

Lord Justice General

Lady Paton

Lord Carloway

Advocator: Mulholland, Q.C., Solicitor General; Crown Agent

Respondent: Shead; Capital Defence, Edinburgh

8 October 2010

Introduction

[1] The respondent has been charged on indictment before the Sheriff Court in Dundee. The sheriff after debate sustained preliminary pleas to the relevancy of a number of charges contained within that indictment. (He then proceeded to find the respondent not guilty of these charges; this latter disposal is acknowledged to have been taken in error.) The relevant charges are in the following terms:

"(4) between 14 July 2007 and 5 December 2007, both dates inclusive, you MARK HARRIS did conduct yourself in a disorderly manner, repeatedly send or cause to be delivered numerous letters and text messages to the said Nancy Renwick at Abercorn Street, Dundee or elsewhere to the prosecutor unknown and did thereby harass, annoy, intimidate and frighten her and thereby commit a breach of the peace;

(5) between 7 August 2007 and 9 August 2007, both dates inclusive at 107 Tay Street, Newport-on-Tay or elsewhere to the prosecutor unknown you MARK HARRIS did conduct yourself in a disorderly manner and repeatedly send communications to Lisa Renwick, Burness Solicitors, 120 Bothwell Street, Glasgow, to her alarm and distress, whereby she required to implement a block on any future communications from you and you did thereby commit a breach of the peace;

(7) between 11 and 15 August 2007, both dates inclusive at 107 Tay Street, Newport-on-Tay or elsewhere to the prosecutor unknown you MARK HARRIS did for the purpose of causing annoyance, inconvenience or

needless anxiety to Nancy Renwick, c/o Tayside Police, Dundee persistently make use of a public electronic communications network in that you did repeatedly telephone said Nancy Renwick, conduct yourself in a disorderly manner and commit a breach of the peace;

(8) on 14 or 15 August 2007 at 107 Tay Street, Newport-on-Tay or elsewhere to the prosecutor unknown, you MARK HARRIS did conduct yourself in a disorderly manner, cause to be sent and did send to various persons at Burness Solicitors, 120 Bothwell Street, Glasgow numerous envelopes containing various items designed to cause distress and embarrassment to Lisa Renwick, all to her fear and alarm and distress and did thereby commit a breach of peace;

(9) on 10 September 2007 at Mobile World Track You Ltd, Blackwood Business Park, Ash Road South, Wrexham you MARK HARRIS did cause and arrange to be fitted to motor vehicle registration number NBR 78 a mobile tracking device without the knowledge or consent of said Nancy Renwick, registered keeper of said vehicle and on dates between 11 September 2007 and 20 October 2007, both dates inclusive, at Gallacher Retail Park, Dundee and at various locations in Scotland, you MARK HARRIS did conduct yourself in a disorderly manner, use the information provided by said device to follow said Nancy Renwick to various locations and make your presence known to her, all to her fear and alarm and commit a breach of the peace;

(10) between 11 September 2007 and 14 October 2007, both dates inclusive Between (*sic*) at 107 Tay Street, Newport-on-Tay or elsewhere to the prosecutor unknown, you MARK HARRIS did conduct yourself in a disorderly manner, obtain and fit or cause to be fitted, to the vehicle, registration number SG51 UCF, a mobile tracking device, for the purpose of harassment of the users of the vehicle, Nancy Renwick and Lisa Renwick, both c/o Tayside Police, Dundee to their fear and alarm and did thereby commit a breach of the peace;

(12) on 24 or 25 September 2007 at Parkland Oval, Crookston, Glasgow and on the A80 road, you MARK HARRIS did, having taken motor vehicle, registration number NBR 78, drive said motor vehicle on the A80 road through a section covered by an automatic speed camera at a speed in excess of the legitimate speed limit in order that the registered keeper of said vehicle would be pursued for an offence she did not commit, incur the financial penalty and licence penalty points to her annoyance and distress and you did this with intent to pervert the course of justice and did attempt to pervert the course of justice;

(13) on 5 November 2007 at Police Headquarters, Dundee you MARK HARRIS did during the course of various conversations, state to Gary Brown, Inspector, Tayside Police, Dundee, then engaged in the execution of his duty and in particular having been engaged in investigations in respect of you MARK HARRIS, that you had engaged a private investigator to obtain information about said Gary Brown and that you knew (a) where said Gary Brown resided; (b) where his mother resided; (c) details of a mortgage application pertaining to said Gary Brown, that you were getting close to said Gary Brown and would get closer still and you wanted to find out every single detail about said Gary Brown, and that you were interested in his mother and brother, all in a manner calculated to intimidate and threaten said Gary Brown in an attempt to stop him engaging in lawful investigations and you did this in an attempt to pervert the course of justice, and you did thus attempt to pervert the course of justice;

(14) on 5 December 2007 at Police Headquarters, Dundee you MARK HARRIS did during the course of various telephone conversations with Paul Romanowski, Detective Constable of Tayside Police, Dundee, then engaged in the execution of his duty, and having been engaged in investigations in respect of you, MARK HARRIS, state that you knew (a) where said Detective Constable resided; (b) where his mother worked; (c) where his father worked prior to his retirement; (d) personal details pertaining to said Detective Constable's brother; (e) that said Detective Constable played rugby for a particular team and (f) details of the amount of mortgage pertaining to said Detective Constable's house and did warn said Detective Constable to stay away from you and stay away from your bank manager and your business all in a manner calculated to intimidate and threaten said Paul Romanowski, in an attempt to stop him engaging in lawful investigations

and you did this in an attempt to pervert the course of justice and you did thus attempt to pervert the course of justice."

[2] The Crown presented this Bill of Advocation complaining that the decision of the sheriff to uphold the pleas to the relevancy in respect of these charges was wrong and should be reversed. As indicated at the outset of the hearing, the complaint as regards charge (7) is no longer insisted upon.

[3] This is the second indictment which the respondent has faced in relation to the circumstances outlined in the charges. In the original indictment charges (13) and (14) were each libelled as a breach of the peace. The respondent's plea to the relevancy in respect of those charges was ultimately upheld on appeal by a full bench of this Court (*Harris (No.1) v HM Advocate* 2009 SLT 1078).

Background

[4] The complainer in charge (4) ("the first complainer") is the ex-partner of the respondent. The complainer in charge (5) ("the second complainer") is her daughter. The breakdown in the relationship between the first complainer and the respondent was acrimonious. The first complainer had obtained a non-harassment order in terms of the Protection from Harassment Act 1997 against the respondent. *Interim* interdicts were granted in her favour against the respondent on 20 July 2007 and 31 July 2007, with a final interdict being granted on 14 August 2007. According to the information provided to the sheriff by the procurator fiscal depute the interdict was in force between 20 July 2007 and 18 October 2007.

Submissions by the Solicitor General

Charges involving an attempt to pervert the course of justice

[5] The Solicitor General challenged the reasoning of the sheriff in holding that charges (12) -(14) were irrelevant. The crime of attempting to pervert the course of justice was not of recent origin: its genesis was found in the works of Hume and Alison (*HM Advocate v Martin* 1956 JC 1, per Lord Cameron at page 3). The offence covered a broad spectrum of behaviour (Hume, i, 366 *et seq*; Alison, i, 488). It was not restricted to the destruction of evidence (*Waddell v MacPhail* 1986 SCCR 593; *Carney v HM Advocate* 1995 JC 11; *Johnstone v Lees* 1994 SCCR 687; *Dalton v HM Advocate* 1951 JC 76; *HM Advocate v Mannion* 1961 JC 79). As regards charge (12), the course of justice began when the speeding offence was deliberately committed, resulting in a notice of intended prosecution being sent to the registered keeper of the vehicle. Charges (13) and (14) involved menacing statements to police officers: the circumstances were *a fortiori* of cases in which there had been witness intimidation (*Carney v HM Advocate*). Each of the charges involved a course of justice which had commenced, an *actus reus* by the respondent and an intent to interfere with that course of justice and was therefore relevant. Such charges had been anticipated in the respondent's previous appeal (*Harris (No.1) v HM Advocate*, per Lord Justice General Hamilton at para [26]).

Charges involving breaches of the peace

[6] The Solicitor General recognised that the conjunctive test for breach of the peace was now well-established (*Smith v Donnelly* 2002 JC 65, per Lord Coulsfield at para [17]; *Harris (No.1) v HM Advocate*, per Lord Justice General Hamilton at para [15]). However, the requisite public element of the offence was not absent merely because the conduct took place on private property. One had to assess whether there was a realistic risk of serious disturbance to the community were the behaviour discovered (*McIntyre v Nisbet* 2009 SCCR 506, per Lord Carloway at paras [11]-[12]; *Paterson v HM Advocate* 2008 JC 327, per Lord Justice General Hamilton at para [22]). The circumstances of each of the charges of breach of the peace libelled met that test. The behaviour libelled in charge (5), particularly in conjunction with that libelled in charge (8), had caused alarm and distress and had the potential to threaten serious disturbance to the community, perhaps prompting colleagues of the second complainer to take the law into their own hands. The act of following the first complainer libelled in charge (9) would, of itself, have caused distress, which was exacerbated when the tracking devices described in charges (9) and (10) were discovered. Each of the complainers had been informed of the offence in respect of the other and could therefore be considered "lieges". It was open to a jury to infer that this behaviour might lead to individuals taking the law into their own hands. In the context

of there being a non-harassment order and an interdict in force against the respondent, the behaviour libelled in charge (4) had caused alarm. Issues of discoverability and immediacy might depend on the facts of each case (cf *Bowes v McGowan* 2010 SLT 683). However, the communications in the present case had been shown to the second complainer, who, again, could be considered a "liege", with the risk that she might take the law into her own hands.

Submissions on behalf of the respondent

Charges involving breaches of the peace

[7] Mr Shead submitted that, beyond the break-up of the relationship between the respondent and the first complainer, any detailed consideration of the wider context risked obscuring the question of the relevancy of each charge. Breach of the peace was a public order offence: if the behaviour complained of took place in private, there had to be a realistic risk of its discovery (*Harris (No.1) v HM Advocate*, per Lord Justice General Hamilton at paras [24]-[25]). There also required to be some connection and immediacy between the conduct complained of and the reaction provoked. The Crown's approach in the present case stretched these principles beyond recognition. If there was a lacuna in the law, it was for Parliament to create relevant statutory offences. Charges (4) and (5) involved private communications and personal information. The requisite public element was absent and there were no averments of other individuals being alarmed or distressed. The nature of the information sent in charge (8) was unlikely to cause individuals to take the law into their own hands. The alleged conduct in charge (7), which was no longer insisted upon, was not materially different from that libelled in charges (4), (5) and (8). Charges (9) and (10) contained no allegations as regards the possibility of a serious disturbance to the community. While some of the alleged conduct in charge (9) took place in public, it would, at most, have resulted in another individual speaking uncivilly to the respondent. Each of the charges was irrelevant.

Charges involving attempt to pervert the course of justice

[8] Mr Shead's primary submission was that there was no crime of attempting to pervert the course of justice at common law. Its existence was not supported by the works of Hume, Alison or McDonald and its emergence as a distinct crime was a development of mid-twentieth century case law (Gordon, *Criminal Law*, 3rd ed., paras 1.32-1.35; *Stair Memorial Encyclopaedia*, Vol.7 paras 491-492). However those cases had not involved any express or implied exercise of the declaratory power to create such an offence. The exercise of that power, *inter alia*, contravened the principle "*nullum crimen sine lege*": it had not been expressly exercised in the twentieth century (cf Gordon, *Criminal Law*, para 1.28; *Webster v Dominick* 2005 1 JC 65, per Lord Justice Clerk Gill at para [28], referring to *McLaughlan v Boyd* 1934 JC 19, per Lord Justice General Clyde at pages 22-23). Rather, the common law had taken a "wrong turn" and erroneously proceeded on the basis that such a crime existed.

[9] In *Scott (A.T.) v HM Advocate* 1946 JC 90, the first reported case featuring such a charge, the appeal was dealt with on conventional grounds and wider issues of relevancy were not considered (see Lord Carmont at page 93). In *Dalton v HM Advocate*, Lord Justice Clerk Thomson's assertion (at page 79) that "the facts" constituted a crime was open to interpretation: historically, there was no need for a *nomen juris*, and it may simply have been an acknowledgement that the destruction of evidence was a recognised crime, being an example either of subornation of perjury or contempt of court, rather than a distinct crime of attempting to pervert the course of justice. A similar analysis could be applied to *HM Advocate v Mannion*, the salient feature of which was that it involved steps being taken to prevent evidence being made available (per Lord Justice Clerk Thomson at page 80). *HM Advocate v Martin* involved escape from lawful custody, a recognised crime by the common law (see Lord Cameron at page 3). If the crime of attempting to pervert the court of justice did exist, the cases suggested that it was narrowly defined and involved the destruction or concealment of evidence. Charges (12)-(14) did not meet that definition.

[10] Mr Shead's final submission was that, as the charges amounted to an unwarranted development of the crime of attempting to pervert the course of justice, the Lord Advocate's insistence upon them would breach Article 7 of the European Convention on Human Rights and was *ultra vires* of her powers (section 57(2) of the Scotland Act 1998). While the relevant procedure as regards a devolution minute had not been followed,

the court could deal with what was, in essence, a devolution issue (*Allison v HM Advocate* 2010 SLT 261, per Lord Rodger of Earlsferry at paras [5]-[6]). The development of a common law offence by judicial law-making had to be achieved progressively and not with one large leap (*SW v United Kingdom* (1996) 21 EHRR 363 at 399; cf *R v Rimmington* [2006] 1 AC 459, per Lord Bingham of Cornhill at para 33, approving *R v Clark* [2003] 2 Cr App R 363, per Tuckey LG at para 13; Gordon, *Criminal Law*, at para 1.44). One had to look at the essence of the offence and determine if it was clearly defined and if any development was reasonably foreseeable, such that an individual would know, if need be with the assistance of the court's interpretation and informed legal advice, what acts and omissions would make him criminally liable (*Kononov v Latvia* 25 BHRC 317 at para 185). That could not be said in the present case. As regards charge (12), the registered keeper would have the opportunity to identify the driver of the vehicle at the time of the offence and there was no course of justice running at the time the actions took place. Charges (13) and (14) referred to officers "having been" involved in investigations which suggested there was no ongoing investigation at the time the actions took place. The sheriff had been right to hold that the charges were irrelevant.

Reply by the Solicitor General

[11] The Solicitor General submitted that Acts of Adjournal were a means to regulate criminal procedure and ensure that parties and courts were given adequate notice. This court, unlike the Supreme Court, was bound by their terms. As a relevant devolution minute had not been lodged within seven days of the indictment being served (Rule 40.2) and no motion to permit the issue to be raised on cause shown had been made (Rule 40.5), the Convention issues should not be considered.

[12] The continued existence of the declaratory power had been confirmed in relatively recent times and there were clear examples of it having been exercised (*Grant v Allan* 1987 JC 71, per Lord Justice Clerk Ross at page 77; *Strathern v Seaforth* 1926 JC 100, per Lord Justice Clerk Alness at page 102; *Khalik v HM Advocate* 1984 JC 23; *Ulhaq v HM Advocate* 1991 SLT 614; Gordon, para 1.15). It had been used to create the offence of attempting to pervert the course of justice long before the enactment of the Scotland Act 1998 and Human Rights Act 1998. An even earlier example of such a charge was seen in *HM Advocate v Rae and Little* (1845) 2 Broun 476. That example did not fall within any of the examples of crimes against the course of justice cited by Hume, who, like Alison, had expressly recognised the possibility of charges which did not fall within the category of subornation of perjury (Hume, i, page 383; Alison, i, 488). That was not consistent with a narrowly defined crime restricted to the destruction or concealment of evidence.

[13] The existence of the crime of attempting to pervert the course of justice had been judicially recognised (*Scott (A.T.) v HM Advocate*, per Lord Carmont at page 93; *HM Advocate v Martin*, per Lord Cameron at page 3). The essential elements of that offence were: a course of justice which had commenced (*Dean v Stewart* 1980 SLT (Notes) 85); an *actus reus* designed to interfere with that course of justice; and the necessary *mens rea* in regard to those actions (*HM Advocate v Mannion*). As regards charge (12) the course of justice had commenced when the speeding offence was detected by the speed camera, if not earlier. There was no difference in principle in attempting to prevent a witness providing evidence prior to, as opposed to after, a police investigation had commenced (cf *Dalton v HM Advocate*). The cases cited were not merely examples of recognised crimes being labelled without the relevant *nomen juris*. In *Dalton v HM Advocate* it was not clear, in light of the deletions by the jury, what that relevant crime might be. Charges of attempting to pervert the course of justice were a regular feature of criminal jurisprudence in Scotland. Some 2,500 such charges had been proffered in 2008/09.

[14] As regards Article 7 of the Convention, three principles could be determined from the Strasbourg jurisprudence: absolute certainty was unnecessary and some vagueness was inevitable; the law may be clarified and adapted to take into account new circumstances which could reasonably be brought under the principles of the offence; and any development had to be consistent with the essence of the offence and foreseeable. None of the principles had been breached in the circumstances of the present case. Had the respondent sought legal advice, he would have been told that his actions amounted to the crime of attempting to pervert the course of justice, involving as it did the three essential elements of the offence as defined by

the case law. That definition was compatible with Article 7. The nature of the offence meant that it was inevitably couched in slightly vague terms but that did not, of itself, contravene Article 7 of the Convention (*Lucas v United Kingdom* (2003) 37 EHRR CD 86).

Discussion

[15] The background to the charges in this indictment is that at one time the respondent was in a relationship with Nancy Renwick but that relationship had broken down. Thereafter the respondent allegedly took a number of steps in relation to Ms Renwick and her daughter, Lisa Renwick. These steps have some, at least, of the characteristics of what might be described as "stalking".

[16] In England and Wales section 1 of the Protection from Harassment Act 1997 prohibits a person from pursuing "a course of conduct (a) which amounts to harassment of another and (b) which he knows or ought to know amounts to harassment of another". References to harassing a person "include alarming the person or causing the person distress" (section 7(2)). By section 2(1) a person who pursues a course of conduct in breach of section 1 is guilty of an offence; a person so guilty is liable on summary conviction to imprisonment for a term not exceeding six months. Where the course of conduct causes another to fear that violence will be used against him or her, heavier penalties are available (section 4(1) and (4)).

[17] As regards Scotland, there is a prohibition against pursuing a course of conduct which amounts to harassment of another and (a) is intended to amount to harassment of that person or (b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person (section 8(1)). There is a like non-exclusive definition of "harassment". However, there is no equivalent statutory offence of breach of the prohibition against harassment. Rather, a victim or prospective victim may bring civil proceedings (known as an "action of harassment"). In such proceedings the court may, among other remedies, grant a "non-harassment order" (section 8(5)(b)(ii)). Section 9 provides for penalties on breach of a non-harassment order. Alternatively, following a conviction for "an offence involving harassment" a prosecutor may apply to the court to make a non-harassment order against the offender, in addition to any other disposal, it also being an offence, with like penalties, to breach such an order (section 234A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 11 of the 1997 Act). Thus, in Scotland a statutory offence in relation to harassment cannot be committed unless there is in force a non-harassment order.

[18] It may be that this difference in treatment proceeds on an assumption that a common law charge of breach of the peace might be available in at least some of the circumstances which, in England and Wales, might have led to a conviction under section 2(1) of the 1997 Act. But, however that may be, it is necessary at this time to approach a charge of breach of the peace against more recent judicial explanations of its ingredients in the context of, among other things, the European Convention. If this leads to there being a lacuna in the protection of victims, that is a lacuna which it is for Parliament to fill.

[19] It is now clear that the crime of breach of the peace involves two elements: conduct (1) severe enough to cause alarm to ordinary people and (2) which threatens serious disturbance to the community (*Smith v Donnelly* at para [17]). These requirements are conjunctive (*Paterson v HM Advocate*; *Harris v HM Advocate*).

[20] The threat of serious disturbance to the community means that communication at a distance of a message which passes wholly privately between individuals cannot, without more, be a relevant foundation for a breach of the peace. There is nothing to suggest that the communications referred to in charge (4) were seen or were likely to be seen by any person other than the respondent and the complainer - until at least they were reported to the authorities. As to the communications referred to in charge (5) (which were e-mails), the Solicitor General advised us that the Crown's information was that the complainer, who was a solicitor, had reported receipt of them at her place of work to her senior managers, who had arranged for future

communications from that source to be blocked electronically. It is to be noted, however, that the charge is that the respondent by his conduct caused alarm and distress to the complainer, Lisa Renwick, not to any person to whom she may have shown, or was likely to show, the e-mails. The charge, as framed, is essentially of sending communications which were distressing to the recipient. There is no element of disturbance to the community. It was not suggested that the form of communication (by internet) gave it that community element. There is nothing to suggest that there was a realistic risk of the sending of this private communication being discovered by any mode (see *Jones v Carnegie* at para [12], and now *WM v HM Advocate* [2010] HCJAC 75).

[21] Charge (8) is somewhat different. There the communications are alleged to have been sent "to various persons" at the firm of solicitors where Lisa Renwick was employed. The enclosures in the envelopes so sent were, we were informed, a letter about her mother (Nancy Renwick), newspaper articles about the civil dispute between Nancy Renwick and the respondent and a dating agency profile. These were, it is averred, designed to cause distress and embarrassment to Lisa Renwick and did cause her fear and alarm and distress. We are not persuaded that this charge is irrelevant. Much may turn upon the evidence as to the terms of the enclosures and the reaction to them, actual or potential, of the third parties to whom the envelopes were in the first place addressed. That these addressees were all within the premises of a firm of solicitors, rather than in the public street, does not, in our view, render the charge irrelevant (*Paterson v HM Advocate*). Their involvement may be sufficient to constitute the necessary community element.

[22] Charges (9) and (10) constitute, in effect, rather unusual forms of stalking or harassment. Charge (10) involves only the fitting of the tracking device. Although the vehicle to which it was fitted was presumably thereafter driven on the public roads, there is nothing to suggest that alarm or distress was thereby caused or was likely to be caused to anyone other than the respective complainers on discovery that the device had been fitted. The prospect of serious disturbance to the community is lacking. Charge (9) may be different in that respect. There the information provided by the device was, it is averred, used by the respondent to follow the complainer to various (presumably public) places and make his presence there known to her. The particular circumstances in which these events occurred in public places may or may not amount to a breach of the peace. We are not in these circumstances prepared to hold that charge (9) is irrelevant.

[23] Each of charges (12) to (14) is labelled as a charge of attempting to pervert the course of justice. The circumstances narrated in charges (13) and (14) share certain features; those in respect of charge (12) are somewhat different.

[24] In Gordon, *Criminal Law of Scotland* (3rd ed.) at para 1.32 and following the learned author, in a chapter headed "Crime, Offences and the Declaratory Power" discusses "attempt to pervert the course of justice". He opens that discussion as follows:

"One way in which the criminal law has been extended in modern times without explicit reference to the declaratory power has been by treating 'attempt to pervert (or defeat) the course of justice' as a specific crime, and holding certain forms of conduct to be criminal because they are modes of committing this crime ... But the appearance of 'attempt to pervert the course of justice' as a specific crime is a fairly modern phenomenon."

It is true that "attempt to pervert the course of justice" is not noticed by the institutional writers as a distinct crime. Although "conspiring ... to defeat or obstruct the administration of justice" (by impersonating an accused) was part of the narrative of a charge in 1845 (*HM Advocate v Rae and Little*), the first appearance of it in a reported case as a distinct crime appears to have been in *Scott (A.T.) v HM Advocate*, where the indictment labelled, among other crimes, an attempt to persuade certain witnesses to give false evidence in criminal proceedings. It might, no doubt, have been charged as subornation of perjury. The issues arising in the appeal were not concerned with the name under which the charge in question had been framed. Lord Carmont, however, at page 93 observed:

"I do not suggest that attempts to pervert the course of justice, as a crime, might not be constituted by inducing persons to make false statements outwith the witness box ...".

He does not suggest that there is no crime known to the law of Scotland as an attempt to pervert the course of justice; indeed, his observation tends to suggest the contrary. Neither of the other judges, who both agreed with Lord Carmont and who included Lord Justice General Normand, expressed any surprise at the way in which the charge was framed.

[25] In *Dalton v HM Advocate* the appellant was convicted, in restricted terms of a charge which narrated that "you did thus attempt to ... pervert the course of justice". The circumstances were of an attempt to persuade an eyewitness not to identify at a police parade a particular person in relation to a theft. It was contended on behalf of the appellant that what he had been convicted of did not amount to a crime by the law of Scotland. This contention was peremptorily rejected by Lord Justice Clerk Thomson. At page 79 he said:

"I have not the slightest hesitation in saying that these facts do constitute a crime. What he was charged with and what he was found guilty of was taking steps to destroy in advance evidence which might lead to the detection of a serious crime and the conviction of those responsible for it."

Lord Mackay, who had been the trial judge in *Scott*, cited as sound law the passage in that case quoted above. Lord Patrick agreed with Lord Justice Clerk Thomson, saying at page 81 in relation to the facts:

"That simply amounted to an attempt to eliminate evidence which might tend to incriminate a person in a future criminal charge, and that is quite clearly a crime, and a serious crime, in the law of Scotland."

[26] In *HM Advocate v Martin* the charge related to an attempt to secure the escape of prisoners in lawful custody. It was libelled as an "attempt to defeat the ends of justice". No issue was taken with the use of "defeat" rather than "pervert". Again the contention was that the circumstances narrated in the charge did not infer the commission of a crime recognised by the law of Scotland. The trial judge (Lord Cameron) rejected that contention. He referred to passages from *Hume* and *Allison* dealing with prison-breaking and of *Allison* says at pages 2-3:

"... it is quite plain that [he] regarded the act of breaking the type of prison in use when he wrote as being an act in violation of the order and course of justice, and an act in direct infringement of regulations essential to the peace and well-being of society."

At page 3 he added:

"But, in my opinion, there can be no doubt that to form a criminal purpose to hinder the course of justice by effecting escape of a prisoner from lawful custody, or by taking other steps to frustrate the ends of criminal justice, is and always has been a crime by the common law of Scotland, and that those who aid the escape are equally guilty with the prisoner who by their aid escapes from lawful custody. What is libelled in this indictment is very plainly an attempt to hinder the course of justice and frustrate its ends by seeking to assist a sentenced criminal to escape or evade the penalty of his crime. That is an offence against public order and against the course of justice. If I am correct in that view - and if I am wrong, I can be corrected - then that is the end of the matter, because what is libelled here is but one species of a well-recognised and undoubted genus of crime."

He thus recognises an attempt to effect the escape of a person from lawful custody as a species of the more general class of crime of taking steps to frustrate the ends of criminal justice.

[27] In *HM Advocate v Mannion* another species of that crime (concealing oneself to avoid being a witness at a criminal trial) was recognised as relevantly libelled. Lord Justice Clerk Thomson said at page 80:

"It seems to me to be clear that if a man, with the evil intention of defeating the ends of justice, takes steps to prevent evidence being available, that is a crime by the law of Scotland."

[28] It is thus clear that by not later than 1961 it had been authoritatively recognised that attempting to pervert (or to defeat) the ends of justice was a crime according to the common law of Scotland and that the commission of that crime might take various forms. In *Waddell v MacPhail* an appeal court presided over by Lord Justice General Emslie sustained a conviction for the common law charge of attempting to pervert the course of justice (giving false evidence to the police as to the driver of a vehicle). A conviction on a similar charge (in respect of intimidating certain witnesses from giving true evidence) was subsequently sustained by an appeal court presided over by Lord Justice Clerk Ross (*Carney v HM Advocate*). Again its existence was not doubted in *Dean v Stewart*.

[29] These authorities provide an ample basis for the proposition that attempting to pervert the course of justice is, and has been since long prior to the advent of the Convention into Scots law, a crime in this jurisdiction. It matters not whether it originally came to be so through the operation of the "declaratory power" of the High Court of Justiciary - though there is no express reference to that power in the authorities cited. While its instances may be various, it is, with its close relationship to the due administration of criminal justice, sufficiently clear to withstand any Convention challenge based on imprecision or uncertainty. There is no question of the court now exercising any declaratory power by declaring a new crime. It is, however, consistently with Article 7 of the Convention, entitled to elucidate and clarify the law in different but foreseeable circumstances (*SW v United Kingdom*, at para 36; *R v Rimmington*, per Lord Bingham of Cornhill at para 35; *Kononov v Latvia*, para 185). That means that, provided that any development is consistent with the essence of the offence and could reasonably be foreseen, the court may interpret and develop it to meet new circumstances.

[30] Mr Shead submitted that, even if the law of Scotland did recognise a crime of attempting to pervert the course of justice, the scope of that crime was limited to cases in which there was an attempt to destroy evidence. But the cases on analysis are not restricted to such a narrow scope. Attempting to pervert the course of justice can foreseeably take a number of forms. Mr Shead's objections in principle must accordingly be rejected.

[31] As to the particular criticisms, charges (13) and (14) clearly envisaged that in each case a course of justice (namely, police investigations with respect to the respondent) was in train and that in the course of each of them the respondent took various steps in an attempt to stop them. These charges are relevant. Charge (12) is unusual. It appears to be concerned not with a pre-existing course of justice but with a course which would be set in train in the event of the vehicle in question being identified by the automatic speed camera as being driven in excess of the legitimate speed limit. If, however, it is established that the respondent deliberately set in train events designed falsely to incriminate the complainer, we see no reason why this should not constitute an attempt to pervert the course of justice.

[32] In all the circumstances we shall pass the Bill to the extent of recalling the sheriff's interlocutor of 21 January 2010 in so far as it found the respondent not guilty of certain charges, dismiss charges (4), (5), (7) and (10) as irrelevant and remit to the sheriff to proceed to trial on the remaining charges.