means*, such as threats or bribery, or even an otherwise lawful act like threatening to sue the witness for damages if he or she does not tell the truth, amounts to the crime of defeating or obstructing the course of justice because X is interfering with a witness.⁸⁵ This conduct may also amount to attempted extortion.⁸⁶ Threatening or bribing someone to tell the truth poses a potential obstruction of the due administration of justice because the witness does not give evidence voluntarily as he or she has been induced. The crime of defeating or obstructing the course of justice also occurs if a witness is offered something in order to induce him or her to alter or withdraw his or her statement made with a view to the provision of evidence in support of criminal proceedings.⁸⁷

9.3.6 Intimidating the accused to plead guilty to a crime

Improperly persuading an accused person to plead guilty to a crime does not only interfere with the accused's constitutional right to be presumed innocent, to remain silent

⁸⁴Murphy *op cit* Chapter Three (n 66) 773 and *R v Kotch supra* Chapter Five (n 165).

⁸⁵*R v Toney* at 370A *supra* Chapter Three (n 86); Card *op cit* Chapter Three (n 1) 538 and Murphy *op cit* Chapter Three (n 67) 580-81.

⁸⁶The crime of extortion is committed when a person unlawfully and intentionally obtains some advantage, which may be of either a patrimonial or a non-patrimonial nature, from another by subjecting the latter to pressure which induces him or her to hand over the advantage.

⁸⁷*R v Panayiotou* at 115G-H *supra* Chapter Three (n 77).

and not to testify during the proceedings,⁸⁸ but it also constitutes the offence of attempting to defeat or obstruct the course of justice. For example, prosecutor X commits the offence of attempting to defeat or obstruct the course of justice when he or she, by improper means (e.g. through threats or intimidation), persuades the accused, Y, to plead guilty to an alleged offence that Y has allegedly committed, even if X believes that Y is guilty of the offence with which he or she is charged. A plea made as a result of intimidation or threats has not been made freely and voluntarily, and any court that acts on that plea is misled and its proceedings have been rendered abortive.⁸⁹ It is argued that this conduct undermines the due and proper administration of justice by the courts. It cannot be said that intimidating the accused to plead guilty to a crime does not prejudice the accused, but X does not commit this offence if he uses lawful means (like the plea bargaining process)⁹⁰ to persuade Y to plead guilty. Likewise, an attorney does not commit this offence if he merely advises his or her client to plead guilty to the crime he or she is charged with.

9.3.7 Obtaining bail by improper means

It is submitted that as bail proceedings form a significant part of the machinery of our criminal justice system, the process that governs bail application and release on bail must not be interfered with lightly. To obtain bail by improper means may constitute the crime of defeating or obstructing the course of justice. The accused, X1, X2 and X3, commit

⁸⁸Section 35(1)(a) read with subsection (3)(h) of the Constitution of the Republic of South Africa of 1996.

⁸⁹See *Meisseer v The Queen* at 143 *supra* Chapter Four (n 65).

⁹⁰Plea bargaining refers to the tendering of a plea of guilty on the basis that there would be some agreed advantage for the accused, for example, that there would be a reduction in sentence, or a withdrawal of other charges.

the crime of conspiracy to defeat or obstruct the course of justice if, during X1's bail application, they agree to lie to the court in order to secure X1's release on bail. In *R v Baba*,⁹¹ for example, the accused, X1 and X2, falsely presented X1 to the court as a co-tenant of a house in order to provide security⁹² which may enable X1 to be released on bail, and their conduct constituted obstruction of justice. In these circumstances the court is misled by the accused's conduct and, based on the misrepresentation, the court releases X1 on bail. This thesis argues that such misrepresentation jeopardises the proper administration of justice because had there not been such misleading evidence, X1 would not have been released on bail.

It is submitted that the constitutional core values protected by this crime are the rule of law and the independence of the courts. The rule of law means, among other things, equality before the law. It is argued that the concept of equality before the law also connotes that those who qualify to be released on bail should be released and those who do not should not be released. Therefore, obtaining bail by improper means violates this concept. In the above example, X interferes with the functioning of the courts. Judicial independence simply means the right and the duty of the courts to perform the function of judicial adjudication through the application of their own integrity and *the law*, without any actual or perceived, direct or indirect interference from or dependence on any other

⁹¹See *R v Baba supra* Chapter Four under 4.3.1.3, text at note 72.

⁹²In terms of section 60(2) of the Criminal Procedure Act 51 of 1977. This section provides that:

The court may, on good cause shown, permit an accused to furnish a guarantee, with or without sureties, that he will pay and forfeit to the state the sum of money determined under subsection (1), or increased or reduced under section 63(1), in circumstances under which such sum, if it had been deposited, would be forfeited to the state.

person or institution.⁹³ It is said that the principle of an independent judiciary goes to the very heart of sustainable democracy based on the rule of law.⁹⁴ Therefore, it is submitted that, in order to give full effect to the due administration of justice, particularly during the pre-trial stages of our criminal justice system, South Africa needs law reform which will punish any conduct intended to obtain bail by improper means as defeating or obstructing or attempting to defeat or obstruct the course of justice.

9.3.8 Persuading a victim not to prosecute his or her assailant or persuading a person not to report an incident to the authorities

Under Canadian law, persuading a victim not to prosecute his or her assailant or persuading a person not to report an incident to the authorities constitutes the crime of perverting the course of justice.⁹⁵ In *R v Whalen*,⁹⁶ for example, the court observed that an attempt to dissuade a person from reporting an incident to the authorities might constitute a way in which the offence of obstruction of justice could be committed. The court further observed that it was irrelevant that neither formal police investigations nor judicial proceedings had been instituted. In this case the accused were facing two charges of obstructing justice for: (1) dissuading or attempting to dissuade persons by threats or other corrupt means from giving evidence in judicial proceedings, and (2) dissuading or attempting to dissuade persons by threats or other corrupt means from reporting to the police incidents which they knew, or ought to have known, needed to be

⁹³See Mahomed *op cit* Chapter Eight (n 60) 111.

⁹⁴*Ibid.*

⁹⁵Rodrigues *op cit* Chapter Five (n 11) 4-115 and Mewett and Manning *op cit* Chapter Five (n 18) 491.

⁹⁶See *R v Whalen supra* Chapter Five under 5.3.2, text at note 87.

dealt with by a court of law.⁹⁷

The writer agrees with the *R v Whalen*⁹⁸ decision where the court said it was persuaded that in a society where the individual has the right to conduct his or her affairs independently of his or her neighbour, within the confines of the law, and someone attempts to dissuade him or her (through improper means) from reporting an incident, it may constitute an obstruction of justice.

It has been argued above that, in South Africa, the course of justice begins and may be defeated or obstructed when the principal crime is committed and the police are investigating it, or even before the police have commenced with their investigation.⁹⁹ Therefore, X defeats or obstructs the due administration of justice where he or she improperly persuades Y not to report a crime to the relevant authorities, like the police. X commits the same offence where he or she improperly persuades Y not to institute private prosecution proceedings against Y's assailant where the state has refused to prosecute.

It is submitted that the constitutional core value protected by this crime is the rule of law which requires that the administration of justice should run smoothly and unhindered. This can only be achieved if, among other things, crimes are reported, investigated, prosecuted, and the guilty are convicted and the innocent are acquitted. The above

⁹⁷At 218.

⁹⁸At 220.

⁹⁹See *supra* Chapter Seven under 7.2, text at note 78.

conduct encourages lawlessness which may erode one of the most important core values of our Constitution – the rule of law.

9.3.9 Pleading guilty to a crime committed by another person

This thesis has not found any precedent in our case law to the effect that X commits the crime of defeating or obstructing the course of justice where, in judicial proceedings, he or she pleads guilty to a crime committed by Y in order to protect the latter from prosecution and subsequently from being sentenced if found guilty. Academic writers have not addressed this matter either. In England and Canada this type of conduct constitutes the crime of perverting the course of justice.¹⁰⁰ This conduct is performed, in most cases, because either X feels pity for Y or the latter has promised him or her money. This conduct seriously offends the principle of public justice because the proceedings in court are conducted on a false basis. As a result, the factually guilty Y will escape conviction and the innocent X will be judged falsely.¹⁰¹ It is submitted that if X is convicted and sentenced, X's conduct also subverts the purpose of punishment. It is further submitted that in terms of the retribution theory of punishment, the balance of the scales of justice can be restored only if the real offender, Y, is punished. Also, the real offender, Y, cannot be deterred¹⁰² from the commission of further crimes if the wrong person is being punished. That state of affairs jeopardises the due administration of justice. It is also submitted that where there is a prior agreement between X and Y that

¹⁰⁰See *R v Devito and Devito supra* Chapter Three (n 52) and *R v Doz supra* Chapter Five (n 97).

¹⁰¹See Hannah *op cit* Chapter Three (n 133) 759.

¹⁰²The idea of individual deterrence is to teach the individual person convicted of a crime a lesson, which will deter him or her from committing crimes in the future. Generally speaking, the community is deterred from committing such acts by the threat of possible punishment.

the former will plead guilty to the crime committed by the latter in order to protect him or her from prosecution, they must both be charged with conspiracy to defeat or obstruct the course of justice.

The writer argues that such a crime protects some core values of our Constitution namely, the rule of law and the independence of courts. Pleading guilty to a crime committed by another person interferes with the proper functioning of the courts. Therefore, it obstructs the due administration of justice by the courts. It also jeopardises the rule of law by undermining the authority of the courts. It is submitted that, in order to protect the rule of law and the independence of the courts by preventing people from pleading guilty to offences committed by others through pity or by receiving money to do so, South Africa can learn from jurisdictions such as Canada and England and reform the law and make the above conduct punishable.

9.3.10 Picketing or parading or demonstrating with intent to impede the due administration of justice

The historical and comparative study undertaken in this thesis has demonstrated that conduct which was punished as the common law crime of embracery, which means tampering with a juror or jury, is codified in other jurisdictions. In the United States, for instance, there is legislation that prevents picketing, parading, or demonstrating near a court building or a building or residence occupied or used by a judge if such conduct is done with the intention of interfering with, obstructing or impeding, the due

administration of justice.¹⁰³

In developing countries like South Africa, mass scale demonstrations, protests, marches, strikes and boycotts have played a powerful role in bringing about political and socio-economic changes. In South Africa, peaceful and unarmed assemblies, demonstrations and picketing are permissible in terms of the Constitution.¹⁰⁴ Section 17 of the Constitution provides:

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket a right and to present petitions.

However, such assemblies, demonstrations and picketing must be done within the confines of the law – they must be peaceful and unarmed to qualify for constitutional protection. Violence or intimidation on the picket line will result in forfeiture of such protection and expose the perpetrators to criminal liability.¹⁰⁵ It is argued that there is a fine line between the constitutional right of people to assemble, demonstrate, picket and present petitions peacefully and unarmed and such conduct as may be intended to undermine the authority of the courts. If, for example, a group of people hold a peaceful and unarmed demonstration outside the court while the proceedings are in progress, and they are carrying placards with written messages intended to intimidate a judge not to come to an independent decision and to intimidate witnesses not to testify, the group crosses the line of their constitutional right to assemble, demonstrate, picket and present

¹⁰³See section 1507 18 United States Code *supra* Chapter Six (n 198).

¹⁰⁴The Constitution of the Republic of South Africa of 1996.

¹⁰⁵D du Toit *et al Labour Relations Law: A Comprehensive Guide* 5ed (2006) 232.

petitions peacefully and unarmed and enters the domain of the crime of defeating or obstructing the course of justice. This conduct has the natural and probable effect of obstructing the due administration of justice.

Protection of the courts is a constitutional imperative. Therefore, how can the courts be protected against picketing or parading or demonstrating with intent to disrupt or improperly influence judicial officers and witnesses? Section 165(4) of the Constitution instructs organs of State to come up with legislation and other measures to assist and protect the courts and to ensure their independence.¹⁰⁶ Therefore, it is submitted that law reform is necessary in order to make it a crime for anyone who, with intent of interfering with, obstructing or defeating, preventing or delaying the due administration of justice or with the intent of influencing the court or any witness, pickets or parades or demonstrates outside the court. What should be criminalized is not picketing or parading or demonstrating outside the court, *per se*, but doing it with the intention of undermining the authority of the courts, and therefore, the due administration of justice.

This thesis has argued, above,¹⁰⁷ that crimes do not exist in a vacuum, they bear relevance to the Constitution and that they protect certain core values found in the Constitution. It is submitted that the crime of defeating or obstructing the course of justice by picketing or parading or using amplifiers with intent to disrupt or influence judicial officers, court officials or witnesses; will protect two of the most important core values of our Constitution – the rule of law and judicial independence. The rule of law

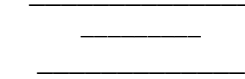
¹⁰⁶The provisions of section 165 are discussed in detail *supra* Chapter Eight (n 58).

¹⁰⁷See *supra* Chapter Eight under 8.1.

denotes the existence of public order which is backed by the authority of the courts in a given society.¹⁰⁸ It is argued that the conduct mentioned above, if done with intent to disrupt or influence judicial officers, erodes the judicial authority which is vested in the courts in violation of section 165(3) of the Constitution.¹⁰⁹ In order to protect these two core values of our Constitution - the rule of law and the independence of the courts—law reform is needed to punish those who defeat or obstruct or attempt to defeat or obstruct the course of justice by means of the conduct enumerated above.

¹⁰⁸See Mathews *op cit* Chapter Eight under 8.2.2, text at note 39.

¹⁰⁹The Constitution of the Republic of South Africa of 1996. See the provisions of section 165 *supra* Chapter Eight (n 58).

9.4 DRAFT BILL**CRIMINAL LAW: (DEFEATING OR OBSTRUCTING THE COURSE OF
JUSTICE AND RELATED MATTERS) BILL****PROPOSED BILL**

The aim of the proposed Bill is to give effect to the full protection of the due administration of justice and the core values found in our Constitution — namely, the supremacy of the Constitution, the rule of law, the doctrine of separation of powers and the independence of the courts. The Bill proposes that –

- all aspects of the law relating to defeating or obstructing the due course of justice be reviewed in order to bring all aspects of the law relating to defeating or obstructing the due course of justice into a single statute;
- the common law offence of defeating or obstructing the due course of justice be repealed and replaced with a new statutory offence of defeating or obstructing the due course of justice applicable to all conduct which defeats or obstructs or attempts to defeat or obstruct the due course of justice; and
- to provide for matters connected therein.

PREAMBLE

WHEREAS conduct which defeats or obstructs or attempts to defeat or obstruct the due administration of justice is of grave concern in a constitutional state as it jeopardises the proper functioning of the criminal justice system of the country;

WHEREAS the common law offence does not deal adequately and effectively with such conduct and some aspects relating to or associated with the commission of the offence of defeating or obstructing the course of justice;

WHEREAS the due administration of justice is crucial for the protection of the Constitution by an independent judiciary;

WHEREAS section 165 of the Constitution of the Republic of South Africa of 1996 vests the judicial authority of the Republic in the courts and provides, *inter alia*, for the independence of the courts and instructs organs of state, through legislative and other measures, to assist and protect the courts to ensure their independence;

WHEREAS the courts are subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice;

AND WHEREAS section 44 of the Constitution of the Republic of South Africa of 1996 vests the legislative authority of the Republic in Parliament;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

INDEX**CHAPTER ONE****DEFINITIONS AND OBJECTS****Definitions and interpretation of the Act**

(1) In this Act, unless the context otherwise indicates—

(a) “Board of inquiry” means any board of inquiry constituted in terms of any legislation to inquire into any issue in any state department;

(b) “Commission of inquiry” means a public inquiry appointed by the President of the Republic in terms of the Constitution and any other law to inquire into an issue as determined by the President;

(c) “Constitution” means the Constitution of the Republic of South Africa of 1996;

(d) “Course of justice” means the administration of justice in judicial and official proceedings, and

(i) commences immediately when the principal offence is committed whether or not investigation into it has begun (in criminal cases) or immediately when the cause of action arises whether or not a summons has been served (in civil proceedings),

(ii) terminates when the court or tribunal which finally adjudicates the matter has passed judgement and if the accused is convicted after it has imposed a sentence.

(e) “Court” means—

(i) the Constitutional Court;

(ii) the Supreme Court of Appeal;

(iii) the High Courts;

- (iv) the Labour Appeal Court;
- (v) the Labour Court;
- (vi) the Magistrates' Courts; and
- (vii) any other court established in terms of an Act of Parliament.

(f) "Judicial proceeding" means proceedings—

- (i) in or under the authority of the court;
- (ii) before a court, judge, justice, or coroner;
- (iii) before an arbitrator or umpire, or a person or body of persons authorised by law to make an inquiry and take evidence therein under oath where a legal right or legal liability may be determined; or
- (iv) before a tribunal by which a legal right or legal liability may be established;

whether or not the proceeding is invalid for want of jurisdiction or for any other reason.

(g) "Judicial officer" means a judge, a magistrate and includes a judge of the Court of Military Judges and the Court of a Senior Military Judge;

(h) "Justice of the Peace" means a person authorized to take down statements under oath and confessions;

(i) "Law" means the law of the Republic;

(j) "Officers of the court" means defence lawyers, prosecutors, interpreters, and transcribers;

(k) "Official proceedings" means proceedings before tribunals whose jurisdiction extends to the enforcement or adjustment of rights and liabilities in accordance with the Constitution and the law and whose procedure is judicial in character and includes investigations conducted by – the National Assembly, the National Council of Provinces and the Municipal Council, or a committee of the National Assembly or the National Council of Provinces or the Municipal Council thereof, that is authorised by the law to summon any person (both legal and juristic) to appear before it to give evidence under oath or affirmation or to produce documents;

(l) "Person/s" means both legal and juristic person/s;

(m) “Police” means members of the South African Police Services, members of the Metro Police of different Municipalities and any police service established in terms of any law;

(n) “President” means the President of the Republic;

(o) “Republic” means the Republic of South Africa; and

(p) “This Act” includes any regulations that may be promulgated in terms of this Act.

Objects

2. The objects of this Act are to give comprehensive and extensive protection to the proper administration of justice and the protection of core constitutional values related to the proper administration of justice by–

(a) Enacting all matters relating to defeating or obstructing the course of justice in a single statute;

(b) repealing the common law offence of defeating or obstructing the course of justice and replacing it with a new and extended statutory offence of defeating or obstructing the course of justice; and

(c) bringing certainty to the prosecution of this crime.

CHAPTER TWO

Picketing and parading

3. Any person who –
- (1) with the intent of interfering with, obstructing, or impeding the due administration of justice, or with the intent of influencing any judge, assessor, witness, or officer of the court, in the discharge of his or her duty, pickets or parades in or near a building housing a court of the Republic of South Africa or in or near a building or residence occupied or used by such judge, assessor, witness, or such officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence,

is guilty of an offence ...

Interference with judicial officers, assessors, witnesses and legal practitioners

4. Any person who–
- (1) unlawfully causes or procures, or threatens or attempts to cause or procure any injury or detriment with the intention of inducing a person who is or may be –
- (a) a judicial officer or other officer of the court at judicial proceedings (whether proceedings that are in progress or proceedings that are to be or may be instituted at a later time); or
- (b) involved in such proceedings as a witness, assessor or legal practitioner, to act or not to act in a way that might influence the outcome of the proceedings,
- (2) unlawfully interferes or attempts to interfere with a judicial officer or other officer of the court at judicial proceedings in a manner not mentioned in subsection (1),

to act or not to act in a way that might influence the outcome of the proceedings

is guilty of an offence ...

Concealing offences

5. Any person who –
- (1) where any other person has committed an offence (either at common law or at statutory law), or knowing or believing him or her to be guilty of the offence, and that he or she has information which might be of material assistance in securing the prosecution or conviction of an offender for it, unlawfully does any act with intent to impede his or her apprehension or prosecution;
 - (2) asks, receives, or obtains, or agrees to receive or obtain, any property or benefit of any kind for himself or herself or any other person, upon any agreement or understanding that he will conceal any offence;
 - (3) offers, gives or agrees to offer or give, any property or benefit of any kind, to any person mentioned in ss (1), for the benefit of that person or any other person, upon any agreement or understanding that he will conceal any offence,

is guilty of an offence...

Attempts to obstruct or to defeat the course of justice or the due administration of the law

6. Any person who –
- (1) attempts to obstruct or to defeat the course of justice or the due administration of the law in a manner not otherwise dealt with in the preceding provisions of this Act,

is guilty of an offence ...

Fabricating evidence

7. Any person who –
- (1) with intent to mislead any person involved in any judicial or official proceedings,
 - (a) fabricates evidence by any means other than perjury or counselling or procuring the commission of perjury; or

(b) knowingly makes use of such fabricated evidence;

is guilty of an offence ...

Deceiving witnesses

8. Any person who –

(1) practices any fraud, deceit, or knowingly makes or exhibits any false statement, representation, token, or writing, to any person called or to be called as a witness in any judicial, or official proceeding, with intent to affect the testimony of such person as a witness,

is guilty of an offence...

Obstruction of justice administered by commissions of inquiry, boards of inquiry, inquiry by the National Assembly, National Council of Provinces, Municipal Council, etc.

9. Any person who –

(1) threatens or in any way punishes, damnifies or injures or attempts to do the above, to any other person for having given or being about to give evidence in future in official proceedings by –

- (a) a commission of inquiry;
- (b) a board of inquiry;
- (c) an investigation by National Assembly;
- (d) an investigation by the National Council of Provinces;
- (e) an investigation by the Municipal Council

is guilty of an offence...

Witness giving contradictory evidence

10. Any person who –
- (1) being a witness in a judicial or in official proceeding, gives evidence with respect to any matter of fact or knowledge and who subsequently, in a judicial or official proceeding or tribunal, unlawfully and intentionally gives evidence that is contrary to his previous evidence,
- is guilty of an offence ...

Conspiracy to a bring false accusation

11. Any person who –
- (1) conspires with another person to bring false charges against an innocent person while knowing that the person is innocent
- is a guilty of an offence...

Conspiracy to defeat justice

12. Any person who –
- (1) conspires with another person with intent to defeat or obstruct the course of justice,
- is guilty of an offence...

Interference with evidence

13. Anyone who –
- (1) unlawfully and intentionally destroys, mutilates or conceals, or fabricates

a record, document or other object or attempts to do so, with intent to impair the object's integrity or availability for use in judicial or official proceedings, or;

- (2) with intent to mislead during judicial or official proceeding, unlawfully uses or attempts to use a record mentioned in ss (1),

is guilty of an offence...

Refusal to give or allow the taking of a blood sample

14. Anyone who—

- (1) with intent to defeat or obstruct the course of justice, unlawfully and intentionally refuses to allow any medical officer of any prison or a district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse to take his blood sample as required by the provisions of section 37(2) of the Criminal Procedure Act 51 of 1977,

is guilty of an offence...

Persuading another person to plead guilty to a crime

15 Any person who –

- (1) in order to protect the main perpetrator of the crime, improperly persuades another person to plead guilty to a crime,

is guilty of an offence ...

Obtaining bail with improper means

- 16 Any person who –
- (1) with intent to defeat or obstruct the course of justice, improperly attempts to obtain bail for himself or herself or any other person
- is guilty of an offence ...

Persuading a victim not to report an incident to the relevant authorities or not to prosecute his or her assailant

17. Any person who –
- (1) with intent to defeat or obstruct the course of justice, improperly persuades any victim of crime or any other person,
 - (a) not to report the incident to the relevant authorities, or;
 - (b) not to prosecute his or her assailant,
- is guilty of an offence ...

Pleading guilty to a crime committed by another person

18. Any person who –
- (1) with intent to protect a person, pleads guilty to an offence committed by another person, or
 - (2) with intent to protect another person, persuades another person to plead guilty to an offence committed by that person
- is guilty of an offence ...

Defeating or obstructing the due administration of justice

19. Any person who –
- (1) performs an act whereby he unlawfully and intentionally obstructs or defeats the due administration of justice, or
 - (2) omits to perform an act in circumstances in which there is a legal duty upon him to perform a positive act, whereby he unlawfully and intentionally obstructs or defeats the due administration of justice
- is guilty of an offence ...

Wasting police time

20. Any person who –

(1) with intent to mislead, causes the police to enter on or continue an investigation by

- (a) making a false statement that accuses some other person of having committed an offence;
- (b) doing anything that is intended to cause some other person to be suspected of having committed an offence that he or she has not committed, or to divert suspicion from himself or herself;
- (c) reporting that an offence has been committed when it has not been committed; or
- (d) reporting or in any other way making it known or causing it to be made known that he or she or some other person has died when he or she or that other person has not died,

is guilty of an offence...

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