Does A Witness Have To Be Corrupt?: *R v Gatti*

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In *R v Gatti; ex parte Attorney-General*[1] the Queensland Court of Appeal, constituted by Fitzgerald P, Pincus JA and Lee J considered the interpretation of ss 127(1)(a) of the Queensland *Criminal Code*. Section 127 is headed 'Corruption of witnesses' and the relevant sub-section reads:

> (1) Any person who —
>
> (a) gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, any property or benefit of any kind to, upon, or for, any person, upon any agreement or understanding that any person called or to be called as a witness in any judicial proceeding shall give false testimony or withhold true testimony . . . is guilty of a crime, and is liable to imprisonment for 7 years.

I. The facts

CR Gatti was charged under ss 127(1)(a) for offering Rochelle Ramsay $10 000 if she withheld her testimony at certain trials. In the District Court, Judge Brabazon held that the Crown must prove an agreement or understanding between Gatti and Ramsay to show that an offence under ss 127(1)(a) had been committed. The Crown entered a nolle prosequi. The Attorney-General referred the following point of law to the Court of Appeal:[2] Is a concluded agreement or understanding between the offeror (who, in this case, was Gatti) and the witness (Ramsay), to the effect that the witness will withhold true testimony or give false testimony, an essential element which must be proven to establish an offence under ss 127(1)(a)?

II. Majority decision

The majority, Fitzgerald P[3] and Pincus JA,[4] held that where a person is charged under ss 127(1)(a) the Crown does not have to prove that there was a concluded agreement between the offeror and the witness.

Fitzgerald P said it seemed significant that the material portion of the sub-section referred to 'promises' and 'offers'.[5] His Honour held that the reference to 'offers' ought to be regarded as extending to the period prior to the witness's response. The nature of the response and whether the 'offer' became a conditional or unconditional promise would not have any bearing on whether an offence against ss 127(1)(a) was committed. This construction of ss 127(1)(a) was supported by the fact that whether the offence was committed was determined solely by the alleged offender's conduct and was independent of the attitude held by the witness or prospective witness.[6]

Pincus JA considered that the key issue was the meaning of the word 'upon'.[7] His Honour rejected the respondent's submission that 'upon' meant 'under', which would require a concluded agreement to exist. His Honour held that the legislature intended the word 'upon' to have a broad meaning. A concluded agreement need not come into being for the offence to be committed and his Honour employed a logic similar to that of

1 [1997] 2 Qd R 481.
2 [1997] 2 Qd R 481 at 483–84 per Pincus JA
3 [1997] 2 Qd R 481 at 482.
4 [1997] 2 Qd R 481 at 483.
5 [1997] 2 Qd R 481 at 482.
6 [1997] 2 Qd R 481 at 483.
7 [1997] 2 Qd R 481 at 484.

Fitzgerald P when he said: '. . . it would seem odd that the reaction of the person to whom the accused made the offer should determine whether or not the accused committed an offence.'[8]

III. Dissent of Lee J.

Lee J's dissenting judgment far exceeded the length and detail of the other judgments. He declined to depart from the view he adopted in *R v Danahay*,[9] which requires an acceptance of the offer by the witness before an offence is committed. If the offer is not accepted, the offence committed is that prescribed by s 140 of the Code, which carries a lower penalty. His view of the relevance of the witness's conduct to ss127(1)(a) differed from the other judges in *Gatti*.

> The response of the witness, as intended by the offeror, can render the offeror's conduct more serious if the witness accepts. Many offences increase in severity according to the progressive results intended or obtained by an offender.[10]

IV. Differences in reasoning and interpretation

1. R v Danahay[11]

This case dealt with the interpretation of ss 127(1)(a), and it was the first time the Court of Criminal Appeal (as it then was) had given detailed consideration to section 127.[12] It was held by a majority (Thomas and Williams JJ; Lee J dissenting) that the witness need not actually give false evidence or withhold true testimony (as required by the agreement) for the offence of corrupting the witness to be complete.

On the issue of agreement, Thomas J held that an offence could be committed where a witness was promised money to give false evidence and the witness had yet to indicate whether he or she would give false evidence.[13] Conversely, Lee J held the words 'upon an understanding' necessarily meant there had to be a consensus between the witness and the offeror that a certain course of conduct would follow. A mere unilateral attempt by the offeror would, in his Honour's opinion, not be enough to commit the offence. The point was not expressly discussed in the judgment of Williams J.

In *Gatti*, Lee J read the judgment of Williams J in *Danahay* as requiring the witness to have indicated acceptance before the offence was committed. On the other hand, Pincus JA[14] said that Williams J was not dealing with the issue that concerned the Court in *Gatti*. Fitzgerald P did not mention *Danahay*.

Lee J[15] viewed *Danahay* as authority for the proposition that the offence under ss 127(1)(a) would only be committed when the offer made to the witness was accepted. He considered this view to be correct.[16]

2. R v Watt[17]

In the Supreme Court of the Northern Territory, Angel J had to consider whether an offence had been committed under section 100(a) of the Northern Territory *Criminal Code*, which

8 [1997] 2 Qd R 481 at 486.
9 [1993] 1 Qd R 271.
10 [1997] 2 Qd R 481 at 502 per Lee J.
11 [1993] 1 Qd R 271.
12 [1993] 1 Qd R 271 at 275 per Williams J.
13 [1993] 1 Qd R 271 at 273.
14 [1997] 2 Qd R 481 at 486.
15 [1997] 2 Qd R 481 at 502.
16 [1997] 2 Qd R 481 at 509.
17 (1996) 105 NTR 54.

is very similarly worded to ss 127(1)(a) in the Queensland *Criminal Code*. A witness was offered $500 to alter the evidence she was to give in the Darwin Magistrates' Court. She did not accept or receive the money, informed the police of the offer and did not give false evidence in court. Angel J referred to *Danahay* and agreed with Thomas J in holding that if an offer is made stipulating that the witness is to give false testimony, then an offence under section 100(a) is committed.[18] His Honour did not regard Lee J's reasoning in *Danahay* as constituting a majority on this point.

Angel J[19] noted that the section used the words 'upon any agreement or understanding' and not 'pursuant to an agreement or understanding'. In his Honour's view, the 'understanding' simply meant that the witness must comprehend that the offer was conditional on the giving of false evidence.

3. Other relevant provisions

Section 140 of the *Criminal Code* makes it an offence to attempt to obstruct, prevent, pervert or defeat justice by any means not otherwise provided for. The maximum penalty of two years imprisonment imposed by this section is lower than the maximum penalty of seven years under ss 127(1)(a). Fitzgerald P felt that s 140 should not be given a wider operation than its literal meaning, and should only be used to fill a gap in the legislation. Since s 140 was a penal provision, it ought to be strictly construed. He concluded that s 140 did not apply to the facts because ss 127(1)(a) was 'intended to have a wide operation'.[20] By contrast Lee J thought that an unaccepted offer made to a witness fell within s 140, rather than ss 127(1)(a).[21] His Honour said s 140 was intended to be a 'catchall and residual provision'.[22]

Sub-section 127(1)(b) covers 'attempts by any other means to induce a person called or to be called as a witness in any other judicial proceeding to give false testimony or withhold true testimony'. Lee J[23] said this could involve threats of physical or other harm or detriment to the witness. His Honour then went on to say that a mere offer of a benefit in the hope of obtaining voluntary consensus did not fall within section 127(1)(b). Section 127(1)(b) refers to 'attempts' made with a significant risk of involuntarily corrupting a witness, while in ss 127(1)(a) the offeror is seeking voluntary consensus.

Sub-section 127(1)(c) punishes a witness who 'asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person, upon any agreement or understanding that any person shall as a witness in any judicial proceeding give false testimony or withhold true testimony'. Lee J[24] said ss 127(1)(a) should not be interpreted in a vacuum. He assumed that the words 'upon an agreement or understanding' were intended to be used consistently throughout section 127. Therefore, if sub-section 127(1)(c) required a concluded agreement, so must ss 127(1)(a). The word 'attempts' is used in sub-section 127(1)(c), but not in ss 127(1)(a). To his Honour's mind, this suggested that unaccepted attempts to bribe witnesses were not contemplated to fall within ss 127(1)(a).

4. Extrinsic materials: the drafting of the Criminal Code

Before the *Criminal Code* came into operation on 1 January 1901, there were no statutory provisions equivalent to Chapter 16 of the Code, which deals with 'Offences relating to

18 (1996) 105 NTR 54 at 318.
19 (1996) 105 NTR 54 at 319.
20 [1997] 2 Qd R 481 at 482.
21 [1997] 2 Qd R 481 at 501.
22 [1997] 2 Qd R 481 at 502.
23 [1997] 2 Qd R 481 at 493.
24 [1997] 2 Qd R 481 at 505–507.

the Administration of Justice' and includes section 127. Lee J[25] recognised that it was inappropriate to look at the letter by Sir Samuel Griffith accompanying his Draft of the Code for the purpose of interpreting a statute.[26] However his Honour held that it was 'not inappropriate' to examine those remarks to discern problems which Griffith perceived and intended to overcome in the *Criminal Code*.

Lee J examined the New Zealand *Criminal Code* 1893, which adopted Griffith's draft Bill of 1880 with minor alterations. His Honour noted that the New Zealand case of *R v Gray*,[27] where an attempt to induce a person to give false evidence was held to fall within sub-section 121(4) of the New Zealand Code, which made it an offence to wilfully attempt 'in any other way' to obstruct, pervert or defeat the course of justice, and not within any other provision. His Honour said section 121(4) of the New Zealand Code was similar to s 140 of the Queensland Code.[28]

Lee J pointed out that various sections of the Penal Code of the State of New York (1881) were sidenoted in the draft Code and states that it carried significant weight in the drafting of Chapter 16. In the New York equivalent of ss 127(1)(a), the words 'upon any agreement or understanding' were used. Many other States of America had penal codes before the Queensland Code came into existence.[29] Notably some other States, such as Texas, couched their legislation in slightly different terms, making it an offence where an offer was made to a witness 'to influence his testimony, or to induce him' to absent himself from proceedings.[30] In the Texan legislation, only the conduct of the offeror is relevant to the commission of the offence.

4. The American cases

Lee J[31] said section 127 was primarily derived from statute law found in the United States of America. As a result, United States cases on bribery and corruption heard in superior courts had 'strongly persuasive, if not binding, authority on the question at issue . . .'[32] His Honour proceeded to deliver a lengthy, well-researched lesson in American jurisprudence to support his view of the interpretation of ss 127(1)(a).

The early United States authority of *Walsh v The People*[33] was cited by his Honour[34] to justify the imposition of a lower penalty for an unsuccessful attempt to bribe a witness than for the successful corruption of the witness with the witness's acceptance or at the witness's request (where there was no concluded agreement) of the bribe. The New York Penal Code dealt separately with an attempt by a witness to receive a bribe and an attempt to bribe a witness. Lee J inferred that, given Griffith's substantial reliance on the New York Penal Code, he must have been aware of the distinction referred to in *Walsh*, which was the prevailing view in the United States. Lee J also considered that the reasoning given in *Walsh* accorded with common sense.

25 [1997] 2 Qd R 481 at 496.
26 *R v Martyr* [1962] Qd R 398;
R v Burnell [1966] Qd R 348.
27 (1903) 23 NZLR 52.
28 [1997] 2 Qd R 481 at 498.
29 [1997] 2 Qd R 481 at 501.
30 *American Encyclopedia of Law*, 2nd ed, Vol 4, 1897 at 914.
31 [1997] 2 Qd R 481 at 495.
32 [1997] 2 Qd R 481 at 496.
33 September Term Illinois, 65 Ill 58 (1872).
34 [1997] 2 Qd R 481 at 508.

Several United States decisions to a similar effect were cited.[35] In *United States v Dietrich*[36] the offence referred to an agreement and this was held to require the concurrent and several acts of two persons. In *State v Ferraro*[37] the Supreme Court of Arizona held that, while in general the offering of a bribe created an offence and the response to the offer was immaterial, the Court was bound to apply the specific legislative provision which, through the use of the words 'understanding or agreement', made acceptance of such offer an essential element of the offence. United States cases were also used to support the proposition that the offeror and the witness could simultaneously commit offences against ss 127(1)(a) and (c) respectively.

5. Resolving ambiguities

Lee J[38] said that, if his interpretation was incorrect, there was a significant doubt as to the true meaning of ss 127(1)(a), in which case the old rule of interpretation, stated by Lord Esher in *Tuck v Priester*,[39] cited as the rule of last resort by Gibbs J in *Beckwith v The Queen*,[40] ought to apply. The rule provides that, where there is more than one reasonable construction of a section, effect should be given to the construction which results in the more lenient penalty. If this rule were applied to the facts, Lee J's interpretation (that an unsuccessful attempt to bribe a witness is an offence under s 140, not ss 127(1)(a)) would be upheld because the maximum penalty is lower under s 140 than under ss 127(1)(a).

IV. Conclusion

The majority in *Gatti* have established an offence will be committed under ss 127(1)(a) of the Queensland *Criminal Code* where a benefit is offered to a witness in exchange for the giving of false evidence or withholding of true testimony. The offer itself completes the offence and any acceptance by the witness is immaterial. This is consistent with *Watt* (the only other Australian case directly on point) and with the view espoused by Thomas J in *Danahay*. However, the fact that Lee J dissented means that doubts as to interpretation may not be thoroughly resolved.

As Lee J noted,[41] the problem faced by the Court in interpreting ss 127(1)(a) in both *Gatti* and *Danahay* could have been avoided if Parliament had used more specific words, such as 'with the intention that' or 'in order to influence any person'. Such phrases appear in other sections of the *Criminal Code* and other pieces of legislation.[42] The absence of such clear words formed the basis on which Lee J interpreted the provision to mean that the agreement referred to must be concluded. To avoid further confusion, an amendment to ss 127(1)(a), giving effect to the majority decision in *Gatti*, could perhaps be made. A reference to a 'proposed agreement or understanding' would show, beyond doubt, that the witness's response to any offer made was immaterial with respect to ss 127(1)(a).

35 *People v Squires* 33 P 1092 (Cal 1893); *State v Durnam* 75 NW 1127 (Minn 1898); *State v Meysenburg* 71 SW 229 (Mo 1902); *People v Weitzel* 225 P 792; *People v Coffey* 161 Cal 433; *State v Benson* 257 P 236 (Wash 1927); *People v McAllister* 277 P 1082; *Ex parte Jang* 78 2Pd 25 (Ca Dist Ct App 1938); *People v Brigham* 163 P2d 891 (Cal Dist Ct App 1946); *State v Whetstone* 191 P2d 818 (Wash 1948); *State v Emmanuel* 253 P2d 386 (Wash 1953); *People v Insogna* 281 NYS 2d 124 (AD 1967); *Fox* 467 P2d 1022 (Nev 1970); *People v Charles* 462 NE2d 118 (NY 1984); *People v Levine* 448 NYS2d 30 (AD 1982); *People v Shaffer* 515 NYS2d 470 (AD May 21, 1987); *People v Kramer* 518 NYS2d 188 (AD July 27, 1987); *People of the State of New York v Alvino* 519 NE2d 808 (NY 1987); *People of the State of New York v Harper* 552 NE2d 148 (NY 1990).

36 126 F 664 (1904).

37 198 P2d 120 (Ariz 1948).

38 [1997] 2 Qd R 481 at 522.

39 (1887) 19 QBD 629 at 638.

40 (1976) 135 CLR 569 at 576.

41 [1997] 2 Qd R 481 at 487.

42 See, for example, ss 102, 103(1), 122, 128 and 129 of the Queensland *Criminal Code*.