Fong v The Queen [2004] NTCCA 6

PARTIES:	WILLIAM DESMOND FONG v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 7 of 2003 (SCC 9929185/20201844 & 20201845)
DELIVERED:	8 September 2004
HEARING DATES:	18 May 2004
JUDGMENT OF:	ANGEL, MILDREN & RILEY JJ

CATCHWORDS:

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION

Appeal and New Trial – inconsistent verdicts – whether verdicts may be reconciled – where inconsistency between verdicts of acquittal and verdict of guilty, generally appellate court not disturb the acquittal

MacKenzie v The Queen (1996) 190 CLR 348, applied

Crimes Act 1914 (Cth), s 29B

Appeal and New Trial – imposing upon the Commonwealth by an untrue representation – representation need not be made directly to the Commonwealth or a Commonwealth authority – representation need not mislead the Commonwealth or a Commonwealth authority

Baxter [1988] 1 Qd R 537; *Bryce v Curtis* [1984] WAR 348; *Jacobsen v Piepers* [1980] Qd R 448, applied

Bacon v Salamane (1965) 112 CLR 85, considered

Joyce v Grimshaw (2001) 120 A Crim R 338, disapproved

Dutton v O'Shane (2003) 200 ALR 710, not followed

Cheques and Payment Orders Act 1986 (Cth), s 94
Crimes Act 1914 (Cth), s 29D

REPRESENTATION:

Counsel:

Appellant:	Ms E Fullerton SC with Mr J Lawrence
Respondent:	Mr P Usher

Solicitors:

Appellant:	Tony Crane
Respondent:	Commonwealth Director of Public Prosecutions

Judgment category classification:	A
Judgment ID Number:	Mil04337
Number of pages:	32

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

Fong v The Queen [2004] NTCCA 6
No. CA 7 of 2003
(SCC 9929185/20201844 & 20201845)

BETWEEN:

WILLIAM DESMOND FONG
Appellant

AND:

THE QUEEN
Respondent

CORAM: ANGEL, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 8 September 2004)

ANGEL & RILEY JJ:

[1] The facts and circumstances giving rise to this appeal appear in the reasons for judgment of Mildren J and there is no need to repeat them.

[2] As regards count 3, imposing upon the Commonwealth by an untrue representation contrary to s 29B Crimes Act 1914 (Cth), if the decision of the Full Federal Court in *Joyce v Grimshaw* (2001) 120 A Crim R 338 which was followed in *Dutton v O'Shane* (2003) 200 ALR 710 at 729 is correct the verdict of guilty on count 3 is unsupportable. In *Joyce v Grimshaw* the Full Federal Court followed certain *obiter dicta* of the Full Federal Court in

Guillot v Hender (1999) 86 FCR 294; 104 A Crim R 589 in preference to the decision and reasoning of the Queensland Full Court in *Jacobsen v Piepers* [1980] Qd R 448 and of the Queensland Court of Criminal Appeal in *Baxter* [1988] 1 Qd R 537, and of Burt CJ in *Bryce v Curtis* [1984] WAR 348. If those cases correctly construe s 29B Crimes Act 1914 (Cth) the verdict of guilty on count 3 should be confirmed.

[3] Having independently considered the matter we are of the view that the correct interpretation of s 29B Crimes Act 1914 (Cth) is that of the Queensland Courts in *Jacobsen v Piepers* and *Baxter*, and of Burt CJ in *Bryce v Curtis*. We are, in any event, of the opinion this Court should follow those cases in preference to *Joyce v Grimshaw*.

[4] The decision in *Joyce v Grimshaw*, with respect, is unsatisfactory in a number of respects. It is, with respect, somewhat surprising that the Court rejected the reasoning and decisions in the Queensland and Western Australian cases whilst conceding their interpretation of s 29B was reasonably open on a plain reading of that section. Following that course was contrary both to the ordinary rule that decisions of Courts of co–ordinate authority will only be departed from if clearly or plainly wrong and the principle that the *ratio decidendi* of decisions prevail over *obiter dicta*. Furthermore, the Court said that the interpretation of s 29B Crimes Act 1914 (Cth) was to be heavily influenced by the interpretation accorded to certain 19th century statutory provisions relating to rogues and vagabonds, which was contrary to the binding authority of *Bacon v Salamane* (1965) 112 CLR

85. There the High Court upheld the dissenting judgment of Herron CJ in the NSW Court of Criminal Appeal below. Herron CJ said – see (1964) 81 WN (NSW) 192 at 196 – "The words of s 29B are capable of being interpreted according to their plain meaning. In my opinion they should be so construed …". This approach was that adopted in the High Court. As Owen J said at 96, Barwick CJ, Windeyer and Menzies JJ concurring:

> "The question is, then, whether s 29B is to be given what I regard as its natural meaning or whether it is to be given one or other of the more limited interpretations which has been placed upon the provisions of the Victorian and Queensland enactments from which some of its words have apparently been taken.
>
> In my opinion the natural meaning of the words is to be preferred."

[5] We are of the view, consistent with *Jacobsen v Piepers, Baxter* and *Bryce v Curtis*, that an offence under s 29B may be committed even though the misrepresentation was not made directly to the Commonwealth or a Commonwealth authority but rather to a third party with a view to it being passed on to the Commonwealth or a Commonwealth authority and even though the Commonwealth or a Commonwealth authority is not in fact misled. The terms of s 29B do not, in the words of Connolly J in *Baxter*, at 540, " .. involve the representation having any effect upon the mind of the bank acting by one of its proper officers."

[6] In the present case the Reserve Bank of Australia has paid out money as a consequence of the false endorsement on the cheque made by the appellant. In our view matters concerning the respective liability of the Reserve Bank

and of the National Australia Bank are irrelevant. Although by reason of s 94 Cheques and Payment Orders Act 1986 (Cth) the Reserve Bank is effectively relieved of any obligation to examine the cheque for endorsement, the fact is the Reserve Bank paid out as a consequence of the appellant's false endorsement. The cheque was presented to the Reserve Bank by the National Australia Bank with the false endorsement. "Davies" was the payee of the Reserve Bank. The appellant caused the Reserve Bank to pay the National Australia Bank by pretending he was Davies. But for the endorsement, which was false, the cheque would not have been presented to the Reserve Bank by the National Australia Bank for payment. The Reserve Bank was imposed upon because its payment on the cheque was the product of the making of the false representation, albeit that the untrue representation was not made directly to the Reserve Bank and albeit that the Reserve Bank was not actually deceived or misled by the false endorsement. The issue of causation was ultimately one of fact for the jury.

[7] We would affirm the appellant's conviction in respect of count 3.

[8] We turn to count 7.

[9] We are of the view that as regards count 7 (defrauding the Commonwealth contrary to s 29D Crimes Act 1914 (Cth)), the appeal should be allowed, the appellant's conviction should be set aside and a verdict of acquittal entered.

[10] The cases presented by the Crown in relation to counts 1, 2, 4, 5, 6 and 7 were similar. The jury found the appellant not guilty on counts 1, 2, 4, 5

and 6 but guilty on count 7. The case against the appellant in relation to each of these counts was strong. It would seem the findings of not guilty in relation to counts 1, 2, 4, 5 and 6 were based upon the jury not being satisfied beyond reasonable doubt that the appellant knew the claims made by the taxpayers were false. If that be so the doubt held by the jury could not have extended to the time of the lodging of the return in relation to count 7.

[11] It is clear that the jury saw a difference in the circumstances prevailing when the conduct referred to in count 7 is said to have occurred. The only possible basis for differentiation identified before us was the making of two telephone calls by Mr Laurie of the Australian Taxation Office to the appellant. It seems likely the first telephone call was made before the taxation returns were lodged for either count 6 or count 7. The second call took place on an identified date being 23 September 1996. That was after the taxation return referred to in count 6 was lodged but before that referred to in count 7 was lodged.

[12] Prior to the first telephone call Mr Laurie had been concerned by a taxation return lodged by the appellant on behalf of another client (Mr McDonald) in which a PPS credit was claimed. Mr Laurie said the amount claimed was "fairly high" and "in fact was exactly 20 percent of the gross income return which was most unusual". He therefore made his first call to the appellant following receipt of the return in August 1996. The transcript records the following:

> "And what was that conversation?---I told him that I was examining the return and I required some evidence to support the amount of PPS credit that had been claimed.
>
> And did he reply to that?---I'm sorry?
>
> Did he reply to that?---He undertook to get some documentary evidence from his client."

[13] That conversation, having taken place following receipt of the return in August 1996, is likely to have occurred before the taxation return referred to in count 6 was lodged on 12 September 1996. However no precise date for the making of the call was identified. Mr Laurie gave evidence that he did not hear back from the appellant and he telephoned the appellant again on 23 September 1996. The transcript records the following:

> "Yes?---And pointed out that if the documentary evidence wasn't produced that I'd go ahead and issue the assessment without allowing any credit.
>
> Did he reply to that?---He said for me to go ahead and do that – to issue the assessment without allowing the credit and he would leave it to his client to follow it up afterwards."

[14] On one view the only new information provided by Mr Laurie between the date of lodging the return referred to in count 6 and that referred to in count 7 was that, if the documentary evidence was not produced, the Australian Taxation Office would issue an assessment without allowing for the credit. At that time, by virtue of the earlier telephone conversation, it may be assumed in favour of the appellant that the appellant was already

aware that the ATO was looking for "some evidence to support the amount of PPS credit that had been claimed" in relation to another client.

[15] It seems likely that it was subsequent to the first call that the return in relation to count 6 was lodged. In relation to that count the jury returned a verdict of not guilty. We are unable to see how the additional information provided on 23 September 1996 in any relevant way added to the information available to the appellant, especially in light of the information conveyed in the August telephone call. We do not see it as providing any basis for distinguishing between the return lodged in relation to count 7 and those lodged in relation to the other counts, especially count 6.

[16] Even if it be assumed, against the appellant, that the two telephone calls from Mr Laurie to the appellant took place after the lodging of the return referred to in count 6, we do not consider that the information conveyed in those telephone calls provided any basis for distinguishing between the return lodged in relation to count 7 and those lodged in relation to the other counts. It was suggested by the respondent that the telephone calls somehow placed the appellant on notice that he was the subject of consideration by the Australian Taxation Office and that none of the claims lodged by him would be allowed without supporting documentation. Reference to the evidence of Mr Laurie does not support such a wide proposition. The evidence of Mr Laurie revealed that he was alerted to the fact that the PPS claim for Mr McDonald was of such a size that it led to a computer generated request for further information. Mr Laurie then rang

seeking documentary support for the claim and, when Mr Fong told him it was not available at that time, indicated that he would issue the assessment without taking into account the claimed PPS refund. Contrary to the submission of the respondent, the telephone conversations simply alerted the appellant to the fact that a claimed rebate for PPS payments for another client would not be allowed because supporting documentation, which had been requested, had not been provided. The telephone conversations do not provide a basis for distinguishing between count 7 and the remaining counts.

[17] The principles applicable to this situation were discussed in *MacKenzie v The Queen* (1996) 190 CLR 348 at 366-368. In that case it was said that if there is a proper way by which the appellate court may reconcile the verdicts, allowing the court to conclude that the jury performed their functions as required, that conclusion will generally be accepted. However in some cases different verdicts represent "an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty". Where the inconsistency "rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice" the relevant conviction will be set aside. Of course where the inconsistency is found between verdicts of acquittal and a verdict of guilty, generally speaking the appellate court may not disturb the acquittal. It may be appropriate, in those circumstances, to enter a verdict of acquittal on the subject count on the footing that this merely carries forward the logic of the other acquittal verdicts. In this case

such a course is, we think, appropriate. In our opinion it would be unreasonable for the verdict on count 7 to remain.

[18] In our opinion the phone calls from the Australian Tax Office alerting the appellant to the need for documentation to support a claimed rebate by one client is scant evidence to support an inference that the appellant knew in respect of a different client that there was no documentation to support a claim he, the appellant, knew to be false. The matter may be tested this way. Accepting the not guilty verdicts on all other counts – especially count 6 – the relevance of the phone calls to count 7 is tenuous indeed.

[19] We would make the following orders. As regards the appellant's conviction on count 3, appeal dismissed. As regards the appellant's conviction on count 7, appeal allowed, conviction set aside and a verdict of not guilty entered. The matter should be remitted back to the trial judge for resentencing on count 3.

Mildren J:

[20] The appellant was charged with six counts of defrauding the Commonwealth contrary to s 29D of the Crimes Act 1914 and with one count of imposing upon the Commonwealth by an untrue representation contrary to s 29B of the Crimes Act 1914. He was acquitted on five of the six counts of defrauding the Commonwealth but was convicted of the remaining count and of the count of imposing upon the Commonwealth. The appellant was sentenced to imprisonment for 18 months on the fraud count and a concurrent term of three months on the imposition count. The sentence was ordered to be suspended after the appellant had served four months pursuant to s 21B of the Crimes Act 1914 (Cth).

[21] The appellant has appealed against the conviction for imposing upon the Commonwealth on the ground that there was no evidence in order to support the charge. He has also been granted leave to appeal against his conviction on the fraud count on the ground that the verdict is unreasonable. Leave to appeal against sentence was refused by a single judge pursuant to s 429(1) of the Criminal Code, but the appellant has nevertheless sought leave to appeal against his sentence before this Court pursuant to s 429(2) of the Code.

Factual Background

[22] At all material times the appellant was employed by Zone Management NT Pty Ltd trading as Income Tax Professionals (ITP) an accountancy business

which, as part of its business, processed and lodged income tax returns for taxpayers. The Crown case was that the appellant defrauded the Commonwealth by lodging returns on behalf of two named taxpayers which he knew to be false and that he imposed upon the Commonwealth by negotiating a refund cheque in the name of one such taxpayer which had been issued by the Reserve Bank of Australia and forwarded by the Australian Tax Office (ATO) to ITP as the taxpayer's agent. Each of the six fraud counts was in similar terms and alleged that on various dates between March and September 1996 the appellant had lodged an income tax return with the ATO on behalf of either a Mr McDonald or a Mr Douglas, otherwise known as Davies, in which application was made for a prescribed payment systems credit (hereinafter referred to as a "PPS credit"), knowing that the claim in respect of the PPS credit was false. The evidence was that the ATO issued refund cheques in respect of six of the seven income tax returns wherein the PPS credit was allowed in whole or in part. In each case the refund cheque was forwarded to the appellant who negotiated the cheque and retained the proceeds with the knowledge and consent of the relevant taxpayer. Both of the taxpayers claim they were indebted to the appellant as a result of unpaid loans and that these cheques were by agreement to be received by the appellant in reduction of those loans.

[23] At trial there was no issue as to the fact that the claims to the PPS credits were false. Similarly there was no issue at trial that the appellant had in fact processed and lodged the income tax returns and that he had received the

relevant refunds. The only issue on the fraud counts was whether the appellant knew that the claims to the PPS credits were false at the time of the lodgement of the relevant returns. The evidence in relation to each of the fraud counts was almost identical. The verdict of guilty in relation to count seven involved the lodging of a tax return on 28 September 1996 on behalf of Mr Douglas in the name of Daryl Davies for the financial year ending 30 June 1996 claiming a PPS credit of $9650. Count 6 on which the jury had found the accused not guilty, alleged that on or about the 12th of September 1996, he had lodged with the ATO an income tax return in the name of Daryl Douglas for the financial year ending 30 June 1995 containing a claim for PPS credits of $7699. Counts 1 and 2 also related to income tax returns in the name of Daryl Davies for false PPS credits in respect of tax returns in the false name of Daryl Davies. It was admitted by the appellant that he knew that Daryl Davies was a false name. In respect of counts 2 and 6, there were two returns lodged for the same financial year, one in the name of Davies and one in the name of Douglas. Count 7 related to a different financial year from any of the other counts.

[24] It was common ground that there was virtually no distinction between the evidence led by the Crown in order to support each of the fraud counts except that, in relation to a claim for a PPS credit lodged on account of one McDonald for the year ended 30 June 1995 (count 5), the appellant had received two telephone calls from an officer of the ATO. The initial call related to McDonald's income tax return lodged on the 25th of August 1996

in which the amount of the credit claimed was for $56,632. The relevant officer, a Mr Laurie, told the appellant that he required some evidence to support the amount of the claim. The evidence was that the appellant told Laurie that he would endeavour to obtain the relevant information from his client. Laurie telephoned the appellant again on 23 September 1996. This was after the lodgement of the tax return in relation to count 6 and before the lodgement of the tax return in relation to count seven on the indictment. Laurie told the appellant that if documentary evidence was not produced in relation to McDonald's 1995 tax return he would issue an assessment without allowing any credit. The appellant told Laurie to go ahead and do that and that he would leave it to his client to follow it up afterwards. The tax return for Douglas on which the appellant was convicted was lodged five days later on the 25th September 1996. There was no evidence that McDonald and Douglas knew each other or that the appellant was part of a conspiracy in which those two clients were involved. The case for the appellant is that the verdict of guilty is unreasonable because it is inconsistent with the verdicts of acquittal on the other fraud counts.

[25] The case for the respondent is that following the telephone conversation with Mr Laurie on 23 September 1996, the appellant knew that the ATO would not accept PPS claims which had no documentary evidence to support them, and that the appellant knew that no such evidence existed. As there was no such evidence in relation to the other counts, the verdicts were not inconsistent, and the conviction on count seven was not unreasonable.

Was the Conviction on the Fraud Count Unreasonable?

[26] The leading authority dealing with inconsistent verdicts is the decision of the High Court of Australia in *MacKenzie v The Queen* (1996) 190 CLR 348. The relevant principles are set out in the judgment of Gaudron, Gummow and Kirby JJ (at 366-368). The essential question ultimately is whether there is an inconsistency of such a nature as to amount to an affront to logic and commonsense and "rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice" (*MacKenzie*, at 368) so as to require the relevant conviction to be set aside. There is a reluctance to accept a submission of this kind. If there is a proper way for the verdicts to be reconciled, allowing the appellate court to conclude that the jury properly performed its functions, that will generally be sufficient to dispose of this ground of appeal.

[27] In considering these questions, it is necessary to bear in mind that the ground of appeal in such a case is not that the verdicts are inconsistent, but that the verdict of guilty was unreasonable, or cannot be supported having regard to the evidence: see *MFA v R* (2002) 193 ALR 184. It requires this Court to undertake its own independent view of the evidence. It is only if there is a **significant possibility** that an innocent person has been convicted that this Court is bound to interfere: see *M v The Queen* (1994) 181 CLR 487 at 494.

The Case at Trial

[28] The evidence at trial was largely uncontroverted. In order to understand how the Crown presented its case it is necessary to refer to the evidence relating to PPS deductions and to the electronic filing of tax returns.

[29] Evidence on both of these subjects was given by Ms Phillips, an officer of the ATO in charge of the investigation into this matter. So far as PPS deductions are concerned, this system was introduced in 1983. It covered nine industries, including contractors and subcontractors in the construction industry. The system required subcontractors to lodge with their contractors a payee declaration form. Examples of such forms were in evidence before the jury. Each form, which was issued by the ATO, had a serial number. The form required the subcontractor to indicate the deduction rate. The normal rate was 20 per cent, but it was possible to obtain a deduction exemption or variation certificate from the ATO. If that happened, the certificate (which was numbered) would show that either zero per cent was to be deducted or some percentage less than 20 per cent. The PPS deduction form required the number of such a certificate to be entered on the form. The contractor was required to enter on the form for the relevant period the gross amount of payments made to the subcontractor and the amount of tax deducted. These certificates were apparently completed in duplicate (or triplicate), one copy going to the payee or subcontractor, and another copy, it may be inferred, went to the ATO. If no PPS deduction form was lodged with the contractor, the contractor was required to deduct tax at the rate of 48.3 per cent. The

contractor was required to remit the tax within 14 days of the end of each month to the ATO. At the end of each year, the contractor was required to supply to the subcontractor a payment summary listing all the payments received for the year and the tax deducted to enable the subcontractor to disclose his gross income and claim a credit for the pax paid. A copy of the summary was also sent to the ATO. So far as Douglas/Davies and McDonald were concerned, the only record which the ATO had was that in the year 1995 an amount of $1,062 had been deducted in respect of Daryl Davies. So far as deduction exemption or variation certificates are concerned there was a deduction variation certificate for Daryl Davies issued in 1989 which expired after one year. McDonald had a certificate issued in 1991 which did not expire until 1999. The PPS Declaration Forms signed by McDonald indicated that the rate approved was zero percent, meaning that the contractor was not required to deduct any tax. It is plain from this evidence that, except in relation to the amount of $1062 in the 1995 year relating to "Daryl Davies": (1) no PPS deductions had been made in respect of Davies/Douglas or McDonald; and (2) there were no payment summaries supplied to Davies/Douglas or MacDonald. Therefore, it may be inferred that the appellant, who was responsible for the lodging of the relevant returns, could not have been supplied with any payment summaries or other written evidence supporting a claim for a credit for PPS deductions.

[30] As to the electronic filing of returns, the evidence was that the appellant had as a director of Zone Management (NT) Pty Ltd trading as ITP – The Income

Tax Professionals (NT) applied to enrol with the ATO to participate in the electronic lodgement of returns system in 1990 and again in 1991, and agreed to be bound by the terms of participation. There was also a declaration signed by one Yogan Sathianathan as a registered tax agent on behalf of Zone Management, agreeing to those terms. There is nothing in the terms requiring a person lodging an electronic return to satisfy himself as to the truth of the information in the return. Relevantly the obligations were (1) to ensure that the taxpayer signed a paper copy of the return and (2) to keep the signed paper return and all relevant schedules and documentation on behalf of the ATO for periods of either four years or seven years after the issue of the assessment or the date of lodgement as the case may be. The evidence was that following the issue of search warrants, raids were carried out by the Australian Federal Police on 31 July 1997 at the appellant's places of business in Nightcliff and in the city, and also later a search was conducted, without a warrant, but with his consent, at the appellant's home. No paper copies of the relevant returns and supporting documentation were able to be located. Evidence was given by a Ms Haselum that she had worked at the appellant's office between 1985 and 2001 as a tax consultant or bookkeeper. The office practice was to keep the PPS summary sheets with the income tax returns. On 4 June 1999, Ms Haselum said that she had asked the accused if he had the file for Mr McDonald. He said that he had not seen it for four to five years. Prior to that she had searched the filing cabinets unsuccessfully to see if she could locate the file. On 7th June 1999, she went

to the appellant's office in relation to some other matter and saw the appellant pick up McDonald's 1994 tax return from the floor. The Crown relied upon this evidence as part of the circumstantial evidence from which an inference of knowledge of falsity might be inferred.

[31] As to the six returns, on four of the returns, the PPS credits claimed were exactly 20 per cent of the gross income. The exceptions were the returns for 30 June 1994 for Davies (count 1) and the return for 30 June 1996 also for Davies. The evidence of Mr Laurie, the field auditor for the ATO who received the 1995 tax return for McDonald, was that it was "most unusual" for the PPS credits to be exactly 20 per cent of the gross income. The inference is that the appellant calculated the claim for the PPS credits for those returns by simply claiming 20 per cent of the gross income. This was some additional evidence to show that the appellant could not have had any documentary evidence to support the claims for PPS credits in respect of those returns. The PPS credit claimed in relation to count 7 for the Davies return of 30 June 1996 totalled $9,285. The total gross income was $23,497 be way of distribution from non-primary production income and $25,965 gross from his business as a boilermaker, a total of $49,462. Twenty per cent thereof amounts to $9,282. There was no partnership return or trust return lodged in respect of the income totalling $23,497. Moreover, the return in question was, to the appellant's knowledge, in a false name. It also contained false particulars as to the name of the taxpayer's spouse.

[32] In relation to the returns for the year ended 30 June 1995, there were two returns lodged, one in the name of Davies and the other in the name of Douglas. Both claimed PPS credits; the former in the sum of $13,876 and the latter in the sum of $7,699. The appellant admitted that he had known since at least July 1990 that Davies and Douglas was one and the same person. The net taxable income in respect of each return was well above the tax threshold. Splitting the returns in this way enabled the taxpayer to gain the benefit of lower rates of tax.

[33] The appellant's case was that the jury could not be satisfied beyond reasonable doubt that he knew that the claims for PPS credits were false. The Crown called both McDonald and Douglas to give evidence. Neither of these witnesses assisted the Crown to any extent. McDonald's evidence in chief was that he engaged the appellant to prepare his returns; he did not know who did the work; he gave the appellant a "a big pile of paper". He presumed he gave the appellant a "book" which contained invoices and payment records (Ext P22); he presumed he told the appellant that he had a PPS claim. He said he "wouldn't have a clue" if he had had evidence to support it; and that there must have been income in excess of $100,000 not included in the "book" if the claims for PPS were correct. He said he never saw the refund cheque for $20,346.41 which the appellant received in relation to the 1994 return, and did not receive anything at all by way of a tax refund. It is not in dispute that the appellant deposited the proceeds of this cheque into an account of own. In cross-examination McDonald claimed

that the appellant had lent him money and that he had authorised the appellant to repay himself out of any tax refunds he received. McDonald was extremely vague about these loans, even as to how much they were for. There was no paperwork to evidence the loans. McDonald also admitted through leading questions in cross examination that when he signed the tax returns he honestly believed that the PPS credits were his due. The appellant was also able to establish that McDonald had signed a contract whereby he acknowledged that he had read the returns and satisfied himself that the financial information therein was true and accurate, that any error in supplying information was his, and that the return was prepared based on information he supplied.

[34] The evidence of Douglas was to much the same effect. He also claimed to have received loans from the appellant. His evidence about the loans was equally vague. Again there was no independent evidence to support the existence of these loans. He also said that he had authorised the appellant to repay himself out of any income tax refund cheque. He also claimed to have held an honest belief that what he had told the appellant concerning his entitlement to PPS credits was true. He also gave evidence that after his bankruptcy "prior to the 1990s" he had adopted the name of Daryl Davies because his employment opportunities under his real name were "restricted". He said that he had taken out loans in his false name, obtained employment in that name and even opened a bank account in that name; but some people continued to know him as Daryl Douglas and consequently he worked in that

name as well. He claimed he probably had records at the time to support the claim for PPS credits, records which were kept in a shoe box. He said he gave the records to Mr Fong's office and that he had no records any longer as he had burnt them. Douglas was patently a dishonest witness.

[35] It was also established through Ms Phillips that there was no requirement that a tax agent check the correctness of information contained in a tax return, so long as the information was "reasonable". If the information was not reasonable, her evidence was that it was incumbent on the tax agent to "make sure it is true and reasonable". She acknowledged that there was no rule or regulation to that effect nor anything stated in any agreement; it was implied by the fact that the rules relating to the registration of tax agents required them to be fit and proper persons. There is no evidence that the appellant was a registered tax agent at the relevant times.

[36] There was no record of interview tendered. The appellant did not give evidence.

[37] The case against the appellant that he knew the returns were false, depended upon inferences to be drawn from the whole of the evidence. The verdicts of not guilty in relation to counts 1, 2, 4, 5 and 6 show that the jury was not satisfied beyond reasonable doubt that the appellant knew that the claims were false, notwithstanding that:

(1) except in relation to one year for a small amount there must have been no payment summaries from employers to support the claims;

(2) the evidence was, at best, that McDonald and Douglas might have told the appellant they were entitled to PPS credits;

(3) in the absence of any other information, the appellant calculated the PPS credits at the rate of 20 per cent of gross income;

(4) Douglas was plainly dishonest to the appellant's knowledge in that he had lodged two returns in respect of the same year, one under a false name;

(5) the person who mostly stood to benefit from the returns was the appellant, who had a personal interest in the claims;

(6) there was no independent evidence to support that claims that the appellant had loaned money to Douglas and McDonald;

(7) the details of the loans were extremely vague;

(8) the files for McDonald and Douglas were missing at the time of the raid;

(9) McDonald's file was subsequently seen in the appellant's possession;

(10) the evidence that the claim for PPS credits of $56,632 was dropped when the ATO asked for evidence to support it.

[38] The most probable explanation for the jury's verdicts of the not guilty was the evidence that the appellant was not required to check the truth of the claims, and the vague evidence that Douglas and McDonald may have

instructed the appellant that there were genuine claims to the money. The jury might also have reasoned that if the appellant, having been spoken to by Mr Laurie, and realising that there was no documentation to support that claim, concluded that he had no choice but to drop the claim. There was no specific evidence up to the time of Laurie's telephone calls that the appellant knew or must have known that a claim for PPS credits would not be acceptable to the ATO in the absence of the employers' payment summaries. However, the jury might also have reasoned that, as a result of the discussion the appellant had with Laurie on 23 September 1996, the appellant then well knew that a PPS claim would not be acceptable to the ATO without documentary evidence to support it, and notwithstanding that knowledge, the appellant lodged the return for Davies some 5 days later, on 28 September 1996 (count 7).

[39] One possible difficulty with this approach is that it might be said that the appellant had been alerted by Laurie's first call of the need for such documentary evidence, and the evidence suggests that the first call occurred in August, i.e. before the tax return in respect of count 6 was lodged. However, Laurie's evidence was that he received the tax return relating to count 5 "in August". The return was not even lodged until 25 August. No evidence was given as to the actual date of the first call. The only evidence bearing on that topic was that Laurie said he made the second call "several weeks later" on 23 September 1996. On the state of this evidence the jury might have decided that it had not been proved that the first phone call was

made before the date of lodgement of the tax return in relation to count 6, i.e. before 12 September 1996.

Conclusions in Relation to the Fraud Court

[40] Applying these considerations to the principles in *MacKenzie v The Queen*, I consider that there was evidence – indeed strong evidence – to support the verdict said to be inconsistent. It was open to the jury to draw the inference that the appellant must have known that the claim in relation to count 7 was false, as by then he knew from the telephone calls he had received from Laurie that the ATO would not accept a claim for PPS credits in the absence of documentary evidence, which in the circumstances must have meant the employer's summaries. It was put that this inference could not be drawn because the call related to a much larger claim made by a different taxpayer, and that the appellant was responsible for lodging thousands of returns. However, the appellant had a personal financial interest in these particular returns because whatever rebate was coming to McDonald and to Douglas was to be his. It is unlikely in the extreme that similar loans were made to other clients of the firm and were to be repaid in the same way. The evidence of Ms Haselum proved also that employers' payment summary forms were normally kept with the original signed returns kept in the office. The appellant must have been well aware of the significance of those forms as evidencing a taxpayer's entitlement to claim PPS tax credits. It was open to conclude that the fact that McDonald's claim would be rejected without the appropriate documents had nothing to do with the size of McDonald's

claim and everything to do with the lack of documentary evidence. However, the jury were not obliged to find that such knowledge related back in time from 23 September 1996 to the dates of the earlier returns. In my opinion that verdict may be properly reconciled with the verdicts of not guilty on the other counts, and are not "an affront to logic and commonsense" suggesting a compromise or confusion in the minds of the jury. Moreover, I reject entirely that any alleged inconsistency rises to the point where this Court should interfere because there is a significant possibility that an innocent man may have been convicted. I would therefore reject the first ground of appeal.

The Appeal against Conviction for Imposing on the Commonwealth

[41] The evidence in relation to count (3) was that the ATO sent a cheque drawn on the Reserve Bank of Australia payable to Mr Daryl Davies or order and crossed "Not Negotiable A/C Payee Only" for the sum of $17,632.42. The appellant endorsed the cheque by signing the front of the cheque "D. Davies" and on the reverse side he wrote "Please pay a/c I. S. Wright" and again signed "D. Davies". The cheque was a refund cheque after processing the tax returns for "Davies" the subject of counts 1 and 2 on the indictment.

[42] The effect of the evidence was that appellant falsely represented that he was D. Davies, the payee of the cheque. It was admitted that the cheque was deposited into an account with the National Australia Bank in the name of I. S. Wright, a company through which the appellant traded in quality

Australian coins. The evidence of Douglas was that the appellant was entitled to take the proceeds of the cheque in reduction of the debt which he owed the appellant.

[43] It is not in dispute that the Reserve Bank of Australia is "the Commonwealth or …a public authority under the Commonwealth".

[44] Section 29B of the Crimes Act 1914 (Cth) provided (at the relevant time):

> Any person who imposes or endeavours to impose upon the Commonwealth or any public authority under the Commonwealth by any untrue representation, made in any manner whatsoever, with a view to obtain money or any other benefit or advantage, shall be guilty of an offence.

[45] The history of s 29B, and a discussion of the elements which need to be proved in order to sustain a conviction, are discussed by the Federal Court of Australia in *Joyce v Grimshaw* (2001) 105 FCR 232; 182 ALR 602. According to that authority, there must be proof that:

1. The appellant imposed upon the Commonwealth or an authority of the Commonwealth. This means that there must be proof that the appellant either cheated the Commonwealth, etc or deceived it. In this case the Crown contended that the appellant deceived the Reserve Bank of Australia.

2. The imposition was made by an untrue representation, i.e. a representation which the appellant knew to be false.

3. The untrue representation must have been made with a view to obtaining money or some other benefit or advantage.

   There is no requirement to prove intent to defraud. There is no requirement to prove that the appellant obtained an advantage or benefit to which he was not entitled.

[46] The argument for the appellant was that there was no evidence that the untrue representation (i.e. the false representation that he was D. Davies, the payee of the cheque) actually misled or deceived the Reserve Bank of Australia into paying on the cheque.

[47] No evidence was called by the Crown concerning banking practice where a cheque is presented for payment with or without an endorsement by the payee. There was evidence that the appellant had successfully negotiated a cheque payable to McDonald into the account of I. S. Wright without any endorsement. Although there was reference by the prosecutor in his submissions to the Trial Judge at the time of a no case submission to unspecified "banking and finance legislation", the trial judge gave the jury no instructions on the relevant provisions of the Cheques and Payment Orders Act 1986 (Cth) or on the law relating to cheques or the duties of collecting or paying banks.

[48] The cheque in question was payable to Mr Daryl Davies or "to order". Section 21 of the Cheques and Payment Orders Act 1986, which was in force at the relevant time, provides that a cheque is payable to order if it is

expressed to require the drawee bank to pay the sum ordered to be paid by the cheque to or to the order of, and only to the order of a person specified in the cheque as payee or endorsee. The legal effect of the cheque being made out to order is that the bank on which the cheque is drawn should pay it only to the named payee or to any other person to whom the named payee, by endorsing the cheque on the reverse side, has ordered it to be paid: see s 24 of the Cheques and Payment Orders Act 1986; W S Weerasooria, Banking Law and the Financial System in Australia, 5th ed, par 13.11. The effect of the crossing on this cheque was an instruction to the drawee bank not to pay the cheque otherwise than to a financial institution (Cheques and Payment Orders Act 1986, s 54). A crossing "not negotiable A/C payee only" does not by itself cast on the paying bank paying the cheque to a banker, any additional obligations to satisfy itself that the collecting bank is collecting it on behalf of the named payee. That is the responsibility of the collecting bank: *Universal Guarantee Pty Ltd v National Bank of Australasia Ltd* [1965] NSWR 342 at 345-346. Thus the crossing in this case is not relevant.

[49] The effect of s 94(2) of the Cheques and Payment Orders Act 1986 is to provide protection to paying banks paying a cheque which is not endorsed or is irregularly endorsed where the cheque is collected by another bank. This sub-section reflected amendments made to the former Bills of Exchange Act 1909 (Cth) in 1971. As Weaver and Craigie, Banker and Customer in Australia (1975) observe (at 268):

> The problem can still arise, however, in relation to "order" cheques which are not being collected for the account of the payee or ostensible payee named therein. These cheques still have to be indorsed. However the paying banker is not in a position to know the name of the customer for whom the collecting banker is collecting the cheque and so the responsibility for policing the indorsement of these cheques now rests on the collecting banker.

[50] The fact that the Reserve Bank met the cheque which was not endorsed by the payee is therefore explicable – it was not the Reserve Bank's responsibility to check that the collecting bank was collecting the proceeds for the payee. The same applies where the endorsement is a forgery or made without the authority of the payee: see s 94(1). As Weaver and Craigie observe (at 268): "paying banks are **not** required to examine any cheques for indorsement, and cheques received from a collecting banker… are **not** to be returned for lack of indorsement or for irregular indorsement".

[51] In these circumstances, it was submitted that it was not open for the jury to have concluded that the Reserve Bank of Australia was misled. If anyone was misled, it was the collecting bank, in this case, the National Australia Bank. Applying *Joyce v Grimshaw*, it was submitted that it was not open to convict the appellant of the offence of imposing on the Commonwealth.

[52] Unassisted by authority, I would conclude that it is not necessary, in order to impose upon the Commonwealth or a public authority under the Commonwealth, for the representation to be made to the Commonwealth or to the relevant public authority. I would think it sufficient if the imposition is caused by an untrue representation regardless of to whom the untrue

representation is made. This would follow, in my view, from the plain words of s 29B, which relevantly provides that the imposition be "by any untrue representation, **made in any manner whatsoever**..." (emphasis provided). That conclusion has the support of the Full Court in *Jacobson v Piepers ex parte Piepers* (1980) Qd R 448; by the Court of Criminal Appeal in *R v Baxter* (1988) 1 Qd R 537; and by Burt CJ in *Bryce v Curtis* [1984] WAR 348.

[53] The only authority which is really to the contrary is *Joyce v Grimshaw*. In that case the Full Court of the Federal Court considered that a contrary conclusion had been reached by the Full Federal Court in *Guillot v Hender* (1999) 86 FCR 294; 104 A Crim R 589. With the greatest of respect, I am unable to find any indication in *Guillot v Hender* that the Court considered the point. It is true that in *Guillot v Hender* the Court said that the misrepresentation must actually mislead or deceive the Commonwealth or relevant authority, but there was no discussion in that case of whether the deception may or may not be a result of the deception of a third party.

[54] Moreover, in *Joyce v Grimshaw* the Court said (at [25]):

> What is not made clear in *Bacon v Salamane* is whether or not the untrue representation must be made to the Commonwealth, or to a public authority under the Commonwealth, or whether it can be made to a third party. And if it can be made to a third party, is it sufficient that only the third party was deceived or mislead by it? Or must it be shown that the Commonwealth, or a public authority under the Commonwealth, was deceived or misled by the untrue representation as well?

[55] What the Court concluded in *Joyce v Grimshaw* was that "CASA was not imposed upon within the meaning of that concept in s 29B because it was not deceived or misled by anything said or done by the respondent" [para 75]. This conclusion does not, as a matter of logic, rule out the possibility of a deception of the Commonwealth, or public authority under the Commonwealth, as the result of a deception made to a third party.

[56] Furthermore, I agree with Angel and Riley JJ that the reasoning in *Joyce v Grimshaw* was heavily influenced by the interpretation accorded to certain statutory provisions relating to rogues and vagabonds, and that this approach had been rejected by the High Court in *Bacon v Salamane* (1965) 112 CLR 85; see also per Herron CJ at first instance in (1964) 81 WN (Pt 1) (NSW) 192 at 196. In that respect I disagree with the conclusion of the Court in *Joyce v Grimshaw* that the word "impose" should be given a meaning derived from its context in ancient vagrancy statutes. In my opinion, the correct approach is to give the word its ordinary natural meaning, i.e. "to place a burden upon" (and see the meanings referred to in *Joyce v Grimshaw* at para [62]).

[57] This Court is not bound by *Joyce v Grimshaw*, although that authority is entitled to great weight and should not be departed from unless I am convinced that it is unsound. With respect, that is the conclusion I have reached. In these circumstances, the appeal against conviction in relation to count 3 must fail.

Orders

[58] I would dismiss the appeal against conviction. There is also an application for leave to appeal against sentence. As I am in the minority in relation to the appeal against conviction, and as the appellant now falls to be resentenced anyway, I agree that the matter should now be remitted for resentence on count 3 only.
