JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 2/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE PUSEY JA (AG)

JAMES FORBES v R

Mrs Jacqueline Samuels-Brown QC, Hugh Wildman, Miss Linda Wright and Miss Marsha Samuels for the appellant

Mrs Sharon Milwood-Moore and Miss Ashtelle Steele for the Crown

2, 3, 4, 5, 6, 11 July 2018 and 26 February 2021

PUSEY JA (AG)

[1] The traffic stop is for many the most frequent exposure to the police force. Most motorists have faced the inconvenience of being ticketed for a motor vehicle offence. That process is normally uneventful. However, one such interaction with the police led to a series of events which culminated in the arrest and charge of former Senior Superintendent of Police (SSP), Mr James Forbes (the appellant), with attempting to pervert the course of justice. The appellant was tried and convicted for that offence. He was sentenced to pay a fine of $800,000.00, or in the alternative, to serve six months' imprisonment. The fine was paid.

[2] An appeal was lodged challenging the appellant's conviction and sentence. The appeal raised issues relating to whether the elements of the offence of attempting to pervert the course of justice had been proved; the correctness of the rejection of a submission of no case to answer on the appellant's behalf; the consideration of the reliability and credibility of the prosecution and defence witnesses; the exclusion of admissible evidence favourable to the appellant's defence; and the adequacy of good character directions.

[3] A review of the facts is necessary to determine the issues raised by the appellant in this appeal. This takes place below.

Overview and chronology

[4] The appellant was jointly charged with Mr David Bruce Bicknell (General Manager of Tankweld Limited) with attempting to pervert the course of justice. The particulars of that offence, as stated on the indictment, are that on 13 April 2012, in the parish of Saint Andrew, the appellant and Mr Bicknell:

> "… attempted to pervert the course of public justice by participating in a meeting at NCB Towers, 2 Oxford Road, whereby an agreement was arrived at to dispose of a criminal matter concerning [Mr Bicknell] that was to be placed before the Court on [18 April 2012] to wit: A Breach of the Corruption Prevention Act, intending that the course of justice should thereby be perverted."

[5] The matter was tried before Her Honour Mrs Stephanie Jackson-Haisley, Resident Magistrate (now called Judge of the Parish Court, pursuant to the 2016 amendment to the Judicature (Resident Magistrates) Act, renamed the Judicature (Parish Courts) Act)),

as she then was. It took place at the Corporate Area Parish Court, on various dates between 11 June 2013 and 15 May 2014. The prosecution adduced evidence from eight witnesses: Sergeant (Sgt) Jubert Llewellyn, Sgt Dellon Lewis, Sgt Dernale Morris, Corporal (Cpl) Sara Davis, SSP Radcliffe Lewis, Inspector (Insp) Rohan Reid, Commissioner of Police (CP) Lucius Thomas (retired), and Assistant Commissioner of Police (ACP) Selvin Haye. The appellant gave sworn evidence and called one witness: Deputy Commissioner of Police (DCP) Linval Bailey.

[6] On 9 April 2012, at about 8:30 am, Sgts Llewellyn, Lewis and another police officer were conducting spot checks along the Sir Florizel Glasspole Highway in the parish of Kingston. A motor vehicle being driven by Mr Bicknell was stopped as he was alleged to have been travelling over the prescribed speed limit (80 km per hour in a 50 km per hour zone). During an ensuing exchange between Mr Bicknell and Sgt Llewellyn, Mr Bicknell informed Sgt Llewellyn that he was late in taking his daughters to the airport. Sgt Llewellyn requested Mr Bicknell's motor vehicle documents. Mr Bicknell responded that Sgt Llewellyn "shouldn't bother [to] write the ticket because I can take care of you". Among the documents handed to Sgt Llewellyn were two $1,000.00 notes. Sgt Llewellyn informed Mr Bicknell of the presence of the two notes and enquired of Mr Bicknell as to the purpose of the two notes. Mr Bicknell said "[i]s okay officer, you can have them".

[7] Sgt Llewellyn used both statements to conclude that Mr Bicknell was offering him a bribe. He immediately reported the matter to Sgt Lewis in the hearing and presence of Mr Bicknell. Sgt Lewis approached Mr Bicknell, told Mr Bicknell of his intention to charge

him for the alleged breach of the Corruption Prevention Act, and apprehended him. A traffic ticket was issued to Mr Bicknell for exceeding the speed limit.

[8] Mr Bicknell was taken to the Traffic Headquarters of the Jamaica Constabulary Force (JCF) at Elleston Road in the parish of Kingston. He was arrested, charged, and bailed in the sum of $50,000.00 with a surety to attend the Corporate Area Parish Court on 18 April 2012. The two $1,000.00 notes were photocopied, and Sgt Lewis placed both notes in an envelope and sealed it. SSP Lewis assisted in making an entry in the station diary documenting these events (a fact also confirmed by Sgt Morris). Upon Mr Bicknell's departure from Traffic Headquarters, Sgt Lewis placed a copy of Mr Bicknell's bail bond, the envelope with the two $1,000.00 notes, the photocopy of these notes, the recommendation (for the surety) and a CR12 form on a file, intending the same to be submitted to the court on its completion.

[9] After Sgt Llewellyn's encounter with Mr Bicknell, he stated that he had "started receiving a number of phone calls". He indicated that he was "getting phone calls practically right throughout", so much so, that he had to "turn off [his] phone".

[10] On 12 April 2012, Mr Daryl Vaz (a Member of Parliament) visited Sgt Llewellyn at the Transport and Repairs Division of the JCF, along Tom Redcam Drive in the parish of Kingston. They had a conversation that lasted for about 10 minutes. Although the details of that conversation were not elicited in the appellant's trial, it is mentioned here as it formed a part of the fresh evidence that was adduced in this appeal. Mr Vaz mentioned to Sgt Llewellyn the "state of Mr Bicknell's health and said [Mr Bicknell] was not well

enough to survive prison and that a conviction would ruin his status as a businessman". Sgt Llewellyn responded that Sgt Lewis was the arresting officer, and he (Sgt Llewellyn) was merely the complainant in the matter. Sgt Lewis also spoke to Mr Vaz on 12 April 2012, but the contents of that conversation were not disclosed.

[11] Upon Mr Vaz's departure, Sgt Llewellyn contacted many persons in search of advice. He first contacted a friend who was also a media practitioner. He also contacted CP Thomas (ret). His friend (the media practitioner) accompanied him to see CP Thomas (ret) at Ewarton in the parish of Saint Catherine. Sgt Llewellyn shared with CP Thomas (ret) the events that had transpired on 9 April 2012. He told CP Thomas (ret) of the possibility that he may have made a mistake in concluding that Mr Bicknell had tried to bribe him and expressed concerns about the possible repercussions for that mistake, including his fear of being sued. To help address these concerns, CP Thomas (ret), with the agreement of Sgt Llewellyn, contacted the appellant (in Sgt Llewellyn's presence) as they both regarded the appellant as a man of impeccable integrity.

[12] On his journey from Ewarton, Sgt Llewellyn received a call from the appellant (whom he had known before). The appellant indicated that he had had discussions with CP Thomas (ret). Arising out of those discussions and pursuant to information from CP Thomas (ret), the appellant proposed to have a meeting the following day (on 13 April 2012), at his office, located at 2 Oxford Road in the parish of Saint Andrew. Sgt Llewellyn testified that the appellant had said that "based on the discussions it was to be a mediation". The appellant denied having a mediation at his office and indicated that he had merely facilitated a meeting that he did not arrange.

[13] Sgt Llewellyn welcomed the meeting as he saw it as an opportunity to avoid the "backlash" and to correct his mistake as he feared that he may have "jumped to a conclusion too early" with regard to whether Mr Bicknell had attempted to bribe him. However, Sgt Llewellyn expressed his concern to the appellant about "the backlash and the consequences". Indeed, he asked the appellant, "what of the backlash?" The appellant's responded that "the Commissioner is aware, that Mr Ellington is aware of it and there shouldn't be any problem". Mr Owen Ellington was then the Commissioner of Police.

[14] Based on explanations given by Sgt Llewellyn throughout his testimony, his primary concern related to the fear of civil action being brought against himself and Sgt Lewis, by Mr Bicknell, arising out of his mistake. He also expressed some anxiety about internal disapproval within the JCF arising out of the meeting. Indeed, Sgt Llewellyn said that he was concerned about the "repercussion [that] would result from participating in that exercise, how it would affect [his] career and also the impact on [his] Senior Colleagues [and the appellant]". He also indicated that one of his fears about having the meeting materialised, as his senior colleague, the appellant, was charged as a result.

[15] For his own part, the appellant had no concerns about the appropriateness of the meeting, in the light of Sgt Llewellyn's assertion that he wanted to dispose of the matter, as he was mistaken in his conclusion that Mr Bicknell had attempted to bribe him. He also believed that there was nothing improper or illegal about the course of action he was about to embark upon, as he was merely facilitating a meeting.

[16] So anxious was Sgt Llewellyn to correct his mistake, that he visited the appellant's office at 2 Oxford Road, the very evening of 12 April 2012, after journeying from Ewarton. Sgt Llewellyn testified that he had met the appellant at his office, and they had a casual conversation about the meeting that was set to occur the next day (although he could not remember the exact words used). Both the appellant and Cpl Davis (who was acting as the appellant's secretary at that time) contradicted Sgt Llewellyn's evidence that such a meeting was held. Cpl Davis testified that the appellant had left the office to attend a conference on that date. At 8:30 pm when she departed the office (which was her usual time for so doing), the appellant had not returned. In his sworn testimony, the appellant denied meeting Sgt Llewellyn at his office that evening, as the conference he had attended was an "all-day workshop" that ended after 5:00 pm.

[17] Sgt Lewis testified that he had also received a phone call from the appellant in the evening of 12 April 2012, inviting him to attend the meeting on 13 April 2012. While the appellant had informed Sgt Lewis that the meeting related to Mr Bicknell's arrest, he had not informed Sgt Lewis as to the other persons that would be in attendance.

[18] Although CP Thomas (ret) admitted to instigating the meeting, he did not say who would or ought to be in attendance. In fact, CP Thomas (ret) said that the appellant had called to inform him that the meeting was to be held the next day, but he (the appellant) did not say with whom (although he assumed that Sgt Llewellyn would be in attendance). The appellant had also told CP Thomas (ret) that Mr Vaz wanted to attend the meeting, and he (CP Thomas (ret)) responded that "we are not having a political meeting".

[19] On 13 April 2012, Sgt Llewellyn stated that he had visited the appellant's office before the start of the meeting to enquire as to "the likely implications of what [they] were about to embark on". The appellant once again said that "it was okay because the Commissioner is aware of it". In cross-examination, Sgt Llewellyn stated that he felt comforted knowing that CP Ellington (now retired) was aware of the meeting and had given it "his blessing", as it gave him "a feeling that [the meeting] was right". However, both the appellant and Cpl Davis testified that no brief exchange took place between the appellant and Sgt Llewellyn prior to the start of the meeting. In fact, the appellant claimed that the only conversation he had with Sgt Llewellyn, before the start of the meeting, was via telephone enquiring as to his whereabouts as he was late. The appellant denied telling Sgt Llewellyn that the meeting had been sanctioned by CP Ellington (ret). He also denied knowing the "context and purpose for which he was being asked to meet to have the discussion".

[20] When the meeting commenced, each party introduced himself, and pleasantries were exchanged. In attendance were the appellant, Sgts Llewellyn and Lewis, Mr Bicknell and another man introduced by Mr Bicknell as Mr Mark McConnell. There was no evidence as to how Mr Bicknell and Mr McConnell came to be at the meeting. The appellant denied having ever met either Mr Bicknell or Mr McConnell and could not say how they were informed of or invited to the meeting. The appellant did not think that their presence at the meeting was unusual as it was quite the norm to have a meeting and not know the parties, and people would come to visit him daily. The appellant denied being aware, prior to the start of the meeting, that Mr Bicknell had been arrested, charged, and bailed

for court. He also denied knowing the role that Sgt Lewis played in the matter (although it had never been challenged that he had called Sgt Lewis and invited him to attend the meeting).

[21] Sgt Lewis testified that the appellant proceeded to inform the parties that "as it relates to the matter against Mr Bicknell a particular course was decided on". At the appellant's request, Sgt Llewellyn provided a synopsis of the events that had transpired on 9 April 2012. The appellant asked Mr Bicknell whether he agreed with Sgt Llewellyn's account and Mr Bicknell agreed, save with respect to the issue surrounding the two $1,000.00 notes, which Mr Bicknell said was "inadvertently placed" among the motor vehicle documents, and were not intended to bribe Sgt Llewellyn. Sgt Llewellyn was then asked to reply by the appellant. Sgt Llewellyn stated that "what Mr Bicknell said was a possibility because when he had requested the documents from Mr. Bicknell he did not ask for any money".

[22] The appellant's recollection of that event is somewhat different. He testified that at the start of the meeting, Sgt Llewellyn had said that "he was not proceeding with the matter as he on reflection never thought [Mr Bicknell] committed any offence". The appellant stated he then asked Sgt Llewellyn whether he thought Mr Bicknell was offering him a bribe, to which Sgt Llewellyn responded:

> "Mr. Forbes [the appellant] if I sit here and tell you that this man offered me a bribe I would be lying on him and my conscience would bother me. It is for that reason I decided not to proceed and went to Commissioner Thomas for advice as I thought I made a mistake."

[23] Sgt Lewis testified that the appellant thereafter indicated that "based on what was said by both gentlemen the matter should be resolved by not being placed before the court". Sgt Lewis agreed with the appellant's suggestion, as he said that based on Sgt Llewellyn's assertions in the meeting, he would have lacked the evidence to proceed on a bribery charge against Mr Bicknell. Sgt Lewis stated further that had Sgt Llewellyn communicated his uncertainty to him earlier, he would not have arrested and charged Mr Bicknell.

[24] Sgt Lewis indicated that the appellant then requested the documents that he (Sgt Lewis) had kept as a part of Mr Bicknell's file, which included the envelope with the two $1,000.00 notes, the photocopy of both notes, the recommendation, the copy of the bail bond and the incomplete CR12 form. The appellant then tore the envelope containing the two $1,000 notes, gave the notes to Mr Bicknell, and instructed him to "go and pay the traffic ticket at the collectorate". Sgt Lewis said in cross-examination that it was possible, although he could not "recall exactly" whether the notes had been passed from him to Mr Bicknell through the appellant. Sgt Lewis stated that subsequent to the meeting he never saw the documents again. He also testified that the decision having been taken not to proceed with the case against Mr Bicknell, there was no further basis upon which to keep the documents, including the two $1,000.00 notes, and so he felt comfortable leaving the documents on the table after the meeting. Cpl Davis indicated that at the end of the meeting, she had seen an envelope on the table in a folder which she eventually "put away".

[25] The appellant, however, denied requesting any documents from anyone and denied instructing Mr Bicknell to pay the traffic ticket as "[n]o issue of the ticket came up". He also denied instructing Sgt Lewis to return the money to Mr Bicknell (a suggestion which was not put to Sgt Lewis by his Queen's Counsel). Although he accepted that he had passed the two $1,000.00 notes to Mr Bicknell, he said that this was only done out of convenience, as he (the appellant) was closest to Mr Bicknell, and Sgt Lewis had attempted and failed to pass the notes directly to Mr Bicknell due to their distant seating positions. The appellant also accepted that had Mr Bicknell's matter been tried, the two $1,000.00 notes would have been a part of the file.

[26] After the return of the notes to Mr Bicknell, Sgts Llewellyn and Lewis requested a document from Mr Bicknell stating that they "did not approach him to resolve the matter in the way it did and that if anyone should visit [Mr Bicknell] or approach [Mr Bicknell] on [their] behalf [Mr Bicknell] should immediately contact [the appellant]". Sgt Lewis stated that he wanted that letter "[t]o basically guard against any possible lawsuit coming from the accused based on the fact that [Sgt Llewellyn] had already charged [Mr Bicknell] and then the decision that was subsequently taken … not to proceed to take him to court". Sgts Llewellyn and Lewis also requested that that document be signed by a Justice of the Peace.

[27] The appellant then called Cpl Davis and dictated a letter to her. Cpl Davis then returned with a typed copy of the dictated letter. All persons present read the letter. Mr Bicknell signed it. The appellant and Mr McConnell also signed it as witnesses. Sometime later, pursuant to the request of Sgts Llewellyn and Lewis, the signature of Mr Peter

McConnell (a notary public) was also attached as a witness. Sgts Llewellyn and Lewis obtained copies of that letter later. The letter was tendered and admitted into evidence as exhibit one and read as follows:

"Mr. Bruce Bicknell
St. Andrew
April 13, 2012

Attn: Sergeants J. Llewellyn, D. Lewis,

Re: Traffic Incident which occurred on Monday April 9, 2012 at approximately 8:20am along the Sir Florizel Glasspole Boulevard involving a 2011 Grey Audi Q7-5610FV

This serves to advise that's on Monday April 9, 2012 while travelling along the Sir Florizel Glasspole Boulevard I was stopped by a Police Officer who was conducting speed checks.

I was informed by the officer who introduced himself as Sergeant Jubert Llewellyn that I had exceeded the speed limit and was travelling at 80 km in a 50 km Zone.

The officer preceded to request the documents for the vehicle which was contained in a white envelope. I took the papers from the envelope upon instruction from the officer and handed the papers to him.

While examining the papers, Sergeant Llewellyn observed that two (2) one thousand dollar notes were among the documents that he got and interpreted this discovery as an attempted bribe and pointed out this matter to me, as also pointed it out to his colleague Sergeant D. Lewis.

I wish to state on record that these notes were inadvertently placed among the documents and were not in anyway intended as a bribe for Sergeant Llewellyn.

I wish to apologise for this grave misinterpretation and misunderstanding of the event and subsequent action that ensued.

I want to further assure both Sergeants Llewellyn and Lewis that I view their actions as solely professional and have no intention of proceeding further with the issue.

Once again, I want to assure these officers of my [utmost] respect for the law and the due process therein and wish to commend you both for the professional stance you have taken.

You are both top role models for the Jamaica Constabulary Force.

Thanks for any consideration given in this regard.

Sincerely,

_____ _____
Bruce Bicknell Mark McConnell **(Witness)**
Date: 13/4/12 Date: 13/4/12

_____
James Forbes **(Senior Supt. Of Police)**
Date: 13/4/12

_____
Peter McConnell **(Notary Public)**
Date: 13/4/12"

[28] The appellant's version of events in this regard was that he had only dictated a part of the letter which had been recorded and typed by Cpl Davis. When asked about the circumstances surrounding the attachment of his signature to that letter, the appellant stated that after the letter had been typed, Sgt Llewellyn had requested that he sign and witness the document "given a man of his reputation … so that nobody can question the document". The appellant said that Mr McConnell had also offered to witness the document, which was thereafter signed by the parties as indicated. However, in cross-examination, he was pressed as to his denial of the obvious conclusion that based on his testimony, his signature on the letter would have been contemplated from the beginning

and not after the request of Sgt Llewellyn. When re-examined on this issue, the appellant said that there were two drafts of the said letter, and his signature was affixed to the second draft (a fact which was not said by or put to any witness, most importantly, Cpl Davis).

[29] As indicated, Mr Bicknell was bailed to attend court on 18 April 2012. Neither Sgts Llewellyn nor Lewis attended court on that date as the mediation arrangements held on 13 April 2012 had in, Sgt Llewellyn's view, "done away with" the court proceeding. Sgt Lewis also stated that he did not lay an information, write, or request any statement, nor did he complete a file in the matter, as a decision was taken at the meeting on 13 April 2012, not to compile a file and submit the same to the court. CP Thomas (ret) had also testified that, in his view, the matter was at an end, as the appellant had called him after the meeting indicating that it ended well, which meant that the appellant had addressed Sgt Llewellyn's concerns.

[30] At the end of the meeting, both Sgts Llewellyn and Lewis were satisfied that nothing improper, unlawful, corrupt or in breach of JCF policies took place. They accepted that it was permissible for a police officer to make a complaint and withdraw it if that complaint was made in error. The meeting was in fact held to correct Sgt Llewellyn's error. Sgt Lewis also said that, in his view, there was no "ongoing investigation" into the matter, as Sgt Llewellyn was the sole witness (whose statement would eventually be placed on file) and there was no need to pursue other witnesses. So, in the view of both Sgts Llewellyn and Lewis, there was nothing inappropriate about the manner in which the matter was disposed of.

[31] Sgts Llewellyn and Lewis indicated that they gave two statements that were related to and arising from Mr Bicknell's matter. They cited their reluctance to give these statements as, in their view, the meeting held on 13 April 2012 brought that entire episode to an end. Indeed, after strenuous cross-examination, Sgt Llewellyn said that he was abandoning his second statement, as it was procured in circumstances "more akin to duress".

[32] In outlining the circumstances under which they gave their statements, both Sgts Llewellyn and Lewis reported to Traffic Headquarters at the direction of SSP Lewis. Thereafter they were escorted to the Anti-Corruption Branch of the JCF in a marked police vehicle (but not handcuffed). They were told that the Director of Public Prosecutions (DPP) was "re-compiling a file in the matter" and required statements from them to be placed thereon. Sgt Lewis stated that he had called his attorney because he was being forced to provide a statement relating to Mr Bicknell's arrest and the meeting with the appellant. However, after being instructed and forced to provide those statements, they eventually relented.

[33] SSP Lewis admitted to twice instructing Sgt Lewis to prepare and collect a statement in the matter against Mr Bicknell. However, Sgt Lewis had only complied with those instructions when the Anti-Corruption Branch intervened. The appellant was charged after those statements had been written and upon completion of the file by Insp Reid. Insp Reid had also submitted that file to the DPP who ruled that both the appellant and Mr Bicknell were to be charged for attempting to pervert the course of justice. ACP Haye arrested and charged the appellant and Mr Bicknell. When cautioned the appellant

said, "I have committed no offence", and Mr Bicknell said, "I am innocent. I have done nothing wrong".

[34] All the police witnesses for the prosecution, who had been asked, indicated that the proper forum to dispose of cases where a person has been arrested, charged, and bailed for court, is before the court. Although the appellant said that if a person is charged there is no absolute rule that that person should be taken to court, his witness, DCP Bailey, accepted that if a person is arrested, charged, and bailed (and there is knowledge that an individual has been bailed), the matter ought to go to court. DCP Bailey indicated there were instances in which a person may be arrested without charge, but there were guidelines for such situations which the appellant would never defy.

[35] SSP Lewis described the manner in which Mr Bicknell's case was disposed of as being rather unusual and indicated that based on his knowledge:

> "The procedure, the general and accepted procedure is that when a person is arrested he must be taken to court where you submit all the necessary information, bail bond, statement and all that is necessary. This is done to make sure that there is transparency and the environment that we now operate in you will prevent people from saying that corruption may exist so it is taken to the court for transparency but on the other side of it there is no law, no force policy or regulation that bars any senior officer of the Jamaica Constabulary Force to intervene in a matter that he or she thinks that great injustice is being done to a citizen of this island. There is no law barring him or [her]."

[36] Although SSP Lewis agreed that there were instances in which an individual was arrested, charged, and bailed, but had not appeared before the court, he stated that those instances were rare. He accepted that a police officer may seek advice from a

trained JCF mediator (like the appellant) on how to proceed in a case. However, SSP Lewis said that had he been presented with a comparable situation, where a person had been arrested, charged, and bailed, he would have taken the matter to court, and would not have engaged in dialogue with the accused. In that regard, he did not deem the appellant's actions with respect to the meeting as transparent.

[37] All the witnesses knew that the appellant was a trained mediator, and in fact, SSP Lewis and ACP Haye indicated that the appellant had trained them in that field during their respective careers. The appellant's training as a mediator was one reason given by Sgts Llewellyn and Lewis as to why they did not believe that the meeting was inappropriate. However ACP Haye stated that within the JCF the process of meditation normally takes place in disputes that are not criminal in nature, unless directed by the court. In giving evidence that highlighted the unusual nature of this meeting, Cpl Davis stated that in the two years she had been acting as the appellant's secretary, she had never typed a document like the letter (shown at paragraph [27] herein), and she had only seen the appellant conduct one mediation in his office.

[38] All the prosecution witnesses described the appellant as a man of impeccable integrity and excellent character. They outlined his many immeasurable contributions to the JCF and the nation (such as the establishment of Crime Stop) and indicated that those contributions had resulted in the appellant receiving a number of promotions and even a national award. Throughout the appellant's 33 years and eight months' service within the JCF, he had received several commendations for outstanding service. Indeed, DCP Bailey, who had testified on the appellant's behalf, stated that the appellant was recommended

for promotion to the post of ACP, prior to his arrest and charge. Sgt Llewellyn described the appellant as one of the "most outstanding members of the JCF", an "honourable man", and "an advocate and exponent of the highest principles of the JCF". No prosecution witness could identify a single infraction, departmental charge, or accusation of professional impropriety on the appellant's part, as those never existed. The appellant himself acknowledged those attributes and used them to support his denial of ever having attempted to pervert the course of justice.

[39] At the close of the prosecution's case, submissions of no case to answer were made on behalf of the appellant and Mr Bicknell. Those made on behalf of Mr Bicknell found favour with the learned Judge of the Parish Court. However, in relation to the appellant, the learned Judge of the Parish Court ruled that a prima facie case was made out against him, and so she called upon him to answer the charge of attempting to pervert the course of justice.

[40] The learned Judge of the Parish Court eventually found the appellant guilty. After hearing evidence from three character witnesses: Reverend Roy James Henry; Miss Faye Audrey Ellington and Miss Vanessa Taylor, and submissions in mitigation, the appellant was sentenced as seen at paragraph [1] herein.

The fresh evidence

[41] As indicated, before hearing this appeal, we heard an application to adduce fresh evidence relating to the transcript of proceedings in the trial of Mr Vaz and a press release issued by the DPP dated 17 July 2014. We refused the application to adduce fresh

evidence relating to the press release but granted it with respect to the notes of evidence in Mr Vaz's trial.

[42] Mr Vaz had been charged with a breach of section 14(2) of the Corruption Prevention Act. His trial was heard in the Corporate Area Parish Court on 17 July 2014. Sgt Llewellyn was also the chief witness in that case. He testified as to the interaction between himself and Mr Bicknell on 9 April 2012 and detailed his interaction with Mr Vaz on 12 April 2012 along Tom Redcam Drive (as shown at paragraph [10] herein).

[43] Sgt Llewellyn said that although he had written a statement in the matter, he may or may not have stated what had occurred between himself and Mr Vaz. This was because the statement was taken under duress. In fact, he said, "I was under stress" and had been told that "[he] was literally under arrest". While at the Anti-Corruption Branch, both he and Sgt Lewis were "cajoled, compelled, forced, [they] were coerced, bounded meaning the vehemence with which [they] were told to provide a statement". They were told by ACP Justin Felice that they could not leave until they provided a statement. Sgt Lewis stated further that:

> "I have never been as stressed in my entire life. Mr. McKenzie took us back to Traffic Headquarters Office to take our cars and we were told that we must return in the morning. We were told that we could bring along the attorney of our choice. I did not sleep that night. I was never handcuffed at any point. I was not actually put in a cell. I was brought to our vehicles and allowed to leave but told to return the following morning."

[44] Sgts Llewellyn and Lewis remained at the Anti-Corruption Branch from 7:30 pm to about 12:00 am. ACP Felice called CP Ellington (now retired) and only then were they

allowed to leave. After returning the next morning, statements were collected from them about the events that transpired with respect to Mr Bicknell, Mr Vaz and CP Thomas (ret).

[45] Sgt Llewellyn testified that the contents of that statement may not have been accurate because he was distraught when it was taken. As he could not recall the conversation between himself and Mr Vaz, he was unable to assist the court with regard to Mr Vaz's charge. Even though he had signed the statement, he "outlined all the stress and apart from self-preservation and the situation [he] saw himself into and [he] saw that a certain fate that was going to [be] meted out, [he] at the time thought [he] had no other option". He had never communicated the fact that he had been under duress and compelled to give the statement earlier, as he had not been given a suitable forum to do so. He therefore thought that Mr Vaz's trial was "as good as any" forum to ventilate the issue.

[46] After being cross-examined briefly, Sgt Llewellyn confirmed the manner in which he had given the statement. The prosecution indicated that based on Sgt Llewellyn's testimony that Mr Vaz had only voiced concerns about Mr Bicknell's health, and the other prosecution witnesses being unable to assist, it was therefore incapable of proving the elements of the offence. The prosecution thereafter offered no further evidence.

The appeal and the issues therein

[47] On 27 May 2014, the appellant filed a notice of appeal with nine grounds. Having regard to the fresh evidence and other issues that had arisen on the transcript, leave was

sought and granted to file and argue three supplemental grounds (nos 10, 11 and 12).

We restate those 12 grounds of appeal, in part, below:

> "1. The learned [Judge of the Parish Court] erred in rejecting the no case submission made on behalf of the appellant.
>
> 2. The verdict is unreasonable having regard to the evidence.
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> 3. The learned [Judge of the Parish Court] erred in finding the appellant guilty, as the prosecution has failed to prove the case against him beyond a reasonable doubt.
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> 4. The learned [Judge of the Parish Court] erred in accepting the evidence of the prosecution witness, Sergeant Llewellyn, and relying on same in arriving at her verdict as the said Sergeant Llewellyn has been shown to be manifestly unreliable and in fact, admitted to his own unreliability.
>
> 5. The evidence adduced on behalf of the prosecution is so discredited and/or so inherently unreliable that no conviction ought to have been arrived [sic] based on the said evidence and the learned [Judge of the Parish Court] erred in convicting the appellant based on the said evidence.
>
> 6. The evidence adduced called by and relied upon by the prosecution was so riddled with contradictions and inconsistencies as to be patently unreliable and lacking the credibility required by law to form the basis of a conviction; accordingly, the learned [Judge of the Parish Court] erred in pronouncing the appellant guilty.
>
> 7. The learned [Judge of the Parish Court] in excluding from the trial, evidence from witnesses patently relevant and admissible, whereby evidence material to issues to be resolved and potentially favourable to the appellant was not taken into account by the said [Judge of the Parish Court] in arriving at her verdict; as a consequence the appellant did not receive a fair trial and was deprived of a verdict of acquittal.

8. The learned [Judge of the Parish Court] rejected evidence from prosecution witnesses favorable to the appellant and consistent with the appellant's defence preferring instead evidence from other prosecution witnesses who were irreversibly discredited; whereby the appellant has been deprived of a verdict of acquittal.

9. The sentence of [the] court is manifestly excessive.

10. The prosecution of the appellant inclusive of his trial up to the point of conviction and sentencing amounts to an abuse of the court's process and in breach of his constitutional right to fairness and equal treatment. Accordingly his conviction ought to be set aside and a verdict of not guilty substituted.

11. The learned [Judge of the Parish Court] erred in her application of the law in relation to character evidence in that the [Judge of the Parish Court] omitted to apply the law to the appellant's sworn testimony and to demonstrate that she applied the propensity limb of the character direction to the evidence adduced whereby the appellant's conviction is to be set aside.

12. The fresh evidence now before the court renders the appellant's conviction unreasonable and/or establishes that there has been a miscarriage of justice. Accordingly his appeal ought to be allowed and the verdict of guilty set aside and a verdict of not guilty substituted…"

[48] In our view, those 12 grounds raised several issues. However, in the light of our ultimate disposition of this appeal, we will only canvass the issue stated below:

> Did the learned Judge of the Parish Court err in her determination as to whether the elements of the offence of attempting to pervert the course of justice (the actus reus and the mens rea) had been proved? (grounds 1, 2 and 3)

Findings of the Judge of the Parish Court relating to the elements of the offence of attempting to pervert the course of justice.

[49] During the trial, the learned Judge of the Parish Court made findings related to the elements of the offence of attempting to pervert the course of justice in two instances: firstly, in her ruling on whether Mr Bicknell had a case to answer; and secondly, in her assessment as to appellant's guilt at the end of the trial.

[50] In making her ruling on the submission of no case to answer, the learned Judge of the Parish Court had regard to the principles stated in **R v Selvage and Morgan** [1982] QB 372 and **R v Norma Von Cork and Others** (unreported), Court of Appeal, Jamaica, Resident Magistrate's Criminal Appeal No 38/2001, judgment delivered 13 May 2002. She used those principles to aid in her assessment of whether the elements of the offence of attempting to pervert the course of justice had been proved.

[51] She found that the prosecution had failed to demonstrate the circumstances under which Mr Bicknell came to be at the meeting. Sgts Llewellyn and Lewis stated that Mr Bicknell had never threatened them, nor had there been any indication that the conversations relating to civil action and backlash, took place in Mr Bicknell's presence or with his knowledge. Indeed, Sgt Llewellyn had said that the fear of being sued resided in his mind, and there was no evidence that it arose from anything said by Mr Bicknell.

[52] The learned Judge of the Parish Court also found that the prosecution did not show that the letter (exhibit one seen at paragraph [27] above) constituted any agreement. In fact, the agreement was arrived at and the money returned to Mr Bicknell before the

letter was dictated. She referred to Sgt Lewis' evidence that he had requested the letter to show that the police did not approach anyone to resolve the matter.

[53] In all the circumstances, the learned Judge of the Parish Court indicated that she was unable to say that the elements of the offence (relating to the actus reus) of attempting to pervert the course of justice had been made out against Mr Bicknell. For those reasons, she upheld the submission of no case to answer in Mr Bicknell's favour.

[54] As indicated, the learned Judge of the Parish Court had rejected the no case submission made on the appellant's behalf, as in her view, a prima facie case had been made out against him.

[55] At the conclusion of his trial, in making her assessment of whether the elements of the offence of attempting to pervert the course of justice had been proved, the learned Judge of the Parish Court relied on the principles emanating from **R v Vreones** [1891] 1 QB 360; **R v Rozamin Lalani** [1999] 1 Cr App Rep 481; and **R v Selvage and Morgan**.

[56] In evaluating the facts that, in her view, proved the actus reus and the mens rea of the offence, the learned Judge of the Parish Court indicated that she preferred the evidence presented by the prosecution. After careful consideration of the appellant's case, she rejected his defence. She found that there was divergence between the appellant's testimony and the case put to the prosecution witnesses by his Queen's Counsel. She said that the appellant "seemed to have resiled from" or "abandoned" his instructions to his Queen's Counsel. She considered what she described as his "evasiveness [and] his reluctance to answer some clear questions", which led her to the conclusion that he was

"disingenuous" and "insincere". In her view, the appellant had also "changed the nature of his case in the middle of it". Having assessed the inconsistencies, discrepancies and omissions on the prosecution's case, the learned Judge of the Parish Court made particular reference to the testimony of Sgts Llewellyn and Lewis, who she found were witnesses of truth. Consequent to that finding, she indicated that she preferred the version of events as outlined by Sgts Llewellyn and Lewis.

[57] She rejected outright the appellant's claim that he was ignorant as to the fact that Mr Bicknell had been arrested, charged, and bailed at the time he had the meeting, as she accepted that this would have been disclosed to the appellant during his prior conversations with Sgt Llewellyn and CP Thomas (ret). She accepted that the meeting took place because Sgt Llewellyn had said that he had made a mistake in charging Mr Bicknell and wanted to correct it to avoid the backlash. She also accepted that the evidence of Sgt Lewis that the appellant had indicated that "as it relates to the matter against Mr Bicknell a particular course was decided on", and also his evidence that the appellant had also said that "based on what was said, the matter should be resolved by not being placed before the court". She found that the two $1,000.00 notes (that were a part of the exhibit in the criminal case against Mr Bicknell) were returned to Mr Bicknell "by the hands of the appellant". She accepted Sgt Llewellyn's testimony that the appellant was fully aware of all the circumstances when he indicated that the appellant had said that "the meeting was to be a mediation". She accepted that the letter was drafted to protect Sgts Llewellyn and Lewis from a civil suit (although that had not been specified in the letter).

[58] Having regard to section 6(1) of the Bail Act, she found that the appellant (who was a SSP at the time with a wealth of experience) was aware that mediation was not permissible in Mr Bicknell's case, as Mr Bicknell had been bailed for court. She indicated that mediation is a court driven process, which can only take place, outside of the court, within limited parameters. The fact that Mr Bicknell had been arrested, charged, and bailed for court, his matter ought to have proceeded along its natural course. The court would, at that time, decide on how to proceed in the light of expressions of uncertainty on the part of the witnesses.

[59] She concluded her findings thus:

> "I accept that [the appellant's] participation in the meeting in his capacity was designed to affect the outcome of this criminal matter against Mr. Bicknell. I accept that out of the meeting there was this agreement arrived at, [at] the instance of [the appellant] to dispose of the matter against David Bruce Bicknell. I accept that no such disposition of a criminal matter is permissible in law at the Oxford Road office.
>
> I accept that there is no legal basis for disposing of a criminal matter in that fashion and such an attempt has the effect of veering the matter from the course that justice ought to follow.
>
> I accept that the actions of the accused constitute both the actus reus and mens rea required to prove the offence of attempting to pervert the course of justice. His act had a tendency to and was intended to pervert the course of justice.
>
> I am satisfied beyond a reasonable doubt of that I find [sic] the accused guilty as charged."

Submissions

[60] Counsel for the appellant, Mr Hugh Wildman, submitted that the appellant ought to have been acquitted at the end of the prosecution's case, as there was nothing to which the actus reus of the offence could attach. Mr Wildman said that when the appellant participated in the meeting, there was no ongoing course of justice, nor had there been an ongoing investigation. No information and hence no formal charges had been laid against Mr Bicknell. The file relating to the instant case was incomplete and had not been placed before the court as statements from both Sgts Llewellyn and Lewis and the CR12 form had not been placed thereon. So, it was Mr Wildman's contention that there could be no perversion or interference with a course of justice that did not exist (see **Roy Denton v R** (unreported), Court of Appeal, Jamaica, Resident Magistrate's Court Criminal Appeal No 39/2005, judgment delivered 28 March 2007 and **R v Anthony Lewis** (unreported), Court of Appeal, Jamaica, Resident Magistrate's Miscellaneous Appeal No 2/2005, judgment delivered 16 February 2006).

[61] Mr Wildman also argued that one cannot accept the bald assertion that as Mr Bicknell had been charged and bailed for court, there was evidence of ongoing proceedings. That evidence, he said, must be examined within its full context (see **R v Colin Shippey** [1988] Crim LR 767). Given Sgt Llewellyn's admission that he acted prematurely in making the allegation against Mr Bicknell, any evidence that a course of justice had been embarked upon would have been tenuous and equivocal. In reliance on **R v Beaudry** [2007] 1 SCR 190, he argued that it was within Sgt Llewellyn's discretion not to bring charges against Mr Bicknell, provided that his discretion was exercised bona

fides. He further submitted that if mere participation in a meeting, in those circumstances, amounted to a criminal offence, then all the persons who had convened and participated in the meeting should have been charged. Accordingly, the actus reus for the office was not established in the instant case.

[62] As it relates to the mens rea, Mr Wildman argued that pursuant to **R v Selvage and Morgan**; **R v Lalani**; and **R v Randy Kirkham** 1998 CanLII 13866 (SK QB), the learned Judge of the Parish Court had failed to direct herself with regard to the specific intent required to prove the offence of attempting to pervert the course of justice. Indeed, he argued that her directions in that regard were flawed, as she seemed to have conflated the actus reus and the mens rea (as in **R v Lalani**). She made no findings as to whether the appellant's participation in the meeting (orchestrated by CP Thomas (ret)) had perverted the course of justice. She also did not comment on the effect of the appellant's attempt to protect Sgt Llewellyn from a civil suit. Although he accepted that there were indeed cases where one's intent to pervert the course of justice could be deduced from their actions, Mr Wildman argued that that had not occurred in the instant case, as the appellant had embarked upon a course that had breached no law or policy guidelines (see **R v Kirkham**).

[63] In the light of the ruling by the learned Judge of the Parish Court that Mr Bicknell had no case to answer, Mr Wildman submitted that she had erred in rejecting the submission of no case to answer made on the appellant's behalf. He indicated that when one had regard to the fact that both the appellant and Mr Bicknell were jointly charged, and given the language of the indictment, their legal positions relative to the offence fell

within the same category, despite the factual differences. Counsel stated that the evidence considered by the learned Judge of the Parish Court, in Mr Bicknell's case, was also exculpatory and neutralized any suggestion that the appellant committed the actus reus and had the mens rea necessary to prove the offence. Indeed, counsel asserted that Mr Bicknell played a more active role in the meeting by providing a summary of events; signing the document as a party and not as a mere witness; and making promises to Sgt Llewellyn in the bribery case against him. The appellant, he said, had no motive to "knowingly perpetuate" any unlawful action but had only facilitated the intended decision of Sgts Llewellyn and Lewis. As a consequence, the no case submission made on the appellant's behalf ought to have been upheld.

[64] Mr Wildman closed this aspect of his submissions by indicating that at the end of the prosecution's case, there was no evidence that had proved the elements of the offence. The learned Judge of the Parish Court, he said, had erred in her interpretation of the law as it relates to ingredients of the offence of attempting to pervert the course of justice. In all the circumstances, the appellant's conviction should be quashed, and his sentence set aside.

[65] Mrs Sharon Milwood-Moore, Deputy Director of Public Prosecutions (Ag) for the Crown, accepted the ratio decendi in the authorities cited by Mr Wildman. She, however, refuted his assertion that there was no evidence to prove the elements of the offence of attempting to pervert the course of justice, and she also rejected his submission that the learned Judge of the Parish Court had misinterpreted the law on that issue.

[66] Mrs Milwood-Moore stated that there was ample evidence before the learned Judge of the Parish Court, indicating that there was an ongoing course of justice. She argued that:

1. Sgt Llewellyn had made a report to Sgt Lewis, immediately following his exchange with Mr Bicknell, resulting in Mr Bicknell's arrest and charge.
2. An entry was made in the station diary documenting Mr Bicknell's arrest and charge.
3. Mr Bicknell was bailed in the sum of $50,000.00, with a surety, to appear before the court on 18 April 2012.
4. Sgt Lewis had retained certain documents to be placed on the file in Mr Bicknell's matter that was to be submitted to the court.

[67] Mrs Milwood-Moore also referred to the appellant's evidence which, in her view, pointed to a course of justice existing. The appellant had stated that his understanding of the "particular course [to be] decided on", arose out of his conversation with CP Thomas (ret) and Sgt Llewellyn prior to the meeting, and Sgt Llewellyn's revelations at the meeting. The appellant, counsel said, had also admitted that he had facilitated a meeting which resulted in the criminal matter against Mr Bicknell being disposed of. Mrs Milwood-Moore argued further, that given the appellant's senior rank within the JCF, he would have fully appreciated the negative effect of returning the two $1000.00 notes, on the criminal case against Mr Bicknell, had that case proceeded before the court. She

posited that those acts, taken together, constituted the actus reus of the offence (see **R v Norma Von Cork**).

[68] Mrs Milwood Moore indicated that when regard was had to the ratio decidendi in **R v Selvage and Morgan** and **R v Lalani**, it could not be said that the learned Judge of the Parish Court had erred in finding that the appellant had the mens rea required to prove the offence. She indicated that by virtue of those cases, the learned Judge of the Parish Court would have been correct in her observation that the mens rea can be inferred from the actus reus, once proved. Indeed, counsel posited that **R v Lalani** has relieved the Crown of the need to prove that the defendant knew that his actions would have had the effect of perverting the course of justice, providing that that defendant intended whatever it is that is intended by the actus reus.

[69] The appellant, she said, had carried out certain acts voluntarily and deliberately as opposed to the acts undertaken by Mr Bicknell. Additionally, his words and conduct support the finding by the learned Judge of the Parish Court that he had acted with the mens rea required to establish the offence, as there would have been evidence that:

1. Sgt Llewellyn had twice told the appellant of his concern about the backlash, consequences and repercussions that could occur as a result of the meeting, and the appellant indicated that as CP Ellington (ret) was aware of the meeting, he did not anticipate any problems.

2. The appellant's ignorance of whether Mr Bicknell had been arrested, charged, and bailed, had never been suggested to the prosecution witnesses during their cross-examination.

3. The learned Judge of the Parish Court found that the appellant had known that Mr Bicknell was arrested, charged, and bailed, prior to the meeting, based on his conversations with CP Thomas (ret) and Sgt Llewellyn.

4. At the meeting, the appellant had said that as it relates to the matter against Mr Bicknell, "a particular course was decided on".

5. After Sgt Llewellyn provided the synopsis requested by the appellant at the meeting, the appellant indicated that based on what was said by Sgts Llewellyn and Lewis, the matter should be resolved by not being placed before the court.

[70] Counsel stated that on an examination of all the evidence, at the close of the prosecution's case, there was indeed a case to answer by the appellant. Additionally, as the learned Judge of the Parish Court was correct in her findings regarding the actus reus and mens rea, grounds 1-3 were without merit.

Discussion and analysis

[71] At common law, it is an offence to attempt to pervert the course of justice. The essential ingredients of that offence were identified late in the 19th century, in **R v Vreones**, as "the doing of some act which has a tendency and is intended to pervert the administration of public justice". Although the term 'attempt' is used, the offence is itself a substantive offence that can be attempted and not an 'attempt' to commit a substantive offence. While there is no closed list of acts that fall within the definition of that offence, a course of justice must be in existence and a defendant acts or embarks upon a course of conduct, which has the tendency to and is intended to obstruct, divert, or disrupt the course of justice.

[72] On a reading of the authorities, it is clear that the circumstances of each case determine what the course of justice is and when it begins. The course of justice may begin when the police discover that a crime has been committed and are conducting investigations to discover the perpetrator (see **R v Selvage and Morgan**). It can begin when the police suspect that a crime has been committed; are conducting investigations to establish whether that is the case, and steps are taken to interfere with that investigation (see **Lorraine Gay Watson v Her Majesty's Advocate** 1993 SCCR 875). It is therefore not limited to matters directly concerning proceedings already in being, or which are imminent, and can be committed after the perpetration of a crime but before investigations into it have begun (see **R v Rafique, Sajid and Rajah** [1993] QB 843). Indeed, as in **R v Machin** [1980] 3 All ER 151, it is committed even though a crime has

not been committed or cannot be proved, if the defendant believes that there are investigations that could result in judicial proceedings.

[73] What then is conduct that can amount to an attempt to pervert the course of justice? As indicated, a course of conduct that has the tendency to and is intended to obstruct, divert, or disrupt the course of justice suffices. It requires some positive action and so inaction will not suffice (see **R v Headley** [1996] RTR 173; [1995] Crim LR 737). Consequently, conduct which may lead and is intended to lead to a miscarriage of justice, whether that miscarriage actually occurs, may constitute the actus reus of the offence, and the prosecution does not have to prove that that tendency, in fact, materialised (see **R v Machin** and **R v Murray** [1982] 2 All ER 225). Lord Lane CJ said in **R v Murray** that the real issue to be determined is whether what the defendant "has done 'without more' might lead to injustice".

[74] As with some criminal offences, there is a requirement to prove intent. The prosecution must prove either an intent to pervert the course of justice or an intent to do something which, if achieved, would pervert the course of justice. The issue as to whether the requisite intent had been established has been explored in several authorities.

[75] In **R v Selvage and Morgan**, the English Court of Appeal had to consider the mens rea required for attempting to pervert the course of justice. In that case, Mrs Pauline Ann Selvage agreed with Mr Dennis Morgan to use her position as a clerical assistant at the Driver and Vehicle Licensing Centre, to remove endorsements made on Mr Morgan's driver's license arising from convictions for various motor vehicle offences.

Mrs Selvage's attempt to affect the removal of those endorsements had failed, and when those attempts were discovered, both she and Mr Morgan were charged with conspiracy and attempting to pervert the course of justice. They pleaded guilty after the records from the licensing authority were admitted into evidence and based on the judge's indication that they had intended to commit the act, despite there being no imminent proceedings.

[76] Their appeal to the English Court of Appeal was allowed, and their convictions quashed. The court found that there was no course of justice embarked upon as there were no criminal proceedings pending, imminent, being investigated or contemplated against the defendants or anyone else at any relevant time. The mere act of altering the records at the licensing authority cannot by itself be said to be a perversion of the course of justice. The court also rejected an argument by the prosecution that an intent to pervert the course of justice is not an essential ingredient of the offence. Watkins LJ said at pages 383 and 384 that:

> "It cannot be right to say that the only intent which has to be proved is the intent to do the act - in the present case to alter the records and so on at the [licensing authority] which may or may not be held to have a tendency to pervert. The entire weight of authority is against it….
>
> In order, therefore, to secure a conviction against Mrs. Selvage and against Mr. Morgan, the prosecution in our opinion had to prove that each of them intended, by Mrs. Selvage's act or acts, that the doing of justice should be interfered with, i.e. that it should be perverted."

[77] **R v Kirkham** is a decision from the Court of Queen's Bench for Saskatchewan in Canada. Although it is a first instance decision, in our view, Baynton J gave a thorough

assessment of the actus reus and mens rea required to prove the offence of obstructing justice (which despite being a statutory offence, is akin to the common law offence of attempting to pervert the course of justice). After applying his assessment of the law to the facts and despite Kirkham's egregious conduct in that case, he still found him not guilty.

[78] Kirkham, a Crown Counsel, was charged with two counts of obstructing justice, in that, he had authorised the police to collect personal information about potential jurors, to gain an unfair advantage in the prosecution; and he had also failed to advise defence counsel of his actions prior to the commencement of the trial. Kirkham sought information regarding the jurors' views on mercy killing, as the defendant in the criminal matter assigned to him was accused of killing his disabled daughter, and in his defence, had said that he had done so out of mercy. Defence counsel learned of the prosecutor's contact with the jurors a year later and reported the same to the police, which resulted in charges being brought against Kirkham.

[79] In deciding whether Kirkham committed the actus reus, Baynton J stated that although the process of getting background information does not and should not involve direct contact with a prospective juror, "there is nothing inherently evil or criminal about counsel getting background information on prospective jurors with a view to utilizing that information in the selection of the jury". The learned judge stated that neither the Canadian Criminal Code nor any other statute or practice had regulated the process of gathering background information on prospective jurors or the disclosure of this information. Additionally, at the time Kirkham's case arose, he stated that there had not

been a policy in place that provided any guidance to counsel as to what his or her legal and professional duties and obligations might be in that respect. While the learned judge believed that Kirkham's conduct, in not advising defence counsel of instructions to contact jurors, may warrant disciplinary or contempt of court proceedings, he found that there seemed to be no criminality in that conduct.

[80] On the issue of mens rea, the court accepted that "specific intent can be inferred because an obstruction of justice is the obvious consequence of conduct of that nature". That type of conduct is not only "obviously intentional in the general sense, but is also obviously done with the specific intent to obstruct the course of justice". In contrast, Baynton J found that "Kirkham's actions were neither obviously wrong nor was it obvious that it would precipitate an obstruction of justice". He had "neither the objective nor subjective foresight that his conduct could result in an obstruction of justice", as Kirkham believed that only three prospective jurors were contacted, and he was afforded three peremptory challenges to keep those three prospective jurors off the actual jury. It was therefore not obvious to Kirkham that his failure to contact defence counsel would result in an obstruction of justice.

[81] Baynton J indicated that "even if [he] were to assume for the purposes of [his] decision that Kirkham's conduct did constitute the actus reus of the two counts charged, [he] would still acquit him on the basis that the mental element of the offence charged in either count has not been established beyond a reasonable doubt". Kirkham, he said, only wanted to ensure that he could meaningfully challenge prospective jurors who might

not be impartial, and in this fashion keep them off the jury selected to try the case. Baynton J stated that:

> "[43] In reaching this conclusion I am in no way suggesting that what Kirkham did was proper or appropriate. It is obvious from what happened that it was not. Kirkham readily admitted on the witness stand that what he did was foolish and lacked good judgment. He undoubtedly will not make the same mistakes again and the potential consequences of such conduct are now known not only to Kirkham but to other counsel as well. But my task is not to determine whether Kirkham failed to exercise good judgment or whether he acted in an unprofessional or even in an unethical manner. Such issues should be canvassed in other forums, not in a criminal court except within the context of a contempt proceeding.
>
> [44] If this were not so, every error of judgment or foolish mistake on the part of Crown or defence counsel that resulted in the ordering of a new trial, could result in a … criminal conviction for obstruction of justice. In my view this interpretation of s. 139(2) is neither the law nor should it be the law. As I mentioned previously, the gravamen of the offence is the guilty intent to obstruct the course of justice. The offence was not designed to criminalize all conduct that causes the course of justice to be obstructed unless that conduct was entered into with that guilty specific objective."

[82] In **R v Lalani**, after an 11-week trial on charges against four defendants, the jury was unable to arrive at a verdict and was discharged. Thereafter, an anonymous caller alerted the court to the existence of improper contact between Lalani (a jury member in the trial against the defendants) and the defendants. Investigations into those allegations led to the discovery of 11 telephone calls between Lalani and two defendants. There was one particularly long call to the defendant, Angela Ash.

[83] Investigations also revealed that Lalani had told several jurors about the contact she had with the defendants in the case. She had told one juror that she had spoken to

Ash on the London Underground and discussed the case with her, including evidence given by Ash's co-accused. Another juror had said that on one occasion, Lalani deliberately followed Ash into the Underground Station. Lalani had even said in an interview that she wanted to acquit all the defendants.

[84] Lalani had initially denied contact between herself and those defendants until investigations revealed otherwise. Lalani agreed to meeting with the defendant, Mr Shirvanbeigy, but not Ash, in the Underground. She also admitted to receiving many calls from Ash and Shirvanbeigy, who told her they were not guilty, but that Mr Mehdizadeh (another defendant) was guilty.

[85] Although Ash had denied speaking to any juror, Lalani's telephone number was found on a notepad in her home. Ash then gave a witness statement detailing her contact with Lalani and the extent of their conversations.

[86] Lalani was charged with doing acts tending and intended to pervert the course of justice. Lalani initially pleaded not guilty. Her counsel made an application for the indictment to be quashed as the particulars did not disclose an offence. The trial judge ruled that any communication between defendants and jurors concerning the subject matter of the trial is capable of being improper communication and can therefore have a tendency to and a possibility to intend to pervert the course of justice. Lalani thereafter changed her plea to guilty.

[87] Lalani challenged her conviction on the basis that the judge was wrong in law when he ruled that, on the admitted facts, the indictment disclosed an offence. Her

convictions were quashed as the court found that the judge had "conflated the actus reus and the mens rea together without focusing sufficiently clearly on the mens rea element of the offence". In assessing the precise nature of the mens rea required for the offence Brooke LJ said that:

> "While it is correct that motive is irrelevant, it is still necessary to prove the requisite intention for the defence, and reliance *tout seul* on improper communication in the face of the defendant's refusal to admit anything about her mental state on either count, did not, in our judgment, go far enough to constitute the complete offence. If the trial had proceeded we have little doubt that the Crown would have had little difficulty in proving that she had the requisite intention…
>
> It appears from the authorities that the prosecution must either prove an intent to pervert the course of justice or, as in ***R v Meissener*** [(1995) 130 ALR 547], an intent to do something which, if achieved, would pervert the course of justice. The course of justice may be perverted if it is obstructed, interfered with, defeated or changed."

[88] Although the court accepted that a defendant in a criminal trial who passes information to a juror, and that juror continues his/her duties without informing the judge, it ought to be easy for the Crown to prove that by that juror's action, he/she intended to pervert the course of justice, in permitting himself/herself to be influenced by the information he/she had received. However, the court stated that:

> "In the present case the appellant resolutely declined to make any admissions at all about her state of mind. It was therefore incumbent on the Crown to call evidence to prove the requisite intention, which could not be implied on admitted facts once the appellant had put the matter so clearly in issue."

[89] In the instant case, in the light of the foregoing, in making a determination as to whether the actus reus existed, we must first consider whether a course of justice prevailed. If we were to find that a course of justice was embarked upon, we must then consider whether there was conduct that had the tendency to and was intended to obstruct, divert, or disrupt the course of justice.

[90] Sgt Llewellyn indicated that based on statements made by Mr Bicknell he had formed the view that Mr Bicknell had attempted to bribe him. He made a report to Sgt Lewis who arrested and charged Mr Bicknell. Mr Bicknell was bailed in the sum of $50,000.00 with a surety to attend court on 18 April 2012. A record of the incident was made in the station diary. In those circumstances, it is evident, that criminal proceedings were initiated.

[91] The process to initiate court proceedings did not complete its natural course as Sgt Llewellyn indicated that he had made a mistake and had "jumped to a conclusion too early" with regard to whether Mr Bicknell had attempted to bribe him, and the meeting was held to provide Sgt Llewellyn with an avenue to correct his mistake and to prevent him from being sued. The question therefore arises as to whether Sgt Llewellyn had the power to elect not to proceed with Mr Bicknell's prosecution, Mr Bicknell having already been arrested, charged, and bailed for court.

[92] A police officer's discretion not to prosecute an offender was explored by the Supreme Court of Canada in **R v Beaudry**. In that case, Beaudry, a police officer, was charged with obstructing justice (under the Canadian Criminal Code) for deliberately

failing to gather the evidence required to lay criminal charges against a fellow police officer, Plourde. Plourde, who was apparently driving while intoxicated, was seen driving erratically and he had failed to stop despite the flashing lights of the patrol car that had been pursuing him. Upon Plourde's apprehension, Beaudry decided not to administer a breathalyser test and had refused to comply with instructions from his superior to prepare a report, as he believed that Plourde was depressed and needed treatment rather than being criminally charged.

[93] During his trial, Beaudry contended that his discretion not to prosecute his colleague had been properly exercised, while the Crown argued that it was based on preferential treatment. The trial judge agreed with the Crown and convicted Beaudry. His appeal to the Quebec Court of Appeal was dismissed (by a majority). He, thereafter, appealed that decision to the Canadian Supreme Court, which also dismissed his appeal (by a majority). The findings, as stated in the headnote, are instructive:

> "… A police officer who has reasonable grounds to believe that an offence has been committed, or that a more thorough investigation might produce evidence that could form the basis of a criminal charge, may exercise his or her discretion to decide not to engage the judicial process. But this discretion is not absolute. The exercise of the discretion must be justified subjectively, that is, the discretion must have been exercised honestly and transparently, and on the basis of valid and reasonable grounds; it must also be justified on the basis of objective factors. In determining whether a decision resulting from an exercise of police discretion is proper, it is therefore important to consider the material circumstances in which the discretion was exercised. The justification offered must be proportionate to the seriousness of the conduct and it must be clear that the discretion was exercised in the public interest [see paragraphs 37-41] …

> The accused cannot be convicted of the offence [of obstructing justice] solely because he has exercised his discretion improperly. Where the discretionary power is relied upon, the analysis of the actus reus of the offence of obstructing justice must be carried out in two stages. It must first be determined whether the conduct in issue can be regarded as a proper exercise of police discretion. If so, there is no need to go any further, since it would be paradoxical to say that conduct that tends to defeat the course of justice can at the same time be justified as an exercise of police discretion. If, beyond a reasonable doubt, the answer is no, it must then be determined whether the offence of obstructing justice has been committed. The actus reus of the offence will thus be established only if the act tended to defeat or obstruct the course of justice. Regarding mens rea, this is a specific intent offence. The prosecution must prove beyond a reasonable doubt that the accused did in fact intend to act in a way tending to obstruct, pervert or defeat the course of justice. A simple error of judgment will not be enough. An accused who acted in good faith, but whose conduct cannot be characterized as a legitimate exercise of the discretion, has not committed the criminal offence of obstructing justice [see paragraphs 49-52]
>
> In the instant case, the guilty verdict is reasonable and is supported by a perfectly plausible interpretation of the evidence. The trial judge made no error of law, and it is apparent from the record that there was evidence to support each element of the offence. The resolution of the determinative issue turned on the credibility of the accused, and the trial judge was in the best position to assess the credibility of the witnesses and to determine whether the evidence left room for a reasonable doubt. His findings of fact provide ample support for his conclusion that the accused had, beyond a reasonable doubt, breached his duty by giving preferential treatment to P because P was a [police] officer, and that he had had the specific intent to obstruct, pervert or defeat the course of justice by not taking the breath samples that would have been needed to lay a charge against him [see paragraphs 4, 55 and 74]."

[94] Accordingly, it is well within the scope of a police officer's discretion not to prosecute an offence. However, that decision must be made subjectively, exercised

honestly and transparently, and based on valid and reasonable grounds justified on objective factors.

[95] In this case, Sgt Llewellyn formed the view that Mr Bicknell had attempted to bribe him based on the existence of two $1,000.00 notes among his car papers and words said by Mr Bicknell to him. Mr Bicknell was arrested, charged, and bailed pursuant to Sgt Llewellyn's conclusion. That same day, Sgt Llewellyn expressed reservations about his conclusion. It was Sgt Llewellyn's position that he had made a mistake and had "jumped to a conclusion too early" with regard to whether Mr Bicknell had attempted to bribe him. Although Sgt Llewellyn testified to receiving a plethora of calls that prompted him to turn off his phone, there was no evidence as to the content of those calls and whether they had influenced his sudden uncertainty as to whether Mr Bicknell had committed an offence. It was stated on the evidence that Mr Vaz had visited and spoke to Sgt Llewellyn. However, there is no indication that the contents of that conversation affected Sgt Llewellyn's decision.

[96] Sgt Llewellyn told CP Thomas (ret) and the appellant that he thought he had made a mistake in arriving at his conclusion and sought their assistance on how to correct that mistake and avoid a civil suit.

[97] During the meeting, Mr Bicknell denied trying to bribe Sgt Llewellyn and indicated that the money had been placed among the documents inadvertently. Sgt Lewis said that had Sgt Llewellyn told him that he was uncertain as to whether Mr Bicknell had tried to bribe him, he would not have arrested and charged Mr Bicknell. Additionally, in Sgt Lewis'

view, there was no "on-going investigation" into the matter as Sgt Llewellyn was the sole witness and consequently, there was no need to pursue other witnesses. Moreover, no information and hence no originating document had been laid, and the file against Mr Bicknell was incomplete as neither statements from Sgts Llewellyn and Lewis, nor the finalized CR12 form had been placed thereon.

[98] It would not have been a proper exercise of discretion for Sgt Llewellyn to decide not to proceed with the case against Mr Bicknell solely because he was a noted businessman, or in response to pressure or requests from anyone. But there was no evidence to that effect. It is also unclear whether Sgt Llewellyn had second thoughts based on a genuine review of the facts and the arrest, or because of the persons who had called him and those he spoke to. However, the evidence suggests that Sgt Llewellyn genuinely believed that he was mistaken when he arrived at the conclusion that Mr Bicknell had attempted to bribe him. In those circumstances, it would have been a proper exercise of his discretion not to proceed with the case against Mr Bicknell. Having solicited the appellant's assistance to correct that mistake, and the appellant facilitating or participating in a meeting that afforded Sgt Llewellyn that opportunity, it could not be said that the appellant acted in a manner to interfere with Sgt Llewellyn's exercise of discretion.

[99] We have arrived at that conclusion hesitantly, because the so-called "mediation" or "facilitation" carried out by the appellant, was not mandated by the court or any legislative power. Indeed, it had never been argued that any such power existed.

Additionally, in our view, this mediation or facilitation of that meeting was outside the usual scope of the JCF for the following reasons:

(a) The initiation of the mediation or facilitation of the meeting came not from within the JCF or from the appellant's chain of command, but from a retired police Commissioner of Police who had sought the appellant's intervention.

(b) The appellant had no administrative or supervisory responsibility for Sgts Llewellyn and Lewis and did not contact or refer the matter to any police officer with that responsibility.

(c) The person charged, Mr Bicknell, was present and involved in the discussion to resolve the issue.

[100] From the testimony given by the police officers, one can conclude that a person can be arrested, charged, and bailed and not placed before the court (although that occurrence is rare). It would not be improper for police officers to involve themselves in such matters. Indeed, the Jamaica Police Manual is silent as to involvement after a person has been bailed. However, where a person is arrested, charged, and bailed (and there is knowledge that an individual has been bailed) the matter ought to go to court.

[101] It could be said that the appellant, in conducting the mediation or facilitation of the meeting, may have failed to exercise good judgment. However, we could not say that the appellant's actions resulted in a miscarriage of justice. Indeed, had the case against

Mr Bicknell proceeded, in the light of Sgt Llewellyn's uncertainty as to whether Mr Bicknell had tried to bribe him, it is unlikely that the prosecution would have been able to prove the requisite mens rea for an alleged breach of the Corruption Prevention Act by Mr Bicknell.

[102] For all those reasons, although a criminal prosecution had begun, the judicial process to bring Mr Bicknell before the court had not been initiated. The matter was still at the stage where the officer laying the charge could exercise his discretion as to whether he would proceed with the prosecution. The evidence indicates that this was told to the appellant by Sgts Llewellyn and Lewis. Therefore, although in our view the appellant's action was misguided, it cannot be said that his conduct had the tendency to and was intended to obstruct, divert, or disrupt the course of justice. The learned Judge of the Parish Court therefore erred in her finding that the prosecution had proved the actus reus of the offence of attempting to pervert the course of justice. In our opinion, the actus reus of the offence had not been proved.

[103] Having made that finding, the question of the appellant's mens rea would be irrelevant. However, we wish to note that as in **R v Lalani**, the learned Judge of the Parish Court seemed to have conflated the actus reus with the mens rea. She failed to analyse whether the appellant had specifically intended the obvious consequence of his actions. Although the meeting resulted in the disposal of the charges against Mr Bicknell, based on Sgt Llewellyn's testimony and that of the appellant, the appellant's mediation or facilitation of the meeting was done in order to assist Sgt Llewellyn to correct his mistake and avoid a civil suit. The appellant was invited to aid Sgt Llewellyn (and not Mr

Bicknell) in this regard by CP Thomas (ret). As a consequence, there was no evidence that there was any specific intent by the appellant, to obstruct, pervert or defeat the course of justice in the matter against Mr Bicknell.

[104] As indicated, a ground of appeal related to the propriety of the learned Judge of the Parish Court's ruling that Mr Bicknell had no case to answer, but the appellant did. Our perusal of that ruling revealed that some of the factors outlined by the learned Judge of the Parish Court in arriving at her finding that Mr Bicknell had no case to answer were applicable to the appellant's case. Mr Bicknell had also played an active role at that meeting and had benefitted directly from the disposition of the criminal case against him, and yet, the learned Judge of the Parish Court stated that his actions did not constitute the actus reus of the offence. Bearing in mind the law relative to the offence of attempting to pervert the course of justice, we accept and agree that the facts, in this case, did not support the existence of actions by Mr Bicknell and the appellant constituting the actus reus of the offence. It is therefore inexplicable, in those circumstances, for the learned Judge of the Parish Court to have ruled that the appellant had a case to answer.

Conclusion

[105] In the light of all the above, in our view, the elements of the offence of attempting to pervert the course of justice had not been proved on the facts in this case. Grounds 1-3 would therefore succeed. In those circumstances, we would make the following orders:

1. The appeal is allowed.
2. The appellant's conviction and sentence are set aside.

3. Judgment and verdict of acquittal entered.

4. The sum of $800,000.00 paid by Mr James Forbes (the appellant) is to be refunded to him forthwith.

[106] We once again find ourselves having to apologise for the delay in delivery of a judgment. Due to the many administrative deficiencies which plague our justice system the delay was entirely unavoidable but is nevertheless deeply regretted.