

SUPREME COURT OF SOUTH AUSTRALIA

(Court of Appeal: Criminal)

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R v ELLIS; ELLIS v THE KING

[2026] SASCA 81

Judgment of the Court of Appeal

(The Honourable President Livesey, the Honourable Justice Bleby and the Honourable Justice Stanley)

23 July 2026

CRIMINAL LAW - APPEAL AND NEW TRIAL - APPEAL AGAINST ACQUITTAL

CRIMINAL LAW - PROCEDURE - INFORMATION, INDICTMENT OR PRESENTMENT - AVERMENTS - PARTICULARS

CRIMINAL LAW - EVIDENCE - PROPENSITY, TENDENCY AND CO-INCIDENCE - ADMISSIBILITY AND RELEVANCY - PROPENSITY EVIDENCE - GENERALLY

CRIMINAL LAW - APPEAL AND NEW TRIAL - INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE

CRIMINAL LAW - PARTICULAR OFFENCES - PROPERTY OFFENCES - OTHER FRAUDS AND IMPOSITIONS - FRAUDULENTLY OR DECEPTIVELY OBTAINING MONEY, VALUABLE, FINANCIAL BENEFIT OR ADVANTAGE - GENERALLY

Appeal against convictions and Crown appeal against acquittals.

Fraser Ellis was charged with 23 counts of deception contrary to s 139 of the *Criminal Law Consolidation Act 1935* (SA). The charges concerned a period when Mr Ellis was a Member of the South Australian House of Assembly. Each count on the Information alleged that between certain dates, Mr Ellis deceived the person authorised to approve the Country Members Accommodation Allowance ('CMAA') and in so doing, dishonestly benefitted himself in a specified sum. Each count, with the exception of Counts 3 and 7, particularised more than one date within a claimed period.

On Appeal from MAGISTRATES COURT OF SOUTH AUSTRALIA (MAGISTRATE SMART) [2024] SAMC 77

Appellant/Respondent: THE KING Counsel: MR R WILLIAMS SC WITH MR R WALKER - Solicitor: DIRECTOR OF PUBLIC PROSECUTIONS (SA)

Respondent/Appellant: FRASER JOHN ELLIS Counsel: MR S HENCHLIFFE KC WITH MS C VERNIK - Solicitor: ILES SELLEY LAWYERS

Hearing Date/s: 14/04/2025

File No/s: SCCRM-24-027783; SCCRM-24-028204

A

The prosecution case was that Mr Ellis falsely claimed to have stayed in Adelaide overnight on parliamentary business on certain dates when he had not stayed in Adelaide.

A magistrate convicted Mr Ellis of four counts and acquitted him of the other 19. The Director of Public Prosecutions has filed a Notice of Appeal against the acquittals pursuant to s 42(2)(b) of the *Magistrates Court Act 1991* (SA). Mr Ellis has filed a Notice of Alternative Contention on the Director's appeal and a Notice of Appeal against his convictions.

The issues arising on the Director's appeal were:

- whether all dates particularised within a single count as having been the subject of a false claim for the CMAA were required to be proved beyond reasonable doubt in order for the count to be proved;
- whether the magistrate erred by reversing a ruling to the effect that evidence supporting each count was cross-admissible in support of the other counts pursuant to s 34P(2)(a) of the *Evidence Act 1929* (SA);
- whether the magistrate erred in failing to consider evidence of proven deception to resolve doubts in respect of other counts;
- whether the magistrate erred in his approach to evidence of good character;
- whether the evidence supported factual findings that there were unclaimed nights when Mr Ellis was, or appeared to be, entitled to claim for the CMAA; and
- the level of appellate restraint that should be exercised in the event that error is shown on a Crown appeal under s 42 of the *Magistrates Court Act*.

Mr Ellis's Notice of Alternative Contention asserted that the evidence failed to exclude the reasonable possibility, consistent with innocence, that Mr Ellis made the erroneous claims honestly but mistakenly, and that this provided a further basis for acquittals on Counts 5, 11, 19, 20 and 21.

Held (by the Court), granting the Director permission to appeal, allowing the appeal on Ground 1, setting aside the acquittals on Counts 19, 20 and 21 and substituting convictions on those counts:

1. Properly construed, each date particularised in a count as an alleged misrepresentation was merely a particular. The prosecution's conduct of the case at trial did not render it a material particular such as to bind the prosecution to proving every date within a count for that count to be proved.
2. Having regard to the totality of the reasons, it is sufficiently clear that the magistrate's treatment of the cross-admissibility of the evidence was a treatment of the weight to be accorded to that evidence in the application of its non-propensity, discreditable conduct use, rather than a reversal of his earlier ruling by which he admitted the evidence under s 34P(2)(a) of the *Evidence Act*.
3. When assessing the weight to be ascribed to the non-propensity use of the evidence on its cross-admission, the magistrate considered the evidence as a whole. In circumstances where he concluded that the evidence so viewed was equivocal, to reason to the effect that a finding of guilt on one count made it more likely that Mr Ellis was guilty of deception on other counts, would be to engage in propensity reasoning.
4. The magistrate was not required to cease having regard to evidence of Mr Ellis' good character after his first proved deception claim, nor to give increasingly diminished weight to evidence of good character when considering each count sequentially.

Held (by the Court), upholding Mr Ellis' Notice of Alternative Contention insofar as it related to Counts 5 and 11:

1. The evidence did not exclude the reasonable possibility, consistent with innocence, that with respect to the dates particularised in Counts 5 and 11 that the magistrate found proved, Mr Ellis had made those claims mistakenly but honestly.

Mr Ellis' Notice of Appeal against Conviction raised the sole issue of whether the magistrate erred in concluding, in relation to each of the findings of guilt, that the evidence excluded the reasonable possibility that Mr Ellis made the erroneous claims honestly but mistakenly.

Held (by the Court), dismissing Mr Ellis' appeal against conviction with respect to each of Counts 6, 14, 18 and 22:

1. The evidence in respect of Counts 14, 18 and 22 excluded any reasonable possibility that Mr Ellis made claims for the CMAA honestly but mistakenly. There is no basis for departing from the findings of the magistrate.
2. With respect to Count 6, the only date in respect of which the offending was proved beyond reasonable doubt was Thursday, 29 November 2018.

Criminal Law Consolidation Act 1935 (SA) ss 130, 138, 139; *Evidence Act 1929 (SA)* s 34P(2)(a); *Magistrates Court Act 1991 (SA)* s 42, referred to.

Alexander v Bakes (2023) 21 ACTLR 27; *Cleanaway Operations Pty Ltd v Hanel* (2025) 398 FLR 292; *De Virgilio v The King* [2026] SASCA 16; *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508; *Johnson v Miller* (1937) 59 CLR 467; *Kyriakopoulos v Police* [2006] SASC 71; *Martin v Department of Transport, Energy and Infrastructure* [2010] SASC 141; *Police v Brown* (1994) 72 A Crim R 527; *Police v Cadd* (1997) 69 SASR 150; *Police v Jachmann* [2009] SASC 392; *Police v Mahon* (2022) 141 SASR 374; *Police v Melisi* (2010) 106 SASR 105; *Police v Smith* [2025] SASCA 37; *Police v W, BCI* (2006) 160 A Crim R 278; *R v Beaumont* (2023) 312 A Crim R 356; *R v Brougham* (2015) 122 SASR 546; *R v C, CA* [2013] SASCF 137; *R v Donovan* [2025] SASCA 7; *R v Garner*; *R v Webb* (2021) 140 SASR 454; *R v H* (1995) 83 A Crim R 402; *R v MacDonald* (1995) 65 SASR 322; *R v Pfitzner* (1976) 15 SASR 171; *R v Witt* [2025] SASCA 115; *Semple v Williams* (1990) 156 LSJS 40; *Thorogood v Warren* (1979) 20 SASR 156; *WGC v The Queen* (2007) 233 CLR 66; *Yuen v Police* (2012) 222 A Crim R 264, applied.

R v Trimboli (1979) 21 SASR 577, distinguished.

DPP v Fraser John Ellis [2024] SAMC 77; *DPP v Merriman* [1973] AC 584; *Environment Protection Authority v Sydney Water Corporation Limited* (1997) 98 A Crim R 481; *Hayes v Kenning* [1992] SASC 3616; *Helps v The Queen (No 3)* [2021] SASCF 10; *Machent v Quinn* [1970] 2 All ER 255; *Police v Smith* [2025] SASCA 37; *R v VHP* (Unreported, New South Wales Court of Criminal Appeal, No 60773 of 1996, 7 July 1997); *Tringrove v Tasmania* (2014) 23 Tas R 402, discussed.

R v Jones (2018) 131 SASR 532; *R v Tran* [2017] SASCF 99; *Warren v Coombes* (1979) 142 CLR 531; *Weinel v Fedcheshen* (1995) 65 SASR 156, considered.

R v ELLIS; ELLIS v THE KING
[2026] SASCA 81

Court of Appeal – Criminal: Livesey P, Bleby and Stanley JJA

1 **THE COURT:** Fraser Ellis was charged on an Information and Summons with 23 counts of deception contrary to s 139 of the *Criminal Law Consolidation Act 1935* (SA) ('CLCA'). The charges concerned a period when Mr Ellis was a Member of the South Australian House of Assembly. Each count alleged that between certain dates, Mr Ellis had deceived the person authorised to approve the payment of the Country Members Accommodation Allowance ('CMAA') on behalf of the Clerk of the House of Assembly. Each count alleged that Mr Ellis falsely claimed he was entitled to be paid the CMAA for certain dates and by doing so, dishonestly benefitted himself in a specified sum.

2 Put simply, the prosecution alleged that Mr Ellis dishonestly claimed to have stayed in Adelaide overnight for parliamentary business on certain dates when he had not stayed in Adelaide.

3 Following a trial, a magistrate convicted Mr Ellis of four counts and acquitted him of the other 19. The Director of Public Prosecutions has filed a Notice of Appeal against the acquittals pursuant to s 42(2)(b) of the *Magistrates Court Act 1991* (SA). Mr Ellis has filed a Notice of Alternative Contention on the Director's appeal and a Notice of Appeal against his convictions.

4 The issues arising on the Director's appeal are:

- whether all dates particularised within a single count as having been the subject of a false claim for the CMAA were required to be proved beyond reasonable doubt in order for the count to be proved;
- whether the magistrate erred by reversing a ruling to the effect that evidence supporting each count was cross-admissible in support of the other counts pursuant to s 34P(2)(a) of the *Evidence Act 1929* (SA);
- whether the magistrate erred in failing to consider evidence of proven deception to resolve doubts in respect of other counts;
- whether the magistrate erred in his approach to evidence of good character;
- whether the evidence supported factual findings that there were unclaimed nights when Mr Ellis was, or appeared to be, entitled to claim for the CMAA; and
- the level of appellate restraint that should be exercised in the event that error is shown on a Crown appeal under s 42 of the *Magistrates Court Act*.

5 The issue arising on Mr Ellis' appeal is whether the magistrate erred in concluding, in relation to each of the findings of guilt, that the evidence excluded the reasonable possibility that Mr Ellis made the erroneous claims honestly but mistakenly. Mr Ellis' Notice of Alternative Contention asserts that this provided a further basis of acquittal on certain of the counts on which he was acquitted.

6 For the following reasons, permission to appeal is granted in part on the Director's appeal, and the appeal on Ground 1 is allowed. The Notice of Alternative Contention is upheld in part. Convictions are substituted on Counts 19, 20 and 21 on the Information. Mr Ellis' appeal is dismissed.

7 These reasons for judgment are arranged as follows:

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The charges

8 Section 139 of the CLCA provides:

139—Deception

A person who deceives another and, by doing so—

- (a) dishonestly benefits him/herself or a third person; or
- (b) dishonestly causes a detriment to the person subjected to the deception or a third person,

is guilty of an offence.

9 Section 130 defines ‘deception’ as follows:

deception means a misrepresentation by words or conduct and includes—

- (a) a misrepresentation about a past, present or future fact or state of affairs; or
- (b) a misrepresentation about the intentions of the person making the misrepresentation or another person; or
- (c) a misrepresentation of law

10 Each count on the Information was particularised in identical terms save for the dates alleged. Each count, with the exception of Counts 3 and 7, particularised more than one date. By way of example, Count 1 alleged that Mr Ellis:

Between the 13th day of May 2018 and the 19th day of May 2018, at Adelaide and other places in the said State, deceived another, being the person authorised to approve the payment of the Country Members Accommodation Allowance on behalf of the Clerk of the House of Assembly, by falsely claiming he was entitled to be paid the Country Members Accommodation Allowance for 12, 13 and 16 April 2018, and by doing so, dishonestly benefitted himself in the sum of \$675.

11 It was undisputed that Mr Ellis submitted the forms which formed the basis of the charges and that he was paid for each of the claims made.¹

12 The primary issue at trial was whether the prosecution had proved beyond reasonable doubt that Mr Ellis possessed the requisite mental state for the charge of deception in relation to each count.² In other words, the question before the magistrate was whether the prosecution had proved beyond reasonable doubt that Mr Ellis knew that his representations were false, that he intended to deceive another and that he had acted dishonestly. In some instances, it was in issue whether the prosecution had proved beyond reasonable doubt that Mr Ellis had made the representations attributed to him, being that he was required to stay in Adelaide overnight for parliamentary business.

¹ *DPP v Fraser John Ellis* [2024] SAMC 77at [6]-[7].

² *DPP v Fraser John Ellis* [2024] SAMC 77at [8].

The Director's appeal

Whether all dates particularised within a single count were required to be proved (Ground 1)

13 The Director submitted that the magistrate erred in ruling that each date particularised in a count as an alleged misrepresentation needed to be proved beyond reasonable doubt for that count to be proved. In his submission, the magistrate only needed to be satisfied of one or more misrepresentations as particularised in a count to find proved the element of intentionally deceiving another.

14 The magistrate returned acquittals on five counts on the basis that not all the misrepresentations alleged within the count were proved. This was despite finding, beyond a reasonable doubt, that Mr Ellis had engaged in deception with respect to at least one of the particularised dates.³ The magistrate determined that each claim form contained 'several discrete representations'.⁴ He concluded that proof of the charge as laid, and in particular the nominated benefit alleged to have been wrongly obtained, depended 'upon a finding that each of the individual representations made were false and each then resulted in payments which totalled the benefit'.⁵ The magistrate explained:⁶

... the prosecution chose to lay the charge in this form rather than individual counts for each separate night said to have been the subject of a false representation. Having made that decision it is necessary, in my view, that each of the representations in each count (not one or more) must be established beyond a reasonable doubt as false to prove the charge.

15 The Director contended that it is impossible to reconcile two aspects of the magistrate's reasons with one another. The first aspect was that the charges were not bad for duplicity. The magistrate said:⁷

Although the defendant does not actively contend the information as laid is bad for duplicity, I have nevertheless considered this issue. I am satisfied that it is not. Although, each count on the information relates to several days (with the exception of counts 3 and 7), the undisputed facts are that each charge is derived from one claim form lodged which results in one payment. Each of the days within the given charge, said to be false, is clearly identified in the particulars of the charge.

16 The magistrate referred to the statement of Lord Diplock in *DPP v Merriman*⁸ to the effect that the rule against duplicity has always been applied in a practical, rather than in a strictly analytical, way for the purpose of determining what constitutes one offence.⁹ He observed that in the present case, the claims contained within the monthly form occurred simultaneously with the lodgement of the form

³ Being Counts 5, 11, 19, 20 and 21.

⁴ *DPP v Fraser John Ellis* [2024] SAMC 77 at [47].

⁵ *DPP v Fraser John Ellis* [2024] SAMC 77 at [47].

⁶ *DPP v Fraser John Ellis* [2024] SAMC 77 at [48].

⁷ *DPP v Fraser John Ellis* [2024] SAMC 77 at [50].

⁸ [1973] AC 584.

⁹ *DPP v Merriman* [1973] AC 584 at 607.

and resulted in one payment. Many of the impugned dates were within the one date range as expressed in the claim form. The dates said to be falsely claimed were clearly stated in the charge and Mr Ellis was on clear notice of the allegations.¹⁰

17 The second aspect of the magistrate's reasons was to the effect that each claim form contained several discrete representations, each of which needed to be proved beyond reasonable doubt.¹¹ The Director submitted that this misconstrued the *actus reus* of the charge. In his submission, the *actus reus* was the submission of the completed form, containing one or more misrepresentations, to the person responsible for approving the claims. Proof of any false date on an individual form could establish the element of intentionally deceiving another. In other words, the prosecution did not need to prove every particular in respect of a count.

18 Mr Ellis submitted, by contrast, that by combining into one count all the asserted false representations made simultaneously by him in the one form and particularising the benefit as being the aggregate sum of the money received for the combination of representations, the formal charge required all those representations to be proved. He maintained that any other approach would be inconsistent with the way the prosecution charged the offences and conducted its case, and that the magistrate did not err.

19 Mr Ellis further submitted that in the event that the Court accepted the Director's contention, it would be sufficient to indicate error without interfering, relying upon the majority's decision in *Police v Smith*.¹²

20 The prosecution is required to establish the essential elements of an offence. It is not generally required to establish all particulars.¹³ It has been observed that particulars 'tend to belie their own name' and 'can never be more than an aid' for determining what the defence is called on to answer.¹⁴ In *Environment Protection Authority v Sydney Water Corporation Limited*, Gleeson CJ explained:¹⁵

In a criminal proceeding, what the prosecution is required to establish are the essential elements of the offence charged.

It is often appropriate, in order to provide an accused with fair notice of the case to be met, and in the interests of efficiency and economy in the conduct of the proceedings, for the prosecution to be obliged to provide further and better particulars of the allegations made in the charge, whether the charge take the form of a count in an indictment, or an allegation in a summons (*Stanton v Abernathy* (1990) 19 NSWLR 656; 48 A Crim R 16).

There may be circumstances arising out of the nature of the evidence in a particular case, or the manner in which the case has been conducted, which will make it unfair or oppressive

¹⁰ *DPP v Fraser John Ellis* [2024] SAMC 77 at [52].

¹¹ *DPP v Fraser John Ellis* [2024] SAMC 77 at [47].

¹² [2025] SASCA 37.

¹³ *Yuen v Police* (2012) 222 A Crim R 264 at [84] (White J), citing *Kyriakopoulos v Police* [2006] SASC 71 at [10]-[11] (White J).

¹⁴ *R v Pfitzner* (1976) 15 SASR 171 at 192 (Wells J).

¹⁵ *Environment Protection Authority v Sydney Water Corporation Limited* (1997) 98 A Crim R 481 at 484 (Gleeson CJ, Ireland and Bruce JJ agreeing).

to an accused person to permit the Crown to depart from its particulars. Subject to that qualification, however, what the Crown needs to establish in order to obtain a conviction are the essential facts alleged in the indictment or the summons. Failure to establish a particular is not fatal (*VHP* (unreported, Court of Criminal Appeal, NSW, No 60733 of 1996, 7 July 1997)).

(Citations in original.)

21 In *R v VHP*, Gleeson CJ observed:¹⁶

As a general rule, what the Crown needs to establish in order to obtain a conviction are the essential facts alleged in the indictment, and if the Crown fails to establish an inessential fact, or a particular which has been provided before the trial, or which emerged from the evidence of Crown witnesses, that is not fatal. However, that generalisation may, in any given case, need to be qualified. Two examples of possible qualifications are of present relevance. First, in some circumstances the requirements of procedural or substantive fairness may restrict the capacity of the Crown to depart from particulars. Second, the evidence in a case may be such that it would not be open to a jury, acting reasonably, to treat one part of the Crown case as reliable, and another part as unreliable.

The general rule was stated by Atkin J in *Reg v Dossi* (1918) 13 Cr App R 158 at 159-160 in the following terms:

‘From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence ... Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence.’

There are, however, many examples of cases in which it has been held that time has been made of the essence of the offence, or, to use another expression adopted by judges, has been made vital, by reason of circumstances which give rise to qualifications of the kind mentioned above. (eg *The King v Dean* [1932] NZLR 753, *R v Kringle* [1953] Tas SR 52, *R v Pfizner* (1976) 15 SASR 171, *R v Macdonald* (1995) 84 A Crim R 508, *R v Westerman* (1991) 55 A Crim R 353).

(Citations in original.)

22 Although an accused is entitled to be given sufficient details of a charge and the particulars alleged to be the foundation of the charge,¹⁷ it does not follow that all particulars in an information are material to proof of the offence so that failure to prove them necessarily results in an acquittal.¹⁸ Nevertheless, a particular that is not inherently material to the proof of a charge may become material as a result of the way in which the case is conducted.¹⁹

23 For example, ‘the circumstances of a particular case, and the course that a trial takes, may make the proof of a specified date, or date range, necessary for a

¹⁶ *R v VHP* (Unreported, New South Wales Court of Criminal Appeal, No 60773 of 1996, 7 July 1997) (Gleeson CJ, Handley JA and Studdert J agreeing).

¹⁷ See *Johnson v Miller* (1937) 59 CLR 467 at 489 (Dixon J); *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508.

¹⁸ *Alexander v Bakes* (2023) 21 ACTLR 27 at [127] (Mossop, Baker and Abraham JJ).

¹⁹ *Police v Smith* [2025] SASCA 37 at [73] (S Doyle JA and Stein AJA).

valid conviction’.²⁰ The circumstances of the case that may render vital a date alleged include the forensic issues raised at trial, such as alibi or lack of opportunity.²¹ In other words, particulars may become ‘material to the integrity of the criminal process’.²²

- 24 In *Hayes v Kenning*,²³ Duggan J explained the distinction between material averments and particulars provided in addition to the facts contained in the statement of the charge:²⁴

However, particulars of the type supplied by the prosecution in this matter cannot be elevated to the status of elements of the offence. To say that the prosecution is to be held to the case disclosed by its particulars is not to say that in every case where there is a discrepancy between the particulars and the evidence there must be an acquittal. If a material averment in the complaint itself has not been proved then the prosecution must fail. But where particulars which are supplied in addition to the facts contained in the statement of the charge are at variance with the facts relied upon by the prosecution at trial and there is a conviction on that evidence, an appellate court will be required to determine whether there was any unfairness to the person convicted giving rise to the possibility of a miscarriage of justice.

- 25 In determining whether a particular is material, regard must be had to the terms of the information and the way the prosecution conducted its case at trial.²⁵ In *Police v Smith*,²⁶ this Court considered whether the description of property as ‘money’ was a material particular which was required to be proved. In that case, the respondent had been charged with dealing with property, that he ought reasonably to have known was tainted, contrary to s 138 of the CLCA. The counts were framed by reference to property in accordance with s 138 but then particularised as involving ‘money’.

- 26 The majority held that the reference to ‘money’ in the particulars was superfluous and not material. That is to say, it was neither inherently material as an element of the offence, nor was it rendered material by the way the case was conducted.²⁷ Their Honours observed:²⁸

Particulars are not elements of the offence. Particulars enable the parties and the Court to understand the nature of the charges and the prosecution case.²⁹ A defendant is entitled to

²⁰ *Helps v The Queen (No 3)* [2021] SASCF 10 at [111] (Peek J) (emphasis omitted).

²¹ *R v MacDonald* (1995) 65 SASR 322 at 330 (Mullighan J), referring to *R v Pfitzner* (1976) 15 SASR 171.

²² *R v H* (1995) 83 A Crim R 402 at 411 (Mullighan J).

²³ [1992] SASC 3616.

²⁴ *Hayes v Kenning* [1992] SASC 3616 at [13], confirmed in *Kyriakopoulos v Police* [2006] SASC 71 at [11] (White J).

²⁵ *Alexander v Bakes* (2023) 21 ACTLR 27 at [129] (Mossop, Baker and Abraham JJ), referring to *R v Pfitzner* (1976) 15 SASR 171 at 185-186 (Bray CJ), 191-195 (Wells J), 215 (Sangster J). See also *Cleanaway Operations Pty Ltd v Hanel* (2025) 398 FLR 292 at [148]-[152] (Livesey P, Lovell and Bleby JJA).

²⁶ [2025] SASCA 37.

²⁷ *Police v Smith* [2025] SASCA 37 at [79] (S Doyle JA and Stein AJA).

²⁸ *Police v Smith* [2025] SASCA 37 at [73] (S Doyle JA and Stein AJA).

²⁹ *WGC v The Queen* [2007] HCA 58; (2007) 233 CLR 66; *R v Pfitzner* (1976) 15 SASR 171.

be given sufficient details, or particulars, of a charge in order to know the case he or she must meet. It does not follow that all particulars included within an information for this purpose are material in the sense that failure to prove them will necessarily result in an acquittal.³⁰ The question [of] whether or not a particular is a material particular depends on the significance to be attached to it in the circumstances of the case. It requires close consideration of the terms of any statutory provision and the issues in dispute at trial.³¹ It also requires consideration of not only the terms of the information but also the way in which the parties conducted the case at trial.³² This in turn includes consideration of not only the way in which the prosecution presented its case, but also any forensic decisions made by the defence. The manner in which the case is conducted may give rise to circumstances which make it unfair to an accused to permit the prosecution to depart from its particulars.³³ Put another way, a particular which is not inherently material to proof of a charge may become material as a result of the way in which the case is conducted.³⁴

(Footnotes in original.)

- 27 In *Machent v Quinn*,³⁵ it was alleged that the respondent had trespassed and stolen 52 items valued at nearly £200. It was proved, on the respondent's own admission, that he had stolen four sweaters valued at £25. However, it was contended that there could be no conviction as the information alleged that additional items had been stolen. Lord Parker CJ, in rejecting that contention, explained:³⁶

It has always been accepted that it is unnecessary that the prosecution should prove that all the articles mentioned in the information or indeed, in the case of an indictment, in the indictment, have been stolen. If proof is given that the accused has stolen any one of those articles it is sufficient.

- 28 In *Tringrove v Tasmania* ('*Tringrove*'),³⁷ the appellant was charged with dishonestly acquiring a financial advantage. It was alleged that he had submitted invoices for cleaning fish farming pens in circumstances where he had not done all the work for which he submitted the invoices. The prosecutor set out to prove more than he needed, and the jury was misdirected, to the effect that a conviction required satisfaction beyond reasonable doubt that Mr Tringrove had done none of the cleaning work itemised on the invoice to which the charge related.³⁸ However, all that the Crown needed to prove in relation to the amount of cleaning to which a particular invoice related was that Mr Tringrove had dishonestly charged for cleaning at least one pen that he had not cleaned. Chief Justice Blow and Pearce J explained:³⁹

³⁰ *Alexander v Bakes* [2023] ACTCA 49; (2023) 21 ACTLR 27 at [127] (Mossop, Baker and Abraham JJ).

³¹ *WGC v The Queen* [2007] HCA 58; (2007) 233 CLR 66 at [45]-[46] (Kirby J).

³² *Alexander v Bakes* [2023] ACTCA 49; (2023) 21 ACTLR 27 at [129] (Mossop, Baker and Abraham JJ); *R v Pfitzner* (1976) 15 SASR 171 at 185-186 (Bray CJ), 191-194 (Wells J).

³³ *EPA v Sydney Water Corporation Ltd* (1997) 98 A Crim R 481 at 484 (Gleeson CJ).

³⁴ See, eg, *Helps v The Queen (No 3)* [2021] SASFC 10 at [111]-[119] (Peek J), and the cases referred to therein.

³⁵ [1970] 2 All ER 255.

³⁶ *Machent v Quinn* [1970] 2 All ER 255 at 256 (Lord Parker CJ, Bridge and Bean JJ agreeing).

³⁷ (2014) 23 Tas R 402.

³⁸ *Tringrove v Tasmania* (2014) 23 Tas R 402 at [8]-[9] (Blow CJ and Pearce J).

³⁹ *Tringrove v Tasmania* (2014) 23 Tas R 402 at [10]-[11] (Blow CJ and Pearce J).

It is well established that, on a charge of stealing a number of items, proof of theft of a single item is sufficient for the accused to be found guilty. Proof that the accused has stolen any of them is sufficient: *Machent v Quinn* [1970] 2 All ER 255; *R v Lindsay* [1963] Qd R 386 at 400-401; *Williams v The Queen* (2002) 11 Tas R 258; *R v Cook* (2006) 95 SASR 201. In *R v Naidu* [2008] QCA 130 the Court of Appeal in Queensland applied the same principle to a charge of fraud. In that case the appellant, over a specified period, made several dispositions of property owned by a person with a mental incapacity. The appellant contended that the property was gifted to her, but the prosecution alleged that the dispositions were fraudulent. The court found the jury could properly convict if it were satisfied the owner's incapacity existed for only part of the period and that, as a result, only some of the transactions were fraudulent.

We see no reason why these authorities should not apply to a charge of dishonestly obtaining a financial advantage. Thus, in order to be satisfied beyond reasonable doubt that either of the appellants had dishonestly obtained a financial advantage in relation to a particular count, the jury did not need to be satisfied beyond reasonable doubt that Mr Tringrove had done none of the work to which it related. If the evidence proved beyond reasonable doubt that he had dishonestly charged for the cleaning of a single pen that he had not cleaned, then he would have dishonestly obtained a financial advantage as to that count. ...

29 The Court found, however, that the Crown case was not conducted on that basis but rather on the basis that none of the cleaning referred to in any of the invoices had been performed.⁴⁰ The Court accepted that if the Crown had proceeded on the correct basis, that it only needed to prove in relation to each count that some of the cleaning had not been done, the defence would have conducted its case differently. Specifically, it would have addressed each item on the invoice in a much more detailed way. Having been deprived of that opportunity, a miscarriage of justice resulted.⁴¹

30 In *Cleanaway Operations Pty Ltd v Hanel*,⁴² this Court considered whether the way in which the prosecution was conducted caused the defendant relevant prejudice and observed:⁴³

If this matter was approached from the perspective of the particulars, it is clear that the case was pleaded in a much broader manner than was ultimately pressed or established. The allegations concerning “all vehicles” and “all routes” were not pressed, and the question is whether the manner in which the case was run, and ultimately upheld by the magistrate and the appeal judge, caused Cleanaway relevant prejudice.

When one has regard to the ways in which the prosecution case was opened and closed, and the attention given to the evidence, it is clear that despite some occasional references to “all vehicles” and “all routes”, the case concentrated on what it was that Mr Hicks was required to do on the South Eastern Freeway descent on 18 August 2014 before the loss of control and collision.

⁴⁰ *Tringrove v Tasmania* (2014) 23 Tas R 402 at [12] (Blow CJ and Pearce J).

⁴¹ *Tringrove v Tasmania* (2014) 23 Tas R 402 at [55]-[56] (Blow CJ and Pearce J).

⁴² (2025) 398 FLR 292.

⁴³ *Cleanaway Operations Pty Ltd v Hanel* (2025) 398 FLR 292 at [151]-[152] (Livesey P, Lovell and Bleby JJA).

31 Turning to the present case, the question is whether every date particularised in a count as an alleged misrepresentation needed to be proved beyond reasonable doubt for the count to be proved. To address that question, it is necessary to consider the terms of the charges and the way in which the prosecution conducted its case below.

32 The form of the charges was uniform. The only difference concerned the dates and aggregate sums alleged. For example, Count 6 alleged:

Between the 4th day of December 2018 and the 7th day of December 2018, at Adelaide and other places in the said State, deceived another, being the person authorised to approve the payment of the County Members Accommodation Allowance on behalf of the Clerk of the House of Assembly, by falsely claiming he was entitled to be paid the Country Members Accommodation Allowance for 4, 11 and 29 November 2018, and by doing so, dishonestly benefited himself in the sum of \$690.

33 Mr Ellis sought to distinguish *Machent v Quinn*,⁴⁴ on the basis that the theft charges in that case involved simply taking the items. There had not been an act of misrepresenting and then a second act of receiving the benefit, as was alleged in this case. This does not provide a principled basis for distinction.

34 The facts of the alleged offending in this case and the form of the charges are relevantly indistinguishable from those in *Tringrove*.⁴⁵ It does not follow from the terms of the charge that each date particularised in a count as an alleged misrepresentation was a material particular, that is, material to proof of the charge. To adapt the language deployed in *Tringrove*, proof of misrepresentation of a single date was sufficient for the accused to be found guilty. The terms of the Information did not require the prosecution to prove every date particularised within each count.

35 It remains to consider whether the prosecution bound itself to a case that it did not need to prove such that to depart from that case now would be productive of a miscarriage of justice.

36 The prosecutor commenced his opening address by explaining that the prosecution case was that, in the two years following his election, Mr Ellis ‘repeatedly made deceptive and dishonest claims for an accommodation allowance’ and thereby benefitted himself to ‘more than \$18,000’. The prosecutor explained that Mr Ellis was a country member by virtue of his usual place of residence and then said:

Being a country member, the accused was entitled to claim an accommodation allowance each time he was required to stay in Adelaide overnight to attend to parliamentary duties or his duties to be actively involved in community affairs and to represent and assist constituents. The first claim the accused lodged for that allowance was for overnight stays in Adelaide during the month of April 2018, that being the month after he was elected.

⁴⁴ [1970] 2 All ER 255.

⁴⁵ *Tringrove v Tasmania* (2014) 23 Tas R 402.

Among the five nights for which the accused claimed the allowance were purported overnight stays in Adelaide on the 12th, the 13th, and 16 April. In fact, on the prosecution case, the accused had not stayed in Adelaide at all let alone on parliamentary or constituency business on those nights. By way of example, your Honour will hear that on 12 April 2018, the accused's diary showed that he had no appointments in Adelaide.

...

The prosecution case, then, is that in submitting the accommodation allowance claim for April 2018, the accused engaged in deception of the person authorised to approve payment of the allowance. The deception, the prosecution submits, was that the accused misrepresented that he had been required to stay in Adelaide on the 12th, the 13th, and 16 April. In other words, he made misrepresentations as to past facts or a state of affairs.

...

Your Honour will hear that the accused's claim was paid in full including for those three dates. And so by deceiving the person authorised to approve payment, the accused benefited himself in the sum of \$675 that he would not otherwise have been paid. The prosecution also alleges that in so acting and in so obtaining the benefit, the accused acted dishonestly according to the standards of ordinary people and knew that he was so acting. So, your Honour, that's count 1 as your Honour would have seen.

...

The remaining counts allege deception perpetrated in the same way in the months that followed, starting in June 2018 and ending in May 2020.

37 The prosecution did not make any reference in opening to it being sufficient to prove one or more of the matters particularised in a charge where any one of them was capable of establishing the relevant element. Defence counsel, in closing address, submitted the charge was formed as a 'compendious or combination charge'. On that basis, he submitted that:

... because of the way that the prosecution chose to lay this information and particularise the counts, Mr Ellis can't be convicted of any count unless you're satisfied the elements with respect to each of the days or nights if you like, which together will add up to the amount which is particularised as having been obtained by the deception.

38 This submission was based squarely on the form of the charge and not on how the prosecution had otherwise conducted its case. For the reasons given earlier, that submission was not correct. Defence counsel subsequently articulated what he described as a 'fallback' submission that the charges were duplicitous, explaining that:

... if your Honour were to rule against us and say that no you can find him guilty of a count, for example count 1, if you find that just that one of those days was dishonest and he obtained a one third of the amount because of one of the three days, we do put in the alternative well we say that's what you could do, then that would, the charge would be duplicitous because they'd (sic) be three parts to it.

39 These submissions serve to illustrate that, at the point of closing addresses, there was no apprehension on the part of the defence that the prosecution had, by

its conduct, bound itself to proving all dates within a single count. The question was clearly in contention as a matter of law. Moreover, while the prosecution had not addressed the question in opening, its written closing submissions submitted specifically that it needed only to prove one or more misrepresentations for any given charge.⁴⁶

40 In the context of responding to the defence fallback argument of duplicity, the magistrate put the question of prejudice to senior counsel for Mr Ellis on the basis of how the charges had been formulated:

His Honour: Here, I invite your reaction to this, there's one lodgement of various claims made simultaneously for the month, one payment made simultaneously and I'm finding it hard to see how there would be any disadvantage to you in the sense that you know exactly, I think, from the way the charge is laid, what it is that's being alleged. It's this day, this day and this day and you've met that.

[Senior counsel for Mr Ellis]: Yes, yes, that's true. If the charges had been divided out into 73 counts, that may and I can't put it any higher than that, have affected the way in which the case was defended. There was obviously potential for considerations of other, an [sic] another approach, but I didn't really have to think that through too much because that's not the way in which I've approached the case. I accept that factually the allegations are, for example in count 1, that there are three days or three nights that are claimed that are said that he's not in Adelaide for and that he dishonestly claimed and therefore got the full amount, so factually there's not much different, or it is indifferent, but as to whether the defence would have been run entirely the same way, that's not necessarily the case, but again I really haven't had to give it much thought.

His Honour: No, no. Well my preliminary view is I just can't see any particular disadvantage to the defence the way it's been laid would cause you ...

41 On the appeal, senior counsel for Mr Ellis (who was counsel at trial) accepted that he had met each individual allegation at trial and that while the Information would have been longer (charging 78 counts instead of 23), had it charged each date separately, the trial would not have been.

42 Several observations emerge. First, the prosecution did not bind itself in opening to a case that required proof of every date within a single charge. Secondly, the defence treated the question as one of law to be prosecuted at the trial. Thirdly, by closing submissions, the prosecution expressly contended for the position it took on appeal.

43 As a matter of construction of the counts, each date particularised in a count as an alleged misrepresentation was merely a particular. The prosecution's conduct of the case did not render it a material particular such as to bind the prosecution to proving all dates within a count. The defence was not led to conduct its case in a manner where a reasonable doubt about any single particular could found an acquittal. Mr Ellis has not been relevantly prejudiced in any material way.

⁴⁶ Referring to *Weinel v Fedchesen* (1995) 65 SASR 156 at 170-172 (Perry J).

44 It follows that the magistrate erred in holding that the prosecution was required to prove all alleged dates within a single count. There is merit in the Director's first ground of appeal. It will be necessary to consider later in these reasons the approach that this Court should take to intervention on account of this error.

The ruling on cross-admissibility pursuant to s 34P(2)(a) of the Evidence Act (Ground 2)

45 Ground 2 reads as follows:

The Learned Magistrate erred in ruling that the counts were not cross-admissible pursuant to s34P(2)(a) of the *Evidence Act 1929* to show a pattern or system relevant to proof of the mental element of the charges.

46 In order to understand this complaint, it is necessary to set out precisely what was submitted at trial and what the magistrate said. The starting point is that the magistrate did, in fact, rule that the evidence was cross-admissible for a non-propensity use pursuant to s 34P(2)(a), being to rebut an anticipated defence of accident or mistake in respect of any one claim:

The prosecution wished to lead evidence and discreditable conduct pursuant to s.34P of the Evidence Act in proof of these charges. The first basis is pursuant to s.34P(2)(a) of the [Evidence Act], the so-called non-propensity use. The discreditable conduct, broadly stated, is in relation to each count the evidence of the other counts. The prosecution have set out their argument in written submissions and in oral argument.

To prove the offence of deception, it is necessary to prove that the defendant engaged in deception, that is he knowingly engaged in deception being the making of a misrepresentation about a past or future fact or state of affairs and that he did so dishonestly. In argument, the prosecution elaborated upon their written submissions. **The prosecution contention is that the repetitive erroneous claims lead to an inference that the claims were made knowingly, knowing them to be false and are, therefore, relevant. This evidence is, so they argue, probative in that it rebuts an anticipated defence of accident or mistake.**

I have considered [defence counsel's] arguments both written and oral. I am satisfied the probative value of the evidence outweighs any prejudicial effect to the defendant for the purposes of s.34P(2)(a). Indeed, as I perceive it, the only prejudice to the defendant arises from the probative value of the evidence. Furthermore, I have had regards to s.34P(3).

The permissible use, as identified, is sufficiently separate and distinct in my view from the impermissible use and can be kept so.

(Emphasis added.)

47 Subsequently, in his reasons for judgment, the magistrate expressly noted that:⁴⁷

⁴⁷ *DPP v Fraser John Ellis* [2024] SAMC 77 at [111]-[112].

A ruling was previously made admitting into evidence pursuant to s.34P(2)(a) evidence of discreditable conduct in relation to each count.

That discreditable conduct, in relation to each count, was the evidence of the other counts.

48 The magistrate then proceeded to consider the submissions he had received about the weight that should be accorded to the discreditable conduct evidence. He noted the two non-propensity uses for which the prosecution contended, recited in the defence written submissions:⁴⁸

1. *To put each count in its proper context, which was relevant to prove that Mr Ellis made the claim, could shed light on what Mr Ellis meant to represent in the claim form and to prove that the claims he made always stayed within the maximum number of nights (135) that could be claimed.*
2. *To prove a pattern or system of falsely claiming to stay overnight in Adelaide, relevant to proof of the mental element. [The prosecutor] referred to the suggested patterns ... and then submitted that the totality of the claims and the number of errors rendered it unlikely that Mr Ellis made honest errors but this did not automatically lead to proof of guilt on any one count....*

(Emphasis in original.)

49 The prosecution had submitted that a pattern emerged from Mr Ellis' claims:

Of the accused's erroneous CMAA claims:

- i. 19 were made on the final day of a parliamentary sitting week when the accused did not stay in Adelaide but travelled back to the Yorke Peninsula;
- ii. 13 were made on days before scheduled parliamentary business when the accused stayed the night on the Yorke Peninsula and only travelled to Adelaide the following day;
- iii. 11 were made on occasions when he travelled from the Yorke Peninsula to Adelaide and back in the course of a single day;
- iv. five were on days on which he had no parliamentary business in Adelaide in his diary;
- v. four were on days on which he travelled home to the Yorke Peninsula from Adelaide at the end of a trip (or planned trip);
- vi. two were for nights on which he stayed somewhere other than Adelaide or the Yorke Peninsula (Sydney and Kangaroo Island).

In addition six of the accused's claimed date ranges were for consecutive nights none of which he spent in Adelaide.

(Footnotes omitted.)

⁴⁸ DPP v Fraser John Ellis [2024] SAMC 77 at [115].

50 The prosecution submitted that the claims were not randomly distributed throughout the month as might be expected if Mr Ellis had been simply guessing. By connecting the claims to events that may have necessitated him staying overnight in Adelaide, Mr Ellis ‘made his deceptive claims more plausible and provided himself a built-in excuse of having made an honest mistake should any of his claims be queried’.

51 With respect to this asserted use, being to prove a pattern, the prosecution relied on *R v Tran*.⁴⁹ In that case, the evidence was held to be cross-admissible, the permissible use being:⁵⁰

... to show that the accused had in place an on-going system of providing large amounts of cash to third parties who were directed by her to keep custody of it and/or use it to purchase cheques (mostly bank cheques) which then went (mostly) to the purchase of two properties. The factors that are especially important are that she had large amounts of unexplained cash, that she provided the cash to others to buy bank cheques (rather than doing it herself), that the amount of cash provided was at or just under the reportable limit of \$10,000 (after bank fees were payable) and that this system was spread around a large number of people, through different banks (and branches) and different accounts. This evidence also has the permissible use of tending to rebut any innocent explanation for an individual payment or repayment.

52 The defence written submissions distinguished between the admissibility of the evidence and the probative weight (if any) that should be given to the evidence. They then made a specific submission on weight:

Mr Ellis submits that when an individual count is considered, viewed in the context of all of the admissible evidence for that count, the evidence of the other counts does not carry any probative weight towards proof of guilt on that count.

53 The defence submitted that the evidence could not prove any underlying illegal system or that the underlying purpose was dishonest. In the defence submission, the only system in place was that which was administered by the Clerk and Corporate Services within the House of Assembly, by which every eligible Country Member submitted claims each month. In this regard, the forms also contained claims that the prosecution accepted were honestly and correctly made, as well as the incorrect claims. The prosecution did not allege dishonest claims in respect of every month when Mr Ellis lodged claims, and Mr Ellis did not lodge a claim every month.

54 The only general pattern to Mr Ellis’ claims, in the defence submission, was that Mr Ellis would stay overnight in Adelaide and claim the CMAA for Sunday and Monday nights before sittings commenced and for the nights of the sitting days. That pattern, in the defence submission, supported Mr Ellis’ case, as it helped to explain why, on some occasions, he mistakenly claimed for those days of the week, thinking that he had stayed in Adelaide overnight as he had in the past. To reason otherwise risked circular reasoning, in that to reason that the number of

⁴⁹ [2017] SASCF 99.

⁵⁰ *R v Tran* [2017] SASCF 99 at [14] (Vanstone J).

mistaken claims showed a dishonest pattern relied on assuming the dishonesty of the incorrect claims in the first place. Rather, the defence submitted, the magistrate should focus on the evidence relating directly to each claim.

55 In response to this submission, the magistrate said:⁵¹

I agree with [defence counsel's] submission. When the evidence is viewed as a whole, the timing of the claims (that is what the prosecution rely upon ...) is equivocal. In my view, it is equally consistent, certainly in relation to the patterns asserted to exist ... with innocent mistake.

56 The magistrate then expressed the conclusion that is the subject of the Director's complaint in Ground 2:⁵²

I am not satisfied, having considered the evidence as a whole, that the evidence relied upon for the second of the asserted permissible uses has the probative value contended. **I am not satisfied the asserted probative value outweighs any prejudicial effect it may have on the defendant.** I therefore intend as suggested by [defence counsel], to rely upon the evidence, '*directly relating to each individual claim*'.

(Emphasis in bold added.)

57 On the appeal, the Director submitted that this passage, and in particular the highlighted passage, show that the magistrate reversed his earlier ruling on admissibility. The language of the probative value outweighing the prejudicial effect is the language of s 34P(2)(a) of the *Evidence Act* and is only relevant to the question of admissibility.

58 The Director submitted that it was not to the point that the evidence did not reveal a neat, mathematical pattern or a routine. Rather, to give an example, despite staying in Adelaide overnight at the end of a sitting week less than 50 per cent of the time, Mr Ellis lodged claims for staying overnight at the end of a sitting week 90 per cent of the time. Then, despite staying overnight in Adelaide before parliamentary business 60 per cent of the time, Mr Ellis claimed he did so 94 per cent of the time.

59 Mr Ellis disputed those statistics. He provided a memorandum at trial which demonstrated, in his submission, that with respect to nights stayed in Adelaide at the end of a parliamentary sitting week, he stayed between 34 and 41 per cent of those nights but claimed for 77 per cent of them. With respect to nights before the parliamentary sitting week commenced, he submitted that the evidence showed that he spent 86 per cent of nights in Adelaide and claimed for 95 per cent of nights. The point of the exercise was to show that the distinction, and therefore the asserted pattern, was not nearly so stark.

60 This dispute over percentages was not particularly helpful. The point of the prosecution submission was to direct attention to the clustering of the claims, as

⁵¹ *DPP v Fraser John Ellis* [2024] SAMC 77 at [123].

⁵² *DPP v Fraser John Ellis* [2024] SAMC 77 at [124].

opposed to a random distribution that, it was submitted, might be expected of genuinely mistaken claims. The magistrate was alive to that. Prior to considering the evidence of patterns expressly in the context of the cross-admission of the evidence supporting the charges under s 34P, he held that the claims patterns were not invariable, increasing the probability that Mr Ellis had made mistakes:⁵³

The DPP groupings relate only to the impugned claims. When the true whole of the claims is considered it becomes obvious that the defendant, at least in the weeks parliament was sitting, had a common but not invariable habit of staying overnight either on the Sunday and Monday prior to a parliamentary sitting week, but also at the end of the parliamentary sitting week. The whole of the evidence therefore tends to support an explanation consistent with innocence namely, that when trying to reconstruct his movements, the defendant did not have an invariable habit to call upon and could have made mistakes when relying solely on his memory and his diary.

61 The magistrate also had regard to what the prosecution submitted was an increased rate of error on Mr Ellis' part in making claims. As to this, he said:⁵⁴

There is no empirical evidence from which firm conclusions can be drawn regarding the rate of errors. Does the increase in the rate of errors run contrary to what one would expect and indicate as asserted by the prosecution, brazenness, and therefore provide proof of a guilty intent. Alternatively, is the increased rate of errors consistent with complacency and a lack of care (but not criminal behaviour) when making claims. To my mind it is unclear and I place no reliance on these asserted trends.

62 Clearly, when considering the patterns of the claims to these forensic ends, the magistrate had regard to the evidence of all of the claims, as a whole. It was only after this that he turned to his earlier ruling by which he had admitted the discreditable conduct under s 34P, as set out earlier.

63 When the magistrate's reasons are viewed as a whole, it is sufficiently clear, in our view, that his treatment of the cross-admissibility of the evidence in the impugned paragraph, earlier, was a treatment of the weight to be afforded to the evidence in the application of its non-propensity, discreditable conduct use. There are two primary features of the reasons that lead to this conclusion.

64 First, the magistrate clearly referred back to his ruling admitting the evidence under s 34P(2)(a). As set out earlier, he had admitted the evidence for an identified forensic purpose, namely:

... that the repetitive erroneous claims lead to an inference that the claims were made knowingly, knowing them to be false and are, therefore, relevant.

65 Having referred back to this ruling, the magistrate then announced expressly that he was now addressing the submissions going to the weight to be afforded to the evidence.⁵⁵ He accepted that defence counsel had correctly identified that the

⁵³ *DPP v Fraser John Ellis* [2024] SAMC 77 at [104].

⁵⁴ *DPP v Fraser John Ellis* [2024] SAMC 77 at [107].

⁵⁵ *DPP v Fraser John Ellis* [2024] SAMC 77 at [113].

question to be determined was one of probative weight (as distinct from the question of admissibility the subject of his previous ruling).⁵⁶

[Defence counsel] has correctly stated the question now to be ‘the probative weight (if any) that should be given to the discreditable conduct evidence (the evidence of the other counts) when any one count is considered’...

66 Secondly, the magistrate’s treatment of the topic at this point was focused on the prosecution’s reliance in closing address on, and defence counsel’s distinguishing of, the pattern evidence in *R v Tran*.⁵⁷ The magistrate agreed with defence counsel’s submission that in contrast to *R v Tran*:⁵⁸

... the only definite pattern which emerges is that ‘... in weeks where Parliament [was] sitting, it was common (but not invariable) that he would stay overnight in Adelaide, and claim the CMAA, for Sunday and Monday nights before sitting commenced and for the nights of the sitting days Tuesday, Wednesday and Thursday. The evidence of that pattern supports Mr Ellis’ innocence, not his guilt.’.

(Emphasis in original.)

67 The dispositive passages set out earlier, which included the statement that the magistrate was not satisfied that the probative value outweighed any prejudicial effect, followed this expression of agreement. That language does suggest an implicit revisiting of the ruling of admissibility pursuant to s 34P(2)(a). However, when the reasons are read in their entirety, it is sufficiently clear that the magistrate was expressing a view with respect to this more focused forensic purpose that had been put in closing. As to that purpose, he considered that the probative value of any pattern established by cross-admitting the evidence of other counts supported, if anything, innocence.

68 That is to say, the magistrate was explaining the use he was prepared to make of the asserted pattern said to be established by the evidence he had cross-admitted.

69 It would have been better if the magistrate had not used the language of s 34P(2)(a) in explaining this. However, when the reasons are read in context, we think this was a slip. We are satisfied that the magistrate was simply determining not to ascribe any weight to the pattern that was said, on the prosecution case, to emerge. We are fortified in this conclusion by the fact that the magistrate had separately, as explained earlier, addressed the weight to be ascribed to the groupings and trends of the claims as a whole.⁵⁹

70 For these reasons, we reject the premise of Ground 2, being that the magistrate ruled that the evidence supporting the counts were not cross-admissible. We dismiss this ground.

⁵⁶ *DPP v Fraser John Ellis* [2024] SAMC 77 at [114].

⁵⁷ [2017] SASFC 99.

⁵⁸ *DPP v Fraser John Ellis* [2024] SAMC 77 at [122].

⁵⁹ *DPP v Fraser John Ellis* [2024] SAMC 77 at [104].

Whether the magistrate erred in failing to consider evidence of proven deception to resolve doubts in respect of other counts (Ground 3)

71 Ground 3 complains:

The Learned Magistrate erred in failing to consider whether the cross-admissible evidence on the counts for which he convicted, removed any doubt he had in relation to the counts for which he acquitted.

72 The Director characterised this ground as compounding the error on cross-admissibility complained of in Ground 2. It is necessary to consider the complaint in the context of the conclusion that the judge did cross-admit the evidence supporting each count but, in the event, applied no weight to that evidence in support of the prosecution case.

73 The essence of this complaint is that on the facts that the magistrate found proved, Mr Ellis made deceptive claims in nine different forms beginning in November 2018 and ending in May 2020. However, the magistrate did not say anything about why evidence of proved deception in those separate claims was not probative of the mental elements in the remaining counts. To quote the Director's written submission:

The Director submits it was plainly relevant to the hypothesis that, in November 2019, Mr Ellis made innocent mistakes in claims for the CMAA, all to his financial advantage, that he had made deceptive claims for the allowance in October and November 2018, May and August 2019, and would go on to make deceptive claims for five consecutive months commencing in January 2020. The learned Magistrate's ruling that the counts were not cross-admissible, however, prevented him from using the evidence in this way without any proper justification.

74 In circumstances where we have held that the magistrate did not rule that the counts were not cross-admissible, this specific complaint cannot be sustained. Nevertheless, there remains the broader complaint that the magistrate did not consider the proved deception counts as probative of the other claims.

75 The foundational observation to be made in respect of this ground is that, for the reasons given earlier, the magistrate considered the evidence as a whole when considering the weight to be given to the non-propensity use of the evidence on its cross-admission. He concluded that so viewed, the evidence was equivocal.⁶⁰ Having reached that conclusion, to then reason in the way proposed by the prosecution, to the effect that a finding of guilt on one count made it more likely that Mr Ellis was guilty of deception on other counts, would be to engage in propensity reasoning. That was not the purpose for which the evidence was, or was sought to be, admitted.

76 Insofar as the complaint in Ground 3 stands independently of the complaint in Ground 2, we reject it.

⁶⁰ *DPP v Fraser John Ellis* [2024] SAMC 77 at [124]-[125].

Whether the magistrate erred in his approach to evidence of good character (Ground 4)

77 Ground 4 complains that the magistrate erred in his approach to, and his treatment of, evidence of good character. The magistrate directed himself in the following terms:⁶¹

The defendant has no prior convictions and is therefore of good character... The defendant has also lead evidence, which was uncontested, of good character. The evidence was referred to in the defendant's outline at paras.109-120. I have had regard to that evidence and the defence submissions.

I direct myself the defendant's good character is relevant in two ways.

Firstly, in assessing the probability that the defendant committed the offences charged. The defence submission is that it is unlikely the defendant would intentionally make the representations knowing them to be false or that he would deliberately seek to obtain a payment he knew he was not entitled to. I have had regard to these submissions and I direct myself accordingly.

Secondly, the defendant's good character is relevant to his denial of the offences. I have taken that into account also. I direct myself accordingly.

The defendant also submits as relevant to the likelihood that the defendant would commit offences of this kind (see para.124) the amount of the alleged defalcations. It is the defence submission that this fact together with the fact that the defendant had a good salary, and would place his position as a Member of Parliament and good reputation at risk, are matters that I should have regard to in assessing the likelihood of his committing the offences charged. I have taken these matters into account in the findings I have made.

The defendant also points to the fact of his repayment of monies the subject of the charge, as being consistent with his honesty and good character (see outline para.88). I have also taken this fact into account in assessing the likelihood of the defendant committing the offences charged.

78 The Director contended that the magistrate erred by failing to reason that Mr Ellis was no longer of good character after his first proved deceptive claim in December 2018. That is, the magistrate erred by failing to delineate when Mr Ellis ceased to be of good character. Further, the Director submitted that evidence of good character ought to have been given increasingly diminished weight because the magistrate considered each count sequentially.

79 Mr Ellis contended that the magistrate's directions concerning good character evidence were orthodox and consistent with authority. He submitted that the magistrate was not bound to direct himself or use the good character evidence in the way contended for by the Director. He further submitted that if the magistrate had reasoned in the manner contended for by the Director, being that Mr Ellis was no longer of good character after his first proved deceptive claim in December 2018, the magistrate would have erred at law due to the operation of

⁶¹ *DPP v Fraser John Ellis* [2024] SAMC 77 at [26]-[31].

s 34P of the *Evidence Act*. In that regard, Mr Ellis relied upon the following observation by Kourakis CJ in *R v Jones*:⁶²

In addition there was a real risk that the jury would take an unfavourable view of the appellant's testimony because he was the kind of person who traded in illicit drugs, whether at about the time that he was found in the possession of the methylamphetamine or at some earlier time. It is arguable that, prior to the enactment of s 34P of the *Evidence Act*, evidence of discreditable conduct admitted to show a specific propensity might properly be used to impeach the credit of a defendant. However, s 34P(1)(c) now prohibits any use other than those expressly permitted. The appellant's credibility was critical to the outcome of the charge because he carried the persuasive onus to rebut the statutory presumption. The failure to warn against the impermissible use of the evidence to undermine the appellant's credibility has also occasioned a substantial miscarriage of justice.

80 The Director did not, at any stage of the trial, apply for the admission of the discreditable conduct evidence for the purpose of rebutting Mr Ellis' evidence of good character. It followed, in Mr Ellis' submission, that the discreditable conduct evidence and any proved offence of deception were inadmissible for use by the magistrate to rebut Mr Ellis' evidence of good character or a finding of his good character. Mr Ellis submitted that the prosecution should be held to the way in which it conducted its case below and that he would otherwise suffer prejudice.

81 In *R v Trimboli*,⁶³ King CJ considered the proper directions to be given when an accused adduces evidence of good character and expounded the following propositions:⁶⁴

1. It is desirable in all cases in which there is evidence as to the accused's good character that a direction be given as to the use to which that evidence should be put.
2. No particular form of words is necessary, but the direction should convey to the jury that they should bear in mind the accused's previous good character when considering whether they are prepared to draw from the evidence the conclusion of the accused's guilt. They should bear it in mind as a factor affecting the likelihood of the accused committing the crime charged. The judge may add, if he thinks it appropriate in the particular case, that the jury should consider the accused's previous good character in assessing the credibility of any explanations given by him and, when he has given evidence, his credibility as a witness.
3. The judge is, of course, at liberty to remind the jury that people do commit crimes for the first time and that evidence of previous good character cannot prevail against evidence of guilt which they find to be convincing notwithstanding the accused's previous character. This last consideration may apply with particular force to certain types of crime and the judge is, of course, free to point that out to the jury if he sees fit.

82 These propositions do not support the error contended for by the Director. The Director was not able to refer this Court to any authority supporting his

⁶² *R v Jones* (2018) 131 SASR 532 at [6].

⁶³ (1979) 21 SASR 577.

⁶⁴ *R v Trimboli* (1979) 21 SASR 577 at 578 (King CJ), referred to in *R v C*, CA [2013] SASCF 137 at [106] (Kourakis CJ, Anderson and Nicholson JJ agreeing) and *De Virgilio v The King* [2026] SASCA 16 at [58]-[61] (Livesey P, David and Stanley JJA).

approach to evidence of good character. We do not accept that a single proved act of deception ought, in the circumstances, lead to the conclusion that evidence of good character cannot then be brought to account in the probabilities of any further offending.

83 By way of example, in *R v C, CA*⁶⁵ the appellant was charged with 30 counts of sexual offending against three complainants and convicted of five counts of indecent assault and 12 counts of unlawful sexual intercourse. The appellant gave evidence that he had not been arrested for any serious criminal offence and called evidence from a number of witnesses who testified that he was ‘held in high esteem in the community and was regarded as creditable’.⁶⁶ It was not suggested that the jury were required to reason in a different way about the appellant’s character once they found a count proved.

84 There are two further considerations. First, the Director should be held to the manner in which he conducted the case below.⁶⁷ The prosecution did not apply for the admission of the discreditable conduct evidence for the purpose of rebutting Mr Ellis’ evidence of good character. That use was not considered or ruled upon under s 34P of the *Evidence Act*. In those circumstances, we would not accept a submission that the magistrate erred in failing to consider such a use.

85 Secondly, and in response to Mr Ellis’ submission in these terms, the Director submitted that his argument did not depend on the evidence of the proved deception being introduced as evidence of bad character. It was merely evidence that ‘neutralised’ the probative value of the evidence of good character. In that sense, ‘it could only ever bring the character needle back to zero’.

86 We have some difficulty with this proposition. Mr Ellis did not give evidence himself, but he adduced evidence of his good character. That evidence was relevant to the likelihood of him having committed the offences, that is, that he was less likely to have done so. To deploy evidence of proved deceptions in rebuttal of that character evidence would necessarily have been for the purpose of showing that the probability of Mr Ellis having committed the offences was less unlikely. That is, it would have been for the purpose of making it more likely. The ‘neutralising’ effect of the evidence still depends on it being evidence of discreditable conduct. Its admission for that purpose would still need to be addressed under s 34P.

87 The magistrate was not required to cease having regard to evidence of Mr Ellis’ good character after the first conviction, nor to give increasingly diminished weight to evidence of good character. We dismiss Ground 4.

⁶⁵ [2013] SASCF 137.

⁶⁶ *R v C, CA* [2013] SASCF 137 at [104] (Kourakis CJ).

⁶⁷ See *R v Beaumont* (2023) 312 A Crim R 356 at [25]-[31] (Livesey P, Lovell and Bleby JJA); *Police v Smith* [2025] SASCA 37 at [95] (S Doyle JA and Stein AJA).

Whether the evidence supported factual findings that there were unclaimed nights when Mr Ellis was, or appeared to be, entitled to claim for the CMAA (Proposed Ground 5)

88 Proposed Ground 5 complains:

The Learned Magistrate erred in making factual findings, without evidential foundation, that there were unclaimed nights where the defendant was, or appeared to be, entitled to claim for the Country Members Accommodation Allowance.

89 There was evidence that Mr Ellis had stayed in Adelaide overnight, and did not claim the CMAA, on 19 occasions when he had parliamentary business diarised or otherwise scheduled on the day of, or following, the overnight stay.

90 Following the magistrate indicating that he placed no reliance on the rate of errors in the claims, he turned to a submission by Mr Ellis to the effect that there were occasions when Mr Ellis could have claimed but did not do so. The magistrate said:⁶⁸

Furthermore, ... each of the financial years was accompanied by a failure to lodge claims which it appears the defendant was entitled to make but did not. In the only full financial year (2019), there was a failure to lodge claims (both genuine and erroneous) which would have satisfied the complete entitlement of 135 days.

I agree with [defence counsel's] argument that these facts speak against any underlying fraudulent plan. I agree with his submission ...:

'Furthermore, no adverse inference can be drawn and applied to an [individual] impugned CMAA claim and/or an individual count, from the result of an aggregation of claims made over a financial year. Each CMAA claim impugned by the prosecution must be considered separately on its merits. To prove its case, the prosecution must prove guilty knowledge and intent by [Mr Ellis] for each individual impugned CMAA claim. As will be shown, each CMAA claim and count has individual considerations.'

In reaching my findings regarding individual counts, including those I have found proved, I have taken into account the fact that the defendant had, as identified, failed to make claims to which he appeared entitled.

91 The magistrate also deployed the evidence of Mr Ellis' failures to make claims when reasoning to findings of not guilty on certain counts. To take an example relied on by the Director, in finding Mr Ellis not guilty of Count 3 on the basis that he was not persuaded that the evidence established that the representation was made dishonestly knowing it to be untrue, he said:⁶⁹

I am reinforced in this conclusion by virtue of the fact in the same month the defendant apparently had the opportunity to make a legitimate claim and did not ... On 1 July the evidence establishes that the defendant remained in Adelaide overnight ... The defendant recorded in his diary a parliamentary obligation on 2 July 2018...

⁶⁸ *DPP v Fraser John Ellis* [2024] SAMC 77 at [108]-[110].

⁶⁹ *DPP v Fraser John Ellis* [2024] SAMC 77 at [183]-[184].

The fact the defendant failed to make a claim in circumstances in which he appears to have been entitled, supports the defence submission that he was making errors in the forms, sometimes at his own expense. This fact sits awkwardly with the defendant making a deliberately dishonest claim when making the claim for 19 July.

92 The magistrate deployed the same reasoning with respect to a number of other counts.⁷⁰

93 The Director submitted that the evidence of failures to claim was limited to showing merely that Mr Ellis had stayed in Adelaide and that he had, or may have had, parliamentary business before or after this stay. However, in order to claim the CMAA, Mr Ellis was required to certify that he had been required to stay overnight in order to attend to parliamentary duties, or his duty to be involved in community affairs and to represent and assist constituents in dealing with governmental and other public agencies. The evidence did not, in the Director's submission, show that he had met this requirement and did not permit the magistrate to reason that Mr Ellis failed to make claims to which he was entitled.

94 As Mr Ellis submitted on the appeal, the magistrate was only required to be satisfied that it was a reasonable possibility that Mr Ellis had failed to make claims to which he was entitled, in order to reason as he did. In that regard, the magistrate couched the entitlement in terms of what 'appeared' to be the case. In our view, it was open to the magistrate to bring this apparent state of affairs to account in the way he did. In any event, in closing submissions, the Director accepted that Mr Ellis had missed opportunities to claim, focusing his submissions on the weight to be attributed to that evidence:

Yes and so there are two months, I think, where Mr Ellis could've made some claims on the defence case and I don't cavil with that and did not, but in every month in which he made a claim his false claims, or his erroneous claims I should say, outnumber the missed opportunities to claim, so in all but those two months when he didn't make a claim and could have, he came out on top and the error was to his advantage. It's, in my submission, not consistent with an honest, genuine attempt to reconcile his previous month's whereabouts. Those months where he could've claimed but didn't were May 2018 and December 2018 and in every other month the erroneous claims that he made outnumber the missed opportunities.

95 We would not permit the Director to depart from the position he took at trial. We refuse leave to amend the Notice of Appeal to incorporate Proposed Ground 5.

The Notice of Alternative Contention

96 It follows that the only complaint of error which we hold the Director has established is that in Ground 1. This has the potential to affect the acquittals on Counts 5, 11, 19, 20 and 21. Before turning to whether the Court should intervene, however, it is necessary to consider Mr Ellis' Notice of Alternative Contention. Mr Ellis contends, by this Notice, that he ought also to have been acquitted on Counts 5, 11, 19, 20 and 21 on the basis that the evidence did not exclude the

⁷⁰ *DPP v Fraser John Ellis* [2024] SAMC 77 at [150], [167], [171]-[175], [259], [267], [353].

reasonable possibility, consistent with innocence, that with respect to the dates within those counts that the magistrate found he had claimed dishonestly, he made the claims mistakenly but honestly.

97 Mr Ellis' alternative contentions require the Court to undertake a real review of the evidence supporting those counts, in the same manner as would be the case if Mr Ellis were appealing against these findings as findings of guilt on the whole charge. In this regard, in *Martin v Department of Transport, Energy and Infrastructure*,⁷¹ White J explained the obligation on the Court on an appeal pursuant to s 42:⁷²

In short, on appeals against conviction under s 42 of the *Magistrates Court Act*, this Court is required to conduct a real review of the evidence put before the Magistrate. On issues which involved an assessment of the quality and reliability of a witness, this Court must make due allowance for the advantage of the Magistrate in seeing and hearing the evidence being given. However, the fact that a Magistrate reached his or her conclusion by an acceptance of the evidence of the witnesses of one party does not prevent this Court carrying out its statutory function. There may be cases in which incontrovertible facts or uncontested testimony or the glaring improbability of the Magistrate's conclusion will, despite the Magistrate's preference for the evidence of a particular witness, warrant this Court's interference. Further, if the question is one of inferences to be drawn from facts found or which are not in dispute, this Court can substitute its decision if it comes to a different conclusion as to the correct inference to be drawn.⁷³

(Footnotes in original.)

98 Mr Ellis did not give evidence; the case against him was documentary. This Court is in as good a position as the magistrate to assess whether the totality of the evidence left a reasonable doubt as to guilt.

99 Mr Ellis' contentions that the evidence did not exclude that he was honestly mistaken when submitting the claims drew, in the first instance, on a number of general findings that the magistrate made, as follows:

- Mr Ellis is of good character, which is relevant to an assessment of the probability that he committed the offences and in considering his denials;⁷⁴
- the time that elapsed between Mr Ellis making the claims and the trial resulted in a significant disadvantage to Mr Ellis, which must be taken into account when scrutinising the evidence. The magistrate accepted that no inference could be drawn against Mr Ellis from an absence of evidence

⁷¹ [2010] SASC 141.

⁷² *Martin v Department of Transport, Energy and Infrastructure* [2010] SASC 141 at [38] (White J). See also *Police v Mahon* (2022) 141 SASR 374 at [81]-[84] (Livesey P, Lovell and S Doyle JJA).

⁷³ See generally *Fox v Percy* [2003] HCA 22 at [25]-[29]; (2003) 214 CLR 118 at 126-8; *Warren v Coombes* (1979) 142 CLR 531 at 551.

⁷⁴ *DPP v Fraser John Ellis* [2024] SAMC 77 at [26]-[30].

supporting a claim, given there was no requirement to keep or provide supporting evidence;⁷⁵

- relatedly, not having kept an independent record of the nights he spent in Adelaide, Mr Ellis could only rely on his memory and his diary when making claims;⁷⁶
- Mr Ellis had a common, but not invariable, habit of staying overnight in Adelaide at the end of a parliamentary sitting week and on a Sunday or Monday night before the start of a parliamentary sitting week;⁷⁷
- the whole of the evidence tended to support an explanation consistent with innocence, being that when trying to reconstruct his movements, Mr Ellis did not have an invariable habit to fall back on and could have made mistakes when referring only to his memory and diary;⁷⁸
- Mr Ellis travelled regularly between his electorate and Adelaide such that the journey was, to him, unremarkable. This was especially so when he was required to cast his mind back several weeks;⁷⁹ and
- Mr Ellis' failure to claim the CMAA for some nights when he stayed in Adelaide, in circumstances where it appeared he was entitled to make a claim,⁸⁰ spoke against any underlying fraudulent plan.⁸¹

100 We bring to account each of these general matters when considering the Notice of Alternative Contention with respect to Counts 5, 11, 19, 20 and 21.

Count 5

101 Count 5 concerned the nights of 12, 18 and 25 October 2018 within a claim for 15 of the 31 nights in October. 18 and 25 October were the last days of sitting weeks. The magistrate found that in circumstances where it was common for Mr Ellis to remain in Adelaide at the end of sitting weeks, although not invariably so, he was not persuaded that the prosecution had excluded innocent mistake.⁸²

102 The date of 12 October was in a different category. It was a Friday. The magistrate found that Mr Ellis' diary showed an appointment in Adelaide that day at 12:00 pm. Mr Ellis travelled to the Yorke Peninsula the same day. His diary records, for 13 October:⁸³

⁷⁵ *DPP v Fraser John Ellis* [2024] SAMC 77 at [20]-[25].

⁷⁶ *DPP v Fraser John Ellis* [2024] SAMC 77 at [161]-[162].

⁷⁷ *DPP v Fraser John Ellis* [2024] SAMC 77 at [104].

⁷⁸ *DPP v Fraser John Ellis* [2024] SAMC 77 at [104].

⁷⁹ *DPP v Fraser John Ellis* [2024] SAMC 77 at [163]-[166]; [289]-[290].

⁸⁰ See the discussion of Proposed Ground 5, earlier.

⁸¹ *DPP v Fraser John Ellis* [2024] SAMC 77 at [108]-[109].

⁸² *DPP v Fraser John Ellis* [2024] SAMC 77 at [208].

⁸³ *DPP v Fraser John Ellis* [2024] SAMC 77 at [202].

Alex East bucks show (Morphettville Racecourse).

103 There was independent evidence that Mr Ellis had attended that event. The magistrate found:⁸⁴

The event of 13th October was a singular one. Unlike many of the other diary entries it was not a routine event but a memorable one. The defendant's diary would be his natural first reference point when selecting dates to be included in his claim form. The diary entry of that date would have alerted him to the event. I consider it extremely unlikely the defendant would be mistaken as to his movements following such an event. I am satisfied the circumstances exclude mistake, especially given the form was completed recently following the event (approximately three weeks) when the event would have been fresh in his mind.

104 It was on this basis that the magistrate was satisfied that when Mr Ellis completed the form, he knew he had not been in Adelaide on the night of 12 October, and that he made the statement dishonestly.

105 As Mr Ellis pointed out, contrary to the magistrate's reasoning, at issue were not his movements *following* the event, but his movements on the day before, the Friday. As to these, he relied on the following:

- his diary recorded a meeting on Friday, 12 October between 9:00 am and 12:00 pm at North Terrace. He also provided to the Independent Commission Against Corruption a memorandum of a parliamentary committee meeting, of which he was a member, commencing at 12:00 pm that day (this does not record whether he attended, but mobile phone tower records indicate he left Adelaide for Kadina at around 2:30 pm);
- he stayed in Adelaide the night before (11 October) and then the nights of 13 – 17 October. His claims for those nights were not challenged. Mr Ellis submitted there was a reasonable possibility that he had overlooked or forgotten the trip back to the Yorke Peninsula on 12 October, or remembered it as being on another date, such that when he filled out the form, he simply did not remember that he spent the evening of 12 October in the Yorke Peninsula;
- the magistrate's finding that the buck's show was a 'singular' event was made without evidence from Mr Ellis, and without reference to the multitude of events in his schedule; and
- even if the buck's show could be said to be memorable, the evidence did not exclude the reasonable possibility that Mr Ellis did not positively remember, or mistakenly remembered, where he slept the night before the event.

106 There is force in the criticism of the magistrate's reasons insofar as they relied on the likelihood that Mr Ellis would remember his movements following

⁸⁴ *DPP v Fraser John Ellis* [2024] SAMC 77 at [205].

an event such as a buck's show, where the impugned claim was for the night before. Indeed, Mr Ellis claimed for the night of the 13 October and that was not challenged. However, in circumstances where Mr Ellis' records showed parliamentary commitments on 12 October, and where that date was sandwiched between nights that were appropriately claimed, we are satisfied that it is a reasonable possibility that Mr Ellis either forgot about, or mistakenly attributed, his trip back to Yorke Peninsula on the Friday. We do not think that the passage of three weeks is so short as to make that misapprehension inherently unlikely. We uphold the Notice of Alternative Contention with respect to Count 5.

Count 11

107 Count 11 concerned the nights of 9 and 16 May 2019. Mr Ellis lodged the claim form on 18 June 2019, claiming for nine of the 31 nights in May. Parliament sat on 1, 2 and 14 – 16 May 2019. Mr Ellis sent an accompanying email with his claim form, which said:

Please find attached my claim form for the month of May. Once again, I fear that I have incorrectly filled in the form so please advise if it needs to be done.

108 The magistrate was satisfied that the evidence did not enable him to reach a conclusion beyond reasonable doubt that Mr Ellis had intended to include 16 May within the claim form. However, he took a different view of the entry for 9 May.⁸⁵

On 9 May the defendant returned from a three day trip to the APY Lands (see P1, tab 17 and P3, tab 15). The defendant's diary for that date shows the following entry '5pm-5.30pm pick up corflutes (87 Angas Street).

I am satisfied beyond a reasonable [doubt] the defendant was not in Adelaide on the night of 9 May. The defendant's vehicle and telephone returned to Kadina on the evening of 9 May (P9, p.27; P1, tab 34, p.6). Further, the defendant's diary has entries recording commitments in Kadina from 9.00a.m. the following morning. I have considered the defendant's submission made in the outline at para.290. However, the defendant's journey to the APY Lands was a significant event and out of the ordinary. I think it extremely unlikely he would have been mistaken as to his movements upon returning to Adelaide. I do not consider it that there is a reasonable possibility that this was an innocent oversight. I am satisfied this was a deliberately false representation and that the defendant dishonestly obtained a benefit to which he knew he was not entitled.

109 Nonetheless, on the basis of the reasoning discussed in the context of Ground 1, having found a reasonable doubt in respect of 16 May, he returned a not guilty verdict on Count 11.

110 Mr Ellis submitted at trial, and on the Notice of Alternative Contention, that:

- he submitted the claim form some 40 days after 9 May, so there was a reasonable possibility that he did not positively remember, or mistakenly remembered, where he stayed that night;

⁸⁵ *DPP v Fraser John Ellis* [2024] SAMC 77 at [275]-[276].

- he had stayed in Adelaide on the night of 6 May, the day before he left for the APY Lands, which may have caused him to think he had stayed there on the night he returned;
- the magistrate assessed the significance of the trip without evidence from Mr Ellis;
- even if the trip was significant, that did not mean he necessarily remembered where he slept the night after he returned, some 40 days later;
- his accompanying email expressly invited direct scrutiny of his claims, which was completely inconsistent with acting dishonestly with an intention to deceive.

111 Like the magistrate, we consider that a three-day trip to the APY Lands would have been a significant event and out of the ordinary. That conclusion can be safely drawn even in the absence of evidence from Mr Ellis. That said, we are troubled by two considerations. The first is the 40-day period that elapsed. In our view, that is a considerable period of time to have passed before submitting the claim form. We do not overlook in this the diary entries of his commitments in Kadina the following morning. However, in this regard, the magistrate mistakenly recorded the date of submission of the claim form as 18 May, rather than 18 June. While it is possible that this was merely a typographical error, we think it likely that this obscured from the magistrate's consideration the length of time that had passed.

112 Secondly, while the magistrate recorded the fact of the accompanying email, he did not bring it to account when considering the claim in respect of this date. Mr Ellis expressly invited scrutiny of the form. When that matter is considered together with the time that had passed, we are unable to exclude as a reasonable possibility that Mr Ellis made an honest mistake in including 9 May in his claim form.

113 We uphold the Notice of Alternative Contention on Count 11.

Count 19

114 Count 19 concerned the nights of 2, 3, 4, 16 and 20 February 2020. Mr Ellis lodged the claim form on 3 March 2020, claiming for 14 of the 28 nights in February. Parliament sat on 5 – 6 and 18 – 20 February 2020.

115 The magistrate found that it was not proved that Mr Ellis had acted dishonestly with an intention to deceive in respect of the night of 20 February. He did not make a finding in respect of the entry for 16 February.

116 2 February 2020 was a Sunday before a parliamentary sitting week, but parliament did not sit until Wednesday, 5 February. As to the evidence of Mr Ellis' movements from 2 February, the magistrate found:⁸⁶

On 2 February 2020 the defendant's diary simply records '12am FE unavailable'. On 3 February 2020 the defendant's diary shows a single commitment in Adelaide at 12.30 p.m. On 4 February the diary shows no commitments. Wednesday 5 February is the first sitting day of the parliamentary week with commitments from 10 a.m. The defendant's telephone was on the Yorke Peninsula from the afternoon of 2 February until 6 a.m. on 6 February (P9, pp.53-55).

117 With respect to 2, 3 and 4 February, the magistrate held:⁸⁷

I conclude that the natural first reference point for the defendant would have been his diary when completing the form. I do not accept there is a reasonable possibility the defendant made a genuine error. I am satisfied beyond a reasonable doubt that he did not and this involved a deliberate untruth.

With the exception of the commitment on Monday, 3 February at 12:30 p.m., 2, 3 and 4 February are devoid of any diary entries. That fact would have indicated to the defendant that he was not in Adelaide. I am satisfied beyond a reasonable doubt the defendant made a deliberately false representation that he stayed in Adelaide on 2, 3 and 4 February. I exclude as a reasonable possibility that, a month later, he thought he had spent six continuous nights in Adelaide when in fact he had spent three of those nights in Kadina. I am satisfied this is the only rational inference open to me on these facts.

118 The claim form as submitted was accompanied by an email from Mr Ellis that said:

As always let me know if I stuffed up, the number of nights is correct though.

119 Unlike the accompanying email enclosing the claim form for May 2019, this email contained an express averment as to the correct number of nights. Relevantly, the first entry was for six nights, expressed as '1/2/20 – 7/2/20'. An administrative officer emailed Mr Ellis and pointed out that this (and another similarly worded entry) totalled seven nights and asked if Mr Ellis wished to amend the entries. Mr Ellis responded:

Yes please, both should be six nights.

1/2/20 – 6/2/20 = six nights

16/2/20 – 21/2/20 = six nights

Sorry, I can never remember if it's the night you go to sleep or the night you wake up!

120 The nights of 2, 3 and 4 February were the Sunday, Monday and the Tuesday before the parliamentary sitting week commenced. Mr Ellis submitted that:

⁸⁶ *DPP v Fraser John Ellis* [2024] SAMC 77 at [392].

⁸⁷ *DPP v Fraser John Ellis* [2024] SAMC 77 at [395]-[396].

- these claims should be viewed from the perspective that he had the common, but not invariable, practice of staying in Adelaide on the Sunday before a parliamentary sitting week;
- he had a commitment recorded in his diary in Adelaide on the afternoon of Monday, 3 February. By reference to that, it was reasonably possible that when he submitted the form on 3 March 2020, he did not positively remember, or mistakenly remembered, staying in Adelaide the nights before and after;
- the frequency of his travel, and relatively recent occasions of staying in blocks in the recent past, meant that the reasonable possibility could not be excluded that he mistakenly recalled staying in Adelaide for that six-night period. Specifically, he had stayed for 10 consecutive nights in November – December 2019, six consecutive nights in September 2018 and June 2019, and five consecutive nights in October 2018, July – August 2019 and September 2019.

121 In our view, the most significant factors in favour of Mr Ellis' case of honest mistake on these dates are the fact that this was a shortened parliamentary sitting week, not commencing until the Wednesday, and that the form was lodged a month later. However, the absence of diary entries on the impugned dates was a strong indicator to him that he had not been in Adelaide. Moreover, the incorrect nights were the second, third and fourth nights of a claim of six in a row. We do not think it is a reasonable possibility that Mr Ellis was honestly mistaken about having stayed in Adelaide for all those nights in a row. Like the magistrate, we are satisfied beyond a reasonable doubt that Mr Ellis made a deliberately false representation that he had stayed in Adelaide on 2, 3 and 4 February.

122 We dismiss the Notice of Alternative Contention on Count 19.

Count 20

123 Count 20 concerned the nights of 5, 9, 23, 24, 25 and 26 March 2020. Mr Ellis lodged the claim form on 6 April 2020, claiming for 12 of the 31 nights in March. Parliament sat on 3 – 5 and 24 – 25 March 2020.

124 The magistrate found it had not been proved that Mr Ellis did not stay in Adelaide overnight on 9 March 2020.⁸⁸ He also found that it had not been proved that Mr Ellis intentionally made the representations for the nights of 5 and 26 March 2020.

125 The 5 March claim was a claim for the period of 1 – 5 March as five nights. The magistrate accepted that it was a reasonable possibility that by putting in that date range, Mr Ellis had not intended to claim for the night of 5 March at all. He was fortified by evidence that from some point, the electronic database had

⁸⁸ *DPP v Fraser John Ellis* [2024] SAMC 77 at [412].

automatically populated the aggregated number of nights claimed based on the date range entered by Mr Ellis.⁸⁹ He had a corresponding doubt with respect to the date of 26 March, which had been included as a typed-in range of 23 – 26 March 2020.

126 However, the magistrate found that Mr Ellis did intend to claim 23 – 25 March.⁹⁰ With respect to those dates, it was not in question that Mr Ellis had not spent those nights in Adelaide. The prosecution submitted that it was implausible that Mr Ellis was honestly mistaken about those nights in circumstances when he had been at home responding to the early stages of the COVID-19 pandemic.

127 The magistrate noted the evidence of the stressors arising at the start of the COVID-19 pandemic and the evidence of the Speaker, Mr Stephens, that this was a particularly stressful time for parliamentarians and that for him, the making of CMAA claims was a low priority. He held:⁹¹

My remarks relate to 23 – 25 March. (In light of my earlier ruling concerning 26 March). I am satisfied the defendant made a deliberately false representation intending to dishonestly claim a benefit with respect to these nights. I think it most unlikely that when completing his form on 6 April the defendant would have mistakenly thought he spent all three nights in Adelaide when he had spent every night on the Yorke Peninsula. I do not accept as a reasonable possibility that he made a mistake. Indeed, the fact of the COVID-19 pandemic and the associated restriction in association and movement would have alerted the defendant, in my view, to the fact he had not been in Adelaide. I do not accept as a reasonable possibility that the defendant was so distracted as to mistakenly nominate these dates as dates he had spent in Adelaide when he had not. In my view, this is the only rational inference open to me on the circumstances.

128 Nevertheless, because of his failure to be satisfied in respect of the other dates, he returned a verdict of not guilty.

129 Mr Ellis submitted that a reasonable doubt about his intention was established by reason of the following matters:

- 23 March was the Monday of a parliamentary sitting week, Parliament sitting on the Tuesday and Wednesday, rather than until Thursday, which was the usual case. Mr Ellis had a common practice of claiming for the Monday to Thursday of a sitting week;
- Mr Ellis' diary recorded commitments at Parliament House on 23, 24, 25 and 26 March;

⁸⁹ *DPP v Fraser John Ellis* [2024] SAMC 77 at [408]-[409].

⁹⁰ *DPP v Fraser John Ellis* [2024] SAMC 77 at [415].

⁹¹ *DPP v Fraser John Ellis* [2024] SAMC 77 at [421].

- it was reasonable to infer that he made mistakes in the March 2020 claim form wholly or partly on account of the additional pressures arising out of COVID-19;
- there was no evidence that, when he filled out the form, he was aware he was not entitled to claim for those nights and was consciously aware his claim was dishonest according to the standards of ordinary people; and
- a reasonable doubt remained in all the circumstances, including having regard to his good character and consistent denial of dishonest intent.

130 Mr Ellis' electorate officer gave evidence that the early stages of the pandemic were stressful in the electorate office with an influx of people contacting the office wanting to speak to Mr Ellis, including about shutting down the Yorke Peninsula to stop the spread. It can be accepted that those early months were chaotic and uncertain, especially for those with responsibilities to the public.

131 It is also the case that Mr Ellis had a practice of claiming for the parliamentary sitting week in the manner claimed for these dates in March. The inference Mr Ellis urged, that this should be taken to be a mistaken claim by reference to the diary, while under the pressures of the early pandemic, is not entirely without attraction.

132 However, when considering whether that inference can be excluded as a reasonable possibility, it is necessary to consider all the evidence. This was not a case where, as in other examples, Mr Ellis had filled out the form much later than the dates the subject of his claims. He signed the form on 6 April 2020, only 12 days after 25 March. The stressors of the pandemic were undoubtedly real, but it was the pandemic that had kept him at home. In our view, it was fanciful that he could have been honestly mistaken that he had spent those days in Adelaide. Like the magistrate, we do not accept as a reasonable possibility that Mr Ellis was so distracted as to honestly but mistakenly have claimed for those dates.

133 We dismiss the Notice of Alternative Contention as it relates to Count 20.

Count 21

134 Count 21 concerned the nights of 6, 7, 8, 9, 16, 26 and 30 April 2020. Mr Ellis lodged the claim form at 3:13 pm on 30 April 2020, claiming for 10 of the 30 nights in April. Parliament sat on 7 – 8 and 28 – 30 April 2020.

135 The magistrate found that it was not proved that Mr Ellis had made the representation intentionally for the nights of 9 and 30 April, essentially on the same basis he had done so for each of 5 and 26 March 2020.

136 The dates of 6 – 9 April immediately preceded the Easter long weekend, Good Friday being on 10 April. The magistrate found beyond reasonable doubt that Mr Ellis had not spent these nights in Adelaide. The prosecution submitted that it was implausible that Mr Ellis mistakenly believed he had spent four

consecutive nights in Adelaide in the days leading up to Easter, when he had spent all four nights at home, only visiting Adelaide for about six hours in the course of one day.

137 The magistrate again took into account the matters relating to the COVID-19 pandemic. He held:⁹²

I am satisfied the defendant did deliberately make a false representation intending to dishonestly obtain a benefit for those three nights. I do not accept that when completing this form on 30 April, just over three weeks later the defendant could, as a reasonable possibility, mistakenly think he had been in Adelaide for three consecutive nights without having spent any of them in Adelaide. I do not accept as a reasonable possibility the claim could be attributed to carelessness, mistake or distraction. I am satisfied it was deliberate and that mistake has been excluded. I am satisfied this is the only rational inference open to me on the circumstances.

138 6 April was a Monday of a parliamentary sitting week, as well as the week before Easter. Mr Ellis' diary recorded three parliamentary sitting days, being 7 to 9 April (even though Parliament did not sit on 9 April). Mr Ellis submitted that it was a reasonable possibility that he had mistakenly assumed that he had stayed in Adelaide, as was his usual practice for a sitting week. He was physically present in Adelaide on 7 April.

139 Mr Ellis made the claim three weeks after these dates. We have held in relation to the October 2018 claims that that was not so short a period of time as to make the possible misapprehension apparent in that month inherently unlikely. However, in this week of April 2020, the scope for misapprehension was much reduced. This was a three-night stretch, right before Easter, when Mr Ellis had spent all the nights at home, interspersed with one day trip to Adelaide. Like the magistrate, we are satisfied that the prosecution has excluded honest mistake as a reasonable possibility.

140 16 April 2020 was a Thursday in a non-sitting week. Mr Ellis' phone was in the Yorke Peninsula continuously over 16 and 17 April. His diary shows a Microsoft Teams meeting with the Premier from 4:30 – 5:00 pm. This was the only scheduled appointment. Mr Ellis had received a WhatsApp invitation to a teleconference session 'each Thursday afternoon of a non-parliamentary sitting week' at the invitation of the Premier for a COVID-19 briefing. He made purchases on the Yorke Peninsula during the day on 16 April.

141 Mr Ellis and his partner had been messaging over the course of the day, with Mr Ellis recounting his meal purchase and the two of them discussing their dinner plans for the evening.

142 The magistrate concluded:⁹³

⁹² *DPP v Fraser John Ellis* [2024] SAMC 77 at [435].

⁹³ *DPP v Fraser John Ellis* [2024] SAMC 77 at [440].

From the defendant's diary there is no reason for him to conclude that he had been in Adelaide. Indeed the reference to a Microsoft Teams meeting during the COVID-19 pandemic was a direct signal that he was not. My conclusion is that the defendant would have accessed his diary before completing the form. Even the most cursory examination of the diary would have told him that he was not in Adelaide on that night. I am satisfied that as a reasonable possibility mistake has [been] excluded. I am satisfied this was a deliberately false representation made to dishonestly obtain a benefit. I am satisfied this is the only rational inference open to me on the circumstances.

143 Mr Ellis submitted in respect of this date that the mere fact that he was mistaken in his belief he was entitled to claim for this night did not prove his actual state of mind and did not exclude the reasonable possibility that he thought he was entitled to claim. To this end, again, he brought to account all the circumstances, including his good character and consistent denial.

144 The magistrate did not rely on the 'mere fact' that Mr Ellis was mistaken. That was what was in issue. The facts relating to this instance are particularly stark. In our view, the prosecution has excluded as a reasonable possibility that Mr Ellis was honestly mistaken. As the magistrate found, the most cursory look at Mr Ellis' diary would have shown he was not entitled to make a claim. Further, he made the claim only two weeks after the event.

145 We dismiss the Notice of Alternative Contention on Count 21.

Conclusion on the Notice of Alternative Contention

146 It follows that we allow the Notice of Alternative Contention insofar as it relates to Counts 5 and 11 on the Information but would otherwise dismiss it.

Prosecution appeals against acquittal: discretion to intervene

147 We have found that the magistrate erred in recording acquittals on Counts 5, 11, 19, 20 and 21 on the basis that he found that Mr Ellis had claimed dishonestly only in respect of some of the dates particularised in each of those counts. We have held that in the cases of Counts 5 and 11, there was an alternative basis on which the acquittals should be upheld. That is not the case with respect to Counts 19, 20 and 21.

148 The question then arises whether this Court should intervene.

149 As noted earlier, this appeal is brought pursuant to s 42 of the *Magistrates Court Act*. This imposes no express requirement of permission to appeal. The Director contended that there is no 'rare and exceptional' restriction for an appeal against acquittal, as opposed to an appeal against sentence. We reject that

submission as contrary to authority.⁹⁴ The well-known principles stated in *Everett v The Queen*⁹⁵ apply in relation to appeals from the Magistrates Court.⁹⁶

150 In *R v Garner; R v Webb*,⁹⁷ this Court observed that a prosecution appeal against acquittal ‘should be approached with great care’ and that the ‘rare and exceptional’ test should be ‘rigorously applied’.⁹⁸ More recently, in *Police v Smith*, S Doyle JA and Stein AJA explained the approach to prosecution appeals against acquittal under s 42 as follows:⁹⁹

The prosecution may appeal an acquittal pursuant to s 42 of the *Magistrates Court Act 1991* (SA). However, the undesirability of exposing a defendant to double jeopardy is a relevant consideration in determining the appropriate disposition of such an appeal. The Court retains a discretion not to intervene even if there is merit in one or more of the grounds of appeal.

In *R v Brougham* Peek J considered it well established that in South Australia the Supreme Court will have close regard to the double jeopardy principles and exercise appellate restraint when addressing prosecution appeals against acquittals by Magistrates. This particularly will be the case where an acquittal proceeds from a lack of satisfaction by the Magistrate of guilt on the facts, as distinct from a misapprehension as to the law. This analysis was referred to with approval by this Court in *R v Fitzgerald*.

...

In having regard to the concern to avoid double jeopardy, the High Court in *Everett* recognised the need, in the interests of fairness to the defendant, to take into account the prosecution’s conduct of a case, even in circumstances where the judge has erred in a fundamental way. The courts have shown a particular reluctance to permit the prosecution, on a Crown appeal, to rely upon a submission or position not advanced below. That must be all the more so where the prosecution seeks, on appeal, to rely upon an approach which it expressly disavowed below.

(Footnotes omitted.)

151 Justice David observed in that case that a Crown appeal will only be allowed in a ‘rare and exceptional’ case.¹⁰⁰ The rule against double jeopardy should prevail unless the case is rare and exceptional because an acquittal by a criminal court should, save in exceptional circumstances, be regarded as final.¹⁰¹

⁹⁴ See, e.g., *R v Garner; R v Webb* (2021) 140 SASR 454 and *Police v Smith* [2025] SASCA 37.

⁹⁵ (1994) 181 CLR 295.

⁹⁶ *Police v Cadd* (1997) 69 SASR 150 at 158 (Doyle CJ). See also *Police v Smith* [2025] SASCA 37 at [129] (David JA).

⁹⁷ *R v Garner; R v Webb* (2021) 140 SASR 454.

⁹⁸ *R v Garner; R v Webb* (2021) 140 SASR 454 at [80] (Kelly P, Lovell and Bleby JJA).

⁹⁹ *Police v Smith* [2025] SASCA 37 at [91]-[92], [95] (S Doyle JA and Stein AJA).

¹⁰⁰ *Police v Smith* [2025] SASCA 37 at [129] (David JA).

¹⁰¹ *R v Donovan* [2025] SASCA 7 at [6] (Livesey P, Bleby and David JJA), referring to *R v Brougham* (2015) 122 SASR 546 at [9] (Peek J).

152 Where a magistrate has entered an acquittal based on having a reasonable doubt as to the sufficiency of evidence, there will be greater reluctance to interfere.¹⁰² This is ‘as distinct from an erroneous approach to the law’.¹⁰³

153 In this case, the magistrate erred in law by finding that the particulars were material and by acquitting Mr Ellis of five counts of deception solely on that basis. The question is whether this Court should exercise its discretion to intervene. The prosecution must demonstrate that the public interest in favour of this Court intervening outweighs considerations of double jeopardy.¹⁰⁴

154 The Director submitted that it is significant that: the acquittals on the impugned counts stemmed from errors of law; principles of appellate restraint regarding assessment of credibility are not engaged; the acquittals were entered by a court of summary jurisdiction; Mr Ellis is yet to be sentenced; and no position different to that advanced at trial has been adopted concerning Ground 1 of the appeal.

155 The error was one of law. Relevantly, a determination of the Notice of Alternative Contention affects the acquittals on Counts 19, 20 and 21. The magistrate’s findings of dishonesty with respect to certain of the dates within those counts stand. Considerations of double jeopardy nonetheless remain but their weight is diminished in the circumstances that the Director highlights. In our view, this is an appropriate case to intervene.

Conclusion on the Director’s appeal

156 On the Director’s appeal, insofar as is necessary, we grant leave to appeal on Grounds 1 – 4. We refuse leave to appeal on Proposed Ground 5. We allow the appeal on Ground 1. We quash the acquittals on Counts 19, 20 and 21 and substitute convictions on the basis of the facts as found by the magistrate.¹⁰⁵

Mr Ellis’ appeal against the convictions

157 The sole ground of Mr Ellis’ appeal is that the magistrate erred in excluding as a reasonable possibility that each of the claims the subject of Counts 6, 14, 18 and 22 were made mistakenly but honestly.

158 In approaching these counts, we bring to account all the general matters that we identified as informing the assessment of Counts 5, 11, 19, 20 and 21 on Mr Ellis’ Notice of Alternative Contention. Again, this Court is required to undertake a real review of the evidence and form its own view of the case in

¹⁰² See *Thorogood v Warren* (1979) 20 SASR 156 at 159 (Zelling J); *Semple v Williams* (1990) 156 LSJS 40 at 41-43 (Olsson J); *Police v Brown* (1994) 72 A Crim R 527 at 535-536 (Olsson J); *Police v Jachmann* [2009] SASC 392 at [8] (Layton J); *Police v W, BCI* (2006) 160 A Crim R 278 at [12] (White J), *Police v Melisi* (2010) 106 SASR 105 at [3] (White J).

¹⁰³ *Police v Smith* [2025] SASCA 37 at [130] (David JA).

¹⁰⁴ *R v Witt* [2025] SASCA 115, [36] (Livesey P, Bleby and David JJA).

¹⁰⁵ *Magistrates Court Act 1991* (SA) s 42(5)(a).

considering whether the magistrate erred.¹⁰⁶ For the same reasons as discussed earlier, this Court is in as good a position as the magistrate to determine the inferences that should be drawn from the evidence and whether an inference of guilt beyond reasonable doubt should be drawn in each case.

Count 6

159 Count 6 concerned the nights of 4, 11 and 29 November 2018. Mr Ellis lodged the claim form on 5 December 2018, claiming for 15 of the 30 nights in November. Parliament sat on 6 – 8, 13 – 5 and 27 – 29 November 2018.

160 The claim for Sunday, 4 November formed part of a claim for a series of nights from Saturday, 3 November through to Wednesday, 7 November. Mr Ellis attended a friend's wedding in Adelaide on Saturday, 3 November. He travelled to Adelaide on 3 November and drove back to the Yorke Peninsula at 9:07 pm on 4 November. He then drove back to Adelaide at 11:33 am on Monday, 5 November. The prosecution submitted it was implausible that he would not recall travelling home after his friend's wedding.

161 The magistrate held:¹⁰⁷

A wedding is an unusual event. The defendant attended the wedding. It is in my view unlikely to be overlooked. I am satisfied the natural reference point for the defendant when selecting dates to include in his claim would have been his diary. The entry of 4 November would have also alerted him to the event that he had forgotten it, which I consider unlikely. I consider it extremely unlikely that following such an unusual event the defendant would overlook or be mistaken as to his movements following the event. I do not consider it a reasonable possibility. I am satisfied from this combination of circumstances that the defendant knew that he had not spent the night of Sunday, 4 November in Adelaide. In my view this is the only rational inference open. I am satisfied that he intentionally made a false representation that he had been in Adelaide and thereby obtained a benefit dishonestly according to the standards of ordinary people and that he knew that he was so acting.

162 Mr Ellis relied on the following matters:

- 4 November was a Sunday before a sitting week. He had stayed overnight on Sundays before sitting weeks and made legitimate claims on 16 occasions. Twice he had stayed over on such Sundays and failed to claim. He had a common, but not invariable practice of staying over;
- on this occasion, he had returned to the Yorke Peninsula for about 14 hours before going back to Adelaide, staying in Adelaide on 3, 5, 6 and 7 November. There was a reasonable possibility that he overlooked this trip or remembered it as having occurred on a different date, given the regularity

¹⁰⁶ *Martin v Department of Transport, Energy and Infrastructure* [2010] SASC 141 at [38] (White J).

¹⁰⁷ *DPP v Fraser John Ellis* [2024] SAMC 77 at [215].

of his travel, such that he remembered it as a five-day block when he came to claim a month later;

- his diary recorded engagements in Adelaide on 5 November from 12:00 pm to 7:00 pm;
- the magistrate overlooked the multitude of events in Mr Ellis' schedule that required travel to Adelaide, and his otherwise busy schedule, when concluding that the wedding would have been an unusual event, especially when Mr Ellis was thinking back for a month; and
- even if the wedding would have been memorable, the evidence did not exclude the possibility that Mr Ellis did not remember where he slept the day after the event, especially given his 'relentless' schedule.

163 We are satisfied that the wedding would have been a memorable event. However, the impugned date was not the date of the wedding, but the next day. That was a Sunday before a parliamentary sitting week, in respect of which Mr Ellis' diary recorded engagements on the Monday. In those circumstances, and having regard to the length of time that had passed before making the claim, we are left with a doubt that the wedding would have left such an indelible mark so as to exclude the reasonable possibility that Mr Ellis was honestly mistaken about staying in Adelaide on the night of Sunday, 4 November.

164 We find that the prosecution has not excluded the reasonable possibility that Mr Ellis was honestly mistaken about the night of 4 November 2018.

165 11 November was also a Sunday before a sitting week. Mr Ellis had commitments that day in Moonta and Balaklava. His first appointment for the week was for 12:00 pm on Monday, 12 November. He then had commitments throughout the afternoon until 7:00 pm. He travelled to Adelaide at 11:03 am that Monday. The prosecution submitted that there was no reason for him to believe mistakenly that he had stayed in Adelaide on the night of 11 November.

166 The magistrate held:¹⁰⁸

The defendant's diary for 11 and 12 November contained a catalogue of commitments until the late afternoon of 11 November. The next commitment was not until 12 p.m. the following day, the 12th. I am satisfied beyond a reasonable doubt from the circumstances that the only rational inference is that the defendant knew he had not been in Adelaide when completing the form. I am satisfied mistake has been excluded as a reasonable possibility. I am satisfied that he made the entry intentionally knowing it to be false and thereby obtained a benefit dishonestly knowing it [to] be dishonest.

167 Mr Ellis submitted:

¹⁰⁸ *DPP v Fraser John Ellis* [2024] SAMC 77 at [219].

- his last commitment on 11 November finished at 5:00 pm at Balaklava, which is about half way between Kadina and Adelaide;
- 11 November was a Sunday before a sitting week, and Mr Ellis had a common but not invariable habit of staying overnight on such nights.

168 This week followed a pattern quite similar to that of the previous week, with the main difference being the number of commitments that Mr Ellis had on the Sunday. It was also one week closer to the time that Mr Ellis filled out the claim form. The Sunday commitments were clearly enough electoral obligations.

169 Having regard to Mr Ellis' routinely busy schedule, his common practice of staying in Adelaide on Sunday nights and the time that passed between this date and his making the claim, we are left with a doubt as to whether Mr Ellis knew he had not been in Adelaide when completing the form.

170 We find that the prosecution has not excluded the reasonable possibility that Mr Ellis was honestly mistaken about the night of 11 November 2018.

171 Thursday, 29 November 2018 was the last sitting day of November 2018. The last entry in Mr Ellis' diary for that date is for 4:30-5:30 pm. The event is 'Drinks in the Premier's office with the Hon. Jeff Kennett AC'. Mr Ellis' next appointment was at 12:00 pm the next day, at Kadina.

172 The magistrate mistakenly identified 29 November as a Friday.¹⁰⁹ He held:¹¹⁰

The event of 29 November was a remarkable one, particularly for a Liberal Party member. I regard it is [sic] as extremely unlikely the defendant would overlook this event and be mistaken as to his movements especially given his completion of the form whilst the event would have been fresh in his memory. If he did not recall the occasion (which I consider unlikely) the entry in his diary provided a natural reference point. This combination of circumstances satisfies me beyond reasonable doubt this was not a mistake but that the defendant intentionally made a false representation that he was overnight in Adelaide on 11 November and that he thereby obtained a benefit dishonestly according to the standards of ordinary people and that he knew he was so acting. I conclude this is the only rational inference which these circumstances enable me to draw.

173 Mr Ellis submitted:

- there was no evidence that proved he actually attended the drinks with Mr Kennett AC. His mobile phone remained in Adelaide until about 9:22 pm, long after the drinks were scheduled to end, and then returned to the Yorke Peninsula. This suggested he was somewhere else. To find that he went to the drinks and had a memorable night was speculative at best;
- there was no evidence as to how memorable drinks with Mr Kennett AC would be for Mr Ellis. The finding relied on assumption and did not provide

¹⁰⁹ *DPP v Fraser John Ellis* [2024] SAMC 77 at [220].

¹¹⁰ *DPP v Fraser John Ellis* [2024] SAMC 77 at [225].

a sound basis for finding that Mr Ellis was consciously aware that he did not stay in Adelaide overnight; and

- even accepting the magistrate's inferences, the evidence did not exclude the reasonable possibility Mr Ellis did not positively remember, or had mistakenly remembered, where he slept that night, given the frequency of his travel. The reference to 'drinks' may have led him to assume he did not drive.

174 Mr Ellis also relied on the fact that he made no claim for December 2018 at all, when he could have claimed for at least five nights in that month. He complained that the magistrate appeared to have had no regard to this fact when assessing his mental state in filling out the form on 5 December 2018. That absence of claims, he submitted, spoke strongly against any deliberate dishonesty in respect of the November 2018 claims.

175 We do not accept Mr Ellis' criticism of the magistrate's remarks regarding the likely memorability of the drinks appointment with Mr Kennett AC. We accept that the diary entry is only evidence of the fact of the appointment. Nevertheless, Mr Ellis was still in Adelaide at the time of the appointment. We do not accept that the fact he stayed in Adelaide until much later supports him having done something else instead. That fact and the fact of the appointment operate as circumstantial evidence that he attended the appointment.

176 While Mr Ellis' failure to claim for December 2018 is relevant as a general indicator against the likelihood of any overall dishonest plan, we do not think it is of any greater specific relevance to the November 2018 claims than it is to other months. Mr Ellis filled out the November claim form on 5 December, long before he would have had to turn his mind to any question of claims for December.

177 The troubling aspect of this claim is that the night of 29 November, a Thursday, was circumscribed by the drinks event that evening and then an event at 12:00 pm in Kadina the following day. Mr Ellis then lodged the claim only six days later. With the diary being his obvious reference source, whether or not he attended the drinks event, there was available to him a clear reminder of his movements by reference to what was scheduled on that Thursday and Friday, at least, only days later.

178 In our view, the magistrate did not err. We are satisfied beyond reasonable doubt that Mr Ellis intentionally made a false representation that he was overnight in Adelaide on 29 November 2018 and that he thereby obtained a benefit dishonestly according to the standards of ordinary people and that he knew he was so acting.

179 It follows that we dismiss the appeal against the finding of guilt on Count 6. However, we do so on the factual basis that the only date in respect of which the offending has been proved beyond reasonable doubt was Thursday, 29 November 2018.

Count 14

180 Count 14 concerned the nights of 8 and 17 August 2019. Mr Ellis lodged the claim form on 11 September 2019, claiming for five of the 31 nights in August. Parliament sat on 1 August 2019.

181 Mr Ellis claimed 8 – 9 August 2019 as one night. The prosecution submitted he can only have intended to create the impression that he spent the night in Adelaide on the night of Thursday, 8 August. However, Mr Ellis had flown home from Sydney that day. He returned to the Yorke Peninsula early that afternoon. His diary shows a commitment with Parliamentary Counsel at 11:00 am and then football training at the Kadina Football Club at 6:00 pm. He had appointments the following day, Friday, 9 August, at Crystal Brook and Port Broughton, but not in Adelaide. His diary showed a gym session at 8:00 am. The prosecution submitted that it was implausible that he mistakenly believed he had spent the night in Adelaide on his return from Sydney.

182 The magistrate held:¹¹¹

I am satisfied beyond a reasonable doubt the defendant has deliberately selected 8 August when completing the form. It is reasonable to conclude the defendant has not selected this date (and other dates) entirely at random but relied on his diary entries and memory. In this instance there is no [rational] explanation from his diary which could explain the mistake. This is unlike other instances. The defendant had returned from Sydney. There were no late commitments in Adelaide. It was not the start or the end of a parliamentary week. The following day shows early morning commitments on the Yorke Peninsula. Even a cursory examination of the diary could not, in my estimation, lead to the conclusion the night was spent in Adelaide. I am satisfied from this combination of circumstances beyond a reasonable doubt this was not a mistake. I am satisfied that it was a deliberate falsehood, dishonestly made and that the defendant thereby obtained an entitlement which he knew he was not entitled to. In my view, this is the only rational inference the circumstances enable me to draw.

183 Mr Ellis submitted that this finding was inconsistent with other findings of the magistrate. Early in his reasons, the magistrate addressed the situation where claim forms contained obvious errors,¹¹² where a date range was selected and the number of nights claimed was one fewer than the number of dates incorporated within the range. The Corporate Services Section had engaged with Mr Ellis in correcting this habit, explaining that the dates specified should be the nights claimed, and should not include the next day.¹¹³

184 The instances the magistrate was referring to were those where there was a genuine claim with some suggested doubt about one date at the end of the claimed period. However, the magistrate said:¹¹⁴

¹¹¹ *DPP v Fraser John Ellis* [2024] SAMC 77 at [315].

¹¹² *DPP v Fraser John Ellis* [2024] SAMC 77 at [54].

¹¹³ *DPP v Fraser John Ellis* [2024] SAMC 77 at [60]-[68].

¹¹⁴ *DPP v Fraser John Ellis* [2024] SAMC 77 at [70].

If the prosecution assert that any discrepancy in dates can be checked against the number of nights claimed to confidently conclude that any discrepancy in date range against nights claimed can be resolved on the basis that the last date is incorrect, I am not so certain. The prosecution assert the defendant ‘...consistently stated’ the number of nights he claimed to be correct. The emails referred to, in my view, fall short of a consistency of conduct which would permit such a conclusion. Furthermore, on at least ‘one occasion’ ... the defendant himself amended the number of nights claimed by increasing the numbers.

185 The issue was acute in the magistrate’s consideration of Count 9:¹¹⁵

The form as lodged by the defendant contains the entry ‘03/03/19 – 04/03/19’ being a claim for one night. This apparent discrepancy was not detected by the Corporate Services staff, although a further entry on the following line ‘10/03/19 – 12/03/19’ has been amended to ‘10/03/19 – 11/03/19’ so as to coincide with the two nights claimed. This immediately raises the question whether the entry 03/03/19 – 04/03/19 was intended to be for two nights or only one. If the claim only relates to one night then which night does it relate to? This issue was not clarified with the defendant by the Corporate Services Section.

186 In that instance, Mr Ellis had stayed overnight on 4 March 2019. The prosecution submitted the magistrate should conclude that Mr Ellis had intended to claim for 3 March. The magistrate was left with a doubt about that and could not determine what was meant by the claim. He concluded that the charge failed.

187 The magistrate reached a similar conclusion with respect to the claim the subject of Count 15, being ‘22/09/19 – 27/09/19 5 nights’. He held that if Mr Ellis intended to claim for five nights, it was not clear which five nights.¹¹⁶

188 Mr Ellis submitted that consistently with these findings, the evidence could not exclude beyond reasonable doubt that he had intended to claim for 9 August, rather than 8 August. There was no evidence led as to whether he had stayed on 9 August.

189 Contrary to the finding of the magistrate with respect to, for example, Count 9, we do not think that where Mr Ellis nominated two consecutive dates and claimed for only one night, there is any ambiguity about the claim. The claim in each of these instances was expressed to be for one night. Read in context, the nomination of two dates was unmistakably a nomination of the night falling between those two dates, that is, the night of the first date.

190 Mr Ellis received the benefit of the magistrate’s doubt on Count 9. That is not here challenged, and nor should it be. However, the particular circumstances of that charge do not bind this Court in conducting a real review of the evidence led in support of Count 14. We are satisfied beyond reasonable doubt that Mr Ellis intended to claim for the night of 8 August.

191 Mr Ellis submitted that in that event, the evidence did not exclude the reasonable possibility that when he completed the CMAA form for August 2019

¹¹⁵ *DPP v Fraser John Ellis* [2024] SAMC 77 at [247].

¹¹⁶ *DPP v Fraser John Ellis* [2024] SAMC 77 at [320].

on 11 September 2019, some 35 days later, he believed he had stayed in Adelaide on the evening of 8 August after his parliamentary commitment and travelled to the Yorke Peninsula the next morning.

192 We do not consider that this is a reasonable possibility consistent with innocence. This was not a sitting week; none of the potential assumptions about his practices applied. To the extent that Mr Ellis necessarily must have relied on his diary, this clearly showed evening and morning appointments out of Adelaide, following his return from Sydney. We are satisfied beyond reasonable doubt that Mr Ellis intentionally made a false representation that he was overnight in Adelaide on 8 August 2019 and that he thereby obtained a benefit dishonestly according to the standards of ordinary people and that he knew he was so acting.

193 17 August 2019 was a Saturday. Mr Ellis claimed ‘16/08/19 – 17/08/19’ as two nights, differently from his practice identified earlier of recording dates as check-in/check-out dates. He stayed overnight in Adelaide on Friday, 16 August only. His diary records the Liberal Party Annual General Meeting at the Convention Centre on Saturday, 17 August from 8:00 am until 1:00 pm. He returned to Kadina at 1:05 pm that day. He had no appointments on the Sunday, other than a reminder about the Kadina Show.

194 The magistrate accepted that Mr Ellis had deliberately claimed for two nights. He held:¹¹⁷

Again, I conclude the defendant would have had recourse to his diary when completing the form. There is no rational explanation why he would conclude that he had been in Adelaide. There is no entry which might have lead to the mistaken belief that he was. Furthermore, the entry in the diary recording the convention would have provided a reference point to the defendant if he had not recalled the convention which I consider unlikely. I am satisfied beyond reasonable doubt from these circumstances this was not a mistake. I am persuaded beyond a reasonable doubt this was a deliberate falsehood and that the defendant thereby dishonestly obtained a benefit to which he knew he was not entitled. I am satisfied this inference is the only rational one which the circumstances enable me to draw.

195 Mr Ellis submitted that the evidence did not exclude that he honestly and reasonably believed he had stayed in Adelaide after the Annual General Meeting. Further, on the same form, Mr Ellis had made three other claims over a two-date range, but only claimed one night, that is, using the check-in/check-out method. He submitted that there was a reasonable possibility that he had intended to claim for only one night but had mistakenly put in two nights instead of one.

196 Like the magistrate, we do not accept as a reasonable possibility that Mr Ellis had mistakenly claimed for two nights instead of one. It is true that he had used the check-in/check-out method in other entries on this form (and on several other forms). However, he made the express representation that this entry was for two nights. We are satisfied beyond reasonable doubt that this was a deliberate representation. Like the magistrate, we conclude that there was no reasonable basis

¹¹⁷ *DPP v Fraser John Ellis* [2024] SAMC 77 at [317].

for inferring that he could conclude from his diary that he had stayed in Adelaide on the night of 17 August.

197 We have brought to this consideration the fact that Mr Ellis did not lodge the claim until 11 September. These dates were not explicable by reference to a recognisable practice with respect to parliamentary sitting weeks. We would not depart from the magistrate's conclusion with respect to this date.

198 It follows that we dismiss the appeal against the finding of guilt on Count 14. We make no different findings of fact from those the magistrate made.

Count 18

199 Count 18 concerned the nights of 17 and 30 January 2020. Mr Ellis lodged the claim form on 6 February 2020, claiming for eight of the 31 nights in January. Parliament did not sit in January.

200 With respect to 17 January, Mr Ellis claimed for three nights in the date range 15/1/20 – 17/1/20. He stayed overnight in Adelaide on 15 January, before driving to Cape Jervis the next morning. He stayed overnight in Adelaide on 16 January, having returned from Kangaroo Island. He was therefore entitled to claim for those nights. He drove back to the Yorke Peninsula in the early afternoon on 17 January.

201 The magistrate rejected a submission that it was possible that Mr Ellis had mistakenly nominated 17 January on a check-in/check-out basis and also mistakenly nominated three nights:¹¹⁸

Accepting the defendant did indeed make mistakes, I can see no basis for the conclusion that he has made the mistakes contended. The defendant's persistent error was to nominate the date range which fell short of the number of nights. This is not such an instance. The defence point to the possibility that the defendant may have mistakenly believed he was in Adelaide overnight on 17 January. They point ... to extracts from the defendant's mobile phone ... which included meeting for a coffee at 11 a.m. on 17 January with a fellow MP. I am satisfied beyond a reasonable doubt the defendant intentionally claimed with respect to the night of 17 January.

There was nothing from the defendant's diary which may have led to the erroneous belief he had been in Adelaide overnight on 17 January. There are no entries in his diary for 17 and 18 January which may have prompted such a belief. I do not consider as a reasonable possibility that a memory of a cup of coffee with a fellow MP on 17 January at 11 a.m. would account for such a mistaken belief. Furthermore, the trip to Kangaroo Island returning on 16 January was a reference point which would have enabled the defendant to recall his movements. This form was signed within a few weeks, when the journey to Kangaroo Island would still have been fresh in his memory.

I am satisfied beyond a reasonable [doubt] from these circumstances this was a deliberately false representation and the defendant thereby obtained a benefit to which he knew he was not entitled. I am satisfied mistake has been excluded as a reasonable possibility. I am satisfied this is the only rational inference I can draw from the circumstances.

¹¹⁸ *DPP v Fraser John Ellis* [2024] SAMC 77 at [379]-[381].

202 Mr Ellis submitted that it could not be excluded that he had made the two mistakes identified earlier, being to nominate dates on a check-in/check-out basis and to put ‘3 nights’ mistakenly instead of ‘2 nights’, given his accepted ongoing confusion in filling out forms. He also relied on the coffee appointment on 17 January in submitting that the evidence did not exclude honest mistake as a reasonable possibility.

203 We reject these submissions. We would not depart from the magistrate’s findings or his conclusion that honest mistake has been excluded as a reasonable possibility.

204 Thursday, 30 January 2020 was the middle date of a claim for three nights, expressed as 29/1/20 – 31/1/20. The evidence showed unequivocally that Mr Ellis travelled to Kangaroo Island on 30 January and stayed there overnight, then travelled from Kangaroo Island to Cape Jervis from 1:30 – 2:15 pm on 31 January. His diary shows that the journey to Kangaroo Island was for a Joint Party meeting at a hotel in Kingscote.

205 Mr Ellis signed the CMAA form a week later, on 6 February.

206 The magistrate rejected a submission that it had not been excluded as a reasonable possibility that Mr Ellis intended to claim only for the nights of 29 and 31 January and inserted ‘3 nights’ instead of ‘2 nights’. This was not an instance of his common error of nominating a date range that fell short of the nights claimed.¹¹⁹

207 The magistrate also rejected a submission that Mr Ellis may have made an innocent mistake, because he had spent the night away from his home in Kadina, albeit that this had not been in Adelaide. The magistrate observed that by this time Mr Ellis had been submitting forms since April 2018, each time having to certify that he was required to stay in Adelaide.¹²⁰ He concluded:¹²¹

I do not accept, as a reasonable possibility, that the defendant would have made the mistake that ‘in Adelaide’ meant ‘in South Australia’. I am satisfied he did not. The defendant is an intelligent person, and the words are plain. The defendant’s claim form was completed within a week of the journey to Kangaroo Island. The events would have been fresh in his memory. These circumstances satisfy me beyond a reasonable doubt that this was an intentional misrepresentation and the defendant thereby dishonestly obtained a benefit to which he knew he was not entitled. This is the only rational inference I consider open to me on these circumstances.

208 Mr Ellis submitted on the appeal that given the other innocent errors he made when filling out the CMAA claim forms, and that he had forgotten to submit forms on at least two occasions, it cannot be assumed he read the forms closely or was aware of the precise terms of the certification. He was clearly not a good

¹¹⁹ *DPP v Fraser John Ellis* [2024] SAMC 77 at [385].

¹²⁰ *DPP v Fraser John Ellis* [2024] SAMC 77 at [386].

¹²¹ *DPP v Fraser John Ellis* [2024] SAMC 77 at [387].

administrator. We do not accept this submission. This was basic. We see no basis for departing from the findings of the magistrate. We dismiss the appeal insofar as it relates to the claim for Thursday, 30 January.

209 It follows that we dismiss the appeal insofar as it concerns Count 18. We would not depart from the findings of the magistrate on this Count.

Count 22

210 Count 22 concerned the nights of 7, 8, 27, 28 and 29 May 2020. Mr Ellis lodged the claim form on 2 June 2020, claiming for 10 of the 31 nights in May. Parliament sat on 12 – 14 May 2020.

211 Mr Ellis claimed for 7 and 8 May in the form of an express claim for two nights, ‘7/7/20 – 8/5/20’. The magistrate found that Mr Ellis had not spent either night in Adelaide. The only diary entry for 7 May was a Microsoft Teams meeting between 4:00 – 4:30 pm. The only entry for 8 May was a video conference between 5:30 – 8:00 pm. The magistrate found:¹²²

The accused’s telephone was on the Yorke Peninsula for the entirety of both days ... I am satisfied from this evidence beyond a reasonable doubt the defendant was not in Adelaide but on the Yorke Peninsula. I also rely in this regard on the messages referred to ...[in] the prosecution outline as establishing this fact. I do not accept the submission the defendant’s representation that he was in Adelaide on 8 May 2020 was the unintentional consequence of wrongly inserting ‘the day he woke up’ which then resulted in the automatic self-population of the number of nights. The evidence shows no reason to claim either the night of 7 or 8 May. This was not an instance where it appears, on the evidence, that the defendant has made a mistake on the day on which he woke up. I am satisfied the defendant’s first recourse would have been to consult his diary which even on a cursory inspection showed no reason to believe he had been in Adelaide on either night and indeed would have alerted him to the fact he had not been.

212 Mr Ellis submitted:

- the evidence did not prove he read the diary entries closely or at all, such as to be aware that the meetings were online meetings;
- the lack of any evidence for the basis of his belief did not mean there was no basis;
- the evidence does not exclude that he honestly thought he was entitled to make the claim;
- having regard to the general findings (referred to earlier in the context of the Notice of Alternative Contention), a reasonable doubt remains over whether he intentionally made a dishonest representation;

¹²² *DPP v Fraser John Ellis* [2024] SAMC 77 at [451].

- having regard to his habit of nominating check-in/check-out dates, it cannot be reasonably excluded that he intended only to claim for 7 May and mistakenly inserted ‘2’ nights.

213 These submissions do not, in our view, support a reasonable possibility that Mr Ellis made these claims, or just that for 8 May, honestly but mistakenly. We do not depart from the magistrate’s reasoning with respect to these dates and reject the appeal insofar as it relates to them.

214 The claim for 27 – 29 May was expressed as a claim for three nights. The only entry in Mr Ellis’ diary for 27 May was for a concreter quote at his home address at 9:00 am. 28 May showed a commitment at Parliament House between 10:55 am and 4:15 pm. 29 May showed a commitment with Gulf FM in Kadina at 9:00 am. It then showed a Microsoft Teams meeting at 3:15 pm.

215 The evidence showed, and the magistrate found, that Mr Ellis travelled to Adelaide on the morning of 28 May, and then home that evening, consistently with his commitment at Parliament House. It otherwise showed, and the magistrate accepted, that Mr Ellis spent all three nights on the Yorke Peninsula. The magistrate concluded:¹²³

It has been shown, in my view, conclusively there was no basis for any mistaken belief. The form was completed only a few days later on 2 June. The events of the preceding week would have been fresh in the defendant’s memory. I am satisfied beyond a reasonable doubt from these circumstances the defendant knew he had not spent these three nights in Adelaide but on the Yorke Peninsula and that he misrepresented that he had and thereby dishonestly obtained a benefit to which he knew he was not entitled. I am satisfied beyond a reasonable doubt that the selection of these days did not involve a mistake. I am satisfied this is the only rational inference open to me on the circumstances.

216 Mr Ellis submitted that the evidence did not exclude that when he came to fill out the form he thought, based on his diary and his imperfect memory, he had stayed in Adelaide on the nights before and after his full day at Parliament House. This is something he would often do. Otherwise, he submitted that the fact the claim was incorrect did not prove it was dishonest according to the standards of ordinary people.

217 As to the claim for 29 May, Mr Ellis submitted that it was a reasonable possibility that he included this on the check-in/check-out method he was known to have used, on the mistaken assumption he stayed on 27 and 28 May and left on 29 May and, in addition, having mistakenly nominated ‘3 nights’. He submitted that this could not be excluded as a reasonable possibility given his ongoing confusion about the forms.

218 We reject these submissions. As the magistrate observed, Mr Ellis lodged the form only four days after the days claimed. We exclude the honest mistakes posited

¹²³ *DPP v Fraser John Ellis* [2024] SAMC 77 at [456].

by Mr Ellis as a reasonable possibility. We would not depart from the reasons of the magistrate.

219 It follows that we dismiss Mr Ellis' appeal insofar as it relates to Count 22.

Conclusion on Mr Ellis' appeal

220 We dismiss Mr Ellis' appeal with respect to each of Counts 6, 14, 18 and 22. With respect to Counts 14, 18 and 22, we do not depart from the factual findings that the magistrate made beyond reasonable doubt. However, with respect to Count 6, we dismiss the appeal on the factual basis that the only date in respect of which the offending has been proved beyond reasonable doubt was Thursday, 29 November 2018.

Conclusion and Orders

221 We order as follows.

222 On the Director's appeal against the acquittals by the magistrate:

1. Insofar as is necessary, leave to appeal is granted on Grounds 1 – 4 of the Notice of Appeal.
2. Leave to appeal on Proposed Ground 5 of the Notice of Appeal is refused.
3. The appeal is allowed on Ground 1.
4. The Notice of Alternative Contention is upheld insofar as it relates to Counts 5 and 11 on the Information.
5. The Notice of Alternative Contention is otherwise dismissed.
6. The acquittals on Counts 19, 20 and 21 are set aside, and convictions on those counts are substituted on the basis of the facts as found by the magistrate.

223 On Mr Ellis' appeal against conviction:

1. The appeal with respect to each of Counts 14, 18 and 22 is dismissed.
2. The appeal with respect to Count 6 is dismissed on the factual basis that the only date in respect of which the offending has been proved beyond reasonable doubt was Thursday, 29 November 2018.