HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ

PETER MANNERY SPIES — APPELLANT

AND

THE QUEEN — RESPONDENT

Spies v The Queen
[2000] HCA 43
3 August 2000
S263/1999

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Criminal Appeal dated 17 September 1998.*

3. *In lieu thereof order that:*

   (a) *the appellant's appeal to that Court be allowed;*

   (b) *the appellant's conviction under s 176A of the* Crimes Act *1900 (NSW) be set aside and direct that a judgment and verdict of acquittal be entered in respect of that charge; and*

   (c) *there be a new trial of the appellant on the charge under s 229(4) of the* Companies (New South Wales) Code.

On appeal from the Supreme Court of New South Wales

Representation:

P Menzies QC with C J Bevan for the appellant (instructed by Clinch Neville Long)

P Roberts SC with M A Wigney for the respondent (instructed by Director of Public Prosecutions)

CATCHWORDS

Peter Mannery Spies v The Queen

Criminal law – Director charged with defrauding creditors of the company – Alternative charge of improper use of position as director – Conviction on first charge by jury – Conviction set aside by Court of Criminal Appeal – What facts the jury must have been satisfied of from their finding of guilt with respect to the first charge – Whether Court of Criminal Appeal had power to substitute conviction on the alternative charge in the circumstances.

Criminal law – Construction of provision conferring power on the Court of Criminal Appeal to substitute a verdict of guilty of an offence different from the offence which the jury convicted of – Standard of proof required to apply the provision.

Criminal law – Director charged with defrauding creditors of the company – Direction to the jury equated director's intention to hinder or delay the creditors with defrauding – Misdirection.

Criminal law – Elements of offence of defrauding.

Company law – Whether directors by reason of their position owe an independent duty to and enforceable by the creditors.

Words and phrases – "jury must have been satisfied of facts which proved the appellant guilty of other offence", "to defraud", "defrauding".

Companies (New South Wales) Code, s 229(4).
Crimes Act 1900 (NSW), s 176A.
Criminal Appeal Act 1912 (NSW), s 7(2).

1 GAUDRON, McHUGH, GUMMOW AND HAYNE JJ. The question in this appeal is whether the Court of Criminal Appeal of New South Wales (Spigelman CJ, Sully and Hidden JJ)[1] erred in exercising its powers under s 7(2) of the *Criminal Appeal Act* 1912 (NSW) to convict the appellant of an offence against s 229(4) of the *Companies (New South Wales) Code* ("the Companies Code") after holding that a conviction for an offence against s 176A of the *Crimes Act* 1900 (NSW) should be set aside.

2 Section 7(2) of the *Criminal Appeal Act* provides[2]:

> "Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

3 The appellant's appeal to the Court of Criminal Appeal arose out of a trial by jury before Judge Armitage of an indictment containing charges under s 176A of the *Crimes Act* and s 229(4) of the Companies Code. In respect of the s 176A charge, the indictment dated 24 September 1997 charged that the appellant "[b]etween about 17 October 1989 and 9 May 1990 ... being a director of a body corporate, namely Sterling Nicholas Duty Free Pty Ltd ('the Body Corporate') ['Sterling Nicholas'], defrauded persons, being the creditors of the Body Corporate, in their dealings with the Body Corporate, by causing the Body Corporate to purchase his shares in Sterling Nicholas Holdings Pty Ltd ['Holdings'] for $500,000." The jury convicted the appellant of this charge. However, the Court of Criminal Appeal set aside the conviction.

4 As an alternative to the charge under s 176A of the *Crimes Act*, the indictment also charged that the appellant "[b]etween about 17 October 1989 and

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1 *R v Spies* (1998) 29 ACSR 217.

2 Other Australian jurisdictions have enacted similar provisions to s 7(2): *Criminal Code* (NT), s 412(1); *Criminal Code* (Q), s 668F(2); *Criminal Law Consolidation Act* 1935 (SA), s 354(2); *Criminal Code* (Tas), s 403(2); *Crimes Act* 1958 (Vic), s 569(2); *Criminal Code* (WA), s 693(2).

9 May 1990 ... being an officer of a corporation, namely [Sterling Nicholas] ('the Corporation'), made improper use of his position to gain directly an advantage for himself by causing the Corporation to purchase his shares in [Holdings] for $500,000 which sum he caused to be credited to his loan account with the Corporation." That charge was laid under s 229(4) of the Companies Code[3]. Because the charge was laid as an alternative charge to the s 176A charge, no verdict was taken in respect of the s 229(4) charge.

5 Instead of ordering a new trial of both charges, the Court of Criminal Appeal exercised its powers under s 7(2) of the *Criminal Appeal Act* and entered a conviction in respect of the s 229(4) charge.

6 In our opinion, the Court of Criminal Appeal erred in entering a conviction in respect of the s 229(4) charge because it was not open to the Court to hold "that the jury must have been satisfied of facts which proved the appellant guilty of" the s 229(4) offence.

The factual background

7 The appellant was one of two directors of Sterling Nicholas. He held 33,750 of the 50,000 issued shares. The other shares in Sterling Nicholas were held by a Mr Newton and his son. The only other director of Sterling Nicholas was a Mr McPherson, an employee of that company. Sterling Nicholas sold duty free items from a number of outlets to overseas travellers. Mr McPherson and the appellant were also directors of Holdings, a company in which the appellant owned 9,999 out of 10,000 issued shares and Mr McPherson owned the remaining share. Holdings had minimal trading activities. Its only asset was a design copyright in relation to two signet rings.

8 At all material times, Sterling Nicholas operated at a loss. For the year ended 30 June 1988 its trading loss was $230,547, and its liabilities exceeded its assets by $361,974. For the year ended 30 June 1989, its trading loss was $1,014,472, and its liabilities exceeded its assets by $1,776,446.

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3 By the date of the indictment, this statute had been repealed but the effect of s 85(1) of the *Corporations (New South Wales) Act* 1990 (NSW) was to continue the operation of the repealed statute in respect of the offence charged. See *Byrnes v The Queen* (1999) 73 ALJR 1292 at 1294 [3]; 164 ALR 520 at 523; *Bond v The Queen* (2000) 74 ALJR 597 at 599 [7]; 169 ALR 607 at 609.

9 During 1989-1990, the appellant owed substantial sums of money to Sterling Nicholas. As at 22 March 1990, he had borrowed from Sterling Nicholas $176,354.80. He had also guaranteed Sterling Nicholas' bank overdraft and had given a mortgage over his home as security for the overdraft debt.

10 The appellant knew the state of the finances of Sterling Nicholas and knew that they were getting worse during the 1989-1990 trading period. He made efforts to sell its business to outsiders but he was unable to do so.

11 A minute of a meeting of directors of Sterling Nicholas, dated 17 October 1989, records a resolution that Sterling Nicholas should purchase all of the issued shares of Holdings for an amount of $500,000. Sterling Nicholas did not have the capacity to pay this sum or any sum for the Holdings shares. Nothing seems to have been done to promote the sale until 30 March 1990, when a minute of a meeting of directors of Sterling Nicholas records a resolution that Sterling Nicholas purchase the appellant's and Mr McPherson's shares in Holdings. The meeting also resolved that, because Sterling Nicholas could not pay for the purchase, an equitable charge would be granted over all of the assets of Sterling Nicholas until the appellant was paid. In addition, the appellant's loan account with Sterling Nicholas was credited with $500,000 being the purchase price of all the shares in Holdings. The result was that the appellant had sold shares in an apparently worthless company for $500,000 and had gone from a substantial debtor of Sterling Nicholas to a secured creditor of that company who was owed $323,645.20.

12 These facts were the basis of the charges against the appellant although the prosecution also relied on certain matters that occurred when the business of Sterling Nicholas was sold to a third party. For present purposes, it is unnecessary to refer to those matters although the appellant's involvement in them must have told heavily against him when the jury were considering the elements of the s 176A charge.

13 In charging the jury on the s 176A charge, the learned trial judge said[4]:

> "The Crown must prove beyond reasonable doubt that the accused himself, by entering into the transaction in which his shares in [Holdings] were sold to [Sterling Nicholas], intended to defraud the creditors.

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4 Transcript of trial, 2 October 1997 at 9.

> The test here is a subjective test. What is relevant is what the accused intended himself to do and that is what the Crown has to prove, that is, it has to prove that he intended to defraud those creditors.
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> As to this element of the offence, the Crown invites you to draw an inference from all the surrounding circumstances that the purpose of the sale of the accused's shares in [Holdings] to [Sterling Nicholas] was for no reason other than to delay or hinder creditors by making the accused, himself, a creditor rather than a debtor; and I should add not only a creditor but a secured creditor at a time when the accused well knew that the company was about to go into liquidation."

14 The learned judge then went on to direct the jury as to the appellant's answer to these contentions of the prosecution. That answer arose out of the entry into a lease by Holdings of premises in Oxford Street, Sydney, from which Sterling Nicholas had operated its business for a number of years, first under a lease for a term of years and then by a holding over.

15 The lease of the premises by Sterling Nicholas expired in 1987. However, the lease gave Sterling Nicholas an option to renew for a further period of four years. In January 1987, the appellant, on behalf of Sterling Nicholas, sought to renew the lease for a further ten years. The lessor indicated that it would accept the offer. A new lease was not executed, almost certainly because Sterling Nicholas commenced negotiations with the lessor to take occupation of a further floor in the building. Discussions concerning this new lease took place over a period of years. Late in 1988, Sterling Nicholas was permitted to occupy an additional floor of the premises.

16 In 1990 the appellant, on behalf of Sterling Nicholas, agreed to enter into a fresh lease in respect of all floors then occupied by Sterling Nicholas. Correspondence between the lessor's solicitor and Sterling Nicholas assumed that Sterling Nicholas would be the lessee. Indeed, Sterling Nicholas was charged for and paid the legal costs associated with the lease. However, on or about 27 March 1990, the appellant told the lessor's solicitor that the lessee was to be Holdings. Subsequently, a lease for the premises occupied by Sterling Nicholas was executed with Holdings as lessee. It was dated 24 May 1990.

17 The terms of the new lease were very favourable to the lessee because the rental was below the market rate. The appellant obtained an opinion from a firm of real estate agents that, if the premises were sublet, a profit of about $700,000 was achievable over the term of the lease and the option period. The prosecution claimed that the appellant nominated Holdings as the lessee to justify the purchase of his Holdings shares by Sterling Nicholas. The prosecution

contended that, in October 1989 when Sterling Nicholas resolved to acquire the appellant's shares for $500,000, Holdings was worthless and that the lease was diverted from Sterling Nicholas and given to Holdings to give it a valuable asset. The prosecution asserted that Holdings had no lease, that the only legal entitlement to the Oxford Street premises belonged to Sterling Nicholas and that this remained the position until the execution of the lease on 24 May 1990, a date well after the completion of the sale of the shares.

18 It was against this background that the learned trial judge put to the jury the appellant's answer to the prosecution's contention that he had intended to defraud the creditors of Sterling Nicholas. His Honour said[5]:

> "The accused's response to this argument is, in essence, that the transaction was entered into in good faith; that there had been no obligation on his part to renew the lease in the name of [Sterling Nicholas]; that the shares in [Holdings] were not valueless; and that [Sterling Nicholas] received value for money."

19 The learned judge also directed the jury as to the elements of the second charge, after telling them that it was an alternative charge and that they should only consider it if they found the appellant not guilty of the first charge. Later, his Honour directed the jury as to the nature of the prosecution case in respect of the second charge. He said[6]:

> "As to the second charge, the Crown case is that the accused clearly made improper use of his position to gain an advantage for himself because the shares in [Holdings] were worthless and the effect of the transaction was to deprive [Sterling Nicholas] of a lease which should have been granted to it and to require that company to pay half a million dollars for something it should have had in the first place. The effect of this being to make the accused a creditor, not a debtor, and to make him immune from any claim by the liquidator."

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5 Transcript of trial, 2 October 1997 at 9-10.

6 Transcript of trial, 3 October 1997 at 48.

The Court of Criminal Appeal's reasons

20 In the Court of Criminal Appeal, Spigelman CJ, giving the judgment of the Court (Sully and Hidden JJ concurring), said that, by reason of the trial judge's directions[7]:

> "The jury could have been left with a belief that as long as they were satisfied as a fact that the shares were not worth anything, the charge could have been made out, even if the accused believed that there was real value in the shares after the transaction."

His Honour held that the failure to correct this belief was a misdirection, so serious as to require the conviction on the s 176A charge to be quashed. But as we have pointed out, the Court of Criminal Appeal exercised its powers under s 7(2) of the *Criminal Appeal Act* and substituted a conviction under s 229(4) of the Companies Code.

21 It will later be necessary to set out and examine the reasoning of the Court of Criminal Appeal in more detail in order to determine whether it correctly applied s 7(2) of the *Criminal Appeal Act*. But it is convenient to deal first with the construction of s 7(2).

The construction of s 7(2) of the *Criminal Appeal Act*

22 Strong though the prosecution cases may have been, it does not follow from the fact that the jury must have been satisfied of the facts supporting the s 176A charge as left to the jury that the Court of Criminal Appeal had the power to convict the appellant of the s 229(4) charge, a charge on which the jury had not brought in a verdict.

23 The power conferred by s 7(2) of the *Criminal Appeal Act* is most likely to be exercisable in situations where the "other offence" is one which is wholly within the ultimate facts of the offence on which the accused has been convicted and which the court sets aside in the appeal. The classic case is a conviction for assault occasioning grievous bodily harm where the court is of the opinion that the prosecution has failed to prove, or there has been a misdirection on, the issue of grievous bodily harm. In those circumstances, the entry of a conviction for common assault would be a clear case for the exercise of the power under s 7(2).

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7 *R v Spies* (1998) 29 ACSR 217 at 222.

In *R v Vella*[8], this Court refused to grant special leave where the Court of Criminal Appeal of Queensland had substituted a verdict of common assault for a conviction for assault occasioning actual bodily harm. Latham CJ said[9]:

> "All charges of assault, with whatever additional aggravating circumstances as compared with common assault, necessarily include the elements constituting the offence of common assault. Therefore it appears to me the section necessarily applies in such case."

24 Other pairs of offences which readily come to mind as likely candidates for the application of the sub-section include murder and manslaughter[10], rape and carnal knowledge[11], assault with intent to commit rape and indecent assault[12], incest and carnal knowledge[13], robbery under arms and robbery[14], larceny and receiving[15], housebreaking and receiving[16], obtaining a chattel by false pretences

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8 [1938] StR (Qd) 289.

9 [1938] StR (Qd) 289 at 290. The relevant provision was s 668F(2) of the *Criminal Code* (Q).

10 *Hughes v The King* (1951) 84 CLR 170. Manslaughter verdicts were also substituted for verdicts of murder in: *R v Burke* (1918) 18 SR (NSW) 336; *R v Trimarchi* (1932) 32 SR (NSW) 451; *R v Stones* (1955) 56 SR (NSW) 25; *R v Stellino* (1966) 85 WN (Pt 1) (NSW) 36; *R v Coghill* (1968) 89 WN (Pt 2) (NSW) 91; *R v Solomon* [1980] 1 NSWLR 321; *R v Thiele* [1928] SASR 361; *R v Rogers* [1950] SASR 102; *R v Fredella* [1957] SASR 102; *R v Olasiuk* (1973) 6 SASR 255; *R v Webb* (1977) 16 SASR 309. As appears later in these reasons, however, convictions for manslaughter should not have been substituted in any of these cases except *Hughes v The King*.

11 *R v Scalia and Lenoy* [1971] VR 200.

12 *R v McCready* [1967] VR 325.

13 *R v Umanski* [1961] VR 242.

14 *R v Hackett* [1955] SASR 137.

15 *Cooper, Shea and Stocks* (1908) 1 Cr App R 88.

16 *George* (1908) 1 Cr App R 168.

and obtaining credit by false pretences[17], many substantive offences and attempts to commit them[18], burglary and housebreaking, embezzlement and larceny. However, s 7(2) can be applied in any case where it appears to the court "that the jury must have been satisfied of facts which prove the appellant guilty of that other offence". Thus, in *R v Grasso*[19], the Full Court of the Supreme Court of Victoria thought that, having regard to the indictment and the evidence, it could substitute a conviction of assault occasioning actual bodily harm after setting aside a conviction of assault with intent to commit rape[20].

25 Under s 7(2) or the other Australian equivalent provisions, the offence in respect of which a court enters a new verdict must be one which was open on the indictment. In *Calabria v The Queen*[21], this Court said:

> "It is a condition precedent to the exercise of the power conferred by that section that the jury could on the information have found the accused guilty of some other offence, ie, the substituted verdict must be one which the jury could have returned at the trial on the information which was in fact presented."

In *Large*[22], *Grasso*[23] and *Knight v The Queen*[24], all cases where the other offence was not one which was wholly within the ultimate facts of the first offence, the other offence was included in the indictment or presentment as an alternative

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17 *R v Norman* [1915] 1 KB 341.

18 *Warren* (1919) 14 Cr App R 4; *Kilbride* (1931) 23 Cr App R 12.

19 [1950] VLR 21.

20 See also *Large* (1939) 27 Cr App R 65, where a conviction of wilful ill-treatment was substituted for a conviction of manslaughter, and *Knight v The Queen* (1992) 175 CLR 495, where this Court substituted a conviction of recklessly causing serious injury for a conviction of attempted murder.

21 (1983) 151 CLR 670 at 676.

22 (1939) 27 Cr App R 65.

23 [1950] VLR 21.

24 (1992) 175 CLR 495.

count (or, in *Large*, an additional count with a direction by the trial judge that it be treated in effect as an alternative count) to the first offence.

26 There would seem to be few, if any, cases, however, where s 7(2) would authorise substituting a conviction for a greater offence in lieu of the original conviction for a lesser offence. That must certainly be so where the jury have acquitted the accused of the greater offence and convicted him or her of the lesser offence. Because that is so, we think that the Full Court of the Supreme Court of Victoria erred in *R v Welker*[25] when it substituted a conviction of housebreaking with intent to steal after setting aside a conviction of attempted housebreaking with intent to steal. In *R v Cervelli*[26], Callaway JA expressed the tentative view that *Welker* was wrongly decided and that the dissenting judgment of Sholl J was correct. In our opinion, his Honour was right in thinking that the judgment of Sholl J correctly construed the Victorian equivalent of s 7(2). *Welker* was wrongly decided on this point.

27 The words "must have been satisfied of facts" indicate that it must appear to the court that, having regard to the evidence, the conviction on the charge which is quashed necessarily meant that the accused was guilty of acts or omissions which, as a matter of law, constitute another offence. The other offence must, of course, be one which the "jury could on the indictment have found the appellant guilty of". As Callaway JA pointed out in *Cervelli*[27], it is not necessary that the relevant facts "be logically implied by the verdict, because regard may be had to the evidence and common ground at the trial." Nevertheless, the court must be able to say that, given the evidence at the trial and what was common ground, the conviction verdict demonstrates that the jury were affirmatively satisfied of those facts which constitute the other offence. This is not the view that the English Court of Criminal Appeal has traditionally taken of s 5(2) of the *Criminal Appeal Act* 1907 (UK)[28], which was the English equivalent of s 7(2).

28 In *R v Hopper*[29], the English Court of Criminal Appeal found that manslaughter should have been left to the jury, quashed a conviction of murder

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25 [1962] VR 244.

26 [1998] 3 VR 776 at 789.

27 [1998] 3 VR 776 at 788.

28 Now s 3 of the *Criminal Appeal Act* 1968 (UK).

29 [1915] 2 KB 431.

and substituted a verdict of manslaughter, notwithstanding that the Court did not think that the jury would have found manslaughter if it had been left to them and made no finding as to what the jury must have found as to the facts. Lord Reading CJ, giving the judgment of the Court, said[30]:

> "[T]his court has power under s 5, sub-s 2, of the *Criminal Appeal Act*, 1907, to substitute for the verdict found the verdict which might have been found if the jury had been properly directed. We cannot possibly say that a verdict of manslaughter would have been found by the jury, but as the question should have been left to them the appellant is entitled to the benefict of a verdict for the lesser offence."

29 In *R v Roberts*[31], the English Court of Criminal Appeal went so far as to substitute a verdict of manslaughter even though the Court thought "that it is extremely unlikely in this case that the jury would have returned a verdict of manslaughter, seeing, as we know, that they regarded this as a deliberate act."[32] The Court regarded *R v Prince*[33] as establishing that it was duty bound to substitute a verdict of manslaughter if there was a view of the facts consistent with such a verdict.

30 It is difficult to escape the conclusion that the rather cavalier approach to the actual words of s 5(2) of the English *Criminal Appeal Act* taken in these cases was influenced by the fact that in those days that Act made no provision for ordering a new trial. If there was a misdirection amounting to a technical miscarriage of justice, the conviction had to be quashed and an acquittal entered unless the court could exercise its power under s 5(2). That circumstance explains, though it hardly justifies, the manner in which the English Court of Criminal Appeal stretched the language of s 5(2) to convict a person whom the Court thought was guilty of some other offence.

31 However, these English decisions have proved influential in New South Wales, notwithstanding that the *Criminal Appeal Act* 1912 made provision for

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30 *R v Hopper* [1915] 2 KB 431 at 436.

31 [1942] 1 All ER 187.

32 [1942] 1 All ER 187 at 193.

33 [1941] 3 All ER 37.

ordering a new trial. In *R v Burke*[34], Cullen CJ noted that in New South Wales the Court of Criminal Appeal, unlike its English counterpart, had the power to order a new trial. Yet his Honour referred to *Hopper* and substituted a verdict of manslaughter for murder even though the jury had not determined, and had never been asked to determine, the critical question of fact which made the case one of manslaughter instead of murder. Cullen CJ identified that fact as[35]: "Was the condition in which the man was through drink such as to make that definition [of murder in s 18 of the *Crimes Act*] inapplicable to his conduct though not such as to produce total unconsciousness of what he was doing?"

32 In *R v Stones*[36], the Court of Criminal Appeal applied *Burke* and entered a verdict of manslaughter after holding that "[i]n what was, after all, nothing but a drunken brawl, in which it seems reasonably clear that at all times the deceased was the aggressor, it is not possible to reject the account given by the prisoner as one reasonable hypothesis."[37] In *Stones*, far from relying on the facts found by the jury to exercise the power conferred by s 7(2), the Court rejected the jury's findings that the facts constituted murder and used its own findings of fact to substitute a verdict of manslaughter.

33 In *R v Trimarchi*[38], the Court of Criminal Appeal relied on *Hopper* to substitute a conviction of manslaughter for murder where the trial judge had erred in not leaving provocation to the jury. Because the jury had not been asked to deal with the issue of provocation, it is impossible to understand how "the jury must have been satisfied of facts which proved the appellant guilty of" manslaughter by reason of provocation. In *R v Stellino*[39], *Trimarchi* and *Hopper* were relied on to justify the entry of a verdict of manslaughter where the trial judge had misdirected the jury on provocation. Yet the only findings that the jury had made had rejected manslaughter by provocation. Again it is not easy to see how the power conferred by s 7(2) authorised the course which the Court of Criminal Appeal took.

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34 (1918) 18 SR (NSW) 336.

35 *R v Burke* (1918) 18 SR (NSW) 336 at 340.

36 (1955) 56 SR (NSW) 25.

37 *R v Stones* (1955) 56 SR (NSW) 25 at 29.

38 (1932) 32 SR (NSW) 451.

39 (1966) 85 WN (Pt 1) (NSW) 36.

34 In *R v Coghill*[40], the Court of Criminal Appeal relied on *Stellino* to enter a verdict of manslaughter where the trial judge had refused to direct the jury that they had the right to bring in a verdict of manslaughter. At that time the New South Wales cases held that[41]:

> "where counsel requests a direction on manslaughter or the jury makes an inquiry in relation thereto, the judge should direct the jury that it may find a verdict of manslaughter instead of a verdict of murder if it proposes to convict and if it thinks fit, and this even if there be no evidence of manslaughter."

In *Coghill*, the only facts found by the jury constituted murder. They found no facts that could reduce the charge of murder to manslaughter. That being so, it is impossible to understand how the Court of Criminal Appeal entered a verdict of manslaughter under s 7(2).

35 *R v Solomon*[42], another New South Wales case, is in a slightly different category. In *Solomon*, the Court of Criminal Appeal entered a verdict of manslaughter instead of ordering a new trial where the trial judge had misdirected the jury concerning the charge of murder. Once again, however, it was impossible to conclude that the jury had found facts constituting manslaughter. Moffitt P said that it was "clear from the jury's verdict that they must have been satisfied of facts which *at least* established manslaughter."[43] But that is not the condition on which s 7(2) operates. The jury must have been satisfied of the facts which constitute the substituted offence. In *Solomon*, no interpretation of the jury's verdict could reach the conclusion that they must have found that the act of the accused causing the death charged was *not* "done ... with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm"[44]. Yet only if the jury made such a finding could the Court of Criminal Appeal hold that the punishable homicide constituted manslaughter[45].

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40 (1968) 89 WN (Pt 2) (NSW) 91.

41 *R v Coghill* (1968) 89 WN (Pt 2) (NSW) 91 at 92.

42 [1980] 1 NSWLR 321.

43 *R v Solomon* [1980] 1 NSWLR 321 at 336. (emphasis added)

44 *Crimes Act*, s 18(1)(a).

45 *Crimes Act*, s 18(1)(b).

36 A number of cases decided by the Court of Criminal Appeal of South Australia were also influenced directly or indirectly by the line of English cases commencing with *Hopper*. They include *R v Thiele*[46], *R v Rogers*[47], *R v Fredella*[48], *R v Olasiuk*[49], and *R v Webb*[50]. In the seminal South Australian case of *Thiele*[51], the Court of Criminal Appeal substituted a conviction for manslaughter for murder on the ground that the trial judge had failed to direct the jury that the accused's drunkenness was relevant to his intent to kill. The Court of Criminal Appeal noted that it had no material which enabled it to find that the jury must have found that drunkenness had prevented the accused from forming the relevant intent. Yet applying *Hopper*, the Court substituted a conviction of manslaughter. The Court was obviously conscious of how far the decision in *Hopper* and its own decision departed from the terms of the statute because it said that "[i]n the special circumstances of this case, and it is not to be taken as a precedent, we think that the interests of justice will be best served if we do not order a new trial, but substitute a verdict of manslaughter."[52]

37 While the English Court of Criminal Appeal might have been influenced by the absence of a power for that Court to order a new trial[53], the Court of Criminal Appeal of South Australia might have been influenced, in the cases of *Thiele*, *Rogers*, *Fredella* and *Olasiuk*, by the fact that murder was then punishable by death.

38 One case which did go against the course of authority in South Australia and correctly refused to apply the South Australian counterpart of s 7(2), was

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46 [1928] SASR 361.

47 [1950] SASR 102.

48 [1957] SASR 102.

49 (1973) 6 SASR 255.

50 (1977) 16 SASR 309.

51 [1928] SASR 361.

52 *R v Thiele* [1928] SASR 361 at 366-367.

53 The absence of such a power was noted by the Court of Criminal Appeal in *R v Thiele* [1928] SASR 361 at 366.

R v Howe[54], where the trial judge had misdirected the jury as to self-defence. The Court of Criminal Appeal said[55]:

> "[T]he jury, upon a direction in accordance with the law ... would have been called upon to consider whether their verdict should be not guilty or guilty of manslaughter, according to the view they took on the evidence. It may be that if the trial had proceeded in that way, the jury would have refused to acquit the appellant, and found him guilty of manslaughter. But whatever the result may have been upon a proper direction as to self-defence, we are unable to say that on the finding of the jury it appears to us that the jury must have been satisfied of facts which proved the appellant guilty of manslaughter. Indeed, on this aspect of the case, there is no finding of the jury at all, for they were never invited to consider the matters of law and evidence which it would be necessary for them to deliberate upon when considering the possibility of returning a verdict of manslaughter under the heading of self-defence. Consequently, we are not entitled to apply the provisions of s 354(2) of the *Criminal Law Consolidation Act* [the South Australian equivalent of s 7(2)]."

Subsequently, without considering the s 354(2) point, this Court affirmed[56] the decision of the Court of Criminal Appeal ordering a new trial.

39 In our opinion, the English decisions should not have been followed in construing the statutes in New South Wales and South Australia. With the exception of *Howe*[57], all these New South Wales and South Australian cases were wrongly decided, as were the cases on misdirection or non-direction that apply them.

40 A case in this Court, which arguably was wrongly decided, is *Pemble v The Queen*[58], where the appellant, on his own admission, had killed a woman after approaching her from behind with a loaded, cocked rifle with the intention of frightening her. In *Pemble*, a majority of the Court (Barwick CJ, McTiernan and

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54 [1958] SASR 95.

55 [1958] SASR 95 at 124.

56 *R v Howe* (1958) 100 CLR 448.

57 [1958] SASR 95.

58 (1971) 124 CLR 107.

Windeyer JJ, Menzies and Owen JJ dissenting) substituted a verdict of manslaughter for murder. They did so on the basis that the facts established manslaughter because the accused had killed the victim in the course of committing an unlawful and dangerous act. However, although the issue of manslaughter was before the jury, manslaughter by unlawful act was not. Barwick CJ concluded that brandishing a loaded, cocked rifle was an unlawful and dangerous act which would make the killing manslaughter and that, as a matter of law, the killing was not accidental even on the accused's account of the facts. That being so, the jury were satisfied of facts that made the killing manslaughter. However, this analysis is open to the criticism made by Menzies J[59] that the unlawfulness of the act leading to death could not be assumed because "it is by no means certain that, until a point had been reached that the girl was frightened by what the accused was doing, the accused committed an assault."

41 The conclusions of McTiernan and Windeyer JJ are not easy to understand given that they accepted that the jury had been misdirected on the issue of murder. Both Justices appear to have taken the view that manslaughter should be substituted for murder because on the facts the jury could not have acquitted the appellant and the facts pointed to manslaughter by an unlawful and dangerous act. But the jury had rejected manslaughter and found that the killing was not accidental. Moreover, Windeyer J accepted that the jury did not have to find that the appellant was engaged in an assault upon the girl when the rifle was discharged[60]. McTiernan J, on the other hand, seems to have thought that the Northern Territory equivalent of s 7(2) authorised the entry of a verdict of manslaughter because the jury might have found manslaughter if they had been properly directed[61].

42 The approach of McTiernan and Windeyer JJ is in accordance with the English, New South Wales and South Australian authorities to which we have referred. But in our opinion it is wrong.

43 Where the ground for setting aside a conviction is lack of evidence, wrongful admission of evidence, misdirection or failure to direct on an issue in the trial, s 7(2) of the *Criminal Appeal Act* should be taken as applying only

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59 *Pemble v The Queen* (1971) 124 CLR 107 at 134.

60 *Pemble v The Queen* (1971) 124 CLR 107 at 139.

61 *Pemble v The Queen* (1971) 124 CLR 107 at 127-128.

where the jury must have been satisfied as to some fact (or facts) underlying the conviction which is (or are) unaffected by the lack or wrongful admission of evidence, misdirection or non-direction, and which constitutes (or constitute) another offence independently of that of which the appellant was convicted. Only then will the Court of Criminal Appeal be able to hold that the jury "must have been satisfied of facts which proved the appellant guilty of that other offence". It is not enough that the Court of Criminal Appeal thinks that, properly directed, the jury would or might have found the appellant guilty of the other offence[62], or that the appellant lost the chance of being found guilty on the lesser offence. In cases of convictions quashed by reason of wrongful rejection of evidence, unreasonable verdicts or miscarriages of justice otherwise arising in the course of proceedings, there would seem little scope for the operation of s 7(2). Where the Court of Criminal Appeal thinks that the jury's finding on one element of an offence was unreasonable, it may often be open to find the appellant guilty of a lesser offence. But where the unreasonableness of the verdict depends on the overall quality of the evidence, there seems no room for applying s 7(2).

44 In recent years, the New South Wales Court of Criminal Appeal appears to have taken a stricter view of s 7(2) than previously[63]. Thus, in *McQueeny*[64], in rejecting an application by the prosecution to exercise its power under s 7(2), Gleeson CJ said[65]:

> "I would be very reluctant to exercise the power granted by s 7(2) in a case where a jury was given instructions that were so incomplete that it is difficult for an appellate court to be sure what facts they must have regarded as being established beyond reasonable doubt ... I do not suggest that the power in question is necessarily limited to cases where the appellate court sets aside a verdict on a greater charge and substitutes a verdict of guilty for a lesser offence. Nevertheless, caution should be used before exercising the

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62 *Deacon* (1973) 57 Cr App R 688 at 693-694.

63 But see *Chayna* (1993) 66 A Crim R 178, the Court of Criminal Appeal substituting a verdict of manslaughter for murder where the trial judge had wrongly summed up to the jury on the basis that the evidence of a doctor did not support a defence of diminished responsibility.

64 (1989) 39 A Crim R 56.

65 *McQueeny* (1989) 38 A Crim R 56 at 60.

> power in a case where the reason for setting aside the jury's verdict was the inadequacy of the instruction that the jury was given."

Similarly in *R v Maxwell*[66], the Court of Criminal Appeal refused to enter a verdict of manslaughter where it held that a conviction for murder had to be set aside, saying of s 7(2) that[67]:

> "the section only applies where the jury's verdict necessarily implies that they were satisfied of facts constituting another offence."

45 The English Court of Appeal also now appears to take a stricter view of the English equivalent of s 7(2) than was formerly taken. In *Deacon*[68], the Court of Appeal, after quashing a conviction for murder, refused to enter a verdict of manslaughter even though it thought that, properly instructed, the jury would at least have convicted the appellant of manslaughter[69]. Lord Widgery CJ said[70]:

> "The basis of the power to substitute a verdict for a different offence must ... be based on the finding of the jury. It is only when it appears to the Court from the finding of the jury that the facts essential to establish the alternative offence [were] proved, that the Court may substitute the alternative verdict. Unlike section 2 [containing the proviso], the Act does not authorise the Court to act on the footing that the Court is satisfied that the jury would have brought in the alternative verdict if properly instructed. *What is necessary is that the findings of the jury themselves must establish the appropriate facts to support the alternative offence.*" (emphasis added)

46 The South Australian courts also appear to now take a stricter view of the South Australian counterpart to s 7(2) than they did in earlier times[71]. In *R v*

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66 Unreported, Court of Criminal Appeal of New South Wales, 23 December 1998.

67 *R v Maxwell* unreported, Court of Criminal Appeal of New South Wales, 23 December 1998 at 87.

68 (1973) 57 Cr App R 688.

69 (1973) 57 Cr App R 688 at 693.

70 (1973) 57 Cr App R 688 at 693-694.

71 *R v Dutton* (1979) 21 SASR 356; *R v Weetra* unreported, Court of Criminal Appeal of South Australia, 7 August 1996; *R v Cozzi* (1999) 73 SASR 374.

Dutton[72], the Court of Criminal Appeal refused to substitute a verdict of manslaughter where the trial judge had inadequately directed the jury on provocation. Cox J said[73] that the power "to substitute a manslaughter verdict in a case of this kind, should, in my opinion, be used sparingly."

47 The power conferred by s 7(2) and its counterparts in other jurisdictions is a very useful one which, in appropriate cases, will result in the saving of time and expense and avoid the inconvenience and worry of victims and witnesses having to testify once again before a jury. But it is a power which must be exercised with great caution[74], lest the effect of s 7(2), in cases where the accused has not elected under s 16 of the *Criminal Procedure Act* 1986 (NSW) to be tried by judge alone[75], is that trial by judge is substituted for trial by jury. Moreover, there is a real question whether, given the terms of s 80 of the Constitution, s 7(2) of the *Criminal Appeal Act* and its Australian counterparts apply in respect of the trial on indictment of any offence against any law of the Commonwealth. Section 68(2) of the *Judiciary Act* 1903 (Cth) "picks up" State laws concerning appeals in respect of Commonwealth offences, but this is expressed to be subject to s 80 of the Constitution.

48 However, once the court finds that the jury must have been satisfied of the facts constituting the other offence, there is no reason why the power under s 7(2) should be used sparingly. The need for caution is directed to the issue whether it really does appear that the jury were so satisfied. In some cases, it may be that, even though the court is so satisfied, the legal error may have put the appellant at some forensic, as opposed to legal, disadvantage. In such a case, it would be proper not to substitute a verdict[76].

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72 (1979) 21 SASR 356.

73 (1979) 21 SASR 356 at 380.

74 *Caslin* (1960) 45 Cr App R 47 at 55; *Graham* [1997] 1 Cr App R 302 at 310; *R v Cervelli* [1998] 3 VR 776 at 787.

75 See *Fleming v The Queen* (1998) 197 CLR 250. The relevant section was then s 32 of the *Criminal Procedure Act* 1986 (NSW).

76 cf *R v Bozikis* [1981] VR 587 at 599-601.

The standard of proof required to apply s 7(2) of the *Criminal Appeal Act*

49 The English Court of Criminal Appeal had taken the view that it must be "sure" that the jury were satisfied of the relevant facts[77], which is the state of mind which English juries must have in concluding that the charge has been proved beyond reasonable doubt. But sureness of mind is not a standard that this Court has countenanced as expressing proof beyond reasonable doubt. That being so, a court of criminal appeal in this country should not apply a different standard from that which the jury would have applied if they had convicted on the charge intended to be substituted. Thus s 7(2) does not operate unless it appears to the Court of Criminal Appeal to the point of certitude that the jury did find certain acts or omissions and that those acts or omissions, as a matter of law, made the accused guilty of the other offence. As the Court of Criminal Appeal pointed out in *Maxwell*[78], s 7(2) applies only "where the jury's verdict necessarily implies that they were satisfied of facts constituting" the other offence. If there is any outstanding issue, whether of fact or opinion, in respect of the "other offence" which is not covered by "the facts" found to the point of certitude, the Court of Criminal Appeal cannot exercise the power to convict which is conferred by s 7(2). The function of the Court of Criminal Appeal is not to find facts, but to give legal effect to the findings of fact that the jury have expressly made or which are necessarily involved in the verdict of guilty which they have returned.

50 Moreover, s 7(2) only operates where the jury have been satisfied of those facts on evidence properly admitted[79], and where the jury have been properly directed[80] as to the facts which are to be used as the basis of entering a conviction in respect of the other offence. If any of the facts of which the jury must have been satisfied is the product of evidence wrongly admitted, or has or may have been influenced by a misdirection, non-direction or other error on the part of the trial judge, s 7(2) cannot operate. The words "must have been satisfied of facts" mean that the jury must have been properly satisfied of facts proved by admissible evidence in accordance with proper directions.

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77 *Caslin* (1960) 45 Cr App R 47; *R v Smith* [1962] 2 QB 317.

78 Unreported, Court of Criminal Appeal of New South Wales, 23 December 1998 at 87.

79 *R v Scaramanga* [1963] 2 QB 807; *Holley* (1969) 53 Cr App R 519.

80 *Deacon* (1973) 57 Cr App R 688 at 694.

The facts of which the jury were satisfied

51 The question in the present case is whether the jury must have been properly satisfied of facts which proved the appellant's guilt on the s 229(4) charge, notwithstanding that the trial judge misdirected the jury in respect of the s 176A charge. The Court of Criminal Appeal thought that it could find that the jury must have been so satisfied. Spigelman CJ said[81]:

> "If it could be said that the jury's finding meant that the accused believed that the intended result would be advantageous to him, then it follows that both the mental element in the s 229(4) charge and the improper use of position element in the s 229(4) charge would be satisfied. The improper use of position in this case is constituted by the entering into of an arrangement for an improper purpose, that purpose being the advantage to be gained by the accused, rather than any purpose of the company, relevantly, [Sterling Nicholas].
>
> In my opinion the finding of the jury on the fraud charge must have encompassed a finding that there was an improper use of position in this sense and that the entire objective of the transaction was to benefit the accused, the now appellant. Accordingly, the finding on the more serious charge of intending to defraud creditors encompassed the relevant findings for the purposes of s 229(4). The mechanism by which the creditors would be defrauded in the only case put to the jury, was a mechanism by which the appellant received an advantage in the sense used in s 229(4) and that intention to defraud the creditors through that mechanism necessarily encompassed a finding that he made improper use of his position."

52 In this Court, the respondent identified the facts which the jury must have found in order to have convicted the appellant on the s 176A charge as follows:

(1) That he was a director of Sterling Nicholas.

(2) That he caused Sterling Nicholas to purchase from himself all of the shares in Holdings for $500,000.

(3) That his purpose in causing Sterling Nicholas to purchase the shares was to advantage himself by making him a secured creditor instead of a

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81 *R v Spies* (1998) 29 ACSR 217 at 223.

debtor of Sterling Nicholas at a time when Sterling Nicholas was at risk of going into liquidation.

53 In support of its claim, the respondent relied upon those passages in the summing-up in which the learned trial judge told the jury that the prosecution invited them to draw inferences that:

(a) the purpose of the sale of the appellant's shares in Holdings to Sterling Nicholas was for no reason other than to delay or hinder the creditors of Sterling Nicholas;

(b) the appellant caused Sterling Nicholas to enter into the transaction for the purpose of making himself a secured creditor rather than a debtor; and

(c) when he entered into the transaction he knew that Sterling Nicholas was about to go into liquidation.

54 It seems certain that the jury must have found the above facts in order to convict the appellant of the s 176A charge in the way that it was left to the jury. But is this sufficient to prove the appellant guilty of the s 229(4) charge?

55 The jury made no finding that the appellant made improper use of his position. Nor did they make any finding that he so used his position to gain directly an advantage for himself. For the s 229(4) conviction to be upheld, therefore, the respondent must establish three further matters:

(4) That, as a matter of law, the findings of facts set out in paragraphs 1, 2 and 3 above constituted an improper use of the appellant's position as a director to gain directly an advantage for himself.

(5) That those three findings of fact were not affected by the trial judge's misdirection or non-direction on the issue of intention to defraud.

(6) That it was proper to convict the appellant of the s 229(4) charge by reference to the factual findings set out in paragraphs 1, 2 and 3, although those findings bear little relationship to the way that the trial judge left the prosecution case to the jury in respect of the s 229(4) charge.

56 To determine whether the conviction under s 229(4) can be upheld, therefore, it is necessary to determine what facts the jury must have found and to

what extent any such finding may have been influenced by the misdirection which was the basis for setting aside the s 176A conviction.

57 The Court of Criminal Appeal set aside that conviction because, as Spigelman CJ said[82]:

> "The jury could have been left with a belief that as long as they were satisfied as a fact that the shares were not worth anything, the charge could have been made out, even if the accused believed that there was real value in the shares *after the transaction*.
>
> The nature of the direction that I believe was appropriate in this case was a direction, in the context of making the ultimate finding that the accused intended to defraud the creditors that the jury had to be satisfied that the accused knew that the transaction by which value had been given to the shares, or as the Crown put it, the appearance of value had been given to the shares, was a transaction which was liable to be set aside, or his knowledge was such that it gave only the fictitious appearance of adding value to the shares.
>
> His Honour failed to direct the jury in that regard in any meaningful respect. Rather he left open the issue of intention to defraud without any elaboration or application to the particular circumstances of the case in hand. In my view that was an error and the appeal from that conviction should be allowed." (emphasis added)

58 With great respect to the Court of Criminal Appeal, we have difficulty in accepting that the learned trial judge erred in failing to direct the jury in the way that Spigelman CJ suggested was "appropriate". The issue which the Court of Criminal Appeal said should have been left to the jury seems to have little, if any, relevance to the way that the defence was conducted by the appellant.

59 It seems certain that, by the "transaction", the Court of Criminal Appeal meant the lease arrangement. However, the lease was not executed until 24 May 1990. It was not until that date that the shares in Holdings acquired "value". But the conduct which was the subject of both charges in the indictment was alleged to have occurred between 17 October 1989 and 9 May 1990. It was the appellant's actions and intention during that period which were relevant. His knowledge or belief that the transaction had given value to the shares was not a

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82 *R v Spies* (1998) 29 ACSR 217 at 222.

relevant issue although the terms of the judgment of the Court of Criminal Appeal suggest that it was. The relevant date for determining the effect of his actions and the intention which he held in carrying them out was the date when he sold his shares in Holdings to Sterling Nicholas. That appears to have been 30 March 1990, although on one view of the evidence, it was as early as 17 October 1989. Given the terms of the indictment, it could have been no later than 9 May 1990, which was the date on which the appellant's loan account was credited with the proceeds of the sale of the shares in Holdings. At all events, it was before the execution of the lease on 24 May 1990 which was the basis of the contention that the shares in Holdings had value.

60 On the assumption that the benefits of the lease transaction to Holdings could raise a reasonable doubt that the appellant did not intend to defraud the creditors of Sterling Nicholas when he sold his shares in Holdings to Sterling Nicholas, the question for the jury, having regard to the terms of the indictment, was whether the prosecution had proved that, when he sold those shares, he defrauded the creditors of Sterling Nicholas. His belief that the shares would have value if and when Holdings acquired the lease of the premises occupied by Sterling Nicholas was relevant only as to the light which it threw on the issue whether he intended to defraud the creditors of Sterling Nicholas.

61 The question was not, as the Court of Criminal Appeal formulated it, whether the appellant "knew that the transaction by which *value had been given to the shares*, or as the Crown put it, the *appearance of value had been given to the shares*, was a transaction which was liable to be set aside, or his knowledge was such that it gave only the fictitious appearance of adding value to the shares."[83] A negative finding on that question would be no answer to the charge under s 176A, assuming that s 176A properly applied to the case. Not to have that knowledge or hold that belief can be consistent with an intention to defraud the creditors of Sterling Nicholas. Given the nature of the prosecution case and the appellant's answer to it, his knowledge or belief that shares had value if and when Holdings acquired the lease of the premises was no more than a foothold for the conclusion that he did not intend to defraud the creditors of Sterling Nicholas because Sterling Nicholas would receive shares commensurate in value with the price that it was paying for those shares.

62 The issue which the Court of Criminal Appeal thought should have been put to the jury was not in the forefront of the defence case at the trial. Understandably from a forensic view point, that case was conducted in a

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83 *R v Spies* (1998) 29 ACSR 217 at 222. (emphasis added)

broad-brush way. As the trial judge summarised it[84], the appellant alleged "that the transaction was entered into in good faith; that there had been no obligation on his part to renew the lease in the name of [Sterling Nicholas]; that the shares in [Holdings] were not valueless; and that [Sterling Nicholas] received value for money." Given that the minutes recorded that Sterling Nicholas should purchase the shares in Holdings as early as 17 October 1989, long before the lease to Holdings was contemplated, it is not surprising that counsel for the appellant did not wish the case to be determined by a close analysis of the evidence, evidence to which his client offered no explanation or justification except by way of submissions.

63 The way in which the learned trial judge left the defence case to the jury reflected counsel's tactics and maximised the appellant's chance of acquittal. A more formal charge by the learned judge would have required a far more precise analysis of the evidence than that which the judgment of the Court of Criminal Appeal suggests. It would have required directions as to the dates of each step in the series of transactions which converted the appellant from a debtor to a secured creditor of Sterling Nicholas, and reference to the evidence relevant to each of those steps, a course which would have told heavily against the appellant given that he gave no evidence explaining or justifying those steps. Moreover, counsel for the appellant made no objection to the summing-up and sought no redirection on any point concerning intention to defraud.

64 Furthermore, there was very little evidence from which it could be found that the appellant believed that, at the time he sold the shares in Holdings to Sterling Nicholas, they had substantial value because of the likelihood of Holdings becoming the lessee of the premises. Unless there was some foundation for thinking that this might be so, there was no ground upon which the jury could think that there was a reasonable doubt as to whether he intended to defraud the creditors of Sterling Nicholas. The evidence pointed overwhelmingly to the appellant's shares being sold to Sterling Nicholas so that, in the event of Sterling Nicholas going into liquidation, the liquidator of Sterling Nicholas would have no claim on the appellant. It is no doubt true that Sterling Nicholas had no legal or equitable right to a lease of the premises. But, as a director of Sterling Nicholas, the appellant owed a duty to Sterling Nicholas to obtain the lease for it. In breach of that duty, he caused it to be taken up by Holdings. He was the only person advantaged by the transaction. Instead of obtaining a valuable lease for a rental under market value in respect of premises which it had long occupied as lessee, Sterling Nicholas had to pay a substantial

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84 Transcript of trial, 2 October 1997 at 9-10.

sum of money to buy shares in the company that acquired the lease. This resulted in Sterling Nicholas having less funds to pay its creditors (because it could not call on the appellant's loan account) than it would have had if there had been no share purchase. In contrast, the appellant went from being the owner of arguably worthless shares in Holdings and a substantial debtor of Sterling Nicholas, to being a secured creditor of that company.

65 The appellant did not give evidence; nor did he call any oral evidence in support of his case. The only evidence that could suggest that he held the belief that the shares in Holdings would become a valuable asset of Sterling Nicholas was that, on 27 March 1990, he told the solicitor for the lessor that the new lease was to be in the name of Holdings. There was also a concession by that solicitor in cross-examination of the possibility that the conversation could have taken place earlier than that date. From these two pieces of evidence, the appellant would have it that, although he converted himself from a debtor of Sterling Nicholas to a secured creditor, the jury could conclude that he had no intention of defrauding the creditors of Sterling Nicholas because at the time of the sale he believed that he was selling shares of potential value to Sterling Nicholas. But why should such a conclusion be drawn? He gave no evidence to this effect, and to conclude that he did so believe seems more a matter for speculation than inference. It is of course possible that he believed that the shares would have value if Holdings acquired the lease, and it is true that he was not obliged to prove affirmatively that he held this belief. But to hold that he did seems to enter the realm of speculation.

66 It is difficult to escape the conclusion that, given the way that the case was conducted at the trial, the summing-up of the trial judge was highly favourable to the appellant, and that it is more likely than not that precise directions concerned with his state of mind as at the date of the sale of the shares would not have assisted his case. That being so, it is difficult to see how the learned trial judge's charge contained any error, or that his charge to the jury constituted a miscarriage of justice. Given the way that the prosecution and the defence cases were conducted at the trial, the appellant seems fortunate to have had his conviction on the s 176A charge quashed on the ground upheld by the Court of Criminal Appeal. If there were no more to the case, a question would arise as to whether, even at this late stage, the interests of justice required this Court to revoke the appellant's grant of special leave to appeal.

67 But there is a good deal more to the case, and it suggests that the appellant should never have been charged under s 176A of the *Crimes Act* in the way that he was. Part of the difficulty of now applying s 7(2) of the *Criminal Appeal Act* to bring the case within s 229(4) of the Companies Code arises out of the way in which the prosecution formulated the s 176A charge against the appellant.

What s 176A of the *Crimes Act* covers

68 Section 176A of the *Crimes Act* provides[85]:

"**Directors etc. cheating or defrauding**

Whosoever, being a director, officer, or member, of any body corporate or public company, cheats or defrauds, or does or omits to do any act with intent to cheat or defraud, the body corporate or company or any person in his or her dealings with the body corporate or company shall be liable to imprisonment for 10 years."

69 Relevantly, s 176A creates an offence where:

(a) a director of a company cheats or defrauds or does or omits to do any act with the intent to cheat or defraud the company; or

(b) a director of a company cheats or defrauds or does or omits to do any act with the intent to cheat or defraud any person in his or her dealings with the company.

70 The first limb deals with the cheating or defrauding of the company. But the prosecution did not rely on that limb. It was on the first part of the second limb that the prosecution case against the appellant relied. On the natural construction of the section, the words "in his or her dealings with the company" in the second limb apply to "any person", and not to "a director of a company". In other words, the question raised by the second limb is whether the director defrauded, or did or omitted to do an act with an intent to defraud, a person in that person's actual dealings with the company. The natural construction of the section does not suggest that a creditor is, by reason of being a creditor of the company, *ipso facto* a person who comes within the expression "any person in his or her dealings with the body corporate or company". That is, the natural reading of the section does not suggest that that expression is used descriptively to characterise people who have dealings with the company as opposed to people

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85 Section 176A was introduced in the *Crimes Act* by the *Crimes (Amendment) Act* 1979 (NSW). The Second Reading Speech dealt very briefly with the section, in the following terms: "The object of this new offence is to allow the prosecution of any director, and so on, who uses his position in a company to cheat and defraud it or members of the public": New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 March 1979 at 3322.

who don't. Rather, it suggests that the offence must be committed in respect of a person's actual dealings with the company. That is to say, the expression "any person in his or her dealings" defines the circumstances in which the acts alleged to have occurred will constitute an offence.

71 There are few decided cases on s 176A. None of them is inconsistent with the above analysis. They are mainly concerned with appeals where there has been an issue on sentencing where the accused had pleaded guilty to various offences including some under s 176A.

72 In *R v Negline*[86], the accused was charged with numerous offences under s 176A of defrauding persons in their dealings with the company. He was a director of a broking company which received premiums from persons effecting insurance. Instead of paying the premiums to the insurance companies, the accused caused those premiums to be retained by the broking company. The issue in the appeal was whether actual loss had to be proved in respect of defrauding under s 176A. The accused argued that the broking company was an agent of the insurance companies, that payments to a broker constitute payments to the principal, and that consequently no actual loss had been sustained by those persons who had paid insurance premiums to the broking company. After reviewing *Welham v Director of Public Prosecutions*[87], *R v Scott*[88] and *R v Sinclair*[89], the Court of Criminal Appeal concluded[90]:

> "In a prosecution under s 176A of the Crimes Act, it is ... sufficient if the Crown establishes the possibility of loss, that is that the victim has been prejudiced in some aspect of his proprietary rights or the enforcement of those rights."

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86 Unreported, Court of Criminal Appeal of New South Wales, 5 December 1990.

87 [1961] AC 103.

88 [1975] AC 819.

89 [1968] 1 WLR 1246; [1968] 3 All ER 241; (1968) 52 Cr App R 618.

90 *R v Negline* unreported, Court of Criminal Appeal of New South Wales, 5 December 1990 at 7.

However, *Negline* says nothing as to whether a creditor falls within s 176A in a case where the defrauding is not alleged to arise out of the dealing that created the debtor-creditor relationship with the company.

73 *R v Law*[91] also concerned an appeal on sentence. The accused had pleaded guilty to numerous charges under s 176A. On the facts, this was another case of the accused being the director of a broker company who defrauded persons in their dealings with the company in circumstances where those persons had paid insurance premiums to the broker company and the accused had defrauded them by either not forwarding those premiums to the insurance companies, or quoting insurance premiums in excess of the actual premiums payable and keeping the difference. Nothing in the case is of assistance in the present context.

74 *R v Murphy*[92], however, was concerned with an appeal against convictions under s 176A. But nothing in the discussion by the Court of Criminal Appeal is of any assistance in the present case.

The indictment charged the appellant with "defrauding" creditors

75 The indictment in the present case alleged that the appellant "*defrauded* persons, being *the creditors of* [Sterling Nicholas]" by causing Sterling Nicholas to purchase the appellant's shares in Holdings. The prosecution sought to prove this charge by alleging that the purpose of the sale of shares in Holdings was made for no other reason than to hinder or delay the creditors of Sterling Nicholas. But this allegation seems misconceived.

76 In *Balcombe v De Simoni*[93], Gibbs J pointed out:

"In *In re London and Globe Finance Corporation Ltd*[94], Buckley J said:

> 'To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is

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91 Unreported, Court of Criminal Appeal of New South Wales, 7 October 1993.

92 Unreported, Court of Criminal Appeal of New South Wales, 19 December 1989.

93 (1972) 126 CLR 576 at 593.

94 [1903] 1 Ch 728 at 732-733.

> by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.'
>
> These words, which 'ever since they were reported ... have been accepted and used in the criminal courts as providing a satisfactory account of the essentials of "defrauding" on the one hand and "deceiving" on the other' (*Welham v Director of Public Prosecutions*)[95], and have been cited with apparent approval in this Court (*R v Kidman*)[96]".

77 Cases decided subsequently to *Balcombe v De Simoni* have shown, however, that there may be a conspiracy to defraud without deceit[97]. In *R v Scott*[98], which first established authoritatively that there can be a conspiracy to defraud without deceit, Viscount Dilhorne said that "'to defraud' ordinarily means, in my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled." In *Scott*, the House of Lords unanimously dismissed an appeal against a conviction for conspiracy to defraud where the Crown had proved that the appellant had agreed with the employees of cinema owners that, in return for payment, they would temporarily take cinema films without their employers' consent to enable the appellant to copy the film and sell the copies without the consent of the owners of the copyright. In *Peters v The Queen*[99], however, this Court, while accepting that *Scott* was correctly decided, denied that dishonesty was an independent element of a conspiracy to defraud. All members of the Court[100], with the exception of Kirby J, held that *dishonest means*, but not dishonesty by itself or additionally, is what must be proved to constitute a conspiracy to defraud.

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95 [1961] AC 103 at 127.

96 (1915) 20 CLR 425 at 447.

97 *R v Scott* [1975] AC 819 at 838; *Peters v The Queen* (1998) 192 CLR 493 at 505 [21] per Toohey and Gaudron JJ, 524 [72] per McHugh J.

98 [1975] AC 819 at 839.

99 (1998) 192 CLR 493.

100 (1998) 192 CLR 493 at 505 [21], 507-510 [27]-[34] per Toohey and Gaudron JJ, 525 [73]-[74], 527-530 [79]-[85] per McHugh J with whose judgment Gummow J agreed at 533 [93].

78 The decision in *Scott* must mean that a person may also be defrauded without being deceived. It necessarily follows that, in an offence alleging "defrauding", deceit is not a necessary element of that offence, notwithstanding what was said in *Balcombe v De Simoni*. Statements to the contrary in that case can no longer be regarded as authoritative. Nevertheless, to prove a defrauding the prosecution must establish that the accused used "dishonest means" to achieve his or her object.

79 In *Peters*, Toohey and Gaudron JJ said[101]:

> "Ordinarily, however, fraud involves the intentional creation of a situation in which one person deprives another of money or property or puts the money or property of that other person at risk or prejudicially affects that person in relation to 'some lawful right, interest, opportunity or advantage'[102], knowing that he or she has no right to deprive that person of that money or property or to prejudice his or her interests[103]. Thus, to take a simple example, a 'sting' involving an agreement by two or more persons to use dishonest means to obtain property which they believe they are legally entitled to take is not a conspiracy to defraud."

80 In the same case, McHugh J said[104]:

> "In most cases of conspiracy to defraud, to prove dishonest means the Crown will have to establish that the defendants intended to prejudice another person's rights or interest or performance of public duty by:
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> - making or taking advantage of representations or promises which they knew were false or would not be carried out;
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> - concealing facts which they had a duty to disclose; or

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101 (1998) 192 CLR 493 at 508 [30].

102 *R v Kastratovic* (1985) 42 SASR 59 at 62 per King CJ.

103 See *Archbold Criminal Pleading, Evidence and Practice*, (1996), vol 2, pars 17-89, 17-94. See also *R v Sinclair* [1968] 1 WLR 1246; [1968] 3 All ER 241; (1968) 52 Cr App R 618.

104 *Peters v The Queen* (1998) 192 CLR 493 at 529 [84].

- engaging in conduct which they had no right to engage in."

81 To prove that the appellant defrauded a "person in his or her dealings" with Sterling Nicholas, therefore, the prosecution had to prove that the appellant used dishonest means to prejudice the rights of such a person in his or her dealings with Sterling Nicholas. The "persons" identified by the prosecution were the creditors of Sterling Nicholas.

The trial judge's directions on "defrauding"

82 In charging the jury on the first count of the indictment, the learned trial judge said[105]:

> "As to the second matter[106], that is that the accused defrauded certain creditors of the body corporate in their dealings with the body corporate. What the Crown must prove beyond reasonable doubt is that the accused, *by deceit or deliberate falsehood*, caused those creditors to be delayed or hindered in seeking to recover debts owed to them by the company." (emphasis added)

83 At no stage, however, did the learned judge identify the deceit or deliberate falsehood. Nor does there appear to have been any. The appellant may have breached his duty as a director of Sterling Nicholas, but there seems no suggestion that he deceived anyone or lied or made a misrepresentation to anyone in the course of selling his shares in Holdings to Sterling Nicholas or obtaining a charge over the assets of Sterling Nicholas. Instead, the learned trial judge later put the prosecution case as one concerned with an intention to defraud by delaying or hindering creditors.

84 Immediately after making the above statement, the trial judge said[107]:

> "Now what I am about to say is important, members of the jury. The Crown must prove beyond reasonable doubt that the accused himself, by

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105 Transcript of trial, 2 October 1997 at 9.

106 The first matter which the trial judge directed the jury they must find beyond reasonable doubt was that the appellant was a director of Sterling Nicholas.

107 Transcript of trial, 2 October 1997 at 9.

entering into the transaction in which his shares in [Holdings] were sold to [Sterling Nicholas], intended to defraud the creditors.

The test here is a subjective test. What is relevant is what the accused intended himself to do and that is what the Crown has to prove, that is, it has to prove that he intended to defraud those creditors.

As to this element of the offence, the Crown invites you to draw an inference from all the surrounding circumstances that the purpose of the sale of the accused's shares in [Holdings] to [Sterling Nicholas] was for no reason other than to delay or hinder creditors by making the accused, himself, a creditor rather than a debtor; and I should add not only a creditor but a secured creditor at a time when the accused well knew that the company was about to go into liquidation."

85 On its face, this might seem to be a direction concerning the *mens rea* of the offence under s 176A. However, shortly after giving this direction, his Honour said[108]:

"The only issue, so far as the first charge is concerned, is whether the Crown has proved beyond reasonable doubt that the accused defrauded the creditors and you will just recall what I said to you about fraud, the meaning of that term in the context of this charge."

That the learned trial judge was equating the appellant's intention to delay or hinder the creditors with "defrauding" is confirmed by the directions that he later gave when summarising the prosecution case.

86 After stating that he "would like to give [the jury] a very broad overview of how it seems to me that the Crown endeavours to put its case", his Honour said[109]:

"As to the first charge, that is the charge alleging that the accused defrauded the creditors of the body corporate, the Crown case is in essence, that you, the jury, are clearly entitled to draw an inference that the purpose behind the accused selling his shares in [Holdings] to [Sterling Nicholas]

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108 Transcript of trial, 2 October 1997 at 10.

109 Transcript of trial, 3 October 1997 at 47-48.

was to defraud creditors by making the accused a creditor, not a debtor, at a time when the company was obviously about to go into liquidation.

The Crown submits that the accused must have known the desperate position in which the company was in because the fact is it was not able to pay its debts when they became due.

The Crown further submits that his conduct was clearly fraudulent as its very clear purpose was to stop the creditors getting hold of the money."

His Honour concluded his summary of the prosecution case by saying[110]:

"As to the second charge which in reality, of course, is the first charge in the indictment the Crown was dealing with them back to front coming to deal with the fraud charge, as to that second charge *alleging an intention on behalf of the accused to defraud* the creditors, that transaction was to stop the creditors getting hold of money and for that reason it was very obviously fraudulent." (emphasis added)

87 The various statements and directions by the learned trial judge show that his Honour directed the jury that the defrauding in breach of s 176A was constituted by the sale of the shares "for no reason other than to delay or hinder creditors by making the accused, himself, a creditor rather than a debtor." In doing so, his Honour misdirected the jury for a number of reasons. First, his directions suggest that the *intention* to delay or hinder creditors is equivalent to prejudicing their rights or interests. Second, his directions omit to say that the use of dishonest means is an essential element in a defrauding offence. Third, they omit to direct the jury that the dishonest means must have taken place in relation to the dealings of the creditors with Sterling Nicholas. Fourth, they suggest that, as long as there was an intention to delay or hinder the creditors, they were defrauded even if their interests were not prejudiced. Since Sterling Nicholas had no legal right to obtain the lease, the creditors were no worse off following the purchase by Sterling Nicholas of the shares in Holdings than they would have been if no purchase had taken place, notwithstanding that the appellant was in breach of his duty as a director and profited by the transaction. The appellant would not have defrauded the creditors even if he had caused Sterling Nicholas to purchase his shares in Holdings *for the purpose of* delaying or hindering them in recovering their debts. In *Welham v Director of Public*

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110 Transcript of trial, 3 October 1997 at 54.

Prosecutions[111], in a passage cited by Viscount Dilhorne in *Scott*[112], Lord Radcliffe said of defrauding:

> "It requires a person as its object: that is, defrauding involves doing something to someone. Although in the nature of things it is almost invariably associated with the obtaining of an advantage for the person who commits the fraud, it is the effect upon the person who is the object of the fraud that ultimately determines its meaning."

88 Moreover, the prosecution case on s 176A faced fundamental difficulties, although nothing was made of them at the trial or in the Court of Criminal Appeal. The charge, as we have pointed out, was one of having *defrauded* the creditors of the company. The prosecution has never sought to put its case higher than that the conduct of the appellant evinced an intention to hinder or delay the creditors, a notion taken from the case law on acts of bankruptcy and conveyances of property with intent to defraud. At no stage of the case has the prosecution attempted to identify the particular property, right or interest of which any creditor was deprived or the dishonest means which were essential to the case of defrauding. Indeed, despite the terms of the indictment alleging a defrauding, the prosecution seems to have treated the case as one simply of a sale of property with intent to defraud creditors in the sense of the Statute 13 Eliz c 5. At no stage were the jury asked to determine whether the obtaining of the purchase price for the shares was achieved by dishonest means and that the effect of doing so was to prejudice a right or interest of the creditors of Sterling Nicholas. The prosecution did not allege that the appellant had used dishonest means to prejudice those persons in the course of their dealings with Sterling Nicholas. Instead, the prosecution alleged that, after a debtor-creditor relationship was created between Sterling Nicholas and the creditors, the appellant entered into a transaction with the company which had the effect of making it less likely that the creditors would be able to recover their debts from Sterling Nicholas.

89 By concentrating on the effect of the appellant's intention with regard to the creditors rather than his actions with respect to Sterling Nicholas, the prosecution case was misconceived in a fundamental way. Notions of intending to hinder or delay creditors which are relevant in actions based on the Statute 13 Eliz c 5 or its modern counterparts, or in determining whether an act of bankruptcy has

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111 [1961] AC 103 at 123.

112 [1975] AC 819 at 838.

occurred, are unlikely to have any relevance when the offence involves one person *defrauding* another. Moreover, it needs to be kept in mind that, in those areas of law, the hindering or delaying is of the creditors *of the person doing the hindering or delaying.* In those areas of law, the insolvent debtor's intention to hinder or delay constitutes an intention to defraud because his or her purpose is to prevent the distribution of his or her property in accordance with the bankruptcy laws[113].

90 The appellant was not the debtor of the creditors of Sterling Nicholas. Their debtor was Sterling Nicholas. The creditors had no claim on the appellant. In the event of a liquidation, the only person who could make any claim on the appellant was the liquidator of Sterling Nicholas. On the evidence, there was a case that the appellant intended to prevent the company and any liquidator of the company recovering from him the debt that was owing before the sale of the shares in Holdings, and to hinder or delay his own creditors, particularly Sterling Nicholas. But it seems absurd to suggest that he was intending to hinder or delay the creditors of Sterling Nicholas, even if the effect of his actions may have made it less likely that they would recover the full amount of the debts owing to them. Once his relationship with the company and lack of relationship with the creditors is brought to the forefront of the case, no jury acting reasonably could conclude beyond reasonable doubt that he intended to delay or hinder the creditors in recovering their debts from Sterling Nicholas. It was open to the jury to find that he intended to protect himself from action by the company or its liquidator. But it could be no more than speculation to conclude that he was concerned with the rights of the creditors against Sterling Nicholas. That suggestion that he was seems a product of the imagination of the prosecution lawyers, anxious to bring the case within a line of authority operating in a very different area of law.

91 In addition, when there is a charge of defrauding, as opposed to a charge of committing an act with intent to defraud, what is required is an actual obtaining of property or of depriving the person defrauded of something which is regarded as belonging to him or her. This is a further reason for thinking that notions of intending to hinder or delay the creditors of Sterling Nicholas had no part to play in the present case.

92 No doubt, as s 176A recognises, a person may be able to defraud the creditors of a corporation in their dealings with the corporation. But that will be

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113 *Dutton v Morrison* (1809) 17 Ves Jun 193 at 197 [34 ER 75 at 76]; *Ex parte Chaplin; In re Sinclair* (1884) 26 Ch D 319 at 335.

because in some way or other that person has dealt with the creditor or creditors or, if he or she has not had any dealing with them, has obtained or used or prejudiced what belongs to the creditors by dishonest means. The appellant had no relevant dealings with the creditors and obtained no property of any creditor. Nor did he alter their legal rights. It is not enough to constitute "defrauding" that an accused has acted dishonestly or that his or her dishonest conduct has had an effect on creditors. As Lee J pointed out in *Re Hyams & Public Accountants Registration Act*[114], a "vast number of offences involve dishonesty, but are not offences involving fraud."

93 It is true that there are statements in the authorities, beginning with that of Mason J in *Walker v Wimborne*[115], which would suggest that because of the insolvency of Sterling Nicholas, the appellant, as one of its directors, owed a duty to that company to consider the interests of the creditors and potential creditors of the company in entering into transactions on behalf of the company. *Walker v Wimborne* was an appeal by a liquidator against the dismissal of his misfeasance summons brought against former directors under s 367B of the *Companies Act* 1961 (NSW). Statements in this and other cases[116] came within Professor Sealy's description of[117]:

> "words of censure directed at conduct which anyway comes within some well-established rule of law, such as the law imposing liability for misfeasance, the expropriation of corporate assets or fraudulent preference."

Hence the view that it is "extremely doubtful" whether Mason J "intended to suggest that directors owe an independent duty directly to creditors."[118] To give

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114 [1979] 2 NSWLR 854 at 861.

115 (1976) 137 CLR 1 at 6-7.

116 *Kinsela v Russell Kinsela Pty Ltd* (1986) 4 NSWLR 722 at 732-733; *Lyford v Commonwealth Bank of Australia* (1995) 130 ALR 267; *Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512 at 1516; [1987] 1 All ER 114 at 118; *West Mercia Safetywear Ltd (in liq) v Dodd* [1988] BCLC 250 at 252-253; *Jeffree v NCSC* [1990] WAR 183 at 187-189, 194.

117 Sealy, "Directors' Duties – An Unnecessary Gloss", (1988) 47 *Cambridge Law Journal* 175 at 175.

118 Heydon, "Directors' Duties and the Company's Interests", in Finn (ed), *Equity and Commercial Relationships*, (1987), 120 at 126.

some unsecured creditors remedies in an insolvency which are denied to others would undermine the basic principle of *pari passu* participation by creditors.

94 In *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler*[119], Gummow J pointed out:

> "It is clear that the duty to take into account the interests of creditors is merely a restriction on the right of shareholders to ratify breaches of the duty owed to the company. The restriction is similar to that found in cases involving fraud on the minority. Where a company is insolvent or nearing insolvency, the creditors are to be seen as having a direct interest in the company and that interest cannot be overridden by the shareholders. This restriction does not, in the absence of any conferral of such a right by statute, confer upon creditors any general law right against former directors of the company to recover losses suffered by those creditors ... the result is that there is a duty of imperfect obligation owed to creditors, one which the creditors cannot enforce save to the extent that the company acts on its own motion or through a liquidator."

95 In so far as remarks in *Grove v Flavel*[120] suggest that the directors owe an independent duty to, and enforceable by, the creditors by reason of their position as directors, they are contrary to principle and later authority[121] and do not correctly state the law.

96 The appellant had no legal relationship with the creditors such that his conduct in selling the shares to Sterling Nicholas constituted a defrauding of the creditors of that company.

97 Furthermore, the mere fact that a transaction with a company may have adverse consequences for the creditors of the company does not constitute a defrauding of those creditors even if it is done dishonestly. A person who induces a company to buy land by means of a false misrepresentation defrauds

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119 (1994) 122 ALR 531 at 550.

120 (1986) 43 SASR 410. See also remarks in *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242.

121 *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187; *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler* (1994) 122 ALR 531. See also *Farrar's Company Law*, 4th ed (1998) at 382-385.

the company but for legal purposes he or she does not defraud its shareholders, creditors or employees although their interests are or may be detrimentally affected by the fraud. Nor does such a transaction constitute a defrauding of the creditors because the person implementing it intends it to be to the detriment of the creditors.

98 If the appellant was guilty of a breach of s 176A of the *Crimes Act*, it was because he had defrauded Sterling Nicholas, not because he had defrauded that company's creditors with whom he had no legal relationship. It may also be faintly arguable that, by resolving that Sterling Nicholas purchase his shares in Holdings, he caused Sterling Nicholas to defraud its creditors. But the prosecution did not put its case in either of those ways.

99 In our opinion, the case against the appellant under s 176A, as formulated in the indictment, was misconceived. The highest that the case against him can be put, so far as the creditors are concerned, is that his actions made it less likely that the company would be able to pay its debts to the creditors. But it would be a large step to hold that person A has defrauded person B, with whom A has no legal relationship, because A's dishonest conduct towards a third party makes it less likely that that third party will be able to pay B.

100 The real case against the appellant was, of course, the breach of s 229(4) of the Companies Code or the defrauding of Sterling Nicholas in breach of s 176A of the *Crimes Act*. That the s 229(4) charge was the real charge against the appellant seems to have been recognised by counsel for the prosecution at the trial, because he dealt with the s 229(4) charge as the "first" charge even though it was the second charge in the indictment and technically was pleaded as an alternative to the s 176A charge.

101 It is clear that this Court could not now enter a conviction under s 176A of the *Crimes Act* and, in our opinion, it is impossible to exercise the powers under s 7(2) of the *Criminal Appeal Act* and enter a conviction under s 229(4) of the Companies Code. The charge under s 176A, as formulated in the indictment and left to the jury, was so misconceived that no factual findings underlying the conviction on that charge could possibly be used to convict the appellant of the s 229(4) offence. The directions to the jury on the issue of "defrauding" were in any event seriously flawed. Any facts underlying the jury's verdict on the s 176A charge cannot therefore be the basis of a conviction recorded under s 7(2). That is enough to require the setting aside of the s 229(4) conviction entered by the Court of Criminal Appeal. That makes it unnecessary to determine whether the same result would be reached even if the prosecution case on s 176A, as formulated in the indictment, correctly applied the law and the Court of Criminal Appeal's reasons for setting aside that conviction were valid.

102 The appeal must be allowed.

Should there be a new trial?

103 Since the charge under s 176A of the *Crimes Act* was misconceived, the prosecution should not be given the opportunity on a new trial to formulate a new case under that section[122]. The more difficult question concerns the charge under s 229(4) of the Companies Code. The appellant has already served the sentence imposed on him by the Court of Criminal Appeal. It is unthinkable that, if he were convicted on the s 229(4) charge, he would receive another custodial sentence or, for that matter, any additional punishment. That being so, it seems prima facie oppressive to put the appellant to the expense and worry of another trial which, on the evidence of the previous trial, is likely to take about 10 days. On the other hand, the case against the appellant in respect of the s 229(4) charge seems a strong one. If this Court were now to refuse to order a new trial of that charge, the appellant would be acquitted of all charges. In addition, members of the commercial community as well as the general public have a vital interest in ensuring that directors who abuse their office and breach the criminal or company law do not escape conviction.

104 Unless the interests of justice require the entry of an acquittal, an appellate court should ordinarily order a new trial of a charge where a conviction in respect of that charge has been set aside but there is evidence to support the charge. In the present case, given the competing considerations, it cannot be said that the interests of justice require that the appellant be acquitted of the s 229(4) charge. That being so, it is a matter for the prosecuting authority to determine whether in all the circumstances there should be a further trial of the s 229(4) charge.

Order

105 The appeal should be allowed. The orders of the Court of Criminal Appeal should be set aside. In lieu thereof, it should be ordered that:

(1) the appellant's appeal to that Court be allowed;

(2) his conviction under s 176A of the *Crimes Act* 1900 (NSW) be set aside and an acquittal be entered in respect of that charge; and

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122 *R v Wilkes* (1948) 77 CLR 511 at 518; *King v The Queen* (1986) 161 CLR 423 at 433.

(3) there be a new trial of the alternative charge under s 229(4) of the *Companies (New South Wales) Code*.

106 CALLINAN J. This is an appeal from the Court of Criminal Appeal of New South Wales which raises questions as to the application of s 7(2) of the *Criminal Appeal Act* 1912 (NSW) ("Criminal Appeal Act") to facts alleged to constitute an offence under s 176A of the *Crimes Act* 1900 (NSW) ("Crimes Act") or alternatively under s 229(4) of the *Companies Code (New South Wales)* ("Companies Code").

Facts

107 The appellant was the major shareholder in, and controlled two private companies, Sterling Nicholas Duty Free Pty Limited ("SNDF") and Sterling Nicholas Holdings Pty Limited ("SNH"). He was a director of SNDF.

108 SNDF conducted the business of selling duty free goods from various duty free stores. Its head office was located in a building in Oxford Street in Sydney.

109 SNDF had been the lessee of the premises in that building for many years until the lease expired in 1987 after which it held over whilst the appellant negotiated with its owner. The formal negotiations for the renewal of the lease began with a letter from the appellant on 16 January 1987, on behalf of SNDF, for a renewal of the lease for 10 years, although an option clause in the instrument contemplated four years only. The lessor was prepared to grant the longer term but no new lease was executed as the appellant then sought, on behalf of SNDF, to obtain a lease of an additional floor of the building, as well as of the premises which had been occupied in the past by SNDF. In late 1988 SNDF went into occupation of the additional floor but an agreement was not immediately reached between the lessor and the appellant on behalf of SNDF for a fresh lease in respect of all of the area which SNDF wished to occupy. All correspondence and draft agreements were in the name of SNDF and this company remained in occupation throughout, and paid the rent as and when it fell due. The lease was a valuable one because its terms were favourable to SNDF in that the rent was below the market rate. A sub-lessor would be able to exploit this by sub-letting the premises.

110 However, when the terms of the lease were finally settled, and the instrument was executed on 24 May 1990 the appellant had caused the name of SNH to be substituted for SNDF.

111 In the meantime SNDF had resolved to acquire all of the shares in SNH. SNDF was then, to the knowledge of the appellant in serious financial trouble, and owed substantial amounts to its creditors. The appellant owed SNDF $176,354.80 and had guaranteed an overdraft of the company at the ANZ bank. The guarantee was supported by a mortgage over the appellant's home.

112 The purchase price that SNDF was to pay for the issued shares in SNH was $500,000. Settlement of this transaction was effected in March 1990. No money changed hands. The shares of the appellant in SNH were paid for by crediting the appellant's loan account with SNDF with the purchase price of them. In consequence, the appellant's position changed from being a debtor of SNDF in the sum of $176,354.80, to being one of its creditors in the amount of $323,645.20. Because SNDF was unable to pay that sum the appellant took an equitable mortgage over the assets of SNDF until it could, with the result that the appellant became not only a creditor of SNDF but also a secured creditor of the company.

113 SNDF resolved to go into voluntary liquidation on 24 August 1990 when its debts exceeded its assets by over $2,000,000. The only remaining relevant factual matter is that in August 1990 SNDF was able to sell all of the shares in SNH to a third party for the sum of $450,000 which was applied in partial reduction of the overdraft of SNDF and in reduction of the debt owed by the company to the appellant which had been secured by the equitable charge.

Previous Proceedings

114 Charges were brought against the appellant as follows:

> "Between about 17 October 1989 and 9 May 1990 at Sydney in the State of New South Wales, being a director of a body corporate, namely Sterling Nicholas Duty Free Pty Ltd ('the Body Corporate'), defrauded persons, being the creditors of the Body Corporate, in their dealings with the Body Corporate, by causing the Body Corporate to purchase his shares in Sterling Nicholas Holdings Pty Ltd for $500,000." (s 176A of the Crimes Act)

alternatively:

> "Between about 17 October 1989 and 9 May 1990 at Sydney in the State of New South Wales, being an officer of a corporation, namely Sterling Nicholas Duty Free Pty Ltd ('the Corporation'), made improper use of his position to gain directly an advantage for himself by causing the Corporation to purchase his shares in Sterling Nicholas Holdings Pty Ltd for $500,000 which sum he caused to be credited to his loan account with the Corporation." (s 229(4) of the Companies Code)

115 The appellant, who was tried by Armitage DCJ and a jury, pleaded not guilty to both charges[123]. He was convicted on the first, and, as the charges were brought in the alternative, no verdict was taken on the second. In December

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123 *R v Spies*, unreported, District Court of New South Wales, 22 December 1997.

1987 the appellant was sentenced to imprisonment by way of periodic detention for 18 months.

116 The appellant appealed to the Court of Criminal Appeal of New South Wales[124]. That Court (Spigelman CJ with whom Sully and Hidden JJ agreed) upheld the appellant's appeal but determined to apply s 7(2) of the Criminal Appeal Act to enter a conviction against the appellant on the alternative count[125].

117 Spigelman CJ was of the opinion that the directions of the trial judge with respect to the first count were erroneous. His Honour said that the Crown had suggested at the trial that the lease which had been taken by SNH had been taken to give the appearance of worth to the share transaction, and, was evidence which could be taken into account on the first count. Of this, Spigelman CJ said, a proper direction to the jury should not, as the trial judge did in this case, rest with the broad element of charging the jury to find that the accused intended to defraud creditors. He added[126]:

> "If a specific mechanism for the fraud has been identified in the Crown case, the jury should be given a direction of the elements of knowledge that are implicit in the Crown case as put before the court."

118 It was the opinion of his Honour that it was necessary that a direction be given on the issue of an intention to defraud which directed attention to the particular circumstances of the case as it had been presented by the Crown, and the appellant's state of mind with respect to them, particularly his state of mind as to the value of the shares and because the directions did not extend to this matter the appeal should be allowed.

119 The directions of the trial judge which made reference to the lease and which the Court of Criminal Appeal thought were insufficient in failing to direct attention to the particular circumstances of the case as it had been presented by the Crown and the appellant's state of mind with respect to them, were given in these terms[127]:

> "But, the Crown says Duty Free by rights should have itself had the lease to the premises, what it was doing was paying half a million dollars for something it should have had in the first place."

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124 *R v Spies* (1998) 29 ACSR 217.

125 (1998) 29 ACSR 217 at 224.

126 (1998) 29 ACSR 217 at 221-222.

127 (1998) 29 ACSR 217 at 221 per Spigelman CJ.

120 After deciding that the appellant's appeal should be upheld Spigelman CJ turned to a consideration of the possible application of s 7(2) of the Criminal Appeal Act which provides:

> "Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

121 Whether s 7(2) of this Act applied depends upon a comparison of the elements of the first charge under the Crimes Act, and the elements of the alternative charge under s 229(4) of the Companies Code. As Spigelman CJ said[128], the issue before the Court was whether, in accordance with s 7(2) of the Criminal Appeal Act, the findings of the jury meant that "the jury must have been satisfied of facts which proved the appellant guilty" under s 229(4): that the mental element under the latter was an intention on the part of the appellant to benefit himself as opposed to an intention to defraud creditors. His Honour stated that if it could be said that the jury's finding meant that the appellant believed that the intended result would be of benefit to him[129], then it followed that the mental element required by s 229(4) of the Companies Code and the element of improper use would be satisfied. Spigelman CJ went on to conclude that the finding of the jury on the first charge must have encompassed a finding that there was an improper use of position in this sense and that the entire transaction was to benefit the appellant[130]. Accordingly the appellant was convicted on the second count by the Court of Criminal Appeal and sentenced to a period of 12 months to be served by way of periodic detention.

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128 *R v Spies* (1998) 29 ACSR 217 at 223.

129 (1998) 29 ACSR 217 at 223.

130 (1998) 29 ACSR 217 at 223.

The Appeal to this Court

122 The appellant appealed to this Court[131] upon various grounds including the following:

> "3. The Court of Criminal Appeal erred in concluding that the Jury's finding that the appellant had the requisite subjective intent to defraud the creditors of SNDF for s 176A *Crimes Act* purposes was without more determinative of the objective test of intent under s 229(4) *Companies Code* against the appellant.
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> 4. The Court of Criminal Appeal erred by equating a subjective intent on the part of the appellant to defraud the creditors of SNDF with an objective intent on the part of the appellant to improperly use his position to advantage himself as an officer of SNDF.
>
> 5. The Court of Criminal Appeal erred in substituting a verdict of guilty under s 229(4) *Companies Code* in circumstances where the Jury was never directed at the trial to consider the objective test of intent under s 229(4) *Companies Code* nor the commercial aspects of the relevant share transactions the subject of the charge having regard to the position of the appellant relative to SNDF in the absence of (ie but for) the implementation of that share transaction.
>
> 6. The Court of Criminal Appeal erred by misconstruing the test of impropriety under s 229(4) *Companies Code* enunciated in *R v Byrnes* (1995) 183 CLR 401.
>
> 7. The Court of Criminal Appeal erred in failing to conclude that all of the Jury's findings for the purposes of s 176A *Crimes Act* and s 229(4) *Companies Code* were vitiated by certain misdirections given by the trial Judge as to the validity of the diversion of the lease in question and as to the value of that lease which were contrary to the charges preferred in each indictment.
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> 8. The Court of Criminal Appeal erred in failing to appreciate that the test of intent in s 229(4) *Companies Code* was an objective test when it substituted a new verdict pursuant to s 7(2) *Criminal Appeal Act* 1912 (NSW)."

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131 Special leave was granted in this Court (Gaudron and Hayne JJ) on 10 December 1999: *Spies v The Queen* (2000) 2 Leg Rep C1a.

123 It is right to consider the appellant's arguments in this case having in mind what was said by the Court of Criminal Appeal of New South Wales (Gleeson CJ with whom McInerney and Newman JJ agreed) of s 7(2) of the Criminal Appeal Act in *McQueeny*[132]:

> "Nevertheless, caution should be used before exercising the power in a case where the reason for setting aside the jury's verdict was the inadequacy of the instruction that the jury was given."

124 Attention needs to be focused upon the precise allegations in the two charges. The first count alleged that the appellant, being a director of SNDF, defrauded the creditors of that company by causing it to purchase his shares in SNH for $500,000.

125 The alternative count alleged that the appellant as an officer of SNDF made an improper use of his position to gain directly for himself an advantage by causing SNDF to purchase his shares in SNH for $500,000, which sum he caused to be credited to his loan account with SNDF.

126 The appellant submits that the Court of Criminal Appeal erred in not having regard to the different natures of the tests with respect to mental element, between an offence under s 176A of the Crimes Act[133] and s 229(4) of the Companies Code[134]. He submits that there are important differences in two respects: first, that the former as charged involved an intention to defraud creditors and the latter to benefit himself; and, secondly, as has been laid down

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132 (1989) 39 A Crim R 56 at 60.

133 "**Directors etc cheating or defrauding**

176A Whosoever, being a director, officer, or member, of any body corporate or public company, cheats or defrauds, or does or omits to do any act with intent to cheat or defraud, the body corporate or company or any person in his or her dealings with the body corporate or company shall be liable to imprisonment for 10 years."

134 "**Improper use of position**

229(4) An officer or employee of a corporation shall not make improper use of his position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation.

Penalty: $20,000 or imprisonment for 5 years, or both."

by this Court in *Chew v The Queen*[135] and *R v Byrnes*[136] for a charge to be made out under s 229(4) of the Companies Code the Crown had to satisfy an objective test of intent rather than a subjective fraudulent intent of the kind which s 176A requires.

127 The offences do not necessarily have identical elements. A person charged under either must be a director or officer. Under the Crimes Act the accused must be shown to have cheated, or defrauded, or to have done an act with that intention. Under the Companies Code, the act in question must be an improper act. It is difficult however to see how a fraudulent act could ever be other than an improper act also. The third element of the offence under the Crimes Act is relevantly to cheat or defraud a person dealing with the body corporate, whereas under the Companies Code it is relevantly for an officer to gain an advantage to himself or herself. It is clearly possible that an act intended to defraud a person dealing with a corporation may also be an act intended to enable an officer of a company to gain an advantage for himself or herself. So, although the elements will not necessarily be identical in every case, as a practical matter they may well be in many situations.

128 The first charge alleges that the appellant as a director of a company defrauded the creditors by causing the company to purchase his shares in another company for $500,000. In the alternative charge the allegation is that the appellant made an improper use of his position, not as perhaps might have been alleged (subject to any objections to duplicity), by defrauding the creditors of the company, but by causing the company to purchase his shares in another company, to "gain directly an advantage for himself … for $500,000 which sum he caused to be credited to his loan account with the Corporation".

129 The question is whether there was a necessary, sufficient, factual coincidence in the charges, as laid, and in the ways in which the trial was conducted with respect to both charges, between the defrauding of the creditors and the gaining of an advantage, to himself, by the appellant, even though the act relied on to achieve both ends, the purchase of the shares for $500,000, was the same in both instances.

130 It does seem to me that the fraud alleged in count 1 was clearly capable of having as an object the gaining of an advantage by and to the appellant. The act and means of defrauding the creditors, the sale of the shares and the application of the proceeds, were one and the same as the act and the means of the appellant's

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135 (1992) 173 CLR 626 (*Companies Code* (WA)).

136 (1995) 183 CLR 501 (*Companies Code* (SA)).

advantaging himself. There was a sufficient factual coincidence between the relevant factual elements in both cases.

131 But, the appellant submits, the tests as to intention to defraud and improper purpose are so different that a conviction on the basis of the former cannot justify a conviction on the latter within the meaning of s 7(2) of the Criminal Appeal Act.

132 In *Byrnes*, Brennan, Deane, Toohey and Gaudron JJ speaking of s 229(4) of the *Companies Code* (SA) said[137]:

> "Impropriety does not depend on an alleged offender's consciousness of impropriety. Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case. When impropriety is said to consist in an abuse of power, the state of mind of the alleged offender is important[138]: the alleged offender's knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention in exercising the power are important factors in determining the question whether the power has been abused. But impropriety is not restricted to abuse of power. It may consist in the doing of an act which a director or officer knows or ought to know that he has no authority to do."

133 Undoubtedly an officer of a company must know that he has no authority to defraud a company and that of course that officer can have no authority to do so. And, if subjectively an officer intends to, and takes steps to defraud a company by making use of his position as an officer of the company that officer must be in breach objectively of the standards of conduct to be expected of an officer of a company. Here any intention to defraud necessarily involved, on either a subjective or an objective test, an improper purpose.

134 The appellant's submissions criticize in some detail the respondent's reliance upon the diversion of the lease from SNDF to SNH and the impact that it had on the respective values of the shares in the companies. I would reject the criticism. The evidence was admissible and not the subject of any objection at the trial. What the appellant caused to be done in relation to the lease was highly probative. That, taken with other relevant matters such as the appellant's personal shareholdings, the obligations he generally had, to maintain the solvency of the companies in whose management he was concerned to enable the

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137 (1995) 183 CLR 501 at 514-515.

138 *Hindle v John Cotton Ltd* (1919) 56 SLR 625 at 630-631.

company to pay its debts as and when they were incurred[139], the debt that he personally owed, the conversion of his position from debtor to secured creditor, the mortgage he had given to secure the guarantee before the sale of the shares, the financial positions of the companies, the long period of occupancy of the premises by SNDF, the negotiations in its name, and the subsequent realization of the lease, could reasonably have sufficed to prove, both the appellant's intention to defraud and the relevant improper purpose. The indictment did not need to refer in terms to the lease. The lease, what was done in relation to it, and the value that it conferred, were relevant matters of evidence and did not need to be mentioned, as submitted by the appellant, in the indictment.

135 However, that is not the end of the matter. Unlike the directions given by the trial judge with respect to the first charge, his Honour did give extensive directions as to the actual mechanisms which the appellant used, and which the respondent submitted constituted improper usage by the appellant of his position as an officer of the company to advantage himself. Those directions would, in my opinion, have sufficed to explain correctly to the jury the matters of which they needed to be satisfied to bring in a verdict of guilty on the alternative charge. But because no verdict was required to be brought in on the alternative charge it is not possible to say whether the jury were in fact satisfied as to those matters. And, in my opinion, the fact that they were satisfied with respect to the first charge, because its elements were not necessarily identical and were not submitted to be identical by the Crown, and because in any event the verdict of guilt on the first charge was the product of an erroneous direction, provides no basis for a holding that the jury must have made findings necessarily encompassing the alternative charge and establishing guilt in respect of it.

136 I should also say that I agree with the analysis of the decided cases, and the identification of the situations in which s 7(2) of the Criminal Appeal Act and its analogues may be applied, which are set out in the reasons for judgment of the majority[140].

137 For these reasons I would allow the appeal, quash the conviction entered by the Court of Criminal Appeal, and order that there be a new trial of the alternative charge under the Companies Code if the Crown is so minded in the circumstances of this case.

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139 See, for example, s 556 of the Companies Code.

140 Reasons of Gaudron, McHugh, Gummow and Hayne JJ at [22]-[48].