SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ensbey; ex parte A-G (Qld)* [2004] QCA 335
PARTIES:	**R** v **ENSBEY, Douglas Roy** (appellant) **R** v **ENSBEY, Douglas Roy** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 94 of 2004 CA No 79 of 2004 DC 1857 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	17 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	29 June 2004
JUDGES:	Davies, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, Davies and Jerrard JJA concurring as to the orders made, Williams JA dissenting in part
ORDER:	**1. Appeal against conviction dismissed** **2. Sentence appeal by Attorney-General dismissed**
CATCHWORDS:	CRIMINAL LAW - PARTICULAR OFFENCES - OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE - OTHER OFFENCES - where the appellant was convicted of destroying evidence pursuant to s 129 *Criminal Code* (Qld) - where the appellant was a pastor who became aware of an inappropriate sexual relationship occurring between a child and adult parishioner - where the appellant had in his possession the diary of the child which documented her activities with the adult parishioner - where the appellant was asked to return the diary notes to the family and returned them shredded and illegible - where the appellant submits that there were two reasonable hypotheses open to the jury as

to his intention in destroying the diary and that he ought to have received the benefit of the doubt - whether it was reasonably open to the jury to conclude the appellant's intention was not to prevent it being used as evidence in a court case - whether appeal against conviction should be allowed

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER - APPLICATIONS TO INCREASE SENTENCE - OTHER OFFENCES - where the respondent was sentenced to six months imprisonment, wholly suspended, with an operational period of two years - whether the sentence imposed is manifestly inadequate in the circumstances

Criminal Code 1899 (Qld), s 129

Knight v The Queen (1992) 175 CLR 495, applied
R v Fingleton [2003] QCA 266; CA No 177 of 2003, 26 June 2003, cited
R v Rogerson (1992) 174 CLR 269, cited
R v Selvage & Anor [1982] 1 All ER 96, cited
R v Vreones [1891] 1 QB 360, considered

COUNSEL: R V Hanson QC, with G P Long, for Ensbey
S G Bain for the Crown

SOLICITORS: Dibbs Barker Gosling for Ensbey
Director of Public Prosecutions (Queensland) for the Crown

[1] **DAVIES JA:** On 11 March 2004 the appellant was convicted in the District Court of the offence that between 31 May 1995 and 1 July 1996 he, knowing that written diary notes might be needed in evidence, wilfully rendered them illegible or indecipherable with the intention of preventing them being used in evidence. He was sentenced to six months imprisonment, wholly suspended, with an operational period of two years. These are an appeal against his conviction and an appeal by the Attorney-General against his sentence. It is convenient to refer to the appellant in the conviction appeal, Mr Ensbey, as the appellant in discussing both appeals.

The appeal against conviction

[2] The undisputed facts relevant to the appeal are as follows. From August 1994 to about June 1995 B, a married man of 29, interfered sexually with S a child of 14. Both were parishioners of the Sandgate Baptist Church.

[3] In April or May 1995 Mr Meteyard an associate pastor of the church received information that B had been conducting an improper relationship with S which included sexual contact. Some time shortly after that, together with Mr Paroz, a youth pastor in the church, he went to the Rs' home where they had a discussion about the matter with Mr and Mrs R and S. During the course of that discussion he mentioned that he had heard that S had kept a diary of her activities with B. Mrs R

conducted a search for the diary and it was produced. Mr Meteyard and possibly Mr Paroz perused the diary.

[4] When they returned to the church Mr Meteyard and Mr Paroz discussed what had occurred with the appellant who then arranged a meeting between those three and B. When confronted with the accusations B admitted to having been in a sexual relationship with S.

[5] The following morning the appellant and Meteyard returned to speak to the Rs and told them that the allegations were true and that B had confessed to a continuing sexual relationship with S. The Rs were plainly upset, especially Mrs R. The appellant said that he would oversee what should be done next. When they were leaving the appellant said he would keep the diary for the time being and left with it.

[6] Thereafter Mr and Mrs R were uncertain as to how to deal with the matter and looked to the appellant for direction as to what to do. Their concern was, understandably, solely for their daughter's welfare. The appellant told them:

1. that it was not necessary to go to the police; that the matter could be dealt within the church; and that he had received legal advice about this;
2. that if they took the matter to court the diary notes would be incriminating against S and could be used against her to make her look bad; that she'd "be ripped to shreds in the Court"; and that if they went to court they "didn't have a leg to stand on".

This advice was given some time after B had admitted to having been in a sexual relationship with S.

[7] After thinking about the matter the Rs accepted the appellant's advice. There was a meeting between B, his wife, Mr and Mrs R, S and the appellant at which B apologized for his conduct and when asked why he did it said "I don't know". B was then punished within the church by being suspended for a time and being required to undergo counselling.

[8] By the end of 1995 Mr and Mrs R had become dissatisfied with what they saw as the lack of support for them within the church in consequence of the events I have described. They left the church in December.

[9] In the following year they decided to seek the return of S's diary notes which were still in the appellant's possession. In April Mrs R mentioned to Mr Meteyard that they had never got the diary notes back and that they would like them back. Mr Meteyard said that he would tell the appellant that and he did so. Not having received them back, in June Mrs R rang the appellant and asked for them back. He asked why and she said "I just want them back". He said "What do you want to do with them?" and she repeated that she just wanted them back. These or similar questions and answers were repeated a number of times. Mrs R said "It took a lot of coercing to be able to get them back. I just had to harp and harp to say, 'I just want them back'". He eventually agreed to send them back.

[10] About a week later the Rs received a brown envelope in which was contained the diary notes, shredded, accompanied by a letter from the appellant. The letter included the following:

> "Enclosed, as requested, are the diary pages. You will notice that they are in a form that will quickly facilitate your desire to close this issue. I sincerely hope that this, in fact, does that."

It is plain that the diary notes were shredded by the appellant after the telephone conversation which I have related.

[11] In March 2001 S made a formal complaint to the police about B's conduct. B was charged, confessed and pleaded guilty to offences involving that conduct.

[12] The principal question sought to be argued by the appellant in this appeal is whether a reasonable jury ought to have found that an inference consistent with innocence was open on the evidence. If they ought to have so found they ought to have given the appellant the benefit of the doubt necessarily created by that circumstance: *Knight v The Queen* (1992) 175 CLR 495 at 503.

[13] The appellant submits that there were two reasonable hypotheses open on the evidence as to his intention in destroying the diary. One was, it is conceded, an intention to prevent it being used in evidence in a court case. The other was, it is submitted, an intention to bring finality to the matter, for the benefit of all involved, with no thought as to a court case. The principal question in issue, consequently, is whether the second of those suggested hypotheses, or some variation of it, was an inference that was reasonably open on the evidence.

[14] Before turning to that question it is necessary to say something briefly about the construction of s 129 of the *Criminal Code* which created the offence of which the appellant was convicted. The elements of that offence are relevantly:

1. knowing that any document may be required in evidence in a judicial proceeding;
2. wilfully rendering it illegible or indecipherable;
3. with intent thereby to prevent it from being used in evidence.

[15] Mr Hanson QC who appeared with Mr Long for the appellant, conceded in the course of argument that "knowing" in this context meant "believing" because of the word "may". It was incongruous, he conceded, to talk about knowing that something may happen. In my opinion his concession was correctly made. It was not necessary that the appellant knew that the diary notes would be used in a legal proceeding or that a legal proceeding be in existence or even a likely occurrence at the time the offence was committed. It was sufficient that the appellant believed that the diary notes might be required in evidence in a possible future proceeding against B, that he wilfully rendered them illegible or indecipherable and that his intent was to prevent them being used for that purpose.[1]

[16] Mr Hanson QC therefore accepted as correct the following direction of the learned trial judge:

> "Now, here, members of the jury, the words, 'might be required', those words mean a realistic possibility. Also, members of the jury, I direct you there does not have to be a judicial proceeding actually on foot for a person to be guilty of this offence. There does not have to be something going on in this courtroom for someone to be guilty of this offence. If there is a realistic possibility evidence might be required in a judicial proceeding, if the other elements are made out to your satisfaction, then a person can be guilty of that offence."

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[1] There is no authority directly on point. But the offence of attempting to pervert the course of justice, both at common law and under statutory provisions may be committed notwithstanding that curial proceedings are no more than a possibility: *R v Rogerson* (1992) 174 CLR 268 at 277.

[17] Mr Hanson QC also conceded that, if B was prosecuted, the diary notes might be required in evidence. They would plainly have been admissible under s 93A of the *Evidence Act* 1977 and the prosecution may have tendered them under that section. Moreover they may have been used in evidence in other ways.

[18] I return then to the question whether it was reasonably open to the jury to conclude that his intention in destroying the diary notes was to bring finality to the matter, for the benefit of all involved, with no thought as to a court case. I do not think it was.

[19] It was plain to all concerned, including the appellant, from the earliest discussions, that there were two and only two possible actions which could be taken in respect of B's conduct. One was to attempt to resolve the matter, to the satisfaction of the parties, especially of S as guided by her parents, within the church by some church process. The other, which could plainly arise if it was not so satisfactorily resolved within the church, was by a formal complaint to the police.

[20] From the outset, the former was the action strongly favoured by the appellant. Put another and more relevant way, the appellant was plainly determined from the outset to discourage the Rs from going to the police. After B had confessed to interfering with S the appellant told Mrs R that if they took the matter to court S would be "ripped to shreds" and that they "didn't have a leg to stand on". That was plainly wrong. And it must have been apparent to the appellant by then that B, having confessed his guilt, would be unlikely to contest the matter in court.

[21] By the time of the telephone conversation which I have related between Mrs R and the appellant, the Rs had left the church because of their dissatisfaction with what they saw as lack of support which they had received when compared with the support which B and his family had received from the church. And in that conversation Mrs R was insistent about return of the diary notes. It is difficult to think of any logical reason for Mrs R's insistence other than that she was contemplating the possibility that a complaint might be made to the police. It is equally difficult to accept that the appellant's persistence in inquiring why she insisted on return of the diary notes and his reluctance to give them back had any basis other than his recognition that that was why she wanted them back.

[22] The view that the reason for his persistent inquiry and his apparent reluctance to return the notes was his recognition that the Rs might require them for the purpose of a possible prosecution is strongly supported by the fact that, after that conversation and before returning the diary notes, he shredded them. He could reasonably have thought that his shredding of them prevented them from being used for the only purpose for which they could reasonably be used, namely in the course of possible future court proceedings in respect of B's offences. And in my opinion it would not have been reasonably open to the jury to conclude, on the above evidence, that he shredded them for any purpose other than preventing them from being so used.

[23] This is further supported by the opening paragraph of his letter. In it he said that his purpose in shredding the notes was to "quickly facilitate your desire to close this issue". The only way in which it would not have been closed would have been if S, guided by her parents, had chosen to take the matter to the police. It would not, in my opinion, have been a reasonable inference for the jury to accept that, in that

passage in his letter, the appellant was speaking of closure in any context other than by not taking the matter further by going to the police.

[24] For those reasons I do not think it would have been reasonable for the jury to conclude that the appellant's intention in returning the diary in shredded form and in writing his letter was to bring finality to the matter with no thought as to a court case. On the contrary, as I have indicated, his intention could only have been, by preventing the diary notes from being used in evidence, to facilitate the Rs' desire to accept what had occurred as closure of the issue.

[25] For those reasons, in my opinion, the appeal against conviction must be dismissed.

The appeal against sentence

[26] In sentencing the appellant the learned sentencing judge accepted, as he was obliged to by the jury's verdict, that the appellant knew that the diary notes might be needed in evidence and wilfully rendered them undecipherable with the intention of preventing them from being so used. But because the appellant did not give evidence the learned sentencing judge did not and could not have reached any conclusion as to the appellant's motive in doing what he did; whether he thought it was in the best interests of all concerned including S or whether, as suggested by the Attorney here, he did it to protect the church. Similarly this Court cannot speculate upon the appellant's motive for his conduct.

[27] There is no doubt that this offence is a serious one. But one factor which distinguishes this case from others involving this or the alternative offence of attempting to pervert the course of justice is that the appellant had nothing to gain personally from his conduct. Usually offences of this kind are committed by a person who has committed another offence, or a person closely associated with that person, in order to prevent the prosecution or conviction of that person. As already mentioned, it should not be inferred his motive was other than that he thought finality within the church was best for all concerned.

[28] The learned sentencing judge also relied on the fact that the appellant was otherwise of unblemished character. That may be of little importance where an offender has committed an offence of this kind in order to prevent his being found guilty of another criminal offence. But as I have already said that was not this case and consequently his otherwise exemplary character is also a relevant factor.

[29] The seriousness of the offence was appropriately recognized by the sentence of six months imprisonment. It was not contended by the Attorney that a higher sentence should have been imposed. The sole question on sentence was whether it should have been wholly suspended.

[30] On that question minds may differ. It would have been open to the learned sentencing judge to require a period of actual custody to be served. On the other hand, because of personal factors I have mentioned, I do not think that it was outside the range of a sound discretion to wholly suspend the sentence.

[31] I would accordingly dismiss the appeal against sentence.

[32] **WILLIAMS JA:** I will not repeat in these reasons factual matters which are set out in the reasons for judgment of Davies JA, which I have had the advantage of reading.

[33] I would add to that narrative the following. Meteyard, who described himself as an associate pastor at the Sandgate Baptist Church, was called to give evidence for the prosecution. He visited Mrs R on learning that she and the other members of the family had decided to resign from the church. During that conversation Mrs R observed that "we've never got the diary back and we'd like it back". Meteyard replied that he "didn't realise that" and undertook to inform the appellant that the Rs would "like the diary back". He then said that about a week later he told the appellant of that and received the reply to the effect of, "Oh, did she?" or "Oh, did they?" Within a few days after that Meteyard received a phone call at home in which the appellant told him "that he had torn the diary up into small pieces and he was going to return it to the Rs in that form". The appellant read to Meteyard the letter he had written to the Rs to go "with fragments of the diary".

[34] Mrs P H Richards, who worked in a voluntary capacity in the office of the church, also gave evidence for the prosecution. She observed the appellant using the guillotine in the office and because of the way he was using it she observed, "Oh, you obviously don't want anyone to read that". Her evidence went on: "He told me it was S's diary that he was – that [Mrs R] had asked for it back and that that's how he was sending it back." She also recalled that he said "that it would incriminate S more if he sent it back in its proper state."

[35] There is no doubt that the shredding of the diary took place immediately following the phone call between Mrs R and the appellant, details of which are set out in the reasons of Davies JA.

[36] The appellant had no property in the diary and he had no right to destroy it regardless of whether or not it was potential evidence in legal proceedings. Prima facie his conduct constituted the offence of wilful damage to property (see s 460 and s 469 of the Criminal Code).

[37] I agree for the reasons given by Davies JA that there was ample evidence before the jury upon which the appellant could be convicted of the offence created by s 129 of the Code.

[38] The conduct of the appellant was appalling. In my view it was an aggravating circumstance that he was a minister of religion and in a sense a position of trust existed between him and the lawful owners of the diary. He has shown no remorse and is not entitled to have the appropriate sentence mitigated because of a timely plea of guilty. It is said he is unlikely to re-offend in similar circumstances, but that is probably only because he is not likely to again be in a similar position.

[39] The only mitigating factor in the appellant's favour is that he has no previous criminal convictions. But that is of relatively minor significance when the court is dealing with a serious offence against the administration of justice. Whilst it is true that the appellant did not stand to benefit personally by his conduct (a feature often present in offences of this nature) that cannot be allowed to deflect attention from the serious nature of offences of this type. The destruction of evidence is, in my view, a serious offence which calls for a deterrent sentence and that would usually necessitate the offender serving an actual period in custody.

[40] In my view a sentence of six months imprisonment makes due allowance for the appellant's previous good character whilst operating as an appropriate deterrent sentence. The decision of this court in *R v Fingleton* [2003] QCA 266 supports

such a sentence. There the offender was found guilty after a trial of an offence in the broad category of interference with the administration of justice and was of previous exemplary character. The court imposed a sentence of six months imprisonment.

[41] In my view the sentence imposed at first instance here was manifestly inadequate because it failed to reflect the gravity of the offence and failed to take into account the aspect of general deterrence. I would allow the appeal of the Attorney-General to the extent of deleting the provision that the sentence of six months imprisonment be wholly suspended for an operational period of two years.

[42] The orders I would make are as follows:

1. In CA No 94 of 2004 – appeal dismissed

2. In CA No 79 of 2004 – allow the appeal to the extent of setting aside that part of the sentence which ordered that the sentence of imprisonment be wholly suspended for an operational period of two years.

[43] **JERRARD JA:** In this appeal I have had the advantage of reading the judgments of Davies JA and Williams JA, in which the relevant facts are carefully described. I have come to the conclusion that their Honours are correct in holding that it was open to the jury to convict Mr Ensbey of an offence against s 129 on the facts established in evidence.

[44] This is so even though there were no judicial or criminal proceedings either on foot, announced, or foreshadowed at the time he tore up the diary pages. On whatever day he did that, nothing had been said to inform him that Mr or Mrs R, or S, had decided that a complaint would be made to the police, and S did not report Mr B's misconduct to police until five years later.

[45] A judicial proceeding itself can be very short. Had Mr B been tried on a plea of not guilty, the hearing may well have ended within two days. It would therefore unduly confine the offence legislated for by s 129 of the *Criminal Code* to require that a judicial proceeding be on foot for that offence to be capable of being committed. A judicial proceeding will usually be shorter than a criminal proceeding, using the latter expression to describe the chain of events normally begun either by the issue of a complaint and summons or by an arrest and charge, which proceeding will usually end either by verdict or plea (and, where appropriate, sentence) in a court of competent jurisdiction subject to appeal; or by a charge being withdrawn in that court. For an offence of the sort ultimately alleged against Mr B, such criminal proceedings would normally involve two judicial proceedings, one being a committal hearing in a Magistrate's Court and the other a hearing in the District Court.

[46] The definition of "judicial proceeding" provided in s 119 of the *Code* is an inclusive definition, and includes any proceedings "had or taken in or before any court, tribunal or person, in which evidence may be taken on oath". That inclusive definition suggests a proceeding on foot or completed, but the term is used in chapter 16 of the *Code* in differing ways. In s 123, dealing with the offence of perjury, it is provided:

> "Any person who in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony

> touching any matter which is material to any question then depending in that proceeding, or intended to be raised in that proceeding, is guilty of a crime, which is called '**perjury**'".

[47] The term "judicial proceeding" as used therein includes a proceeding which is in contemplation only. By way of contrast in s 119B, dealing with retaliation against a judicial officer, juror, witness or member of the family of one of those, the term is used to describe a proceeding in which something has already been lawfully done by a juror or witness, and accordingly a proceeding which has occurred or is still taking place.

[48] Since the term is used in different ways in chapter 16, and since s 129 should not be unduly restricted in its ambit, the judicial proceeding referred to in s 129 in which an offender knows that the relevant book, document, or other thing is or might be required in evidence, should be understood to include a judicial proceeding which the offender knows, or believes on reasonable grounds, may occur. An alleged offender might know, for example, that a complaint and a summons had issued or that the person suspected had been arrested, and thus that criminal proceedings were already on foot; or that a complaint had been made to the police, or that the intending complainant said he or she would report a matter to the police, in which case criminal proceedings would be foreshadowed.

[49] A more difficult matter for appropriate application of the section is where, as in this case, not even criminal proceedings are on foot or foreshadowed, let alone judicial proceedings, at the time the potential evidence is destroyed. There is authority at the common law, however, approving the application of the associated offence of fabricating evidence, provided for by s 126 of the *Code*, to a situation in which there was no judicial proceeding on foot, and only the reasonable possibility, foreseen by and which arose out of facts known to the accused, that one might occur in the future.

[50] Section 126 provides:

> "(1) Any person who, with intent to mislead any tribunal in any judicial proceeding –
>
> (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 a crime, and is liable to imprisonment for 7 years".

In *The Queen v Vreones* [1891] 1 QB 360 Mr Vreones was convicted of an offence described therein by Lord Coleridge CJ at page 366 as the misdemeanour of attempting, by the manufacture of false evidence to mislead a judicial proceeding which might come into existence; and by Pollock B at page 368 as "an indictment for a fraud or cheat at common law"; and described 90 years later in *R v Selvage & Anor* [1982] 1 All ER 96 by the Court of Appeal at page 102 as an offence of attempting by the manufacture of false evidence to mislead a judicial tribunal. The relevant facts were that Mr Vreones had been appointed by sellers of wheat as a superintendent to take samples from a cargo of wheat shipped from the Black Sea to buyers in England. The contract contained a provision that in the event of a dispute arising out of the contract of sale it should be referred to two arbitrators,

> and in accordance with the contract and with the custom of merchants at the port of Bristol at which the wheat arrived, samples were taken from it and sealed with the seals of the buyer and seller. These were given into the custody of Mr Vreones and taken by him to his lodgings, and ought to have been forwarded to the offices of the London Corn Trade Association. Instead, Mr Vreones tampered with those samples by artfully removing the wheat, cleaning it, and replacing it, all without breaking the seals, so as to produce a very much better quality sample. This was done with the motive that in the case of any dispute arising, the purchaser might be defeated by the production of the good wheat before any arbitrators who might be appointed.

[51] No arbitrators were in fact appointed, and nor had the purchaser take any steps to appoint them, because the samples provided to Mr Vreones for delivery to the Corn Trade Association were found on comparison to be so superior to the samples taken when the contract was entered into, and to all the other samples taken by either or both parties, and to the bulk of the cargo, that it was regarded as pointless proceeding to arbitration. Nevertheless, he was convicted of an offence as variously described in the judgments quoted.

[52] The decision may provide a picture of the development of the offence of attempting to pervert the course of justice, which is consistent with the citation of it in *The Queen v Murphy* (1985) 158 CLR 596 at 609, and from it in *Meissner v The Queen* (1995) 184 CLR 132 at 141 in the joint judgment of Brennan, Toohey and McHugh JJ at 141, and by Deane J at 148. The description given in *R v Selvage* of the charge in *R v Vreones* does reflect the wording of the *Criminal Code* in s 126, and so applied would justify a conviction for fabricating evidence where the judicial proceeding intended to be misled by that fabricated evidence never in fact took place, and was always only a possibility, albeit realistic, on the known facts.

[53] In *R v Selvage* itself the Court of Appeal limited the circumstances in which the offence of attempting to pervert the course of justice could be committed to those where the course of justice must have been embarked on in the sense that proceedings of some kind were in being, or imminent, or investigations which could or might bring proceedings about were in progress.[2] *R v Vreones* was described in *R v Selvage* as "close to if not on the very boundary itself of the offence of perverting the course of justice", and on the description given in *R v Selvage* of the limits of the offence of attempting to pervert the course of justice, that observation was accurate. But the offence charged in *R v Vreones* was different, as the Court of Appeal itself recognised in *R v Selvage*.

[54] The judgment in *The Queen v Vreones* is a leading case, cited in the joint judgment of the High Court in *The Queen v Murphy* for the proposition that at common law an attempt to obstruct the course of justice was a punishable misdemeanour. It is accordingly appropriate to follow it. Applying the logic of the decision to a charge of destroying evidence, as opposed to a charge of fabricating it, there is no need for the prosecution to establish more than the possibility, known to or believed in by the accused on reasonable grounds, that a judicial proceeding would occur, those

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[2] A wider view was taken by the High Court in *The Queen v Rogerson* (1992) 174 CLR 268 by Mason CJ at 277-278, Brennan and Toohey JJ at 281-282 and 283-284, and Deane J at 294-295. On that wider view, a police investigation need not have even commenced, provided that the accused contemplated the possibility that one might, when doing the act allegedly intended to frustrate or defeat the course of justice.

reasonable grounds being matters shown to exist to the knowledge of the accused. On that construction the appellant was properly convicted.

[55] I do not think anything follows from the manner in which the offence provided for in s 140, that of attempting to pervert the course of justice, was amended by Act No 77 of 2003. As originally enacted s 140 read:

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

[56] In 2003 the section was amended to read:

> "A person who attempts to obstruct, prevent, pervert, or defeat the course of justice is guilty of a crime.
>
> Maximum penalty – 7 years imprisonment".

The explanatory note to the amending Act informs that the amendment made was to remove the necessity for the prosecution to prove that no other offence in the *Criminal Code* applied before a person could be convicted of attempting to pervert the course of justice. While the section as originally drafted conveyed the inference that the offences described elsewhere in that chapter also described ways of perverting or attempting to pervert the course of justice, the opposite did not follow; the Crown did not and does not now have to prove that the material facts necessary to establish an offence against s 129 also establish an offence of attempting to pervert the course of justice, although they almost invariably would.

[57] I agree with what Davies JA has written regarding the appeal against sentence, and accordingly agree that each of the respective appeals against conviction and sentence should be dismissed.