SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fingleton* [2003] QCA 266
PARTIES:	**R** **v** **FINGLETON, Diane McGrath** (applicant/appellant)
FILE NO/S:	CA No 177 of 2003 SC No 145 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2003
JUDGES:	McPherson, Davies and Williams JJA Judgment of the Court
ORDERS:	**1. Appeal against conviction dismissed** **2. Appeal against sentence allowed to the extent of varying the sentence by suspending it for an operational period of two years after the appellant has served six months of the term imposed**
CATCHWORDS:	CRIMINAL LAW - PARTICULAR OFFENCES - OFFENCE RELATING TO ADMINISTRATION OF JUSTICE - INTERFERENCE WITH WITNESSES - s 119B *Criminal Code* 1899 (Qld) - threat made to remove Co-ordinating Magistrate from position - whether threat made "without reasonable cause" CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - CIRCUMSTANCES OF OFFENDER - accused in prominent position - whether first offence makes accused immune from imprisonment - whether disgrace of conviction, loss of position and career adequately considered by primary judge - whether realistic prospect of re-offending *Acts Interpretation Act* 1954 (Qld), s 25(1)(b)(i) *Criminal Code* 1899 (Qld), s 119B, s 415(2) *Magistrates Act* 1991 (Qld), s 10(1), s 10(2)(d), s 10(8)

Whistleblowers Protection Act 1994 (Qld), s 20, s 23
Crimes Act 1900 (NSW), s 326
Criminal Justice and Public Order Act 1995 (UK), s 51(2)
Larceny Act 1916 (UK), s 29(1)(i)

Attorney-General v Butterworth [1963] 1 QB 696, referred to
R v Del Piano (1990) 45 A Crim R 199, considered
MFA v The Queen (2002) 77 ALJR 139, referred to
R v Johnson and Edwards [1981] Qd R 440, applied
R v Lionel Murphy; unreported, CCA (NSW) nos 340 and 245 of 1985, 28 November 1985, considered
Thorne v Motor Trade Association [1937] AC 797, applied

COUNSEL: R V Hanson QC, with A J MacSporran, for the appellant
M J Copley for the respondent

SOLICITORS: Patrick Murphy Solicitors for the appellant
Director of Public Prosecutions (Queensland) for the respondent

SUMMARY STATEMENT

(1) It is convenient to state shortly the effect of the reasons for judgment of this Court.

Appeal against conviction

(2) The appellant was convicted by a jury of eight women and four men of threatening, without reasonable cause, to cause detriment to a witness in retaliation for that witness having lawfully given evidence in a judicial proceeding: *Criminal Code* s 119B.

(3) The powers of this Court to set aside a verdict of guilty reached by a jury on admissible evidence after a proper summing up are strictly limited. That was this case, for there were no objections in this Court to the admissibility of evidence at the trial and no complaints about the summing up of the learned trial judge.

(4) The sole ground argued for doing so was that no reasonable jury could have found beyond reasonable doubt an absence of the reasonable cause referred to in (2). It was accepted that no challenge could be made to the jury's finding that the appellant threatened Mr Gribbin with demotion in retaliation for his having lawfully given evidence in a judicial proceeding.

(5) The appellant contended that the cause of her threat to retaliate in this way was a reasonable belief that they could no longer work together satisfactorily. However the members of this Court have satisfied themselves that, on the evidence, it was objectively open to the jury to decide that the appellant acted as she did with a view to punishing Mr Gribbin for giving evidence rather than with a view to resolving any difficulty supposed to exist between them of working together.

(6) The other elements of the charge having been conceded, it follows that it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of the above charge and that the appeal against conviction must be dismissed.

Sentence

(7) The offence of which the appellant has been convicted is, in summary, of threatening harm to a witness because he gave evidence in a judicial proceeding. That is a very serious offence.

(8) Unless witnesses can feel confident that they will not be victimized for giving evidence freely and voluntarily, many will not be prepared to do so and the ends of justice will be defeated. In this case the threat to Mr Gribbin might have deterred others from giving evidence for Ms Thacker in her judicial proceeding against the appellant.

(9) The offence is even more serious in this case because it was committed by a judicial officer whose duty it is to uphold the law and, indeed, to protect witnesses against conduct of the kind of which she is guilty.

(10) No doubt because of that, the appellant did not challenge the head sentence of 12 months imprisonment. Rather she contended that it should have been wholly suspended, substantially because of the extent to which she will suffer in consequence of the conviction quite apart from the sentence.

(11) We think that that, together with the facts that, absent an order for suspension, she will be required to serve eight months of her sentence, that she is serving it in protective custody and that she is unlikely to re-offend ought to have resulted in a partial suspension of her sentence. But because of the seriousness of the offending conduct we think his Honour was correct in requiring an actual period of custody to be served.

The effect of this statement

(12) This statement is published for convenience only and is not intended to provide a complete or authoritative exposition of the effect of the Court's decision, which must be gathered from the reasons for judgment of the Court.

Orders

1. Appeal against conviction dismissed.
2. Appeal against sentence allowed to the extent of varying the sentence by suspending it for an operational period of two years after the appellant has served six months of the term imposed.

[1] **JUDGMENT OF THE COURT:** The appellant, who is the Chief Magistrate, was found guilty in the Supreme Court by a jury of eight women and four men of an offence under s 119B of the Criminal Code of retaliating against a witness in judicial proceedings. The witness in question was a fellow magistrate, Mr Basil Gribbin, who is the Co-ordinating Magistrate at Beenleigh. The verdict against the appellant made it unnecessary for the jury to consider an alternative charge under s 140 of the Code of attempting to pervert the course of justice. She was sentenced to imprisonment for 12 months and now appeals against her conviction and applies for leave to appeal against sentence.

[2] Section 119B is in the following terms:

> "**Retaliation against judicial officer, juror, witness or family**
> A person who, without reasonable cause, causes, or threatens to cause, any injury or detriment to a judicial officer, juror, witness or a

> member of the family of a judicial officer, juror or witness in retaliation because of -
> (a) anything lawfully done by the judicial officer as a judicial officer; or
> (b) anything lawfully done by the juror or witness in any judicial proceeding;
> is guilty of a crime.
> Maximum penalty - 7 years imprisonment".

The expression "judicial proceeding" is defined in s 119 as including any proceeding before a tribunal in which evidence may be taken on oath. It therefore includes a proceeding before the judicial committee established by Part 4 of the *Magistrates Act* 1991, to which Mr Gribbin had on or about 12 August 2002 provided an affidavit in support of an application by another magistrate Ms Anne Thacker for the review of a decision of the Chief Magistrate.

[3] Section 119B was introduced in the Criminal Code of Queensland by an amending Act (No 23 of 2002) which took effect on 19 July 2002 some two months before the events giving rise to the prosecution of the appellant in this case. Its legislative model was a similar but not quite identical provision in s 326 of the *Crimes Act* 1900 of New South Wales introduced by the *Crimes Act Amendment Act* of 1995. Both statutory provisions may perhaps owe something to s 51(2) of the *Criminal Justice and Public Order Act* 1995 (UK), the terms of which are set out in §11-137 of *Arlidge Eady & Smith on Contempt* (2nd ed), at 674.

[4] Before those enactments, conduct of the kind referred to in these statutory provisions was dealt with by exercising powers to punish for contempt of court, which extends to cases of intimidating potential witnesses as well as threatening those who have already given evidence. See *Attorney-General v Butterworth* [1963] 1 QB 696; *Morris v Wellington City Corporation* [1969] NZLR 1038. Because contempt proceedings are available only in respect of courts of record in the strict sense, the British Parliament long ago passed the Witnesses (Public Inquiries) Protection Act 1892, making it an offence to punish a witness for having given evidence at any inquiry held pursuant to a statutory authority (ss 1, 2). See C J Miller, *Contempt of Court* (1976), at 197-198. That Act may be the source of some of the language used in parts of the provisions of all of these statutes.

[5] With this legislative history in mind, we turn to the facts that gave rise to the prosecution in the case under appeal. Stated very briefly, they are that on 18 September 2002, the appellant as Chief Magistrate sent an email (ex 2) to Mr Gribbin at Beenleigh. The position of Co-ordinating Magistrate which he occupied is provided for in s 10(2)(d) of the *Magistrates Act* "for the purpose of the allocation of work of the Magistrates Court". The power of appointment or nomination to that position is by the same provision vested in the Chief Magistrate who, by virtue of s 25(1)(b)(i) of the *Acts Interpretation Act* 1954, also has the power to remove a person so appointed. At the time in question some ten Co-ordinating Magistrates had been appointed in various parts of Queensland. They met in conference with the Chief Magistrate twice a year. There was a statement of their functions (ex 4), which she had prepared and circulated. Those functions went somewhat beyond the bare reference to allocation of work in s 10(2)(d); but some of the magistrates had served for many years, and the appellant, who had been appointed a magistrate from outside the service in 1995 and Chief Magistrate in

1999, was understandably interested in having the benefit of their experience and advice in carrying out her statutory responsibility of "ensuring the orderly and expeditious exercise of the jurisdiction and powers of the Magistrates Courts" under s 10(1) of the Act.

[6] Omitting the first two paragraphs of ex 2, which the appellant agreed in her evidence had not prompted her to send the show cause notice, and beginning at the third paragraph, the email sent to Mr Gribbin on 18 September 2002 was in the following terms:

> "3. Could you also explain to me why you sought fit to supply an affidavit in the matter of Ms Thacker's Review of my decision to transfer her to Townsville. You were critical in it of both Mr Deer and myself in relation to transfer matters. Is this a matter which you feel should be discussed by you in an affidavit before the Judicial Committee, when you have never raised it with me personally or at a Co-ordinating Magistrate's meeting?
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> 4. In the circumstances, I feel that I do not have your confidence in my leadership abilities. No other magistrate, certainly not a Co-ordinating Magistrate, has seen fit to enter into any such matters. In fact, in the matter of *Payne v Deer*, I specifically refused to supply an affidavit to Ms Payne's Solicitors because of the need to be seen not to be in dispute with the then Chief Magistrate.
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> 5. Further, you circulated all other Co-ordinating Magistrates (except Mr Hine and with no reference to myself), in relation to a proposed agenda item for the forthcoming Co-ordinating Magistrates meeting. The agenda is, in the end, a matter for my discretion, following consultation with the other Co-ordinating Magistrates. No-one put to me that such an item should not be on the agenda. I consider that action on your part again, to be disloyal to the leadership of the magistracy, and disruptive of the morale of the magistracy.
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> 6. The position of Co-ordinating Magistrate in the Queensland Magistracy is a privileged position. I regularly meet with all Co-ordinating Magistrates who give input into the administration of the courts. Whilst constructive criticism will always be appreciated, there must be loyalty to the Chief Magistrate. As stated, you sought to agitate a view about an item on the agenda for the meeting beginning tomorrow, without my knowledge.
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> 7. This and the other example I refer to above, manifest to me a clear lack of confidence by you in me as Chief Magistrate. In the circumstances, I ask you to show cause, within seven days, as to why you should remain in the position.

> 8. In the circumstances, it is not appropriate that you attend the Co-ordinating Magistrates meeting this Thursday and Friday at Central Courts."

[7] The numbering has been added. It will be seen in this numbered and slightly truncated form that paragraph 7 of the email ex 2 threatened Mr Gribbin with removal from the position of Co-ordinating Magistrate if he did not show cause within seven days why he should remain in that position. Such action amounted to a threat within the meaning of s 119B, and it would be a threat of a detriment within the section if that was what would result from his removal from that office. As to that, there was evidence that the position was one that carried an additional salary of $2,000 pa as well as a certain level of status and power, and what Mr Gribbin described as a degree of "job satisfaction". The appellant challenged the conclusion implicit in the verdict that the potential loss of those advantages amounted to a detriment, although without making it a ground of appeal as such. Several of the other Co-ordinating Magistrates gave evidence at the trial to the effect that the additional annual salary of $2,000 did not compensate for the extra work and responsibility involved; but none of them had chosen to resign from the position for that reason or otherwise, and, as the appellant herself said in ex 2, the position of Co-ordinating Magistrate "is a privileged position". On the evidence, the jury was justified in reaching the conclusion that the threat of removal made to Mr Gribbin involved a threat of a detriment within the terms of s 119B that was not merely trifling.

[8] The email ex 2 identifies two matters of complaint (referred to in para 7 as "this and the other example") against Mr Gribbin. The first (paras 3 and 4) is his having supplied an affidavit in the matter of Ms Thacker's application to review the Chief Magistrate's decision to transfer her to Townville. The second (paras 5 and 6) is described as the "proposed agenda item". In the exercise of her power under s 10(2)(a) of the Act, the Chief Magistrate had determined that Ms Thacker serve as a Magistrate in Townsville. For personal reasons of family and the like, this at the time presented difficulties for Ms Thacker, and she exercised the right conferred by Part 4 of the *Magistrates Act* to have the determination reviewed by the judicial committee established by s 10A. For the purpose of that application, Mr Gribbin on 12 August 2002 provided an affidavit to Ms Thacker's solicitors a copy of which was received by the appellant on 16 August 2002. When this affidavit was given or filed in those review proceedings Mr Gribbin became a witness in a judicial proceeding within s 119 and s 119B of the Code. Because by their verdict the jury must necessarily also have found that the appellant's threat to cause him detriment by removing him from the position of Co-ordinating Magistrate was done in retaliation for (or, as s 119B has it, "in retaliation because of") his having become a witness, evidence of the offence was complete apart from proof of the requirement that it be "without reasonable cause". The element of retaliation was not in issue on the appeal.

[9] The sole ground of the appeal against conviction is that no reasonable jury could have found beyond reasonable doubt an absence of reasonable cause for the appellant's threat to remove Mr Gribbin. The requirement in s 119B that threatening the witness with detriment be without reasonable cause is not an element of the offence in s 326 of the New South Wales *Crimes Act*. In Queensland it appears to have been carried into s 119B from s 415(2) of the Code defining the crime of extortion, or "blackmail", by reference to a demand with threats to provide

something "without reasonable or probable cause". A similar form of words appeared in s 29(1)(i) of the *Larceny Act* 1916 in England. In *Thorne v Motor Trade Association* [1937] AC 797, 817, Lord Wright thought that the words "or probable" added nothing beyond what is meant by "reasonable" cause standing on its own; which may be why in Queensland the section was enacted in the form in which it stands in s 119B. In *R v Johnson and Edwards* [1981] Qd R 440, 446, Dunn J said that in a prosecution under s 415 it was for the defence to raise the question of reasonable and probable cause; but once it was made an issue, it was for the prosecution to negative the existence of that cause.

[10] That ruling was followed in the present case. In directing the jury and having enumerated other elements of the offence that were in issue at the trial, his Honour said:

> "Fourthly, the Crown must prove beyond reasonable doubt that the accused made the threat without reasonable cause. You have heard evidence of a difficulty presented by an apparent inability of a Co-ordinating Magistrate and the Chief Magistrate to work harmoniously and constructively together in performing their respective functions. That difficulty could constitute reasonable cause for the Chief Magistrate to call upon the Co-ordinating Magistrate to show cause why the Co-ordinating Magistrate should remain as a Co-ordinating Magistrate. But whether such a difficulty would be a reasonable cause for the accused's sending the e-mail that has led to the charges before you when she did, and in the circumstances then existing, is for you to determine. Remember that such a cause must be reasonable. Please also remember that, in the end, the Crown must prove absence of reasonable cause. The Crown must prove absence of reasonable cause beyond reasonable doubt."

[11] There was some debate on appeal about the scope and potential content of the expression "reasonable cause". Because it is an element of the offence under s 119B, proof of its absence must involve something more than establishing that the offender retaliated against the witness, which is itself an element of the offence. The requirement that the threat be without reasonable cause may be there to cater for a case in which a witness deliberately gives false evidence to a court or tribunal. There would or might then be reasonable cause for threatening a detriment; for example, by dismissing an employee who has given such evidence. The British Act of 1892 specifically withdrew protection from a witness whose evidence is given "in bad faith". On the authority of what was said in *Thorne v Motor Trade Association*, Mr Hanson QC for the appellant submitted that there might be commercial or, he added, administrative reasons for threatening a witness with a dismissal or other detriment. Here the appellant, it was urged, had reason to consider that the "working relationship" between her and Mr Gribbin had broken down, and so had reasonable cause for threatening Mr Gribbin with removal from the position of Co-ordinating Magistrate. The Chief Magistrate made this point in the email ex 2 when she said that she did not feel she had his confidence in her "leadership abilities" (paras 4, 7) and that "there must be loyalty to the Chief Magistrate".

[12] The prosecution case at the trial was that the appellant's claim that in sending the email she was acting to resolve a breakdown in their working relationship was a contrivance designed to conceal her true purpose, which was to "pay back" or exact

retribution from Mr Gribbin for having provided the affidavit in the Thacker application. The learned trial judge in the passage of the summing up that has been set out earlier in these reasons presented the jury with these two competing views of the evidence and did so fairly and distinctly. No challenge to the judge's directions has been made on appeal. His Honour first said that the inability of a Co-ordinating Magistrate and the Chief Magistrate to work harmoniously and constructively together in performing their respective functions could constitute reasonable cause for the Chief Magistrate to call upon the former to show cause why he should remain as a Co-ordinating Magistrate. Then, evidently referring to the prosecution case, he said it was nevertheless for the jury to determine whether such a difficulty would be a reasonable cause for the appellant's sending the email ex 2 "when she did, and in the circumstances then existing".

[13] Later in his summing up, the trial judge referred in greater detail to the address of Ms Cunneen of counsel for the Crown, in which she commented adversely on the appellant's credibility, and submitted to the jury that the appellant had wanted to humiliate Mr Gribbin for providing the affidavit "as a payback, as a punishment". In doing so, his Honour referred to a particular exchange that had taken place between Mr Gribbin and the appellant on the morning of 19 September 2002, which was after ex 2 was sent, as showing that she was a "vengeful person". His Honour then dealt in some detail with the submissions at trial of Mr Hanson QC, which related among other things to the appellant's receipt of Mr Gribbin's affidavit on 16 August 2002 and her action in despatching the email ex 2 on 18 September 2002. There was no request for any redirection on these or other matters in the summing up. The jury retired at 11.11 am on 4 June 2003 and returned their verdict at 3.43 pm on what was by then the fourth day of the trial.

[14] The powers of this Court to set aside a verdict of guilty reached by a jury on admissible evidence after a proper summing up at trial are strictly limited. The sole ground urged for doing so here is that no reasonable jury could have found beyond reasonable doubt an absence of reasonable cause under s 119B. In support of the appeal, Mr Hanson's written outlines of submissions make the following specific points. First, (a) that under s 10(2)(d) of the *Magistrates Act* the Chief Magistrate had the power of appointment and removal, and that the threatened removal involved no excess of power. But this assumes that her threat to exercise the power of removal was for a proper purpose. If instead it was for the purpose of punishing Mr Gribbin or paying him back for providing the affidavit, the exercise of that power, or the threat to do so, would, as Mr Hanson QC conceded, not have been authorised by s 10(2)(d). Whether or not that was so was implicit in the question, which was one of fact, that it fell to the jury to determine concerning the absence of reasonable cause.

[15] The second point (b) was that the detriment threatened by his removal was minimal. This has already been referred to. The notion that, by threatening Mr Gribbin with removal from the position of Co-ordinating Magistrate, the Chief Magistrate was really doing him a favour was not suggested, and is inconsistent with the finding that it was done in retaliation. Mr Gribbin was never asked if he wished to relinquish the position because of its supposed disadvantages and it is implicit in his conduct and his evidence that he had no wish to do so.

[16] Point (c) of the written outline is a collocation of several different items relied on to show there was reasonable cause for the appellant's threat, or that the jury should at

least have entertained a reasonable doubt about that matter. There had, it was said, been a history of animosity between the appellant and Mr Gribbin. He had come up through the old public service system, starting as a clerk or as a clerk of court, which was changed by the *Magistrates Act* in 1991; she was an "outside" appointment from the profession, and was quickly promoted to Chief Magistrate over him and others like him. However, the jury had the advantage of seeing Mr Gribbin cross-examined about these matters, and may have felt they were not a significant factor in bringing about what happened much later on. It was very much a matter of credibility which it was for them to determine. Likewise, Mr Gribbin's participation as only one of the eight-member committee of the Magistrates Association, which in October 2001 sent a letter to the Attorney-General representing that the Chief Magistrate's power of reprimand under s 10(8) of the Act should be abrogated, may well have been regarded by the jury as not amounting or even contributing to cause the sending of the email ex 2 in September of the following year. Mr Gribbin did not draft the letter but was simply a member of the committee that resolved to send it. The Association, of which the appellant was a member before becoming Chief Magistrate, has among its objects safeguarding the interests of magistrates.

[17] Then there was the "agenda item", which is the second of the two matters referred to in the email ex 2, at paragraphs 5 and 6. One of the twice-yearly meetings of Co-ordinating Magistrates was due to start on the morning of 19 September 2002. The agenda prepared and circulated by the appellant before the meeting contained an item identified as the "role of the Association". On 9 September 2002 Mr Gribbin, who was by then Vice-President of the Magistrates Association, wrote to other Co-ordinating Magistrates (all but one of whom was an Association member) recommending that they oppose any move to discuss the role of the Association at the meeting. He did not send a copy of the letter to the Chief Magistrate, who by then had ceased to be a member, nor to the Deputy Chief Magistrate Mr Hine, in the latter case because he expected the letter would be passed on to her. No doubt this might be seen as a form of "caucussing"; but, objectively speaking, it is quite possible to conceive of reasons why Association members might have found it embarrassing in the presence of the Chief Magistrate to discuss or adopt an attitude towards the role of the Association that was in conflict with their continuing membership of it. Mr Gribbin considered that the Co-ordinating Magistrates were not representative of the whole Association and could not properly speak at the meeting on their behalf.

[18] As it turned out, his concern proved to have been well founded. The appellant learned before the meeting of his recommendation to the other magistrates about the agenda item. She took the view that it was "a very serious matter to try to interfere with my agenda", and that it "undermined her authority". She sent the email ex 2 of 18 September, which, after requiring Mr Gribbin to show cause within seven days why he should not be removed, went on to inform him it was "not appropriate" that he attend the Co-ordinating Magistrates meeting to be held on the following day. Nonetheless he arrived at the meeting some time after it had begun. The appellant had by then informed the other magistrates at the meeting about the affidavit but did not give it to them to read. When Mr Gribbin came, he found the door locked. The appellant thereupon absented herself from the meeting, and went out shutting the door behind her. She then had a conversation or confrontation with Mr Gribbin in which she confirmed he was excluded from the meeting and was to be removed from his position on the ground, according to his account of it, of his disloyalty to

her as Chief Magistrate. After that, he departed and went away to consult members of the Bar about the decision to remove him.

[19] In the appellant's written outlines of argument on appeal, these matters formed part of item (c). The remainder of it and item (d) of paragraph 22 of the outlines may be considered together. They concern the appellant's response to Mr Gribbin's affidavit in support of Magistrate Thacker's application for a review of the appellant's decision to transfer her to Townsville. The affidavit, which is ex 1, is some eight pages long and consists of 30 paragraphs. They contain a historical account of the policies concerning transfers which had been followed since Mr Gribbin first joined the service in 1964. Covering as Queensland does such a large area geographically and with a population which is more decentralised than in other States, transfers, not only of magistrates but at times of teachers, police and others have always posed problems. The account of it given by Mr Gribbin in the first 19 paragraphs of his affidavit is entirely historical and factual. In the ensuing paragraphs he referred to some "forced" transfers in the time of the appellant's predecessor Mr Deer CSM after 1991, two of which are identified by name, before turning in paragraphs 27 to 30 to the appellant's approach to the problem, which he described as "difficult to tie to a clear policy approach" and involving "many forced transfers". Some of them he said had "caused distress to individual magistrates" without, as he saw it, "any benefit to the Courts generally or the community where a magistrate has been forced to transfer to a centre". He concluded in paragraph 30 with the observation that the issue of transfers since 1991 had been a major contributing factor in the "alarming erosion" of the sense of collegiality in the Magistracy and the "increasing alienation" of successive Chief Magistrates from the position of being "first among equals", which he described as essential to the proper performance of the role of Chief Magistrate as head of the jurisdiction.

[20] It was this affidavit, or those paragraphs of it, that are described by the appellant in paragraph 3 of the email ex 2 as being critical of both "Mr Deer and myself". In evidence at the trial, she condemned them variously as being "offensive", "vicious criticism", and "a most grossly insulting opinion", as well as hurtful and unnecessary. It was not for the jury to pass on the merits or demerits of the appellant's transfer of Ms Thacker, which, as the trial judge explained, was a matter which the judicial committee constituted by three judges is charged with determining. The jury may, however, have thought that some of the appellant's responses to Mr Gribbin's criticisms in the affidavit were excessive and went some way to showing that, as the prosecution submitted, her action in issuing the show cause notice ex 2 was vindictive or actuated by vengeful feelings against Mr Gribbin. They might also have thought that, even if he had shown it to her before providing it to Ms Thacker's solicitors, the result would not have been very different. As it was, there were some constraints of time within which it had to be filed to support Ms Thacker's application to the judicial committee.

[21] In the end these were all matters for the jury, whose function it was to assess the weight to be given to various parts of the evidence before them. There was, it is true, evidence on either side that was capable of leading to a conclusion one way or the other. It was for the jury to determine, if they were able to do so, where the truth of these matters lay. The appellant's submission in this Court amounts to saying that the accumulation of evidence on her side was so overwhelming that the jury could have been left with no reasonable doubt about the absence of reasonable cause on her part for threatening Mr Gribbin with removal, and that no other conclusion was

fairly open to them. But that is far from being the case. Mr Hanson's submission on appeal focussed on the evidence in the appellant's favour and he naturally said little in his submissions about the prosecution evidence against her.

[22] The members of the Court have of course read the record, in conjunction with the Crown's outline on the appeal, and have satisfied themselves that on the evidence it was objectively open to the jury to decide that the appellant acted as she did with a view to punishing Mr Gribbin rather than resolving any difficulty supposed to exist between them of working together in performing their respective functions. Cancelling the meeting with Magistrates Pascoe and Gribbin that was to have been held on 17 August, not speaking to Mr Gribbin at the function on that day, and the reference to "punching Basil's lights out" could collectively have been regarded by the jury as indicating such anger as would tend to support the conclusion that the later conduct in sending the email was done without reasonable cause. The fluctuation in the appellant's recall of such events could have confirmed that conclusion in the minds of the jury. Further, what was said by the appellant in the conversation with Searles on 9 September, and the fact that she took a draft letter to their meeting on 27 September dismissing Mr Gribbin without calling on him to show cause could also have influenced the thinking of the jury on the issues of motive and reasonable cause. The jury were, on the evidence which they saw and heard being given at the trial, reasonably entitled to conclude that the prosecution had proved the absence of reasonable cause and had done so beyond reasonable doubt. Expressed in another way, it was reasonably open to the jury on the evidence before them to be satisfied beyond reasonable doubt of the appellant's guilt of the charge against her under s 119B. See *MFA v The Queen* (2002) 77 ALJR 139, 146, 150. As was said there by McHugh, Gummow and Kirby JJ (77 ALJR 139 §96), "Experience suggests that juries, properly instructed on the law … are usually well able to evaluate conflicts and imperfections of evidence". If it is necessary to say so, we feel no reasonable doubt about the appellant's guilt to which the jury ought have given effect in reaching their verdict.

[23] It follows that in our opinion the appeal against conviction should be dismissed.

[24] The application for leave to appeal against the sentence of imprisonment for 12 months is based on the ground that in all the circumstances it is excessive. The appellant's submission is that the sentence should have been wholly suspended.

[25] There is no doubt about the seriousness of the offence. The maximum penalty provided for committing it is imprisonment for seven years. It was said that, although by its nature the offence is serious, the facts of this particular case place this instance of it at the lower end of the range of offences of its kind; that the detriment threatened was not great; and that it amounted at most to an error of judgment rather than more serious misconduct.

[26] We are unable to accept these submissions or to do so without considerable qualification. Threatening a witness, whatever means is used, for giving evidence has always been regarded as serious because of its potential to deter the witness in question, as well as others, from giving evidence before courts and tribunals, which is central to the way in which justice is administered. This is why such conduct has been punished as a criminal contempt of court, and why s 119B and corresponding legislation elsewhere now has been enacted making it an indictable offence. Unless witnesses retain confidence that they will not be victimised or penalised for giving

evidence freely and voluntarily many of them will not be prepared to do so, and the ends of justice will be defeated. It is for somewhat similar reasons that legislation such as s 20 and s 23 of the *Whistleblowers Protection Act* 1994 has been enacted.

[27] Mr Gribbin was a target of conduct of this kind, which might in fact have deterred others from giving evidence in support of Ms Thacker's application to the judicial committee for review of the appellant's determination in her case or in other such applications in future. It is said that the detriment he was likely to sustain was not great; but, to be forced to undergo public or professional humiliation associated with demotion from office for conduct that is protected by law is something to which no one is or ought to be obliged to submit. To say that the appellant's action here evidenced at most an error of judgment is to overlook the findings implicit in the jury verdict that the threat was made without reasonable cause and in retaliation for something lawfully done by Mr Gribbin as a witness in a judicial proceeding. Deterrence is obviously a prominent consideration in sentencing for offences under s 119B.

[28] The offence in this instance is, as the appellant's written outline acknowledges, exacerbated by the senior position which she holds in the judicial system. The offence is even more serious in this case because it was committed by a judicial officer whose duty it is to uphold the law and, indeed, to protect witnesses against conduct of this kind. The public must be entitled to rely on the integrity of its judicial officers. The only example of a sentence imposed on a judicial officer for a somewhat similar offence in relatively recent times is *R v Lionel Murphy* (CCA (NSW) 340 of 1985 and 245 of 1985). The offender, who was a justice of the High Court, was sentenced to 18 months imprisonment, but with an order for his release after entering into a recognizance after serving 10 months of the sentence. The conviction in that case (which was later set aside on appeal) was for attempting to pervert the course of justice in judicial proceedings, which was the alternative charge against the appellant here. See also *Del Piano* (1990) 45 A Crim R 199, 210, which concerned a similar offence by a solicitor, where the sentence of 12 months was made cumulative on sentences for other offences partly because the offender had acted in breach of his duty to the court.

[29] More generally, those occupying prominent positions in public life who commit serious offences that are facilitated by abusing the powers and the trust confided in them should not expect to escape lightly. The pattern of sentencing in such cases tends to bear this out. In 1996, in *R v Leisha Harvey*, *R v Donald Lane* and *R v Brian Austin,* sentences of imprisonment ranging from 12 to 15 months were imposed on Ministers of the Crown for using their official credit cards for private purposes by misappropriating many often relatively small amounts varying in total respectively from about $6,000 to $12,000 and $13,000 or more. In the latter case, if not in the other two as well, restitution to the State was also ordered.

[30] In none of these matters had the offender any previous record of offending. Each of them had a record of public service in the past. Harvey, Lane and Austin lost the high offices which they enjoyed and their salaries and political careers were brought to an abrupt end. Justice Murphy would have suffered a comparable fate had he not been acquitted at his second trial. The offence of which he was originally convicted for which he was sentenced bears some resemblance to the appellant's crime in the present case. Both offences have a tendency to interfere with the administration of justice. In none of these instances was the offender regarded as immune from a

period of actual imprisonment because it was a first offence. Indeed, it is a fair inference that the prominent positions they occupied when their offences were committed contributed to the decisions to impose custodial sentences.

[31] The appellant is in a similar position. At sentencing she was 56 years old. She had had a hitherto unblemished record in the course of which she successfully overcame various adversities to reach the office of Chief Magistrate. The offence which she committed against s 119B is made more serious in her case because, much more than others, it was her duty to protect witnesses against conduct of this kind. Nevertheless, and quite apart from the punishment imposed by the sentence itself, she has suffered and will continue to suffer greatly as a result of her offending conduct. In addition to the disgrace of her conviction, she cannot expect to retain her position in the Magistracy; and, as was acknowledged by her counsel, her career in the law is now at an end. As a result, she will also sustain extensive disadvantages of a financial kind.

[32] It was submitted that, while not challenging the head sentence of twelve months imprisonment, the sentence should in these circumstances have been suspended altogether. A similar course was urged in the cases of *Harvey*, *Lane*, and *Austin*. It was rejected there partly because at that time those offenders had the prospect of being released on parole after serving half of the full term of their sentences, which in the case of the first two of them would have resulted in their release after they had served six months. Under the statutory regime that now prevails, it will be eight months before the appellant is considered for release in that way. She is, we were informed, being kept in protective custody, which increases the hardship upon her in prison. In addition, we are satisfied that there is no realistic prospect that she will offend again.

[33] We are persuaded that some of these circumstances may not have been accorded sufficient weight in imposing the sentence in this matter. We nevertheless consider that, consistently with the other sentences which have been referred to, a period of imprisonment cannot be avoided in this case. In the result, we would vary the sentence imposed on the appellant by suspending it for an operational period of two years after she has served six months of the term of imprisonment. There will be leave to appeal accordingly and the appeal against sentence will to that extent be allowed.

Orders:

1. *Appeal against conviction dismissed.*
2. *Appeal against sentence allowed to the extent of varying the sentence by suspending it for an operational period of two years after the appellant has served six months of the term imposed.*