SUPREME COURT OF QUEENSLAND

CITATION:	*R v Harnden* [2003] QCA 340
PARTIES:	**R** **v** **HARNDEN, Christopher John** (appellant)
FILE NO/S:	CA No 436 of 2002 DC No 281 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Maryborough
DELIVERED ON:	8 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	22 April 2003
JUDGES:	McMurdo P, Williams JA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Appeal against conviction dismissed** **Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE – OTHER OFFENCES - where appellant convicted of attempting to pervert the course of justice – whether police unfairly delayed in charging the appellant with the offence – whether two witnesses collaborated statements - whether conviction unsafe and unsatisfactory and not according to law CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES - where evidence by witness inconsistent with statement - whether learned primary judge misdirected the jury as to the onus of proof CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – where appellant sentenced to 2 years imprisonment – where offence occurred when appellant on bail – where sentence ordered to be served concurrently with an earlier sentence which concerned separate and distinct offences – whether sentence manifestly excessive

Mackenzie v R (1996) 190 CLR 348, followed
MFA v The Queen (2002) 77 ALJR 139, followed
R v Morex Meat Australia Pty Ltd & Doube [1996] 1 Qd R 418, considered

COUNSEL: The appellant appeared on his own behalf
M J Copley for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The appellant was convicted in the Maryborough District Court on 4 December 2002 of attempting to pervert the course of justice and was sentenced to two years imprisonment. He appeals against that conviction on the ground that it is unsafe and unsatisfactory and not according to law and applies for leave to appeal against his sentence on the grounds that it is manifestly excessive in all the circumstances. He is self-represented and has made clear written submissions, which he has articulately expanded upon orally.

[2] The appellant was originally charged with three counts of attempting to pervert the course of justice at Hervey Bay, the first on 13 April 2002 and the second and third on a date unknown between 30 June 2002 and 1 August 2002. He was arraigned only on counts 1 and 3. The second count was subsequently the subject of a *nolle prosequi*. He was convicted on count 1 and found not guilty on count 3.

[3] It is necessary to review the evidence in order to deal with the arguments raised in the appeal. Ms Carolyn Frehmann gave evidence that on 13 April 2002 she was at the Bay Central Shopping Centre, Hervey Bay, with her friend Kate Harmon, when the appellant, her former partner, approached on a bicycle. Ms Frehmann was to give evidence in a criminal case brought against the appellant involving a complainant, Debbie. The appellant said: "I heard that you've made a statement against me." She said, "Oh, I've given a statement." He enquired, "Why?" She replied, "Well, you did the wrong thing." He said, "Well, why did you do that to me?". He said that if she had made a statement against him and he went to jail over it, he would hunt her down and come out and shoot her. He kept saying that Debbie was "full of shit" and that Ms Frehmann should not listen to Debbie because she was filling Ms Frehmann's head full of rubbish and trying to turn her against him. Ms Frehmann said, "he basically just more or less threatened that if I sent – if my statement was given and I sent him to jail that he would hunt me down and more or less shoot me or kill me, or whatever." After a brief adjournment, she added that, following a period of calm conversation in which the appellant insisted that he had done nothing wrong to Debbie, the appellant asked her if she was willing to retract her statement. He then said, "If you don't retract your statement and if I go to jail … if I go to jail, I will come out – I will hunt you down and I will shoot you." The appellant then attempted to console her and she told him she would retract her statement.

[4] Kate Harmon gave evidence that the appellant approached Ms Frehmann and spoke to her. Although she was removed from them she could hear the conversation. He became "really aggressive and he wanted her to drop what was going on, to drop

statements – witness statement. Then Carolyn got really upset, and then he got really lovey-dovey – 'oh, I love you. I don't want to do this to you.' The conversation was sometimes calm but from time to time the appellant became more aggressive. She saw the appellant raise his arm as if to hit Ms Frehmann and he threw tobacco at her which reflected off her, onto the car and then the ground. Ms Harmon started to walk towards them. She and Carolyn walked back to the shopping centre. The appellant then said, "Make sure, Kate, that you get her to go to the police station and drop the fucking witness statement." He added, "Well, if I go to jail I'll fucking hunt you down and blow your fucking head off." In cross-examination Ms Harmon agreed that this last statement had not been included in her written statement to police although she told the police about it.

[5] The prosecution relied on the evidence of Ms Frehmann and Ms Harmon to establish count 1.

[6] Mr Hutton gave evidence that on 31 July 2002 he visited a friend at the Palms Caravan Park and as he was leaving the appellant approached him. Mr Hutton said, "I'm not supposed to be talking to you. Just keep away from me." The appellant said, "There's no witnesses around here. There's nobody to prove nothing." He said he wanted Hutton to go to the police station and retract his statement about the incident at Debbie's place. The appellant seemed nervous and said that if he did not do so he would have Hutton's cars burnt out. The prosecution relied on this evidence to establish count 3.

[7] The appellant gave evidence that he was not well disposed towards Hutton because he knew that Hutton was a drug dealer who had sold drugs to the appellant's new partner, Jacqueline Heffernan, a single mother. The appellant said he was not a drug user and did not like people to push drugs onto others who could not afford them. He saw Mr Hutton on 31 July 2002 at the caravan park but did not threaten him, ask him to retract any statements or even speak to him.

[8] He spoke to Ms Frehmann, his former fiancé, on 13 April 2002. By that time he had formed a new relationship with Ms Heffernan but he asked Ms Frehmann about her life and they had a friendly conversation. He did not ask her to retract her statement or threaten her.

[9] Jacqueline Heffernan gave evidence that she spent 31 July with the appellant at the caravan park, and, although she saw Mr Hutton drive past them, the appellant did not speak to him. On 13 April she went with the appellant to the Bay Central Shopping Centre and she saw the appellant speak to Ms Frehmann. They were two or three car lengths from her and she could not hear what they were saying.

[10] No police officers gave evidence in the case.

[11] The appellant claims the police unfairly delayed in charging him with this offence. It is not clear from the record when the appellant was charged but as the offence occurred in April 2002 and his trial took place in December 2002 the delay cannot have been great. The contention is not established and, in any case, provides no reason here to overturn the jury verdict.

[12] The appellant claims the case was based on weak evidence and particularly emphasises that the evidence of Ms Harmon, should not have been accepted. He is critical of the way in which her statement was taken by police and claims the police

acted improperly. I can find nothing in the transcript to justify that claim. Ms Harmon said that everything in her statement to police was accurate and that she had not read Ms Frehmann's statement before making her own statement to police. She also maintained that she had a clear recollection of the words said by the appellant to Ms Frehmann on 13 April 2002. This contention is without substance.

[13] The appellant next emphasised that in cross-examination Ms Harmon agreed she did not put in her police statement that the appellant had said to Ms Frehmann, "if I go to jail I'll blow your fucking head off". She said she told the police officer this; the police made notes and later produced a statement for her to sign which did not contain those words. Ms Harmon was nevertheless adamant that the appellant said those words. The appellant contends that this establishes Ms Harmon and Ms Frehmann have since collaborated as to Ms Harmon's evidence, which is untruthful on this point. The issue was canvassed extensively by the appellant's experienced defence barrister at trial. The learned primary judge referred to this part of Ms Harmon's evidence in his charge to the jury. The jury were entitled to accept Ms Harmon's explanation as to why the matter was not in her statement to police and to accept her evidence that the appellant said these words to Ms Frehmann. Indeed, they could have convicted him on the basis of Ms Frehmann's evidence alone. This contention is without substance.

[14] The appellant submits that if the jury accepted Ms Harmon's evidence, then the failure of the police officer to include in Ms Harmon's statement the damning words set out earlier, requires a referral of the police officer's conduct to the Crime and Misconduct Commission or the Commissioner of Police. The police officer who took her statement did not give evidence. It is impossible to know precisely what the jury made of Ms Harmon's evidence. On the material before this Court, there is nothing to justify any referral of the police officer's conduct to a higher authority.

[15] The appellant next contends that the learned primary judge misdirected the jury "on the onus of proof, of inconsistent statements and a miscarriage of Justice was established and convictions were set aside when a trial Judge omitted to give direction concerning an essential element in the offence charged". This contention is not easy to understand, but the appellant has referred us to a passage of the summing-up when the judge was addressing the inconsistent statements of witnesses, including Harmon, which the appellant claims supports that contention:

> "How should you approach that, if you think that a witness is being inconsistent in what they say? Well, ladies and gentlemen, it is, I think, probably just a matter of ordinary commonsense. If I tell you one thing today and I tell you a different thing tomorrow, then you will start to wonder whether you can believe anything that I say. It obviously affects one's credibility. So one obvious explanation, if you think that a witness has been inconsistent, is that they are lying; that they are not telling the truth; and that the explanation for the inconsistency is that they simply have forgotten the last lie they told. That can be one explanation."

[16] This portion of the summing-up was favourable to the appellant and no fair complaint can be made of it. His Honour explained to the jury that inconsistent statements requires witness's evidence to be carefully scrutinised and could mean they are lying or unreliable. Elsewhere in the summing-up his Honour properly, clearly and adequately explained the onus of proof and the elements of the offence

of attempting to pervert the course of justice. This contention is also without substance.

[17] His Honour correctly told the jury that they could convict the appellant on one count and acquit on the other; they must look at each count separately and decide whether either was proved beyond reasonable doubt.

[18] The jury had the advantage of collectively observing the witnesses. It was open to them to reject the appellant's evidence on count 1 and to accept the evidence of Ms Frehmann and the supporting evidence of Ms Harmon on that count beyond reasonable doubt. It was also open to them to be left in doubt about the evidence of Mr Hutton on count 3; the appellant's evidence attacked Mr Hutton's character and to some extent Ms Heffernan's evidence supported the appellant's evidence that the conversation alleged to have taken place with Mr Hutton did not occur. The jury were entitled to accept part of the appellant's evidence, or at least be left in doubt as to count 3, whilst rejecting his evidence on count 1, which was contradicted by both Ms Harmon and Ms Frehmann. It follows that there was a rational explanation for the verdict of not guilty on count 3. Despite that not guilty verdict, on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of the guilt of the appellant on count 1.[1]

[19] The issues, the evidence, including a fair summation of the appellant's case, the elements of the charges and all relevant matters were carefully and fairly placed before the jury by the learned primary judge in his summing up. There was no application for redirections.

[20] On the whole of the evidence, the jury were entitled to be satisfied of the appellant's guilt on count 1 beyond reasonable doubt.[2]

The application for leave to appeal against sentence

[21] The applicant, who was 33 years old both when he committed the offence and at sentence, had a significant criminal history commencing as a juvenile in Victoria. These juvenile offences were largely for dishonesty and included multiple thefts and burglaries. He continued to offend as a young adult and was sentenced to periods of imprisonment for further offences of dishonesty in 1987 and 1988. In 1989 he was convicted and fined for unlawful assault and other street offences. He had an extensive traffic history. He committed offences of assault in 1990 and 1993, for which non-custodial sentences were imposed. On 13 November 2002, he was convicted of two counts of stealing, attempted fraud, two common assaults and two counts of burglary; the last offence had the aggravating feature of violence being used. He was sentenced effectively to 14 months imprisonment suspended after nine months with an operational period of three years. A period of 76 days was declared to be time served under the sentence.

[22] The applicant has had a sad and dysfunctional upbringing. His parents were alcoholics and he had an abusive and violent childhood and home life. This was a major factor in his early offending behaviour. It is to his credit that he was able to stay out of trouble between 1995 and 2000. He found the breakdown of his relationship with Ms Frehmann very traumatic; his self-esteem suffered and he later became bankrupt.

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1 *Mackenzie v R* (1996) 190 CLR 348.

2 *MFA v The Queen* (2002) 77 ALJR 139, 144, 149.

[23] His work history is good. He has worked as a brick layer and more recently in Queensland in the fishing industry on trawlers. His present partner is supportive despite his incarceration and he intends, when released, to move to Brisbane with Ms Heffernan and her child to start afresh.

[24] The learned primary judge accepted defence counsel's submission that in the circumstances the custodial sentence imposed on this count should be concurrent with the sentence he was then serving. He is a mature man and was on bail when he committed this offence. He has shown no remorse and did not have the benefit of a mitigating plea of guilty. He has a poor criminal history. The offence of perverting the course of justice is serious in that it is an attack on the system of justice. A salutary penalty must be imposed to deter those who might consider such conduct and to maintain public confidence in the criminal justice system. The maximum penalty is, perhaps surprisingly, only two years imprisonment, the penalty imposed here.

[25] This was a serious example of the offence. The concurrent nature of the sentence sufficiently moderated the penalty to recognise the few mitigating factors. The sentence was within range and not manifestly excessive.

[26] I would dismiss the appeal against conviction and refuse the application for leave to appeal against sentence.

[27] **WILLIAMS JA:** The facts relevant to this appeal against conviction are fully set out in the reasons for judgment of the President which I have had the advantage of reading. Essentially the appellant contends that the conviction is "unsafe and unsatisfactory".

[28] Though the appellant contended that the case against him was a circumstantial one, that was not so. There was direct evidence from Ms Frehmann and Ms Harmon that the offence particularised in count one on the indictment was committed. If the jury was satisfied beyond reasonable doubt of the truthfulness of Ms Frehmann then there was ample evidence upon which it could convict. There was, as pointed out in the reasons for judgment of the President, grounds on which a jury might have had some concern about some aspects of the evidence of Ms Harmon, but in the end her credibility, and how much of her evidence was accepted, was a matter for the jury.

[29] A perusal of the evidence, and a consideration of the summing up, does not support the contention that the conviction was unsafe and unsatisfactory.

[30] There was no inconsistency between the finding of guilty on count one, and the finding of not guilty on count three. The latter count was dependent upon the creditability of witnesses whose evidence related to that count alone. There were, as the President has pointed out, reasons why a jury may well have concluded that the evidence of Hutton could not be accepted beyond reasonable doubt so as to support a conviction on count three.

[31] I agree the appeal against conviction should be dismissed.

[32] This court in *R v Morex Meat Australia Pty Ltd and Doube* [1996] 1 Qd R 418 at 444-5 considered the appropriate sentence for the offence of attempting to pervert the course of justice. A number of cases were reviewed and the court observed that "a singular feature is that they all attracted terms of imprisonment to be actually

served." Given the appellant's criminal history, and the fact the offence in question was committed whilst he was on bail, a significant custodial sentence was called for. As has been observed in a number of cases, the offence of attempting to pervert the course of justice, like perjury, is a crime that strikes at the heart of the administration of justice. That is a circumstance which must be given significant weight when a court is considering the appropriate penalty to impose for such an offence.

[33] In all the circumstances I am not persuaded that a sentence of two years imprisonment to be served concurrently with the other sentence the appellant is serving is manifestly excessive.

[34] The application for leave to appeal against sentence should be refused.

[35] I agree with the orders proposed by the President.

[36] **HOLMES J:** I agree with the reasons for judgment of McMurdo P and Williams JA and the orders they propose.