

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Seymour* [2004] QCA 19

PARTIES: **R**  
**v**  
**SEYMOUR, David John**  
(appellant)

FILE NO/S: CA No 71 of 2003  
SC No 654 of 2001

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 13 February 2004

DELIVERED AT: Brisbane

HEARING DATE: 13 October 2003

JUDGES: McMurdo P, Davies JA and Mackenzie J  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Allow the prosecution to amend each count of the indictment by omitting the words "Keno wagers" and substituting "credit"**  
**2. Appeal against conviction dismissed**

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – AMENDMENT – TIME FOR AMENDMENT – amendment of indictment after conviction and on appeal under s 572(3) *Criminal Code* (Qld) – whether appellant would be prejudiced by such amendment – whether trial would have been differently conducted – whether amendment allowed

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – where appellant convicted on 11 counts of fraud – where defence of honest and reasonable but mistaken belief – whether jury's verdicts open on the evidence

CRIMINAL LAW – GENERAL MATTERS – DEFENCE MATTERS – IGNORANCE AND MISTAKE OF FACT –

HONEST AND REASONABLE BELIEF – whether learned trial judge’s direction to jury identified critical issues regarding authority to obtain credit – whether learned trial judge’s direction complied with requirements in *Peters v R* and *MacLeod v R* to instruct jury that issue whether at time alleged offences committed appellant had knowledge, belief or intent and if so whether alleged offences were dishonest by standards of ordinary, decent people

CRIMINAL LAW – EVIDENCE – CONFESSIONS AND ADMISSIONS – STATEMENTS MADE IN PRESENCE OF ACCUSED AND RELATED CONDUCT – DENIALS – where prosecution alleged lies to establish consciousness of guilt – whether learned trial judge’s direction complied with requirements in *Edwards v R* and *Zoneff v R*

*Criminal Code* 1899 (Qld), s 1, s 408C, s 572

*Keno Act* 1996 (Qld), s 148

*Keno Rule* 1997 (Qld), r 2, r 10

*Edwards v R* (1993) 178 CLR 193, considered

*MacLeod v R* (2003) 77 ALJR 1047, considered

*Peters v R* (1998) 192 CLR 493, considered

*R v Fahey, Solomon and AD* [2002] 1 Qd R 391, cited

*Zoneff v R* (2000) 200 CLR 234, considered

COUNSEL: G P Long with P E Smith for the appellant  
P Rutledge for the respondent

SOLICITORS: Legal Aid Queensland for the appellant  
Director of Public Prosecutions (Queensland) for the respondent

- [1] **McMURDO P:** The appellant was convicted in the District Court at Brisbane after a 14 day trial of 11 counts of fraud with circumstances of aggravation<sup>1</sup> under s 408C *Criminal Code*. Each offence charged that, at varying dates between 19 February 1998 and 26 May 1998, he dishonestly obtained Keno wagers from the Gympie & District RSL Memorial and Citizens Club Incorporated ("the Club"). He appeals against his conviction on a number of grounds. First, he contends the appellant in placing Keno wagers did not obtain property from the Club; that no reasonable jury could have convicted the appellant on the evidence; that the learned primary judge failed to direct the jury as to the critical issues; and that the learned primary judge erred in his direction to the jury as to the evidence of lies demonstrating a consciousness of guilt.
- [2] A consideration of the second ground of appeal involves a review of the extensive evidence given in the case and this makes a sensible starting point in dealing with the grounds of appeal.

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<sup>1</sup> On counts 1, 2, 4 and 6-11 the appellant was found guilty of two circumstances of aggravation, namely that he was an employee and the amount of property obtained was more than \$5,000; on counts 3 and 5 the appellant was found guilty of only one circumstance of aggravation, namely that he was an employee.

## **The facts**

### ***The background***

- [3] The appellant was the general manager of the Club from December 1997 until shortly after 26 May 1998. He had control of the Club's financial records and accounts and was a signatory to its bank accounts. The staff were responsible to him. The Club was run by a committee to which the appellant was answerable.
- [4] On 19 December 1997, the Club agreed with Jupiters to operate on its premises an agency for the computer game of Keno, a game of chance adapted from lotto. The appellant was a signatory to this agreement. Jupiters operated Keno from the Treasury Casino, Brisbane, relaying it to agencies throughout Queensland by on-line connections, with a new game available every three minutes, 24 hours a day, although the hours of operation in the Club were 8 am to 12 midnight. Jupiters maintained detailed supervision and records of all transactions through their on-line linkage; they could ascertain the amount owed to them at any time through transaction scan reports.
- [5] Keno was installed at the Club on 20 January 1998. The Club had two Keno terminals; a punter would select and give numbers to an operator who in return for the customer's money would process the wager and issue a ticket as proof of it. Under the agreement between Jupiters and the Club, money received by the Club as Keno wagers was paid into the Club machine gaming account; each day Jupiters would automatically "sweep" the money owed to it from the previous day's trading (the amount wagered less the amount of any winnings and the club's 10 per cent commission) from that account into Jupiters' account. Under the agreement, credit betting was not allowed; the Club was authorised to pay out winnings of up to \$6,000 but prizes of \$1,000 or more could not be paid until Jupiters was satisfied of the details of the winner's identity entered into the terminal; winnings greater than \$6,000 had to be paid by a Jupiters' cheque.
- [6] The prosecution case was that on 11 occasions between 19 February and 26 May 1998 the appellant made Keno wagers on the Club's credit and ultimately on 27 May 1998, after a disastrous night of Keno for the appellant betting on credit, the balance of the Club's machine gaming account was insufficient to cover Jupiters' sweep of the previous day's Keno wagers and the Club suffered a major loss. In each count, the appellant told a staff member to allow him to place Keno wagers on credit. The staff member would keep a tally of the wagers and winnings; sometimes the appellant would commence betting with cash, then withdraw money from his EFTPOS account and later bet on credit. The prosecution alleged the appellant dishonestly obtained the following amounts of Keno wagers on the Club's credit:

Count 1	19.02.98	\$29,969.00
Count 2	05.03.98	\$5,617.00
Count 3	11.03.98	\$3,903.00
Count 4	27.03.98	\$42,089.80
Count 5	01.04.98	\$3,870.00

Count 6 03.04.98	\$35,628.25
Count 7 09.04.98	\$12,194.50
Count 8 15.04.98	\$21,832.25
Count 9 17.04.98	\$41,518.00
Count 10 27.04.98	\$73,966.00
Count 11 26.05.98	\$161,000.00

[7] The appellant made the following repayments to the Club:

Date	Amount
27.02.1998	\$5,400.00
09.04.1998	\$43,897.00
17.04.1998	\$8,586.00
17.04.1998	\$23,826.00
21.04.1998	\$3,100.00
30.04.1998	\$40,000.00
26.05.1998	\$24,892.00

- [8] The appellant eventually repaid a further \$126,834.18 from the sale of his house which, it could be inferred, had been purchased with Keno winnings.
- [9] The appellant told staff and committee members he was conducting promotional Keno betting in association with Jupiters to increase the Club's Keno turnover and attract customers; he had to lose a certain amount of money so as to put a large amount through Keno each month and Jupiters would reimburse the Club.
- [10] It was common ground with respect to each count other than counts 3 and 5 that the appellant obtained the Keno wagers on credit but the issue of contention was whether he did so dishonestly or whether the prosecution could negative beyond reasonable doubt that he was honestly and reasonably mistaken as to his entitlement to make the Keno wagers in the way he did.
- [11] Section 148 of the *Keno Act* 1996 (Qld) ("the Act") provides that an authorised Keno operator<sup>2</sup> must not make a loan or extend credit in any form to a person to enable the person to take part in an approved Keno game. The Club was not authorised to extend credit to the appellant. A difficulty for the prosecution was that the Club was convicted on 1 October 1998 in the Magistrates Court at Brisbane of 12 counts of extending credit to the appellant so as to enable him to take part in

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<sup>2</sup> Here, the Club.

an approved Keno game on 26 May 1998 and was fined \$6,500 together with costs of court and professional costs. The pleas of guilty were entered on legal advice.

- [12] The Club's committee met monthly with a small group meeting more frequently. The committee at the relevant times was made up of Mr Lauchs as President, Mr Paterson as Vice-President, Mr Lilley as Treasurer and other members, including Mr Dower, who became President and Mr Ferguson, who became Vice-President in March 1998. These committee members gave evidence that they at no time and in no way extended credit to the appellant for Keno wagers. A report from the appellant and a Treasurer's report, compiled from figures supplied by Mr Watts, the Club's assistant manager, and prepared with input from Mr Adam Taylor, an accountant, who was responsible for auditing the Club's accounts, were presented at each monthly meeting. Mr Lilley, as Treasurer, attended the Club regularly; he had full access to the administration area of the Club and its records and the appellant often discussed Club matters with him. It was never resolved nor recorded in the minutes of the committee meetings that credit was to be extended to the appellant for Keno betting.
- [13] Before the employment of the appellant, the Club had undergone a \$1 million renovation in 1996/1997 and had unsatisfactory financial management procedures in place in that the President was investigating the disappearance of \$16,000. The appellant introduced an improved system of financial accountability involving cheque requisitions; he implemented a sexual harassment and workplace health and safety policy and presented a dynamic positive management style, promising future growth and financial success. During the appellant's time as general manager, bar sales and nett takings from gaming improved.
- [14] Mr Miles, the gaming development and operations manager for Jupiters, agreed that agencies like the Club were encouraged to run their own promotions and that an agency would probably benefit if it became known as lucky.
- [15] In the appellant's report to the Club in December 1997, he proposed a Keno promotions budget for January of \$500. The minutes of the Club committee meeting of 20 January 1998, the day Keno commenced at the Club, record that the appellant explained the Club would keep a written record of prizes given away for raffles and promotions.
- [16] The Club's assistant manager, Mr Watts, recalled that the appellant discussed Keno promotions at management meetings. He had an idea to increase Keno turnover by having mystery winners published in newspapers and to promote high levels of Keno betting to create large wins so that patrons would come to the Club. He heard the appellant and Mr Lilley, the Club Treasurer, discuss these promotions. Before Keno was introduced, poker machines were promoted with valuable giveaways such as small cars and world trips. An extract from the management committee budget review showed a predicted annual budget for Keno promotions of \$39,822.<sup>3</sup>
- [17] Mr Lilley agreed that he discussed promotions with the appellant but he thought the money to be used was "some sort of funny money,"<sup>4</sup> a book entry through Jupiters.

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<sup>3</sup> Ex 66, appeal book 2006.

<sup>4</sup> It seems there was an unconnected "Funny Money" promotion to celebrate the Club's 50th anniversary in 1998 giving \$1 of funny money for each \$10 spent on Keno or gaming (see ex 61, appeal book, 1970).

Now, Jupiters were the people I thought were backing him on his promotions". He did not know how the appellant was using Club money as a promotion although he saw him with Keno ticket stubs. In February or March 1998, he asked the appellant about the wagers and winnings in the Club, which seemed high. The appellant said: "No. That's part of our promotion ... we've got to spend money to earn money, type-thing".

- [18] Mr Shaun McCarthy was, at the relevant time, Jupiters' regional manager with responsibility for Gympie. He was involved in negotiating with the appellant the agreement to install Keno at the Club. The normal course when opening Keno terminals at an agency was to have a promotion day giving away "Keno dollars" to encourage punters to play the game. All opening day promotions were typically in the range of \$400-\$500 paid by Jupiters and the Club on a 50-50 basis. Over a 12 month period for a club like this, the Jupiters' contributions to promotions would have been a maximum of \$2,000. The appellant sometimes contacted him with promotional ideas, some of which were unreasonable for the Club's size. He was shown a letter dated 20 February 1998 in which the appellant proposed a total Keno promotions budget of \$40,000. Mr McCarthy denied that the appellant showed him that letter and said it was very unlikely Jupiters would ever have agreed to the proposal in it. Jupiters did not give money to the Club to be gambled through the Club on Keno and nor was he aware of any approval for promotional betting at the Club; promotional betting was not a standard promotion at any venue.
- [19] Mr Cumming, the honorary secretary of the Gympie RSL Sub-Branch, a member of the Club and a friend of the appellant who received a percentage of some of his winnings, heard the appellant talk about promoting Keno on a number of occasions; the appellant said he had \$40,000 to spend on Keno promotion.

### **Count 1**

- [20] The first occasion when there was a shortfall in the Keno takings was 19 February 1998. That day, \$43,178 was gambled through the Club; by the end of trade \$33,080.60 was required to be banked to the Club's machine gaming account to meet Jupiter's sweep the following day; there was a cash shortfall of \$29,969. Mr Watts, who had been promoted by the appellant to manager, asked the appellant about it. The appellant explained that it was a promotion run by the Club in conjunction with Jupiters to create local interest in Keno so that the Club would be seen as the number one Gympie Keno venue. To balance the books, with the appellant's approval Mr Watts drew a cheque shown as "promotion". The related cheque requisition recorded "Keno promotions as approved by David Seymour". The appellant did not suggest the cheque should be hidden or concealed. A Keno spreadsheet recorded this amount as a promotion.
- [21] The auditor, Mr Adam Taylor, saw the January spreadsheet and most of February's. He noticed the promotions column and the large amount recorded in it. The appellant told him that that was a promotion which involved having large wins on Keno at the Club. He accepted this and made no further enquiries.
- [22] The appellant told Mr Lilley that this amount was for a Keno promotion. Mr Lilley said that he understood this related to some sort of promotional betting through Jupiters to build up the Club figures although he did not know the details.

- [23] The profit and loss statement for February 1998 presented to the Club's committee meeting on 17 March 1998 recorded under the item "415. Promotions 415.02 General" the amount "\$38,439.57". The appellant's report to that meeting also noted "\$38,000 for total promotions, with \$18,000 set aside for Jupiters which they will match after the next 12 months". The minutes of the meeting recorded that the manager's report referred to a monthly loss of \$47,000 which included \$18,000:
- "... put aside for Jupiters, which they will match over the next 12 months. There will be a yearly promotion and a car will be the major prize, plus Keno and poker machine dual promotions. All of this represents a big part of the loss as recorded. Along with tax break of some \$40,000 we are on track in achieving our goal."
- [24] Mr Dower, who took over as President at this meeting, confirmed that something like this was said at the meeting, which received and adopted the Treasurer's and the appellant's reports and approved the expenses.
- [25] Ms Patricia Andrews was employed at the Club as a bar attendant and learned how to operate the Keno terminals when they were installed. She understood from her training and from the handbook provided that credit betting was not permitted. On occasions, she saw the appellant bet without paying for his bets. The appellant initially paid cash for his Keno bets but after a while he bet without providing cash. He told her he was doing a promotion in conjunction with Jupiters and that he had money downstairs in his office safe that would pay for it at the end of the night. The Keno operators kept a tally of his bets and winnings on pieces of paper which were put in the bag with all the other records at the end of the night. She told the appellant she was unhappy with his credit betting and that if he asked her to do it again she would quit. He laughed at her and told her "it was alright, it was just poorly organised and that if they could do it again that they would use funny money so that we would have something coming in". Whilst most people bet \$1 on average per game, the appellant sometimes bet as much as \$950 for a two spot per game. At the end of the night, she took the money out of the till and the supervisor completed an operator balance; the cash was grossly inadequate to balance the till. She filled out a float sheet with details of the cash plus the money owed by the appellant, an amount of about \$34,000. She recorded this as an IOU at the bottom of the Keno float sheet.
- [26] Terence Schmid, the Keno supervisor that evening, noticed that the appellant was betting without cash and that Ms Andrews, the Keno operator, was recording the amounts of the bet on pieces of paper. On one occasion, the appellant said he was working with Jupiters on a system and on another occasion that he had been given funny money to play with and "they were working on a system".
- [27] Jupiters paid a cheque to the Club dated 24 February 1998 for \$5,400 won on 19 February which was banked into the Club's account on 27 February 1998. Mr Miles was aware that Jupiters had paid the Club this amount for winnings but it was not then unlawful for the Club to play Keno through syndicates of its members. He gave instructions that, in future, winning cheques were not to be issued in the Club name but in the name of a head of the syndicate.

## **Count 2**

- [28] On 5 March 1998, \$12,627 was gambled through the Club. The shortfall required to be banked to the Club's machine gaming account to meet Jupiters' sweep the

following day was \$5,617, which was the amount of the IOU written on the Keno float sheet by the Keno operator, Ms Kiehny; although she could not remember that night specifically, the appellant was the only person who ever bet on credit.

- [29] The next morning, Mr Watts discovered a shortfall of about \$5,600 in the Keno float sheets for the previous night. He spoke to the appellant who explained it was a personal debt that he owed to the Club and he asked Mr Watts to withdraw \$100 per week from his salary to repay it. These deductions were then made from the appellant's salary. A cheque was drawn on the Club's machine gaming account for that amount to balance the books; the cheque butt recorded "Keno Promotions – David Seymour". The cheque requisition form dated 6 March 1998 records "Keno promotions → KP to be reimbursed".
- [30] The committee meeting of 17 March 1998, dealt with in the discussion of count 1,<sup>5</sup> took place 11 days after this offence was said to have been committed.

- [31] The Treasurer's report to the Club's committee meeting for March 1998, which took place on 19 April 1998, annexed a profit and loss statement showing a loss of \$71,545.66 against the projected figure of \$53,000 and recorded a number of explanations for this, none of which related to large Keno promotions. The profit and loss statement for the first quarter of 1998 did record promotions at \$59,909.09. In the appellant's monthly report to the April committee meeting, he stated:

"The first quarter of the year has now come to a close and, as budgeted, this quarter is showing a loss. This loss is due to systems and promotions put into place to attract new clientele that will grow and protect our income for the future."

He also noted:

"Due to the large win I had on Keno<sup>6</sup> that was fantastic on a personal note, as well as giving the Club state-wide notice creating the publicity that will make us number 1 in the State for Keno (knocking off the Treasury Casino with Keno due to Jupiters' promotional help), I have come to the decision that management will no longer be permitted to gamble at their place of work."

- [32] The management and Treasurer's reports were passed at the April meeting so that the promotional betting expenditure during March was ratified by the committee.

### **Count 3**

- [33] Ms Bruhn was the Keno operator on 11 March 1998. She recalled that on a couple of separate occasions the appellant bet without paying for his bets and said it was a promotional thing from Jupiters. By looking at the Keno float sheet that she completed that day, she said that "it would probably have been a night when there was credit betting because the total cash was left blank". She could not recall anyone other than the appellant ever betting on credit, and his bets were also bigger than other punters. Ms Bruhn was shown the Keno float sheet for that night and affirmed that she "would say" it was a night that the appellant bet on credit because that was the only reason that no total cash figure was recorded; she did not see why it would be another night.

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<sup>5</sup> These Reasons [23] and [24].

<sup>6</sup> See Count 7, these Reasons [51]-[57].

- [34] Mr Schmid, the Keno supervisor, saw that the appellant placed bets that night without paying and Ms Bruhn kept a written tally. He relieved Ms Bruhn for her meal break and he continued the system. He recalled the appellant's bets were bigger than other punters. At the end of the night, the till did not balance until an IOU against the appellant was created for the outstanding amount.
- [35] The reconciliation printed the next morning shows actual cash received as \$5,606.20 as against expected cash of \$5,607 with only an 80 cents variance.
- [36] The following day, Mr Watts drew a cheque on the Club's general account for \$3,903 payable to Gympie RSL; the cheque was signed by Watts and the appellant; the deposit form dated 13 March 1998 records the banking of that cheque to the Club's machine gaming account together with some cash; written in the section of the deposit slip relating to particulars of cheques, is the word "Keno". Mr Watts did not recall to what that cheque related and agreed there was nothing to indicate it related to the 11 March. The cash disbursement journal records that on 12 March 1998 a cheque for \$3,903 described as "Keno Promo" and recorded in another column headed "Keno".
- [37] The committee meeting of 17 March 1998 dealt with in the discussion of count 1 took place eight days after this offence was said to have been committed. The 19 April Club committee meeting is dealt with in the discussion of count 2.

#### **Count 4**

- [38] Count 4 was said to have been committed on 27 March 1998 when Ms Nissen was one of the Keno terminal operators. She recalled the first occasion when the appellant placed credit bets with her was in late March or early April 1998. The bets varied between \$1 and perhaps up to \$1,000; the bets were substantially bigger than other punters. Towards the end of the night, the appellant owed over \$40,000. Of course, the till did not balance at the end of trading. The appellant said not to worry; he told Jill (O'Brien) to write a cheque from the jackpot cheque book to balance the Keno machine and he would fix it in the morning; Jill filled out the cheque for over \$40,000 and the appellant signed it. The appellant once told Ms Nissen that the Club had a fund of promotional money provided by Jupiters and he had to spend it or he would not get any more. On no occasion did she hand any winnings to the appellant. Occasionally, when the appellant was betting on credit he did so whilst sitting with committee members.
- [39] Ms Norma Jill O'Brien was working with Ms Nissen that night and recalled that the appellant paid for his bets at the start of the night and then bet on credit with his debts recorded on a sheet of paper. He told her not to worry about the debts he was accruing because he was "using the money that had been banked up on the poker machines and had to be used". He won \$9,000 that night but by the end of the night on David Young's terminal the appellant owed \$42,000. The appellant took a cheque book from the safe and wrote out a cheque for \$42,089.80 dated 28 March 1998 to balance the till.
- [40] The next day, Mr Watts noticed the reconciliation sheet for 27 March showed a large shortfall in cash. He discussed this with the appellant who explained that the Club was conducting a promotion with Jupiters gaming and as Jupiters were to come on-line as the Club's licensed poker machine operator the Club was to pay Jupiters \$35,000 for these linked jackpots over 12 months, at about \$1,000 a week

for the period, and instead of writing Jupiters a cheque, the Club was to pay by losing the \$35,000 in Keno.

- [41] During the night, the appellant won a major prize of \$9,558, \$6,000 of which was deducted from his tally sheet and \$3,558 of which was paid to him by a cheque issued by Jupiters banked to the appellant's personal account.
- [42] The evidence relating to the Club's committee meeting of 19 April in which the March financial records were discussed is set out in the facts concerning count 2.<sup>7</sup>

### **Count 5**

- [43] This count was said to have been committed on 1 April 1998. A cheque for \$3,870 dated 2 April 1998 was drawn on the machine gaming account, the cheque butt of which records "Keno Promotions". On 2 April 1998, a cheque requisition form for \$3,870 with the reason for request as "Keno Promo" was drawn on the machine gaming account. Mr Watts did not recall to what that cheque related.
- [44] The Keno daily reconciliation sheet dated 2 April 1998 showed no variation between the actual cash and cash received of \$7,359.40.
- [45] That evidence was not consistent with that of the Keno operator, Ms Andrews, who said she took the appellant's bets on credit once he stopped paying for his own bets. That night the appellant at times himself operated the machine, punching in numbers. She kept a tally sheet of his debts and wins. At the end of the night, the till was short a lot and the piece of paper with the amount owing by the appellant was put in the safe.
- [46] The Treasurer's April report accepted and passed at the Club committee's May meeting recorded that the bar takings reached \$61,130.26, the highest in the history of the Club; "Keno commission for April showed a staggering result of \$46,898.54, mainly due to promotions run in conjunction with Jupiters". The Treasurer, Mr Lilley, gave evidence he understood that the appellant's betting was part of this promotion and although he did not comprehend the details, this was the reason the Keno commissions were so high. In the April profit and loss statement attached to the Treasurer's report, the only reference to promotions was under the major heading of "Expense" the heading "Total Promotions" and the figure \$6,277.11 although the heading "Machine Gaming Division" does record the amount of \$43,621.42.<sup>8</sup>

### **Count 6**

- [47] This count was said to have been committed on 3 April 1998. The Keno operator, Ms Nissen, recalled that the appellant was betting heavily on credit and she and Ms Andrews were keeping a tally sheet of his debts. Ms Nissen was concerned his betting was getting out of hand and suggested he slow down. The appellant said, "I'll give youse \$10,000 if we keep going. ... If I win the big one, let's keep going for the big one ... I'll give you a sweetener of 10 grand". That night there was a phone call from Jupiters enquiring about who was betting on Keno. The appellant told her to say it was "the boys from Nolans Abattoir, they have a syndicate in the Club, they're here betting". She recalled the appellant had some large wins that night and that he asked her to record the winner as Richard Cumming. On another

<sup>7</sup> See these Reasons [31]-[32].

<sup>8</sup> This evidence covers the periods charged in counts 6-10 inclusive.

night, the appellant became aggressive and accused her of talking about his betting behind his back; he said, "If anyone had said anything it was going to be our jobs".

- [48] Ms Andrews saw the appellant betting at Ms Nissen's terminal. Initially, he paid for the bets taking money out of his EFTPOS account<sup>9</sup> and then bet on credit; a tally sheet was kept of his bets and wins. He said his betting was to do with Jupiters; he wanted the Club's Keno turnover to be amongst the highest in the State; he was supposed to lose that night.
- [49] The appellant did not tell the Keno operators to conceal his bets and nor did they hand him any winnings.
- [50] The appellant won \$43,987 that night. He told Cumming<sup>10</sup> that he was promoting Keno at the Club and he was winning, although he was trying to lose. He asked Mr Cumming to agree to have the winning cheque presented to him and be photographed because it would look odd if the manager was presented with a winning cheque. After the cheque was presented to Mr Cumming, he endorsed the cheque to be paid to the RSL Club and gave it to the appellant who assured him it would be credited to the Club. The Club received some publicity because of the win. Mr Cumming agreed this all seemed to be part of a Keno promotion. The Jupiters' cheque for \$43,987 was deposited to the machine gaming account on 9 April 1998.

#### **Count 7**

- [51] This offence was said to have been committed on 9 April 1998. By reference to the relevant Keno float sheet, Ms Bruhn was able to identify that evening as the second occasion on which she was the operator when the appellant placed bets on credit. Because the total cash figure was left blank, this indicated to her that there was credit betting that night. When she was asked by whom, she said:  
 "Possibly David [the appellant], I guess.  
 Yes. Have you ever seen anyone else other than him bet on credit? --  
 No."
- [52] The appellant's bank account indicates that he withdrew \$2,000 in eight transactions at the Club that evening.
- [53] Mr Watts gave evidence that he saw the appellant placing bets that night. At one stage the appellant used Club money by betting on credit. During the evening, the appellant asked to borrow \$1,000 of the Club's money from the bottom safe. Mr Watts went to the safe and took \$1,000, leaving the appellant's IOU. The appellant said he would repay the Club later. During the evening, the appellant told him that he had won \$287,000, that the cheque would be issued in Richard Cumming's name and that he would give Mr Cumming a 10 per cent commission. The appellant said that he had been betting with the Club's money and that he would repay the Club the money he owed out of the winning cheque.
- [54] Former Club President, Mr Lauchs, was with the appellant that night. Initially, the appellant was paying for his own bets on Keno. Later in the evening he was betting on credit, sometimes even pushing the buttons to get his own ticket, with the

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<sup>9</sup> This is not supported by the appellant's bank records.

<sup>10</sup> See these Reasons, [19].

machine operator, Ms Bruhn, keeping a tally. The appellant told him of his large win and of the arrangement with Mr Cumming.

- [55] The transaction scan report shows that \$287,224 was won at Keno that evening. Mr Miles gave evidence that although the amount of the win was \$287,224, the Jupiters' cheque was made out to Mr Cumming for the amount of \$282,224 together with \$5,000 in cash.
- [56] Mr Cumming agreed to have the appellant's winnings paid in a cheque in his name because the appellant was the Club manager. Jupiters later presented the cheque to Mr Cumming, who gave it to the appellant's wife. He went with the appellant to the bank; \$28,000 was transferred into Mr Cumming's account and the remainder was credited to the appellant's account.
- [57] The appellant won \$8,586 on one Keno bet and a cheque for this amount was issued to "Gympie Gold", which was deposited to the Club's machine gaming account on 17 April 1998, together with a bank cheque drawn by the appellant for \$23,826.<sup>11</sup> The appellant contends that the cheque amount of \$8,586, combined with the \$5,000 cash from the \$287,224 win, if taken from the appellant's tally, would have covered the \$12,194.50 amount outstanding at the end of the evening. There is, however, no evidence that the \$5,000 was not paid out in cash to the appellant and instead used to reduce his tally; had it been, it would have reduced the final amount outstanding at the close of the night, and presumably would have been taken into account in the \$12,194.50 figure.

### **Count 8**

- [58] This offence was said to have been committed on 15 April 1998 when \$58,324 was gambled through the Club; there was a shortfall of \$23,071 in the Club's machine gaming account to meet Jupiters' sweep the following day which the prosecution contends was as a result of the appellant's betting on credit.
- [59] The Keno operator, Ms Mawhinney, said that the appellant commenced by paying for his Keno bets but then bet on credit. She had him sign an IOU which then became a tally sheet. She questioned him about his credit betting; he said that he had a \$10,000 credit with the Club. She knew that he had bet on credit with other operators although this was the first time he had done so with her. Ms Mawhinney said that the appellant did repay some of the IOUs that night but not straight away. He would run up a debt, come back later and pay every now and again.
- [60] Mr Watts was betting with the appellant that night. Mr Watts bet \$88 on credit which he reimbursed the next day. He saw the appellant betting on credit. The end of day cash should have been \$27,611.80. A bank cheque payable to the appellant for \$23,826 was endorsed by the appellant payable to the Club and banked to the machine gaming account on 17 April.
- [61] Mr Moessinger was a Keno operator supervisor at the Club. He saw the appellant betting on credit that night with Ms Mawhinney. At the end of the night, Mr Watts told him to write out a cheque for \$2,060 for the appellant's winnings from the Club's Jupiters' Keno gaming cheque book which came out of the Jackpot account. Mr Watts did the reconciliation details for the cheque and said it would be sorted out in the morning.

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<sup>11</sup> See count 8.

**Count 9**

- [62] This offence was said to have occurred on Friday, 17 April 1998 when \$117,974 was gambled through the Club; there was a shortfall of \$41,518 in the Club's machine gaming account to meet Jupiters' sweep the following day, which the prosecution contended was as a result of the appellant's betting.
- [63] Keno operator, Ms Kiehny (then Geary) said the appellant commenced betting by paying for his bets. He asked her to make an EFTPOS withdrawal but this was unsuccessful. He said there was a problem with his bank and told her to take money out of the EFTPOS float. She did so and recorded the \$100 amount. He ran out of money again and requested her to follow the same procedure, which she did, this time for about \$200. The appellant told her that his betting was a promotional arrangement with Jupiters and that he had been given an amount of money to bet with to increase the Club's sales. He had a substantial win of over \$9,000 during the night. As the Club was able to pay up to \$6,000 to a player, he told her to take \$6,000 off his tally and the remaining amount of \$3,100 was provided in a cheque from Jupiters made out to "Gympie Gold" which was later deposited to the Club's account. At the end of the night the shortfall in the takings was recorded as \$41,516. She asked him whether she should take the money owing to EFTPOS from the Keno money so that all the money he owed was in one area and he agreed. She told him the amount owing and he fetched a cheque book from the safe in the back room, wrote out a cheque, made an error, destroyed that cheque and then wrote out another for the correct amount.
- [64] Mr Watts said the appellant told him that the shortfall was an amount which had to be lost in relation to the Jupiters' promotion for the provision of linked jackpots; the Club owed Jupiters money which they had to lose through Keno. To cover these losses Mr Watts approved the drawing of a cheque on the machine gaming account for \$41,518. The appellant said it was for ongoing promotions relating to amounts that had to be lost by the Club to repay Jupiters for linked jackpots.

**Count 10**

- [65] This offence was said to have been committed on 27 April 1998 when \$111,988.50 was gambled through the Club; by the end of trade there was a shortfall of \$73,966 required to be banked to the Club's machine gaming account to meet Jupiters' sweep the following day, which the prosecution claimed was a result of the appellant's betting activities that night.
- [66] The Keno operator, Ms Kiehny, gave evidence that the appellant bet on Keno without paying for his bets. She kept a tally of his bets and winnings. He told her to tell him when he had reached \$3,000. She did so and he directed her to continue taking his bets on credit and to let him know when the tally reached \$6,000. She did so and he continued betting. At one stage, the tally was over \$50,000. He told her that his betting was Jupiters' promotion. When she did the float sheet at the end of the evening the amount of money combined with the amount owed by the appellant through his betting balanced the till. The next evening after work, the appellant "was going crook to another staff member about staff that can't keep their mouths shut ... he said that people had been talking because other people can tell ... him exactly how much he bet, and then he said if he found out who it was that person won't have a job."

- [67] Detective Sergeant Tipman, a Club member, recalled being at the Club that night<sup>12</sup> with some members of his Lions club. The appellant asked him to bet for him in return for 10 per cent of the winnings because the committee had asked him not to play Keno in the Club. Mr Tipman initially declined, but ultimately agreed. The appellant handed him three \$50 notes. He placed the wager of \$101 and returned with the change and the ticket. The appellant continued to ask him to place bets but he did not handle any more money; winning tickets were returned to the cashier and placed as further bets. He also saw the appellant placing other bets. Mr Tipman decided to end his involvement because he was concerned that he may be asked to contribute 10 per cent of any loss and he had no idea whether the appellant was winning or losing. The appellant said he had won \$3,000 and offered Mr Tipman \$300 which Mr Tipman refused.
- [68] Mr Watts was away from the Club on 27 April 1998 completing a safety training course. Early in the following month he found a large shortfall in the Jupiters gaming account. The appellant explained this was the final amount the Club owed Jupiters gaming for the provision of linked jackpots. He recorded it as a promotion in the Club accounts. On 1 May 1998, the appellant showed Mr Watts a \$40,000 cheque which he said was the money spent by the Club on the provision of linked jackpots lost through Keno; Jupiters decided not to go ahead with the promotion and were repaying the Club that amount. This cheque was added to the Keno takings for banking on that day.
- [69] The appellant had borrowed this \$40,000 from the Commonwealth Bank.

### **Count 11**

- [70] This offence was said to have been committed on 26 May 1998 when \$320,602.90 was gambled through the Club; a shortfall of \$93,000 was required to be banked to the Club's machine gaming account to meet Jupiters' sweep the following day, which the prosecution alleged was caused by the credit betting of the appellant.
- [71] The Keno operator that night was Mr Young. He said the appellant told him to keep a tally and he would fix up at the end of the night. No other wagers exceeded \$20 but the appellant's wagers ranged from at least \$100 to thousands of dollars. He was betting every game, that is, every three minutes. As the night progressed, the tally got higher and more bets were put on for higher amounts; the betting got faster. A video of the appellant gambling was tendered.
- [72] The club President, Mr Dower, joined the appellant and Mr Watts during the night and saw the appellant betting on credit.
- [73] The supervisor, Mr Moessinger, also took some bets from the appellant on credit and kept a tally.
- [74] Mr Watts saw the appellant betting on credit that night. Jupiters' area manager, Mr O'Brien, rang during the night and spoke to the appellant about the large bets. The appellant said that Mr Watts was leaving on an overseas holiday and that he was gambling and winning on Keno. At the end of the night when the Keno float was reconciled it was found that \$160,000 was owing. The appellant said this could not be right and suggested a Club payment plan be put in place to hide this in the books

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<sup>12</sup> In cross-examination, he agreed he could not be certain of the date.

and pay it off over a period. He phoned Mr McCarthy from Jupiters and told him that Mr Watts had splurged on and lost \$160,000 on Keno that night.

[75] At 12.45 am the next morning, Mr O'Brien received a call from the appellant to the effect that the Club had experienced such a high turnover on Keno that night that it would be unable to meet the sweep the following day because of credit betting. He said there had been some confusion about Mr Watts winning \$110,000 when he had only won \$10,000.

[76] Mr Miles spoke to the appellant that evening. The appellant said that Mr Watts had been betting on credit and that he had had a few drinks; he thought they had won \$110,000 when in fact it was only \$10,000. Mr Miles told the appellant that he would have to refer the matter to the Queensland Office of Gaming Regulation for investigation.

[77] On 27 May 1998 there was a meeting of the trustees of the Club where the appellant spoke of how well the Club was progressing and its great future prospects. After the meeting, the appellant and Mr Dower had a cup of tea and scones. Mr Dower then had a beer with Mr Lilley and was about to leave when the appellant called him into his office, closed the door and presented him with a letter of demand from Jupiters for \$162,000, which was faxed to the Club at 4.30 pm that day. The appellant said he would try to get an overdraft from the bank; he could get a loan on his home for \$100,000 provided he still had a job and Mr Dower signed a certificate saying that the appellant had a seven year contract of employment.

[78] On 2 June 1998, a special meeting of the Club was held. The appellant gave a written statement in which he sought to minimise his own involvement and place responsibility with Mr Watts. He resigned from the Club and offered to repay \$72,000 of the outstanding amount on condition that no legal action would be taken against him. He apologised for:

"... more gross misconduct on the 26 May 1998. It was never my intent to deserve or spend the amount of \$162,000 that was the end result. I was extremely intoxicated and never should have kept being given drinks and allowed to bet on Keno on behalf of our finance management, Tony Watts, to try to win him some extra money to go to London with. I played Keno, as well as our finance manager and in my intoxicated state, believe he had won \$110,000. I was [sic] playing for personal gain, but to win a small amount for Tony."

[79] The appellant did not give or call evidence.

**Are Keno wagers "property" within s 408C *Criminal Code*?**

[80] The appellant contends the charges brought are fatally flawed as "Keno wagers" are not property obtained by the appellant within s 408C *Criminal Code*.

[81] The term "Keno wager" is rather unhelpfully defined in the *Keno Rule* 1997 ("the Rule"), r 2 as:

"Means a wager for a game of keno."

[82] The term "wager" is not defined in the Act or the Rule, but r 10 provides:

"A keno wager may be made by using one or all or more of the following –

(a) cash;

- (b) for a game of keno conducted in a casino by a keno licensee under a keno licence – chips;
  - (c) keno dollars;
  - (d) promotional keno dollars;
  - (e) funds from a person's deposit advance account established by a keno licensee for the person;
  - (f) funds from a persons' TABQ account;
  - (g) another method approved by the chief executive."
- [83] The ordinary meaning of "wager" is "1. something staked or hazarded on an uncertain event; a bet. 2. the act of betting. 3. the subject of a bet."<sup>13</sup>
- [84] Under s 408C(3) *Criminal Code*:  
 "For the purposes of this section –  
 (a) **'property'**, without limiting the definition of property in s 1, includes credit, service, any benefit or advantage, anything evidencing a right to incur a debt or to recover or receive a benefit and releases of obligations;  
 ...; and  
 (f) if a person obtains property from any person or induces any person to deliver property to any person it is immaterial in either case whether the owner passes or intends to pass ownership in the property or whether he or she intends to pass ownership in the property to any person."
- [85] The term "property" in s 1 *Criminal Code* is inclusively defined as:  
 (a) every thing animate or inanimate that is capable of being the subject of ownership; and  
 (b) money; and  
 ...  
 (g) any other property real or personal legal or equitable, including things in action and other intangible property."
- [86] The prosecution case was that the appellant in each count bet on Jupiters' Keno games dishonestly using the Club's credit. The wagers he made were, however, his bets; they were not obtained from, and nor were they property of, the Club. What the prosecution plainly intended to allege against the appellant was that he obtained "credit" from the Club to make those wagers.
- Application to amend the indictment**
- [87] Mr Rutledge, counsel for the respondent on this appeal, invited the Court, if it came to this conclusion, to amend the indictment on each count by deleting the words "Keno wagers" and substituting the word "credit".
- [88] Section 572 *Criminal Code* permits the amendment of an indictment even after conviction and on appeal<sup>14</sup> if the Court is satisfied no injustice will result. The appellant contends that the trial was not conducted on this basis and he would be prejudiced by such a late amendment: cf *R v Fahey, Solomon and AD*.<sup>15</sup>

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<sup>13</sup> Macquarie Dictionary, Federation edition, 2001.

<sup>14</sup> See *R v Fahey, Solomon and AD* [2002] 1 QdR 391.

<sup>15</sup> Above.

[89] It is difficult to comprehend how the amendment sought, even at this very late stage, could cause injustice in this case. The appellant concedes the evidence would probably not have differed had the amendment been made at the start of the trial. The defence case was that the prosecution could not prove beyond reasonable doubt that the appellant was not given credit by the Club either to place these bets to promote the Club or to bet on his own behalf nor that the appellant was not honestly and reasonably mistaken that the Club had given him credit for either of those purposes. That this was the essential issue in the case was made abundantly clear in the learned primary judge's summing-up, which included:

"... it is obvious, I think, that a key part or the key part of this trial is whether or not the prosecution can prove, beyond reasonable doubt, that [the appellant] acted dishonestly because each counsel has stressed throughout the trial and in submissions to you that dishonesty or its absence is a major feature of the case."<sup>16</sup>

[90] In the notes provided to the jury for their consideration whilst deliberating, his Honour referred to these facts:

"

- the authority to spend the Club's money
- the Club's budget for Keno promotions
- the extent of any arrangement with Jupiters
- the prohibition on credit extended by the Club
- did he in fact have credit extended to him?
- what was to happen to any wins?
- what he did with any wins
- what he said to others about his betting
- the certificate of conviction.
- the committee papers (budgets, P&L reports)"<sup>17</sup>

[91] His Honour continued:

"The key thing is what was [the appellant's] knowledge, belief or intention when he, as it were, made the bets, obtained the wagers. So the focus on the trial is something which must be inferred, that is the state of mind at the time [of placing the bets]."<sup>18</sup>

His Honour added:

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<sup>16</sup> Appeal book, 1094.

<sup>17</sup> See the summary provided by his Honour to the jury.

<sup>18</sup> Appeal book, 1094-1095.

"... can the Crown, as it were, prove that he did not have an innocent, honest and reasonable mistaken belief about the question of his authority, particularly when it came to the promotions?"<sup>19</sup>

...

So, it seems to me one of the primary facts that you've got to find in this case is, as the prosecutor says, there was simply no credit extended to [the appellant] at all. That's what the prosecutor suggests, a very simple proposition, just nothing, nothing, nothing. Or was some sort of credit extended to him by at least somebody in authority?

Now, the significance is this. If he had no credit at all, which is what the prosecutor suggests to you and contrary to what Mr Smith says, well he would then create, wouldn't he, an immediate debt with the Club if he was using their money, immediately repayable. There's no credit in the sense of any delay like next morning or next week or whatever. That's the opposite of having credit. If you take someone's money when you shouldn't you've got to pay it back legally immediately, as you can well imagine."<sup>20</sup>

His Honour then dealt with the defence submissions as to the Club's certificate of conviction and explained that this was an admission by the Club that it did extend credit to the appellant on 26 May 1998. His Honour then added:

"Did he have credit extended to him on any of these 11 occasions? I say 11 because if you did think that he had credit extended to him on 26 May it may well be that the facts – that that would indicate to you that he had credit extended to him on earlier occasions. And, of course, in all of this bearing in mind the burden of proof, that is it is [sic] an aspect of dishonesty or not and it is the Crown which has to prove that he was dishonest beyond a reasonable doubt."<sup>21</sup>

- [92] His Honour later returned to topic of credit betting and explained that the appellant would not have been credit betting if he was betting on behalf of the Club and that an important question for them was to determine whether the appellant was betting for himself or for the Club.<sup>22</sup>
- [93] In summing up the defence case, his Honour again referred to defence submissions that the Crown had not proved the element of dishonesty because it had not shown that the Club did not give the appellant approval to place promotional bets; nor had it shown that the appellant was not honestly and reasonably mistaken as to his belief that he was entitled to place the promotional bets on behalf of the Club.<sup>23</sup>
- [94] His Honour explained that the prosecution case was that Jupiters had no arrangement for any extensive promotion of Keno and the appellant had fabricated a lie about Jupiters to cover his tracks with the Club and to pretend that the Club had extended credit to him to bet personally or even on behalf of the Club; that the

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<sup>19</sup> Appeal book, 1102.

<sup>20</sup> Appeal book, 1105-1106.

<sup>21</sup> Appeal book, 1107-1108.

<sup>22</sup> Appeal book, 1119-20.

<sup>23</sup> Appeal book, 1121-1122.

appellant had "snowed" the elderly or over-trusting members of the committee who were told small bits of information by the appellant and given the impression that business was progressing well when in truth losses were mounting; and that the staff were uncomfortable and overborne by the appellant.

- [95] In a re-direction, his Honour pointed out that the defence submission was that in counts 3, 5 and 7 the prosecution could not prove that the appellant actually bet on credit, that is that he did not use his own money or resources on those evenings; if he was just playing for cash, there is no offence at all; the issue is:

"... can the Crown prove that he was, to use the phrase, credit betting on those evenings ... .

... In each case the Crown says there is sufficient evidence to find that he was using the Club's resources rather than his own ... ."24

- [96] In the light of these judicial directions, the evidence and the conduct of the trial, I am satisfied the jury verdict demonstrated satisfaction beyond reasonable doubt that the appellant on each count dishonestly obtained credit from the Club. The appellant has not demonstrated that the trial could or would have been differently conducted to the advantage of the appellant had "credit" been substituted for "Keno wagers" in each count at the commencement of the trial. Whilst I appreciate that an amendment to the indictment at this late stage is an unusual course, I am satisfied that the amendment sought does not create any injustice in this case. The application to amend should be granted under s 572(3) *Criminal Code*.

**Were the guilty verdicts open on the evidence?**

- [97] The appellant contends the guilty verdicts are unreasonable and that it was not open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt on any or all counts. The appellant emphasises that the jury could not be satisfied that the credit for the appellant's wagers had been dishonestly obtained in that the prosecution did not establish beyond reasonable doubt that the appellant was not authorised or was not honestly and reasonably mistaken as to his authority to personally bet on credit (counts 7, 8 and 11) or in conducting promotional betting on behalf of the Club on the remaining counts, or indeed that he even bet on credit at all (counts 3 and 5).
- [98] There was uncontested evidence that Jupiters had no arrangement for large scale promotional betting either with the Club or the appellant and that the appellant misled committee members and staff about this. The fact that some committee members saw the appellant betting without payment, thinking he was doing so under some arrangement with Jupiters, did not make the verdicts unsafe on that basis.
- [99] The accounts, prepared on information supplied by the appellant, sometimes showed large amounts for promotions and were ratified at committee meetings. The committee members appeared unsophisticated and appeared to place great confidence in the appellant. The fact that they authorised significant amounts in promotions which they believed was in association with Jupiters did not mean they authorised the appellant to bet on the Club's credit.

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<sup>24</sup> Appeal book, 1147.

- [100] The Club's conviction for extending credit to the appellant on 26 May 1998 was, as the judge explained to the jury, rebuttable, and this was a question for them. The evidence was the plea of guilty was entered on legal advice. There was a large body of otherwise uncontested evidence from the Club's officer-bearers that they did not authorise the appellant to bet on credit either on behalf of the Club as promotional betting, or personally. They understood both in their dealings with the appellant in the Club and at committee meetings that he was acting in accordance with an arrangement he said he had with Jupiters, which they did not fully comprehend; in fact, there was no such arrangement with Jupiters. The jury were entitled to conclude the Club did not authorise the appellant to bet using the Club's credit for promotional or personal betting.
- [101] When the appellant repaid to the Club \$40,000 borrowed from his bank, he told Mr Watts this was a Jupiters' payment; this strongly indicated a dishonest intent, negating any honest and reasonable mistake.
- [102] The summary of evidence given earlier in these reasons includes evidence on each count which the jury was entitled to accept and which, if accepted, clearly supported a conclusion that the appellant bet on credit and the reasonableness of the verdicts. The jury was entitled to conclude that the appellant obtained credit from the Club dishonestly and not under an honest and reasonable mistake of fact as to that authority.
- [103] The appellant especially questions the verdicts on counts 3 and 5, which he says are unreasonable because it was not established beyond reasonable doubt that there was a deficiency at the end of each day's betting; the appellant's conduct was open, closely connected with the scope of his employment and with the knowledge of at least some members of the Club committee and his promotional betting was ratified by the Club committee at subsequent meetings.
- [104] It is important to understand that the convictions on these counts did not extend to the circumstance of aggravation that the value of the credit obtained was more than \$5,000. The offence in each case was committed if the appellant obtained credit from the Club dishonestly. There was uncontested evidence capable of being accepted by the jury from the Keno operators that the appellant bet on credit on those two occasions. There was other evidence capable of being accepted that he did so without authority and not under an honest and reasonable mistake. It did not matter if at the end of the night's betting the appellant did not owe the Club money if he had obtained credit from them during the night.
- [105] The jury verdicts on counts 3 and 5, as in the remaining counts, were also open on the evidence.
- [106] This ground of appeal fails.

**Did the judge fail to direct the jury as to the critical issues?**

- [107] At the hearing of the appeal, the appellant was given leave to substitute the following ground of appeal: "The learned trial judge erred in failing to direct the jury in a way which identified the critical issues in this case and relate those issues to the relevant law and the facts of the case."
- [108] As I apprehend the appellant's contention, it is that the learned primary judge failed to adequately instruct the jury on the need for the prosecution to prove that the Club

did not extend credit to him to personally bet on Keno, that the directions did not properly distinguish between promotional and personal betting and that the directions given were not in accordance with *Peters v R*<sup>25</sup> and *MacLeod v R*.<sup>26</sup> The appellant contends the real issue which should have been emphasised to the jury was whether the prosecution had proved beyond reasonable doubt that the appellant knew he was not authorised to act as he did at the time he obtained credit and that the judge was wrong to direct the jury that:

"Now, of course, [the appellant] can't extend himself credit. He was the manager. If he said to a friend who came in off the street and had a bet, 'I'll extend you credit', he [sic] may well be that he had authority to do it for the Club, but he certainly cannot extend, of course, credit to himself if there is no authority otherwise. And of course likewise his junior staff members in the Club can't extend credit if he simply pushed them into it, which is the Crown case here. Now, it's up to you whether he did those things. I'm just pointing out to you when it comes to questions of extending credit he can't pull himself up by his own bootstraps. So, look at all the facts, including as Mr Smith said, the certificates of conviction. Did he have credit extended to him on any of these 11 occasions?"<sup>27</sup>

[109] That direction was not in itself wrong and, in any case, should not be looked at in isolation. The jury were provided with three and a half pages of notes concerning the relevant law which included the following:

**Dishonestly**

- (1) With respect to each count (except counts 3 and 5), it is accepted that [the appellant] obtained Keno wagers with Jupiters, at the RSL Club, or on the dates alleged.
- (2) What was [the appellant's] knowledge, belief or intention when he obtained the wagers?
- (3)<sup>28</sup>
- (4) Because of his knowledge belief or intention at the time, did he bet dishonestly, judged by the standards of reasonable, ordinary, honest people?
- (5) Must he have realised that what he was doing was dishonest, according to these standards?
- (6) To prove an offence, the prosecution must prove dishonesty beyond reasonable doubt.

**Mistake**

- (1) Did [the appellant] have the mistaken belief about the extent of his authority to make 'promotional bets' or to bet on credit. If so, then he would not be criminally responsible for making the bets to any greater extent than if the real extent of his authority or credit had been such as he believed it to exist – provided that his belief was both honest and reasonable.
- (2) If the facts indicate a mistake, then it is for the prosecution to prove beyond reasonable doubt that it was not an honest and reasonable mistake of fact.

<sup>25</sup> (1998) 192 CLR 493.

<sup>26</sup> (2003) 77 ALJR 1047.

<sup>27</sup> Appeal book, 1107.

<sup>28</sup> Set out in para [91] of these Reasons.

..."

[110] His Honour added in his summing-up:

"And, as Mr Swanwick's phrase put it, 'the point of dishonesty which is charged is the moment of placing the bets – the moment of getting the bets' from the – from the Club.

Now if you've got any other ideas that are important, you contribute them to the list that I have made. They're the ones that seemed to be significant to me.

Now, (4) is the first of the two questions you have to ask yourself. Because of his knowledge, belief or intention at the time, did he bet dishonestly, judged by the standards of reasonable, ordinary, honest people.

Dishonesty has no legal meaning apart from the everyday meaning that you will give to it. And that simply means, what do reasonable, ordinary people think is dishonest. And you of course have to apply that standard to his conduct in this case.

Now, point (5) is important. Must he have realised that what he was doing was dishonest according to these standards? The point about – or the reason for that is this. The criminal law doesn't punish people who are simply – who are simply foolish or careless, perhaps misguided, and so on, if they're not dishonest.

But what it does not do at the same time is to allow people to force on all of us their strange or crazy or very peculiar views about their own conduct. You will all know some people, I'm sure, who do things that we would think are wrong or dishonest, that they themselves probably think they're doing – doing the right thing.

What paragraph (5), as part of the test of dishonesty, is meant to do is to point out to you that you judges [sic] [the appellant's] state of mind, not by his own personal views about whether he was dishonest or not, but by the standards of dishonest – sorry, by the standards of reasonable, ordinary, honest people.

So that is it. Must he have realised what he was doing? That's an important question to you. But the standard is – the standard of dishonesty was the ordinary community one. So, in other words, that doesn't allow someone who's got eccentric, or very unusual, views to escape dishonesty if the community thinks the conduct is dishonest.

And as you know, to prove the offence, the prosecution must prove dishonesty beyond reasonable doubt. ...

Now, mistake is here because Mr Smith,<sup>29</sup> in fact, has raised that with you. It is true that [the appellant] didn't give evidence, and in

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<sup>29</sup> The appellant's counsel at trial.

no sense has he said here literally: 'I was mistaken.' But that doesn't matter. If you think that the evidence of [sic] a whole indicates that he may have been mistaken, then you should consider what is here. Just as the law doesn't punish someone who is merely foolish or stupid, so the law doesn't punish any of us if we make a mistake about things. All the law insists upon is that the mistake must be both honest and it's got to be reasonable. It's a bit like judging things by reasonable, ordinary community standards."<sup>30</sup>

[111] His Honour then gave some examples of mistake and referred in more detail to the evidence on count 11 as to whether the appellant thought the winnings were \$110,000 or \$10,000 and to conversations between the appellant and Mr Watts and Mr Lilley as to whether he had authority to act as he did. He added:

"You can infer because of conversations along those lines that [the appellant] may well have been mistaken about what the committee was really approving him to do. Can I put it another way, or rather the way of course that Mr Smith quite rightly put it – can the Crown, as it were, prove that he did not have an innocent, honest and reasonable mistaken belief about the question of his authority, particularly when it came to the promotions?"<sup>31</sup>

[112] Other relevant directions given by his Honour are recorded at para [91] of these Reasons.

[113] The directions given sufficiently complied with the requirements set out in *Peters* and affirmed in *MacLeod* in that they identified the knowledge, belief or intent said to render the appellant's actions dishonest and instructed the jury that the issue was whether at the time credit was obtained, the appellant had that knowledge, belief or intent and if so whether the obtaining of credit to bet on Keno wagers was dishonest by the standards of ordinary, decent people.

[114] It was amply clear from his Honour's directions that the prosecution case was that there was no authorisation to the appellant to bet on credit at all. It follows that it was not essential for any particular distinction to be drawn between personal and promotional betting, although his Honour did adequately make this distinction on more than one occasion.

[115] This ground of appeal is without substance.

#### **The judge's directions as to lies**

[116] The appellant contends the primary judge's directions as to lies were inadequate primarily because his Honour did not sufficiently identify the basis upon which the statements relied on by the prosecution as lies were said to be capable of implicating the appellant in the commission of the offences and did not adequately point out evidence suggesting the statements may not be lies and that the directions were in this way inconsistent with *Edwards v R*<sup>32</sup> and *Zoneff v R*.<sup>33</sup>

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<sup>30</sup> Appeal book, 1095-1097.

<sup>31</sup> Appeal book, 1102.

<sup>32</sup> (1993) 178 CLR 193, 210-211

<sup>33</sup> (2000) 200 CLR 234, 244.

[117] His Honour clearly identified the type of evidence said to constitute the lies that his Honour determined could be relied upon to establish consciousness of guilt and referred to all those mentioned in the prosecution address. His Honour told the jury that they must first accept that the witness who gave evidence of what is said to be a lie was accurate and that the appellant's statement was a lie in each case. His Honour told the jury that the prosecution, in establishing that it was a lie, relied on the evidence from those employed at Jupiters, that there were never any large scale promotions involving the appellant. Those directions were repeated as his Honour took the jury through the matters relied on as lies by the prosecution. His Honour told the jury that if they were satisfied the statements said to be lies were made by the appellant and were untrue, they then had to ask whether there was any other reason for the untruth because not every untruth is a deliberate lie. His Honour added:

"If you are satisfied that what he said was untrue and deliberately so, then you take it into account with all the other evidence as part of the circumstantial case against him, where the case sets out to demonstrate dishonesty. So if you are drawing inferences about his state of mind, that is, whether it can be proved it is dishonest or not, you can take into account deliberate untruths and weigh them with all the other evidence.

But all of that is just to show something that may well be unreliable, there may be a reason for it, and of course even if he did tell untruths, it does not necessarily mean that he is guilty of the offence. ... The prosecutor wants you to accept they are not just incorrect statements or unreliable statements but they are actual evidence pointing directly to his guilt, especially his dishonest intentions. You will realise there is a big difference between just taking someone's unreliability or untruths into account and just putting them in the balance, and using them as independent evidence themselves of dishonesty. That is a big step to do that and that is the step that Mr Swanwick wants you to take.

Now before you can take that step I want to be sure that you are aware of some considerations that you have really got to keep in mind. As I say, it is a big step. Now the first thing is this. You would have to be satisfied that [the appellant] told a deliberate untruth. In other words, a deliberate lie, because there might be a difference between you merely rejecting his version of events and the finding that he has lied.

You have to say to yourself, well, is there any other reason that [the appellant] would have from [sic] making a mistake or telling an untruth apart from his guilt. For example, ... was he influenced by wishful thinking as to what Jupiters' arrangements were going to be with him, something of that sort? It is entirely up to you what the facts might indicate. But all I'm saying is, just be careful before you are satisfied that he told a deliberate untruth, a deliberate lie.

Secondly, if you think he did tell a deliberate lie, you can only use it against him if it is directly linked to the very offences charged with,

that is, dishonestly using the Club's money to gamble. That is the key feature ... alleged against him, so it is only of significance if it is linked to that.

Thirdly, you must – this is the really important point – you must be satisfied that the lies were told because he knew that the truth would implicate him in the commission of the offences he was committing. That is, the prosecutor asks you to accept that he must be lying because he is conscious that the truth would convict him, that is, what he was really doing, gambling with the Club's money without authority. And that is where you might keep in mind that sometimes there are reasons for someone to lie, which really may be innocent. And the one that I suggest here, just at random, really, that you might keep in mind, is whether it was wishful thinking about a possible Jupiters' promotion.

So having kept in mind those warnings, if you accept that there is an innocent reason for him telling untruths, you cannot use it against him in proof of this offence. You can only use the untruths against him if you are satisfied that he lied to a variety of people out of a realisation that the truth would implicate him in a fraud against the Club, that is, he had no good reason for spending the money on bets."<sup>34</sup>

[118] It was not necessary for his Honour to point out every matter raised by the defence which may have thrown doubts on the reliability of the evidence of the Jupiters' witnesses relied upon to establish the falsity of the appellant's statements. The appellant emphasises evidence that Mr Dower said at a meeting on 30 June 1998 that Mr McCarthy from Jupiters had confirmed receiving the letter from the appellant about Keno promotions and rejected it: Mr McCarthy's evidence was that he did not see the letter. Mr Dower's evidence of what Mr McCarthy said to him was obviously hearsay. His Honour was certainly not obliged to refer to this evidence in his jury directions.

[119] Not surprisingly, no re-direction was sought on this issue by the appellant's experienced counsel. His Honour's careful, fair and thorough directions as to lies sufficiently complied with the requirements of *Edwards* and *Zoneff*. This ground of appeal also fails.

[120] It follows that the appeal against conviction should be dismissed.

Orders:

1. Allow the prosecution to amend each count of the indictment by omitting the words "Keno wagers" and substituting "credit".

2. Appeal against conviction dismissed.

[121] **DAVIES JA:** I have read the reasons for judgment of McMurdo P and agree with the orders she proposes.

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<sup>34</sup> Appeal book, 1116-1117.

[122] **MACKENZIE J:** I agree with the orders proposed by the President for the reasons given by her.