CITATION:	*The Queen v Wilton* [2018] NTCCA 16
PARTIES:	THE QUEEN v WILTON, Walter
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Northern Territory jurisdiction
FILE NO:	CA 16 of 2018 (21720895)
DELIVERED:	21 November 2018
HEARING DATES:	30 October 2018
JUDGMENT OF:	Grant CJ, Kelly J and Riley AJ

CATCHWORDS:

CRIMINAL LAW – PROPERTY OFFENCES – JURISDICTION, PRACTICE AND PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS

Whether indictment charging 36 separate counts of criminal deception contrary to s 227(1) of the *Criminal Code* irregular and oppressive – different or further charges may be laid in substitution for those on which an accused was committed – agreed facts proffered as part of the committal process cannot govern the form of the indictment – subject to a consideration of oppression, the Crown may choose to plead a course of criminal deception as separate counts – no fundamental irregularity that evidence may also sustain a charge of joint enterprise – evidence on each count mutually admissible – pleading 36 separate counts would not bolster overall chance of conviction – no greater difficulty charging the jury concerning the use of evidence – number of counts and complexity of issues not strongly suggestive of oppression – counts brought under same offence

provision – conduct took place over confined period –finding of guilt on a single compendious offence inscrutable in identifying facts found – appeal allowed.

Criminal Code (NT) s 210, s 227, s 299, s 310, s 322, s 414

Barton v The Queen (1980) 147 CLR 75; *Campbell v The Queen* [1981] WAR 286; *Chung v The Queen* (2007) 175 A Crim R 579; *Clyne v New South Wales Bar Association* (1960) 104 CLR 186; *Durovic v The Queen*(1994) 71 A Crim R 33; *Ex parte Cousens; Re Blacket* (1946) 47 SR (NSW) 145; *Giam v The Queen* (1999) 104 A Crim R 416; *Grassby v The Queen* (1989) 168 CLR 1; *House v The King* (1936) 55 CLR 499; *Jago v District Court of New South Wales* (1989) 168 CLR 23; *King v Finlayson* (1912) 14 CLR 675; *Kolalich v Director of Public Prosecutions (NSW)* (1991) 173 CLR 222; *Maxwell v The Queen* (1996) 184 CLR 501; *R v Appleby* (1996) 88 A Crim R 456; *R v Brow* [1981] VR 783; *R v Khouzame and Saliba* (1999) 108 A Crim R 170; *R v McCready* (1985) 20 A Crim R 32; *R v Nisbet* [1972] 1 QB 37; *R v Reid* [1999] 2 VR 605; *R v Scalia and Lenoy* [1971] VR 200; *R v Smart* [1983] 1 VR 265; *Ridgeway v The Queen* (1995) 69 ALJR 484; *Royall v The Queen* (1991) 172 CLR 378; *Salvo v The Queen* [1980] VR 401; *Sutton v The Queen* (1984) 152 CLR 528; *TWL v R* [2012] NSWCCA 57; *Walsh v Tattersall* (1996) 188 CLR 77; *Walton v Gardiner* (1993) 177 CLR 378; *Williams v Spautz* (1992) 174 CLR 509, referred to.

REPRESENTATION:

Counsel:

Appellant:	D Morters SC
Respondent:	JCA Tippett QC

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Maleys Barristers and Solicitors

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Wilton [2018] NTCCA 16
No. CA 16 of 2018 (21720895)

BETWEEN:

THE QUEEN
Appellant

AND:

WALTER WILTON
Respondent

CORAM: GRANT CJ, KELLY J and RILEY AJ

REASONS FOR JUDGMENT

(Delivered 21 November 2018)

THE COURT:

[1] This is an appeal brought by the Crown pursuant to s 414(1)(e) of the *Criminal Code* (NT) from a decision of the Supreme Court staying proceedings on indictment. The essential question for determination in the appeal is whether the indictment charging 36 separate counts of criminal deception contrary to s 227(1) of the *Criminal Code* is irregular and/or oppressive.

Background

[2] The Crown case against the respondent is that between 7 November 2016 and 22 March 2017 the respondent, who owned and operated an

electrical contracting business in Darwin, presented 36 invoices to the Royal Darwin Hospital ("RDH") which were false in several material respects. It is alleged that the false information contained in each invoice included that the respondent had completed works and had purchased replacement parts as specified in the invoice. The Crown alleges that the respondent knew the representations contained in each invoice were false at the time it was submitted and that he did so for the purpose of obtaining a benefit, being the payment subsequently made in respect of each invoice. It is alleged the respondent received payment of $148,031.63 into bank accounts with which he was associated.

[3] The evidence which the Crown proposes to call includes that the respondent had a co-offender who was at the relevant time employed by the RDH as a technical services officer in the Engineering Department ("the co-accused"). The respondent and the co-accused were initially the subject of an information laid in the Local Court alleging two counts of obtaining a benefit by deception. The parties presented agreed facts at the committal hearing ("the agreed facts")[1] on the understanding that both the respondent and the co-accused would enter pleas of guilty to the charges.

[4] In accordance with that understanding, the co-accused subsequently pleaded guilty to a one count indictment on agreed facts in which he

1 Appeal Book 3-14.

admitted 36 instances of obtaining a benefit by deception in relation to the invoices presented by the respondent. He was sentenced in the Supreme Court on 2 February 2018. However, following committal the Crown was advised that the respondent would be contesting the charges. The Crown subsequently presented an indictment dated 24 May 2018 charging the respondent with 36 individual counts of having, by criminal deception, obtained a benefit for himself or another. Save for variations in the dates of the offences the pleading of each count is in common form, as follows:

> **WALTER WILTON**
>
> Between [relevant dates] at Darwin in the Northern Territory of Australia, by deception obtained a benefit for himself or another.
>
> Section 227(1)(b) of the *Criminal Code*.

[5] The respondent has been provided with particulars of each count as part of the pre-trial disclosure processes, and no complaint is made about the lack of particulars in the indictment. In addition to those 36 counts, the respondent is charged with one count of attempting to obstruct or defeat the course of justice. That count does not fall for consideration in this appeal.

[6] By order made on 20 June 2018 pursuant to s 339 of the *Criminal Code*, and in the exercise of the Court's inherent jurisdiction, the learned trial judge stayed the proceedings on indictment subject to the Crown amending the indictment or filing a fresh indictment which

pleaded one or two counts of criminal deception in place of the 36 counts. His Honour did so on the basis that, in his Honour's view of the Crown case, the respondent had been alleged to commit only one, or possibly two, crimes and the indictment was "fundamentally irregular and oppressive" in its current form.[2]

[7] The appellant contends that the trial judge erred on the following three grounds:

(a) in ruling that the 36 counts charging the accused with criminal deception contrary to s 227(1) of the *Criminal Code* could be charged as one or two counts without infringing the principle against duplicity or giving rise to any latent ambiguity;

(b) in finding that there was an obligation on the Crown to proceed on a charge or charges in which the Crown would be required to prove a joint criminal enterprise, and in staying an indictment which alleged separate counts in relation to each of the acts the Crown asserts the accused had engaged in to obtain a benefit without allegation of joint criminal enterprise; and

(c) in concluding that it would be oppressive to the accused to present an indictment which alleged 36 counts of criminal deception but not oppressive to allege one count of criminal deception which particularised 36 separate acts of criminal deception.

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2 *The Queen v Wilton* [2018] NTSC 46 at [6].

[8] As noted at the outset, the essence of the matter is whether the indictment as presently pleaded is irregular and/or oppressive, and it is for that reason convenient to deal first with that ground of appeal.

Ground 3: Is the indictment irregular and oppressive as currently pleaded?

[9] Section 227 of the *Criminal Code* provides relevantly:

> (1) Any person who by any deception:
>
> (a) obtains the property of another; or
>
> (b) obtains a benefit (whether for himself or herself or for another),
>
> is guilty of an offence and is liable to the same punishment as if he or she had stolen the property or property of equivalent value to the benefit fraudulently obtained (as the case may be).
>
> (1A) In subsection (1), ***benefit*** includes any advantage, right or entitlement.

[10] So far as is relevant for these purposes, s 1 of the *Criminal Code* defines "deception" to mean:

> … intentional deception by word or conduct as to fact or law and includes a deception as to the present intention of the person using the deception or another person;

[11] The penalty provision in s 227(1) calls up the general punishment for stealing prescribed by s 210 of the *Criminal Code* in the following terms:

> (1) Any person who steals is guilty of an offence and is liable, if no other punishment is provided, to imprisonment for 7 years.

(2) If the thing stolen is a testamentary instrument, whether the testator is living or dead, or if the thing stolen has a value of $100,000 or more, the offender is liable to imprisonment for 14 years.

[12] It is apparent from that provision that the value of the benefit obtained will govern the maximum penalty to which the defendant is exposed. As discussed later in these reasons, that matter has some relevance to the determination of this appeal.

The elements of the offence

[13] It is instructive for these purposes to consider the elements of the offence created by s 227 of the *Criminal Code*. The offence supplements the general offence of stealing.[3] It replaces the old statutory offences relating to fraud, but in doing so does not replicate the provisions of the Griffith Code. The terms and structure of the offence created by s 227 of the *Criminal Code* have more in common with those provisions deriving from the offence of obtaining a pecuniary advantage by deception originally enacted in the *Theft Act 1968* (UK).[4]

[14] Unlike those provisions, however, the Northern Territory offence contains no requirement that the deception be "dishonest". The term "dishonesty", when used in relation to the crime of obtaining an

3 Its relationship to the offence of stealing is apparent from the fact that stealing and obtaining property by deception are available as alternative verdicts: see *Criminal Code*, s 322.

4 See *Criminal Code* (Cth), ss 134.1, 134.2, 135.1, 135.2; *Criminal Code 2002 (*(ACT) ss 326, 333; *Crimes Act 1900 (*(NSW), s 192E; *Criminal Law Consolidation Act 1935 (*(SA), s 139; *Crimes Act 1958* (Vic), ss 81, 82.

advantage or benefit by deception, imports the element that an offender must obtain the property without any belief that he or she has any legal right to deprive another of it.[5] There is no such element in the Northern Territory offence.

[15] The offence created by s 227(1)(b) of the *Criminal Code* is constituted by the following elements.

[16] The first element is that the defendant obtained an advantage, right or entitlement for himself or herself or for another. The words "advantage, right or entitlement" take their plain meaning. While the formulation "advantage, right or entitlement" is not limited to a financial benefit, it clearly and primarily comprehends that form of benefit.

[17] The second element is that the defendant must by words or conduct have made a false representation as to fact or law. That representation must be false at the time it is made.

[18] The third element is that the deception must be intentional in the sense that the defendant must actually know or believe that the representation by words or conduct is false. As already described, intentional deception rather than dishonesty is all that is required to establish the fault element, although it will usually be the case that an accused who intentionally deceives another will be acting dishonestly.

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5 See *Salvo v The Queen* [1980] VR 401 at 425; *R v Brow* [1981] VR 783.

[19] The fourth element is that the accused must have intended that the false representation be acted upon so that the benefit would be received.

[20] The fifth element is that the accused, or another person as the case may be, must obtain the benefit as a result of the making of the false representation, in the sense that there is a causal link between the representation and obtaining the benefit. In these circumstances, that requires a finding that the relevant officer would not have authorised and made the payment had it not been for the accused's false representation. It is not necessary that the benefit was obtained from the same person who was deceived, or that the accused's deception be the only one involved in the transaction.

[21] This final element will be satisfied if the false representation made by the accused deceived someone, and as a result the accused (or another person) obtained a relevant benefit. That determination is one of causation in fact for the jury to make in the application of their common sense to the facts as they find them, appreciating that the purpose of the enquiry is to attribute criminal responsibility.[6]

The agreed facts, the Crown case and irregularity

[22] In making the determination on the stay application, the learned trial judge focused attention on the agreed facts presented for the purpose of

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6 See, albeit in the context of different offences, *Royall v The Queen* (1991) 172 CLR 378 at 387, 411-412, 441; *Campbell v The Queen* [1981] WAR 286 at 290.

the committal proceedings[7] and the interrogation of the Crown case during the course of submissions. Those agreed facts describe a scheme involving the co-accused under which:[8]

(a) the respondent and the co-accused formed a partnership firm and a company, and opened bank accounts in the names of those entities to which both were signatories;

(b) the co-accused, who was a Northern Territory Government employee at the RDH, made false entries in the Northern Territory Government computer system creating the firm and the company as authorised contractors;

(c) the co-accused then raised in the Government computer system 28 fictitious work orders for electrical works at the RDH in the name of the firm they had created, and eight fictitious work orders for electrical works at the RDH in the name of the company they had created;

(d) the respondent and the co-accused created false invoices corresponding to the fictitious work orders, and created, signed and attached false supporting documentation;

(e) the invoices were false because none of the work was in fact performed and none of the replacement parts were supplied, and

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7 Appeal Book 3-14.

8 The learned trial judge conducted an extensive survey of the agreed facts in his Reasons: see *The Queen v Wilton* [2018] NTSC 46 at [29]-[64].

the respondent knew that to be so and intended to obtain money by deceiving the Territory;

(f) the false invoices were submitted by the respondent on behalf of the firm or company, and identified the respondent as the worker/subcontractor to whom the work had been allocated, and the person responsible for carrying out the works;

(g) the attachments to the false invoices were signed by the co-accused variously as an SES Manager and RDH Facilities Management;

(h) once a false invoice was submitted, it was uploaded by personnel in the Department of Corporate and Information Services, which was the central accounts payable agency, and then sent to the co-accused at the Department of Health, who was responsible for the inspection and review of contractor invoices and supporting documentation for electrical works performed at the RDH;

(i) on receipt, the co-accused checked and coded each invoice in the Government computer system, and then sent the invoices to the Engineering Services Manager at the RDH for final payment approval;

(j) between November 2016 and 27 March 2017, the Engineering Services Manager approved payment of each false invoice, acting in good faith on the co-accused's certification; and

(k) the 36 invoices were paid in 10 separate batches between 22 November 2016 and 27 March 2017 to either the firm or the company bank account, with each batch comprising payment for anywhere between a single invoice and 15 invoices.

[23] The learned trial judge drew attention to the fact that the information laid in the Local Court had charged only two compendious counts of obtaining a benefit by deception; that the respondent had been committed for trial on the basis of material which included the agreed facts; and that the co-accused had pleaded guilty to a single count of criminal deception which amounted on the facts to joint involvement in a continuing scheme to defraud the Northern Territory Government in the amount of $148,031.63 (being the total of the payments made across the 36 invoices).[9] His Honour concluded that the agreed facts established that the respondent "was jointly engaged with [the co-accused] in a single compendious integrated criminal scheme over a continuous period of time against a single victim", rather than engaging "in a series of discrete criminal deceptions simply involving the rendering of each false invoice for payment".[10]

[24] On the basis of that characterisation, the learned trial judge determined that the fraudulent scheme had a number of components beyond the discrete acts constituted by the submission of the invoices by the

9 *The Queen v Wilton* [2018] NTSC 46 at [27].

10 *The Queen v Wilton* [2018] NTSC 46 at [65].

respondent to the RDH. His Honour identified the components of the joint enterprise to be: (1) the registration of the partnership firm and the company in the Government computer system as approved contractors with vendor codes; (2) the issuing of fictitious work orders; (3) the rendering of false invoices and supporting documentation; and (4) the coding and approval of the false invoices by the co-accused before transmission to the Engineering Services Manager for final approval.[11]

[25] From those matters the learned trial judge drew a number of further conclusions. The first was that the Crown case was not consistent with the offences charged by the indictment. The second was that the Crown must be running a case of joint criminal enterprise at trial because the relevant deception necessarily comprehended the case described in the agreed facts[12] and the components his Honour had identified. From that, his Honour concluded:

> Simply handing [the Engineering Services Manager] a false invoice which had not come through the appropriate channels and been checked and coded by [the co-accused] is unlikely to have caused the payments to be made to the accused.[13]

[26] On that basis, the learned trial judge determined that there was a fundamental irregularity because the indictment was framed in a way which was different to the way the Crown presented its case and would

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11 *The Queen v Wilton* [2018] NTSC 46 at [67].

12 As his Honour had described them in *The Queen v Wilton* [2018] NTSC 46 at [66]-[68], [85].

13 *The Queen v Wilton* [2018] NTSC 46 at [87].

be required to run the case[14], in the manner described by the Full Court of the Supreme Court of Victoria in *R v Scalia and Lenoy*[15]. A number of observations may be made in relation to that determination.

[27] First, neither the form of the charges in the information nor the agreed facts presented at committal[16] bind the Crown in relation to the charges presented on indictment or the manner in which it presents its case at trial. The committal hearing is an administrative process, the primary function of which is to establish whether there is a sufficient case against an accused person to warrant the trouble and expense of a trial. Beyond that, the process is an important one to enable accused persons to hear the evidence against them, to cross examine prosecution witnesses where appropriate, and to call evidence in rebuttal and put forward a defence should they wish to do so.[17]

[28] Committal for trial does not require an indictment to be filed in any particular form. The filing of an indictment by the Director of Public Prosecutions is an independent act and not a confirmation of anything done by the preliminary examiner.[18] The Crown is not bound by the charge or charges on which the preliminary examiner committed.

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14 *The Queen v Wilton* [2018] NTSC 46 at [88], [90].

15 [1971] VR 200 at 202-203. It should be noted that the irregularity identified on appeal in that case was that verdicts of guilty were taken and entered against two accused of two separate and distinct crimes charged on the one count.

16 Now styled in the Northern Territory as "preliminary examination".

17 *Barton v The Queen* (1980) 147 CLR 75 at 99-100; *Grassby v The Queen* (1989) 168 CLR 1 at 15.

18 *Ex parte Cousens; Re Blacket* (1946) 47 SR (NSW) 145 at 147.

Subject to questions of fairness, different or further charges may be laid in substitution for those on which an accused was committed where the evidence at the committal supports the laying of those different or further charges.[19]

[29] Similarly, the agreed facts that were proffered as part of the committal process, and in the expectation that the respondent would be entering a plea of guilty, cannot govern the form of the indictment or the manner in which the Crown presents its case. While it was no doubt correct for the learned trial judge to find that the evidence to be called by the Crown at trial will be generally consistent with the facts set out in that document, the Crown is not thereby bound to frame the charge as a joint enterprise implemented in a single compendious criminal deception.

[30] In *R v McCready*[20], the Full Court of the Supreme Court of Victoria considered an application for leave to appeal against a conviction for conspiring to defeat the course of justice in relation to an attempted escape from prison. The argument on appeal was that the applicant should have been charged with the offence of attempting to assist others to escape from lawful custody rather than conspiracy to defeat the course of justice. The substance of the applicant's submission was

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19 *R v Nisbet* [1972] 1 QB 37; *Kolalich v Director of Public Prosecutions (NSW)* (1991) 173 CLR 222; *Criminal Code,* s 299.

20 (1985) 20 A Crim R 32.

that the evidence led by the Crown more appropriately comprehended the former offence rather than the latter.

[31] The Court rejected that proposition, in part on the basis that proceeding under the former charge would have presented the Crown with considerable difficulties in proving aid to escape from custody in circumstances where the gravamen of the applicant's conduct was to prevent the accused from being brought to trial. Considerations of a similar nature arise in the present matter.

[32] On a charge alleging joint criminal enterprise, the jury might conceivably be required to accept the evidence of the co-accused in particular aspects in order to establish to the requisite standard the existence of agreement or common purpose to carry out a particular criminal activity. That might present difficulties in circumstances where the co-accused has been convicted of fraud and has received a discount on that sentence for his assistance to authorities, including giving evidence against the respondent.

[33] In addition, the draft aide-memoire formulated by the learned trial judge states the elements which in his Honour's view would constitute the compendious offence.[21] On that formulation, the Crown would be required to prove beyond reasonable doubt that there was an agreement to carry out particular criminal activity; that the respondent knew that

21 *The Queen v Wilton* [2018] NTSC 46 at [91].

the partnership firm and the company were not authorised or approved to perform work at the RDH; that the co-accused falsely coded the invoices in the relevant Government computer system; that the respondent specifically and by that method intended to deceive the Engineering Services Manager to approve payment of the amounts claimed; and that by reason of that conduct, including the coding activity by the co-accused, the respondent caused the Engineering Services Manager to approve payment of the amount claimed in the invoices.

[34] That would arguably cast an onus on the Crown to prove beyond reasonable doubt that the respondent was aware of various aspects of the internal workings of the RDH payment approval system, and of the co-accused's activities in those specific respects. So much follows from the fact that in cases of joint criminal enterprise it is essential to identify the elements of the offence the subject of the joint criminal enterprise and to direct the jury that the participants agreed to do all the acts with the relevant intention necessary to establish the offence.[22]

[35] Leaving aside the difficulties in proof which might present, in *McCready*, Young CJ, with whom the other members of the Court agreed, made the following observations:

> … in any event it is I think clear that it is for the Crown to decide upon what offences an accused person is brought to trial by way of

22 See, for example, *TWL v R* [2012] NSWCCA 57 at [36].

> presentment or indictment, and, although the Court unquestionably has power to prevent an abuse of its process, it is not for the Court to decide, speaking generally, upon what offence the Crown should proceed. There are, of course, many statements in the books by judges and courts of the highest standing that it is undesirable to join charges of conspiracy with charges of substantive offences, that the charge of conspiracy should be sparingly employed, [and] that at times a charge of conspiracy by reason of the evidence admissible to prove it may put an accused person at a considerable disadvantage. But all those observations stop short of denying to the Crown the right to indict or present for trial upon such charge as the Crown thinks fit.
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> …
>
> If it be accepted, as I think it must, that the Crown is entitled to present for trial an accused person on such offence as the Crown considers appropriate, the argument that it is unfair to treat one offender under one section and a co-offender under another cannot be sustained. If there be any unfairness arising out of the Crown's decision, that unfairness can be redressed at the point of sentencing.[23]

[36] In a similar vein, Ormiston J made the following supplementary comment:

> I was not satisfied that the applicant made out any basis for his argument that there was abuse of process. The charge brought under s 42 involved different and additional elements. If the Crown chose to bring that charge, then it took on the burden of proving those elements. The fact that those elements were not difficult to prove in this case makes no difference to the fact that the charge was different and the Crown was entitled to prove it.[24]

[37] Subject to a consideration of possible oppression, duplicity and breach of the principle against multiplicity (which is discussed further below), the same considerations govern the choice by the Crown whether to

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23 *R v McCready* (1985) 20 A Crim R 32 at 39-40. Those observations were cited with approval by two members of the High Court in *Maxwell v The Queen* (1996) 184 CLR 501 at 534, and by the New South Wales Court of Criminal Appeal in *Chung v The Queen* (2007) 175 A Crim R 579 at [59]-[61].

24 *R v McCready* (1985) 20 A Crim R 32 at 43.

plead a course of criminal deception under the same offence provision as a joint enterprise implemented in a single compendious scheme or as separate counts in respect of each distinct act of deception. Nor does any relevant objection arise from the fact that the co-accused pleaded guilty to a single count whereas the charges brought against the respondent are in a different form, or potentially expose the respondent to a higher total penalty.

[38] The second observation to be made in this context relates to the learned trial judge's conclusion that a false invoice which had not been checked and coded by the co-accused is unlikely to have caused the payments to be made to the respondent. The suggestion in that conclusion is that the charge against the respondent may only be pressed as one of joint criminal enterprise. Otherwise, the Crown would fail to satisfy the requirement that the benefit was obtained by reason of the deception. Again, however, it is a matter for the Crown to decide the form of the charges proffered, and in so doing the Crown accepts the onus of proving each element which follows from the form as presently pleaded. Those elements have been described earlier in these reasons.

[39] The Crown alleges that the respondent created 36 separate invoices which each contained false representations about the completion of the work and/or the provision of replacement parts. In the Crown's submission, those invoices were "for work alleged to have been

completed in respect of separate work orders, for different projects, performed on different days, at different locations within RDH, with different replacement parts allegedly being purchased and different safety requirements being observed". It may be accepted that in those circumstances, if proved, each invoice constituted a separate representation and it mattered not that some were received together by the relevant accounts section and were on occasion paid in bulk lots. That is so even though those representations might also be characterised as a continuing course of conduct and a single criminal enterprise involving the same victim.

[40] In alleging that on 36 separate occasions the respondent presented invoices which he knew to be false, it is incumbent on the Crown to prove for each count, amongst other things, that the respondent has by submitting the invoice made a representation as to fact or law which was false at the time it was made. The Crown must prove that the deception on each occasion was intentional in the sense that the respondent actually knew or believed that the representation made by the submission of the invoice was false. The Crown must prove that the respondent intended that the false representation be acted upon so that the benefit would be received. Finally, the Crown must prove that the respondent obtained the benefit as a result of submitting the false invoice, in the sense that the relevant officer would not have authorised and made the payment but for the accused's false representation in the

first place. As described above, that question of causation is a matter of fact for the jury.

[41] In seeking to prove those matters at trial the Crown will no doubt lead evidence to establish that there was an agreement between the respondent and the co-accused to a general process by which each invoice was submitted and each benefit was obtained. It may also be that the jury concludes that the respondent and the co-accused were acting in concert. The Crown acknowledges that it will rely upon a course of conduct to demonstrate the criminal intent of the respondent, but only for the purpose of establishing the mutual admissibility of the evidence of each count as provided for in *King v Finlayson*.[25]

[42] Those matters notwithstanding, there is no fundamental irregularity arising from the fact that the indictment is pleaded in a way that is different to the form of the charge on committal; or from the fact that the evidence to be called by the Crown at trial will likely include evidence as to agreement between the respondent and the co-accused; or from the fact that the evidence led might conceivably support a charge of deception implemented in a single compendious scheme. Nor would those matters of themselves lead to the conclusion that the indictment as presently pleaded is oppressive or constitutes an abuse of process. Something more would be required to sustain that conclusion.

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25 (1912) 14 CLR 675.

Oppression, abuse of process and the principle against multiplicity

[43] There is no dispute that superior courts have inherent jurisdiction to prevent abuses of process, and may stay either conditionally or permanently proceedings on indictment which are an abuse of process.[26] The categories of abuse of process are not closed and the concept is not amenable to precise definition.[27] In *Williams v Spautz*[28], the High Court observed that the basis of the jurisdiction is that the public interest in the administration of justice requires a court to protect its ability to function as a court of law by ensuring that its processes are used fairly by state and citizen alike and that, unless the court protected its ability to function in that way, its failure would lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice.

[44] While the power to impose a stay encompasses the prevention of "injustice", injustice in this context has "a limited meaning".[29] The core propositions are that the judicial processes must not be invoked for an improper purpose and must not be abused in a way that interferes with the conduct of a fair trial.[30] In the criminal context, the

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26 See *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 at 201; *Barton v The Queen* (1980) 147 CLR 75 per Gibbs ACJ and Mason J at 96, Murphy J at 107, Wilson J at 116; *Williams v Spautz* (1992) 174 CLR 509 per Mason CJ, Dawson, Toohey and McHugh JJ at 518.

27 See *Ridgeway v The Queen* (1995) 69 ALJR 484 per Toohey J at 506; *Jago v District Court of New South Wales* (1989) 168 CLR 23 per Mason CJ at 25.

28 (1992) 174 CLR 509 per Mason CJ, Dawson, Toohey and McHugh JJ at 520.

29 *Jago v District Court of New South Wales* (1989) 168 CLR 23 per Mason CJ at 25.

30 See *Williams v Spautz* (1992) 174 CLR 509; *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 72; *Walton v Gardiner* (1993) 177 CLR 378.

question whether a stay should be granted for abuse of process generally arises in cases of double jeopardy or when there is an assertion that a fair trial is not possible by reason of some feature of the proceedings. Moreover, the discretion is exercised only in clear and rare cases.[31] It was to that principle which Young CJ was speaking in *McCready,* when his Honour said:

> Before a court could interfere with a charge presented by the Crown on the grounds that it was an abuse of process, there would have to be some very strong evidence or basis for thinking that the Crown was indeed seeking to achieve an ulterior purpose by the procedure adopted. That would indeed be an abuse of process. It may not be the only abuse of process, but the mere choice of one section rather than another under which to prosecute, even though the section charged carries a higher penalty than the alternative section that might have been used, is not in my view an indication of an abuse of process. Mr Winneke contended that substantive counts were in fact not open in this case, but I find it unnecessary to consider that submission for it seems to me that the reasons which I have already given are sufficient to meet the contention that there was an abuse of process in the present case.[32]

[45] In addition to the conclusion of irregularity based on the nature of the Crown case (discussed above), the other basis for the learned trial judge's determination to stay the proceedings on indictment was "to ensure that [the] accused is charged in accordance with the principle

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31 *Williams v Spautz* (1992) 174 CLR 509 at 529 per Mason CJ, Dawson, Toohey and McHugh JJ (the onus of satisfying the court that an abuse exists lies on the party alleging it, the onus is a heavy one, and the power to grant a permanent stay is one to be exercised only in the most exceptional circumstances); *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 30 per Mason CJ, quoting with approval a passage from *Moevao v Department of Labour* [1980] 1 NZLR 464 at 482 per Richardson J (the stay of a prosecution is an "extreme step" and the yardstick is not simply fairness to the particular applicant; the focus is on the misuse of the court process by those responsible for law enforcement and is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the court); *R v Mohi* (2000) 78 SASR 55 at [29] per Martin J.

32 *R v McCready* (1985) 20 A Crim R 32 at 43.

that where the facts alleged … constitute a single offence [the] accused should only be charged with one offence" in order to avoid a multiplicity of counts likely to embarrass the accused.[33] The breach of the principle against multiplicity was said to arise in this case from the fact that on proper characterisation the Crown case involved an allegation that the respondent engaged in an uninterrupted course of conduct directed at a single victim in violation of a single provision of the criminal law, giving rise to but a single crime.[34]

[46] The learned trial judge went on to summarise the consequences of that breach, and the reasons why the interests of justice lay in granting the stay, to include that: (1) the pleading is oppressive; (2) the pleading of 36 separate counts is unfairly calculated to bolster the overall chance of gaining a conviction against the accused; (3) the jury directions will be more numerous and more complicated and the chance of a misdirection to the jury significantly increased; (4) the jury's task in considering the 36 counts as opposed to one would be more difficult than it need be; and (5) if the respondent is ultimately convicted sentencing will be more complicated than it need be.

[47] Turning first to the question of multiplicity and oppression, as the Full Court of the Supreme Court of Victoria observed in *R v Smart*[35], the

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33 *The Queen v Wilton* [2018] NTSC 46 at [17].

34 *The Queen v Wilton* [2018] NTSC 46 at [90].

35 [1983] 1 VR 265.

fact that an applicant is presented on a large number of counts is not of itself a conclusive reason for severance, but it strongly suggests an oppressive proceeding and the Crown must justify the course taken. That was a case in which the presentment pleaded 63 counts in seven separate groups ranging across seven discrete offences alleged to have been committed between November 1971 and May 1975 involving a range of different corporate entities. The Court observed:

> At the outset it is useful to recall the words of Hawkins J in *R v King* [1897] 1 QB 214 where the accused had been tried on forty counts of obtaining and attempting to obtain goods by false pretences. Hawkins J said, (at 216): "I pause here to express my decided opinion that it is a scandal that an accused person should be put to answer such an array of counts containing, as these do, several distinct charges. Though not illegal it is hardly fair to put a man upon his trial in such an indictment, for it is almost impossible that he should not be grievously prejudiced as regards each one of the charges by the evidence which is being given upon the others."
>
> There can plainly be no precise mathematical limit to the number of counts that can be joined in one presentment but it is of the utmost importance that the Crown's reasons for joining a large number of counts in a single presentment should be closely scrutinised with a view to ensuring that the accused is not subjected to improper prejudice."[36]

[48] The ensuing discussion in *Smart* identifies a number of considerations which inform the assessment of prejudice.

[49] The first is whether the evidence in the counts is mutually admissible, or whether the jury might be improperly influenced by hearing evidence of alleged wrongdoing in relation to one offence or category

36 *R v Smart* [1983] 1 VR 265 at 283.

of offence which is inadmissible in proof of other offences or categories of offence charged. As Brennan J said in *Sutton v The Queen*:

> When two or more counts constituting a series of offences of a similar character are joined in the same information, a real risk of prejudice to an accused person may arise from the adverse effect which evidence of his implication in one of the offences charged in the indictment is likely to have upon the jury's mind in deciding whether he is guilty of another of those offences. Where that evidence is not admissible towards proof of his guilt of the other offence, some step must be taken to protect the accused person against the risk of impermissible prejudice. Sometimes a direction to the jury is sufficient to guard against such a risk; sometimes it is not. Where a direction to the jury is not sufficient to guard against such a risk, an application for separate trials should generally be granted.[37]

[50] The same difficulty concerning inadmissibility does not present here. As has already been noted, the evidence in respect of each particular count is admissible in respect of the other counts, albeit for a specific purpose.[38] Similarly, the fact that the 36 counts in this case relate to the same victim and course of conduct obviates the risk of prejudice of that type. In any event, even if the matter was presented as a single charge as stipulated by the learned trial judge[39], the jury would be required to hear evidence in relation to each of the 36 allegedly false claims. It cannot be said that the pleading of 36 separate counts will bolster the overall chance of gaining a conviction against the accused on this basis. Nor will any great or greater difficulty arise in

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37 *Sutton v The Queen* (1984) 152 CLR 528 at 541-542.

38 *King v Finlayson* (1912) 14 CLR 675.

39 *The Queen v Wilton* [2018] NTSC 46 at [91].

explaining to the jury what evidence it may use on each particular count and for what purpose.

[51] Secondly, the number of counts charged in the form of the indictment may bear on the length of the trial. While it may be accepted that a long and complex trial may increase the risk of error and, where there is a large number of counts, increase the burden of charging the jury,[40] there would again be little or no difference in the present case in the length of the trial whether it proceeded on the single stipulated count or 36 separate counts. Similarly, the jury's task in considering the 36 counts as opposed to one would not obviously be more difficult than it need be. For reasons discussed further below, the jury's task in the consideration of the single count stipulated would give rise to its own difficulties.

[52] The question for consideration in the present appeal is not whether the 36 counts should be limited to a lesser number of representative counts. It is whether the 36 individual transactions should necessarily be charged in a single count. Even were that not so, the number of counts on the indictment as presently pleaded[41], together with the complexity of the issues involved, is not strongly suggestive of oppression. By way of example, in *Durovic v The Queen*[42] it was held

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40 *R v Smart* [1983] 1 VR 265 at 284.

41 Cf *R v Appleby* (1996) 88 A Crim R 456, where the indictment pleaded 97 separate counts.

42 (1994) 71 A Crim R 33.

that an indictment charging approximately 400 counts across two offence provisions did not give rise to oppression. The offences were alleged to have been committed between April 1987 and October 1988. The accused was arraigned on 3 August 1992 and the verdicts were delivered after a lengthy trial on 11 February 1993. The appeal court observed:

> The degree of complexity of the facts in *Smart's case* bears no resemblance to the degree of complexity in this case, and the application of the principles in *Smart* does not assist the appellant. Although the indictment in the present case contained a large number of counts and the trial took a long time, the Crown case was quite straightforward as has been described. Apart from an alternative charge of dishonestly obtaining a financial advantage on three counts, the whole indictment put to the jury concerned two different crimes only, the directions for which were not complex.[43]

[53] A similar conclusion was reached by the Victorian Court of Appeal in *R v Reid*[44] in relation to a 23 count indictment charging offences against four separate provisions of the *Crimes Act* (Cth) and three separate provisions of the *Corporations Law* (Cth). The same general observation might be made in relation to the present case.

[54] Thirdly, the risk of oppression and prejudice to the accused will increase where the presentment ranges across a number of different offences with different elements, and over an extended timeframe. The 36 counts under consideration in this appeal are all brought under the

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43 *Durovic v The Queen* (1994) 71 A Crim R 33 at 40.

44 [1999] 2 VR 605 at [169].

same offence provision, and the conduct in question took place over a relatively confined period between November 2016 and March 2017. And again, even if that conduct was charged within the confines of a single count, the evidence would still be required to traverse each of the 36 transactions over that period. There can be, and there is, no suggestion that the respondent does not understand the case he is required to meet under the indictment as presently pleaded.

[55] The draft aide-memoire formulated by the learned trial judge contemplates the incorporation of a schedule which would "[s]tipulate all key components of the scheme in accordance with the evidence". As already discussed, that schedule would necessarily include the raising and submission of the 36 allegedly false invoices, the circumstances which led to the payment of those invoices, and the amounts of those payments. Paragraphs 3 and 4 of the draft aide-memoire provide:

> 3. You are not required to find all of the components of the conduct particularised in the Schedule proven but you must find some of the components proven; and you must be satisfied that the components you find proven deceived or induced or caused Mr Neil Bond to approve the invoices which were false for payment.
> 4. You must be unanimous in your findings about which of the components of the conduct particularised in the Schedule have been proven beyond reasonable doubt.

[56] That direction would necessarily extend to two broad categories of matter. The first category relates to the mechanics of the scheme,

including such matters as the registration of the partnership firm and the company in the Government computer system as approved contractors, the issuing of fictitious work orders, the rendering of false invoices and supporting documentation, and the coding and approval of the false invoices by the co-accused before transmission for approval. The second category of matter relates to the individual invoices, which were submitted in various amounts and were paid in 10 separate batches ranging in amount from $825 through to $54,245.40.

[57] There are some difficulties attending the compendious identification of the components of a scheme when coupled with a direction to the jury that it need not find all components of the conduct proven, but must be unanimous in its findings about which of the components have been proven. The first is that a jury might conceivably convict on findings which fall short of the essential elements of the offence. The second is that in the event of a finding of guilt the verdict will be inscrutable in terms of the identification of the facts found on the elements of the crime.[45]

[58] A third difficulty relates to the individual invoices and the question of penalty. Paragraph 2(g) of the draft aide-memoire identifies the elements of the offence to include that the accused obtained a benefit of $148,031.63 (or part thereof) as a result of the deception, which is the total amount charged in the 36 invoices. It is conceivable that a

45 See, for example, the discussion in *Giam v The Queen* (1999) 104 A Crim R 416 at [24]-[29].

jury might find the conduct in relation to some invoices to be established beyond reasonable doubt but the conduct in relation to others not. It cannot be the import of the draft aide-memoire that the respondent would escape criminal liability in that event. However, it would be necessary for the court to know the benefit found to have been obtained by deception, both for the purpose of assessing criminal culpability and in order to determine the maximum penalty applicable.

[59] As previously noted, the operation of the penalty provision in s 227(1) of the *Criminal Code* is to prescribe a maximum penalty of imprisonment for 14 years if the benefit obtained has a value of $100,000 or more, and imprisonment for seven years otherwise. That would require, at least under the terms of the draft aide-memoire, that the jury be unanimous in its findings as to which of the payments, if any, were obtained by deception. Moreover, a simple verdict of guilt under the terms of a single count indictment as stipulated would not disclose that matter, raising the possibility of the need to take a special verdict in that respect.

[60] For these reasons, any assessment of the principle against multiplicity must take into account the fact that under a single compendious charge the evidence would still be required to traverse each of the 36 transactions and the jury required to make findings in relation to each of those transactions.

[61] That leaves the concern that if the respondent is ultimately convicted on a multiple count indictment sentencing will be more complicated. It is no doubt correct to say that sentence might need to be imposed across a possibly far greater number of offences, but in so doing the Court would have a clear understanding of the level and nature of the criminality concerned and would be able to aggregate or cumulate as the circumstances required.

The nature of the appeal

[62] The relevant appeal provision states:

> (1) A Crown Law Officer may appeal to the Court:
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> (a) where proceedings on indictment have been stayed pursuant to section 21;
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> (b) against any determination made pursuant to section 347;
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> (c) against any sentence with respect to an indictable offence;
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> (d) where proceedings have been had as to whether a person ought to be declared an habitual criminal or a person incapable of exercising proper control over his sexual instincts or recommitted as such after his discharge as such and such declaration or recommittal was not made; or
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> (e) where an indictment has been quashed or proceedings on indictment have been stayed under:
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> (i) section 339; or
>
> (ii) the inherent jurisdiction of the court of trial,
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> and the Court may, in its discretion, direct that the proceedings continue or vary the sentence and impose such sentence or make such a declaration or recommittal order, or make an order quashing the order of the court of trial quashing the indictment, and may make any consequent orders including an order for the arrest of the respondent to the appeal as the Court thinks proper.

[63] Counsel for the respondent submitted, with reference to *House v The King*[46], that the learned trial judge's determination to stay the indictment as presently pleaded is discretionary in nature and should not be disturbed simply on the basis that the appeal court might have adopted a different course. Of course, that principle is subject to the qualification that if some error has been made in exercising the discretion by, for example, the application of a wrong principle, the consideration of extraneous or irrelevant matters or the failure to take into account material considerations, then the appellate court may exercise its own discretion if it has the materials for doing so.[47]

[64] The avenue of appeal from a decision staying proceedings on indictment is created under the general provision for Crown appeals, including against sentence. As with appeals against sentence, Crown appeals from a discretionary determination of this nature should be a rarity brought only to establish some matter of principle. This is such a case, involving as it does a consideration of the Crown's discretion in presentment, the circumstances in which a pleading will be irregular, and a superior court's power to prevent oppression and the circumstances in which that power is properly exercised.

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46 (1936) 55 CLR 499.

47 *House v The King* (1936) 55 CLR 499 at 503-504.

[65] For the reasons given, the appropriate course in this matter is to quash the order of the court of trial staying the proceedings on indictment and direct that the proceedings continue.

Ground 2: Obligation on the Crown to plead joint criminal enterprise

[66] The second ground of appeal becomes superfluous having regard to the result reached above on the ground contending that the learned trial judge erred in concluding that the pleading in the indictment of 36 separate counts of criminal deception was irregular and oppressive.

[67] Those reasons traverse the nature of the Crown's discretion in presentment, and the factors which may operate to circumscribe the exercise of that discretion.

Ground 1: Would a single count be duplicitous or ambiguous?

[68] That leaves the first ground of appeal, by which the Crown positively asserts that charging the 36 separate acts constituted by the submission of the invoices in the one count of criminal deception contrary to s 227(1) of the *Criminal Code* would infringe the principle against duplicity or give rise to latent ambiguity. The contention follows that this would make any subsequent conviction susceptible to appeal, and that in the proper application of the law such an appeal would necessarily succeed.

[69] The principle against duplicity will not preclude the laying of a single charge where the conduct constitutes a continuing offence or amounts to the one transaction or criminal enterprise. Whether multiple acts may be characterised as a single crime is a question of fact and degree in each case, having regard to such matters as the connection of events in point of time, the similarity of the acts, the physical proximity of the place where the offence happened, the intention of the accused throughout the conduct, and whether those acts are directed to a single victim.[48]

[70] In the appellant's submission, the representations contained in the invoices are distinct acts, separated in time and subject matter, which cannot be construed as either a continuous course of conduct or a composite activity. The submission follows that the terms of s 227(1)(b) of the *Criminal Code* require the pleading of a separate count for each deceptive act. In making that submission the appellant relies on the decisions of the High Court in *Walsh v Tattersall*[49] and of the New South Wales Court of Appeal in *R v Giam*[50] as authority for the proposition that it is contrary to law to "roll up" multiple acts of deception, such as are alleged in this matter, in the one count.

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48 See, for example, the discussion in *R v Khouzame and Saliba* (1999) 108 A Crim R 170 at 182-183.

49 (1996) 188 CLR 77.

50 (1999) 104 A Crim R 416.

[71] Counsel for the appellant also drew attention in that respect to s 310(2) of the *Criminal Code*, which permits an indictment against a person for stealing property over a period of time to plead a single count for stealing over that period of time notwithstanding the different acts of stealing took place at different times. Section 310(1) of the *Criminal Code* contains a similar provision in relation to the offence of assault. The submission followed that these provisions are exhaustive of the circumstances in which separate acts constituting criminal offences under the *Criminal Code* may be charged in the one count.

[72] In *Walsh v Tattersall*[51], the High Court considered the operation of the *Workers Compensation Rehabilitation and Compensation Act* (SA) in circumstances where an employee who had been charged with obtaining payments by dishonest means claimed, *inter alia*, that the count was bad for duplicity because a number of offences were contained within the overall charge. At the material time, s 120(1)(a) of the South Australian Act provided relevantly:

> A person who – (a) obtains by dishonest means any payment or other benefit under this Act …. is guilty of an offence …. (Emphasis added)

[73] In that case, Gaudron and Gummow JJ, in the majority, held that as a matter of statutory interpretation each benefit obtained from the making of a dishonest representation constituted a separate offence and

51 (1996) 188 CLR 77.

to roll up multiple instances of receipt of benefit in the one count was to allege an offence not known to law. Their Honours observed that:

> In a particular instance, the dishonest means by which this result is achieved may comprise a number of untrue statements or wilful nondisclosures, identified as a course of conduct extending over a period. But, once a payment or benefit is first so obtained an offence then has been completed. Where there is a temporal sequence of payments or benefits allegedly obtained by dishonest means, the ascertainment of the essential element of dishonesty will be tested at different times. That is not to deny, in the particular circumstances of the case, that the same untrue statements or wilful nondisclosures may have the necessary operative effect in relation to more than one act of obtaining. But there is no offence created of "(obtaining) by dishonest means payments or benefits under (the Act)".[52]

[74] Kirby J reached the same conclusion, on the basis that the relevant part of the Act was concerned with individual payments and offences must therefore be charged individually.[53] It is unsurprising given the specific terms and structure of the provision creating the offence that the High Court held that each benefit obtained from the making of a dishonest representation was a separate offence and must be charged separately. So much is apparent from Kirby J's examination of the language and history of the relevant provision, including:

1. Section120, the provision for criminal offences appears in a statute which provides for periodic payments and for payments of "medical, rehabilitation and like expenses" where recoverable which, of their nature, accrue periodically.
2. Section 120(1)(a) of the Act, under which the appellant was convicted, uses the word "any" to describe a "payment or

52 *Walsh v Tattersall* (1996) 188 CLR 77 at 89.

53 *Walsh v Tattersall* (1996) 188 CLR 77 at 100-102.

other benefit" which constitutes the offence. But the succeeding paragraph uses the indefinite article "a". These words are apt to give rise to a separate offence for a single occasion of dishonesty occasioning each payment.

3. The history of the section reinforces this conclusion by the greater specificity of s 120(1) after the amendment of the Act in 1991. Whereas previously the Act talked in terms of "any benefit", thereafter the section was expressed in terms of "a payment", "a statement" and "a claim".[54]

[75] Similarly, in *R v Giam*[55] the New South Wales Court of Criminal Appeal was considering the operation of s 178BB of the *Crimes Act* (NSW), which provided:

> Whosoever with intent to obtain for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever, makes or publishes, or concurs in making or publishing, any statement (whether or not in writing) which he or she knows to be false or misleading in a material particular or which is false or misleading in a material particular and is made with reckless disregard as to whether it is true or is false or misleading in a material particular shall be liable to imprisonment for 5 years. (Emphasis added)

[76] The Court held that the charges brought against the appellant were bad for duplicity in that they alleged the making of two separate false statements with intent to obtain a benefit in the one charge. Spigelman CJ, who delivered the judgment of the Court, concluded that as a matter of statutory construction the relevant criminal provision was to be construed in the singular rather than the plural. His Honour said:

> It was submitted in this case, as it was in *Walsh v Tattersall*, that s 8(b) of the *Interpretation Act 1987* (NSW) stating that the use of

54 *Walsh v Tattersall* (1996) 188 CLR 77 at 89.

55 (1999) 104 A Crim R 416.

> the singular will include the plural may be applicable in this case, so that the word "statement" in s 178BB of the *Crimes Act* shall be understood to mean "statements". In my view that submission should not be accepted.
>
> The first reason for that is this is a criminal statute and it should be construed strictly. The second reason is that the word immediately preceding the word "statement" is the word "any", which points to a degree of singularity. Thirdly, the conclusion is reinforced by the crucial sub-element of the same element in the section, namely the definition of the nature of the statement. The statement has to be a statement which a person knows to be false or misleading "in a material particular", or which is in fact false or misleading "in a material particular" and which is "made with reckless disregard as to whether it is true or false or misleading", again, "in a material particular".
>
> The reference to the definite article in these crucial references to "material particularity" is such as to identify the fact that a single statement is being referred to on the proper construction of s 178BB. [56]

[77] Again, it is unsurprising given the terms and structure of the legislation under consideration that the Court should hold that each false statement made with the requisite intent amounted to a separate offence which must be charged separately.

[78] By contrast, and as the learned trial judge pointed out, s 227(1) of the *Criminal Code* is drafted in broad terms which are apt to encompass a range of behaviours from single deceptive statements to elaborate schemes of deception. The term "deception" is specifically defined in s 1 of the *Criminal Code* to mean "intentional deception by word or conduct as to fact or law and includes a deception as to the present intention of the person using the deception or another person". It is not

56 *R v Giam* (1999) 104 A Crim R 416 at [16]–[18].

suggestive of a singular act in the same way as are the terms "statement" and "payment". While the word "any" qualifies the term "deception" in s 227(1) of the *Criminal Code*, a single deception might in some circumstances be constituted from more than one utterance or representation.[57]

[79] In so far as this ground of appeal depends upon acceptance of the proposition that obtaining a benefit by a deception that consists of a course of conduct comprising a number of different representations can never be the subject of a single charge under s 227(1), it must be rejected. It is not necessary to determine whether in this particular case such a charge would have been duplicitous, as the appeal succeeds on another ground. It may be accepted, however, that if the respondent were to be convicted on a single "rolled up" charge the conviction might be subject to challenge by way of appeal on the ground of duplicity, and the outcome attended by some doubt.

Disposition

[80] The appeal is allowed to quash the order of the court of trial made on 20 June 2018 staying the proceedings on indictment.

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57 See, for example, the discussion in *R v Giam* (1999) 104 A Crim R 416 at [19]–[21].