COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCCrApp & CAIS No. 146 of 2011

BETWEEN

CRAIG FLOWERS

Appellant

AND

THE COMMISSIONER OF POLICE

Respondent

BEFORE:	The Honourable Mrs. Justice Allen, President The Honourable Mr. Justice Conteh, JA The Honourable Mr. Justice Isaacs, JA
APPEARANCES:	Mr. Alfred Sears, QC with Sir Richard Cheltenham, QC, Mr. Charles Mackay and Mr. Moreno Hamilton, Counsel for the Appellant Mr. Franklyn Williams, Deputy Director Public Prosecutions with Mr. Ambrose Armbrister, Counsel for the Respondent
DATES:	19 February 2015; 7, 16, 29 April 2015; 24 June 2015

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Criminal appeal – Duplicity – Retrospectivity – Lottery – Transitional provisions – Extraneous matters - Forfeiture of funds

The appellant was one of a number of persons charged before the magistrate's court with offenses against the now repealed Lotteries and Gaming Act, Chapter 387. Specifically, he was charged with permitting premises to promote, organise or conduct a lottery contrary to section eleven, count one, and permitting premises to be used for lottery contrary to section eleven, count two. The charges were laid subsequent to a raid, conducted on 28 April 2009, by members of the Royal Bahamas Police Force, of the FML Web Shop on Wulff Road. The officers, armed with a search warrant, entered the establishment and seized a

number of items, inclusive of $834,639.32 in cash and coins. The appellant was convicted on both counts and as a result he appealed his convictions.
On appeal the appellant argued, and it was conceded by counsel for the respondent, that count one disclosed no offence known to the law and therefore the resulting conviction ought to be quashed.

In relation to count two, the appellant submitted, inter alia, that the charge was duplicitous, that in any event the enactment of the Gaming Act legitimised/decriminalised the gaming activities/operations of the appellant, that the magistrate took extraneous matters into account and that the money found on the premises was forfeited contrary to law. Save as to the extent of the concession, above, the respondent rejects all of the appellant's submissions.

Held: appeal allowed.

per Allen, P: The rule against duplicity is an old common law rule which relates to the form of an indictment; it operates to prevent more than one offence being charged in one count so as to enable the accused person to know and to be in the position to properly plead to the offence alleged against him. Where the count discloses one offence which may be committed in more than one way the authorities suggest that the charge will not be considered duplicitous. In the present case the charge alleged two modes by which premises may be used for the purpose of a lottery.

It is well settled that laws are presumed to be prospective, unless, inter alia, a contrary intention appears from the wording of the Act. Also, the Interpretation and General Clauses Act states that where a written law repeals another written law the repeal does not affect anything duly done or duly suffered under the repealed law. In the present case, the wording of the Gaming Act was clearly prospective and no intention to retroactively16 legitimise/decriminalise gaming activity appeared. Moreover, the aforementioned provision of the Interpretation and General Clauses Act prevented the appellant's submission in relation to the retrospective operation of the Gaming Act.

To the detriment of the prosecution's case was its failure to adduce evidence demonstrating, to the requisite standard, that the appellant knew and permitted the premises to be used for the purpose of conducting a lottery.

The magistrate failed to make a forfeiture order, as required by statute and he also failed to demonstrate on what evidence he was satisfied of the connection of the money to the offence.

Carson v Carson [1964] 1 WLR 511 applied
Collie and others v Commissioner of Police [1965-70] 2 LRB 84 considered
Hodgetts v Chiltern District Council [1983] 2 AC 120 mentioned
Jemmison Priddle [1972] 1 QB 489 mentioned

R v Sault Ste. Marie [1978] 2 SCR 1299 applied
Re Athlumney [1898] 2 QB 547 applied
Thomson v Knights [1947] KB 336 applied

per Isaacs, JA: As the statutory definition of lottery includes the game called numbers the magistrate was entitled to rely on that definition to determine that a lottery was disclosed by the evidence.

The Gaming Act is clearly intended to have a prospective, not retrospective effect. Further, had it been the intention of Parliament to affect past criminal behaviour they could have expressly provided.

Notwithstanding the magistrate's intention to confiscate the money found on the premises of FML Webshop Wulff Road, he did not make an order to that effect. In any event, he did not record the evidence which satisfied him of the connection between the money and the offence and further he did not specify to which offence the money was supposedly connected.

Atkinson v Murrell [1972] 2 All ER 1131 considered
Reader's Digest Association Limited v Williams [1976] 3 All ER 737 considered
R v Shepherd [1993] 1 All ER 225 considered

JUDGMENT

Judgment Delivered by the Honourable Mrs. Justice Allen, P:

1. This appeal is against the decision of Stipendiary and Circuit magistrate Derrence Rolle-Davis to convict the appellant of offences contrary to sections 11 and 12 of the Lotteries and Gaming Act, Chapter 387 ("the repealed Act") on 28 September 2011.

2. As a result of the said convictions, the appellant was sentenced to a fine of $5,000 on each count or, alternatively, two years' imprisonment on each count, to run concurrently. Further, the sum of $834,639.32 found on the premises alleged to be those of the appellant was ordered by the magistrate to be forfeited to the Crown.

3. The above convictions were based on the following counts laid against the appellant:

> **"Count 1:** Permitting premises to promote, organise, or conduct a lottery, contrary to section 12 of the Lotteries and Gaming Act, Chapter 387.

Particulars are: that you on Tuesday 28th April, 2009, at New Providence, being concerned together did knowingly permit your premises, namely, FML Webshop situated at Wulff Road to promote, organise and conduct a lottery.

Count 2: Permitting premises to be used for lottery, contrary to section 11 of the Lotteries and Gaming Act, Chapter 387.

Particulars are: that you on Tuesday 28th April, 2009, at New Providence, being concerned together did knowingly permit your premises, namely, FML Webshop situated at Wulff Road to be used for the purpose of a lottery."

4. The appellant challenges the learned magistrate's decisions on the following grounds:

"1. The Learned Magistrate erred in law in the ruling dated 2nd September, 2009 in rejecting the submission on behalf of the Appellant that charges under Section 11 and 12 were bad for duplicity and that the search warrant was invalid.

2. The Learned Magistrate wrongly admitted inadmissible evidence, contrary, inter alia, to Sections 66, 67 and 68 of the Evidence Act, 1996 without which the prosecution would not have been able to make out a sufficient case against the Appellant under Sections 11 and 12 of the Lotteries and Gaming Act and in finding that there was admissible evidence against the Appellant establishing a "lottery" within the meaning of section 2 of the Lotteries and Gaming Act, Chapter 387.

3. The Learned Magistrate took extraneous matters into consideration.

4. The decision of the Learned Magistrate was erroneous in point of law when he:-

(i) Expressly or impliedly took into account the evidence from the statements made by other defendants to the police against the appellant;

(ii) Found that a lottery was conducted on the day, which was the subject of the charge, and on the premises of the Appellant;

(iii) Allowed evidence to be adduced by the prosecution with respect to an alleged offence occurring on the 23rd April, 2009 which evidence was irrelevant and inadmissible to prove the above charges alleged to have occurred on 28th April, 2009.

(iv) Rejected the No Case Submission on behalf of the Appellant in the oral ruling, made on the 19th July, 2011 that the charges framed on the Charge Sheet purportedly pursuant to Sections 11 and 12 of the Lotteries and Gaming Act, did not contain the statutory elements of the offences charged; that Exhibits #14 and 15 were admitted contrary to Sections 66, 67 and 68 of the Evidence Act; and that there was not a sufficient case made out against him in accordance with section 203 of the Criminal Procedure Code Act.

(v) Failed to comply with the mandatory provisions of Section 108 of the Criminal Procedure Code Act in that he did not date and sign the judgment in open court at the time of pronouncing it and the judgment was not made available to the Appellant up to the expiration of the time limited for appealing.

5. The decision of the Learned Magistrate was unreasonable and could not be supported having regard to the evidence.

6. The Learned Magistrate erred in law in finding the Appellant guilty of the offences relating to the operation of a lottery in circumstances in which there was no evidence to show that he had control over all the steps necessary to constitute the actus reus of the offences. Specifically, customers purchased tickets and redeemed their winnings from the Appellant's business. However, he had no control over the operation of the lottery.

7. That in the circumstances the conviction of the Appellant ought not to be allowed to stand having regard to the passing by Parliament of the Gaming Act, 2014 as that Act

retroactively legitimized/decriminalized the gaming activities/operations of the Appellant (FML Webshop) in respect of the period six years prior to the effective date, 24th November, 2014; upon his compliance with the conditions specified in the Gaming Act, 2014, which said conditions have been complied with.

8. The order of the Learned Magistrate in forfeiting the sum of $834,629.36 was erroneous in point of law in that he wrongly interpreted section 72 of the Lotteries and Gaming Act, Chapter 387 to mean that once there was a conviction he was able to forfeit anything produced to the Court notwithstanding that nothing was produced to the court and there was no admissible evidence adduced by the prosecution to show to the satisfaction of the court that the said sum of $834,629.36 related to the offences for which the Appellant was charged.

9. That under all the circumstances of the case, the decision is unsafe or unsatisfactory."

5. At the hearing of the appeal, counsel for the respondent conceded that count 1, that is, 'permitting premises to promote, organise or conduct a lottery', disclosed no offence under the repealed Act; and in particular, that it disclosed no offence under section 12. I agree.

6. In relation to the appeal against the conviction on Count 2, laid pursuant to section 11 of the repealed Act, that section provides:

> **"Any person who uses any premises or knowingly permits any premises to be used for any purposes connected with the promotion or conduct of a lottery, shall be guilty of an offence and liable on summary conviction, in the case of a first conviction for such offence, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment, and in the case of a second or subsequent conviction for such offence, shall be liable to a fine not exceeding five thousand dollars and shall be sentenced to imprisonment for a term not exceeding two years."**

7. In that regard, counsel for the appellant submits that the charge fails to specify which of the alternative offences is being charged, and creates the necessary implication that the charge was duplicitous.

8. The rule against duplicity is an old common law rule which relates to the form of an indictment; it operates to prevent more than one offence being charged in one count so as to enable the accused person to know and to be in the position to properly plead to the offence alleged against him.

9. Duplicity is obvious where one count charges more than one offence, but in some cases it is difficult to determine whether it applies, as where in a single count one activity is charged, but the activity involves more than one act.

10. In the case of **Thomson v Knights** [1947] K.B. 336 the defendant was convicted pursuant to section 15 of the English Road Traffic Act, 1930 which provided:

> **"Any person who when driving or attempting to drive, or when in charge of a motor vehicle on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be liable to certain penalties."**

11. Lord Goddard, C.J., giving the judgment of the court, held that the conviction was not bad for uncertainty. At page 337 he stated:

> **"The offence is driving, or attempting to drive, or being in charge of a vehicle, when the man is incapable of having proper control of the vehicle, and that incapacity is caused by drink or a drug. I do not think Parliament here meant to create one offence of being incapable by reason of a drug and another offence of being incapable by reason of drink. What Parliament intended to provide was that a man driving or attempting to drive, or being in charge of a motor car in a self-induced state of incapacity, whether that incapacity was due to drink or drugs, the man commits an offence in each of those cases. In my opinion the conviction is not for an alternative offence nor can it be said to be in respect of two offences. The offence was being in charge of the car when in this particular state of incapacity.**

12. Similarly, in the Canadian Supreme Court case of **R. v. Sault Ste. Marie** [1978] 2 S.C.R. 1299 the respondent City was found guilty of a breach of the Ontario Water Resources Commission Act, R.S.O 1970, c. 332, section 32(1) which provides as follows:

> **"Every municipality or person that discharges or deposits or causes or permits the discharge or deposit of any polluting material of any kind into or in any well, lake, river, pond,**

spring, stream, reservoir or other water or watercourse or on any shore or bank thereof or into or in any place that may impair the quality of the water of any well, lake, river, pond, spring, stream, reservoir or other water or watercourse is guilty of an offence..."

13. The Court, in relation to a submission that the charge was bad for duplicity stated, at page 1308:

> **"In my opinion, the primary test should be a practical one, based on the only valid justification for the rule against duplicity: does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge?... I think we must conclude that the charge in the present case was not duplicitous. There is nothing ambiguous or uncertain in the charge. The City knew the case it had to meet. Section 32(1) of The Ontario Water Resources Commission Act is concerned with only one matter, pollution. That is the gist of the charge and the evil against which the offence is aimed. One cognate act is the subject of the prohibition. Only one generic offence was charged, the essence of which was "polluting," and that offence could be committed in one or more of several modes. There is nothing wrong in specifying alternative methods of committing an offence, or in embellishing the periphery, provided only one offence is to be found at the focal point of the charge. Furthermore, although not determinative, it is not irrelevant that the information has been laid in the precise words of the section.**
>
> **I am satisfied that the Legislature did not intend to create different offences for polluting, dependent upon whether one deposited, or caused to be deposited, or permitted to be deposited. The legislation is aimed at one class of offender only, those who pollute."**

14. The mischief at which section 11 is aimed is either use of premises for the purposes of a lottery, or knowingly permitting the use of premises for the purposes of a lottery.

15. Promoting and conducting a lottery are alternative modes by which premises may be used for the purposes of a lottery; and the authorities are clear that a charge ought not to be considered duplicitous unless more than one offence is charged in a single count. The charge here simply alleges the two modes of committing the offence charged and is not duplicitous (see **Jemmison v Priddle** [1972] 1 QB 489).

16. Also posited by counsel for the appellant is the assertion that the essential elements of the offence which must be established by evidence led by the prosecution, are firstly, that one must be found on the premises; and secondly, that there must be evidence of a lottery taking place on those premises. He further asserts that there was no evidence that the appellant was found on the premises.

17. To establish the offence charged under section 11, the prosecution must prove that the person knew and permitted his premises to be used for a purpose connected to the promotion or conduct of a lottery. There is no element of the offence that such a person must be found on the premises, although evidence that he was so found, may be evidence from which one may infer that he knew and permitted those premises to be used for that purpose.

18. As noted above, a section 11 offence requires the accused to have "knowingly" permitted his premises to be used in contravention of the section.

19. Counsel for the appellant complained that the word "knowingly" was omitted from the statement of the charge and that the omission prejudiced and embarrassed the appellant in his defence. The Second Schedule to the Criminal Procedure Code Act which sets out the rules for the framing of charges and informations makes it unnecessary to state all of the essential ingredients of the offence, but makes it mandatory that it contain the reference to the section of the Act which creates the offence. Specifically, paragraph 3(3) of the Schedule provides:

> **"The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and, if the offence charged is one created by Act, shall contain a reference to the section of the Act creating the offence." [Emphasis added].**

20. I am satisfied that notwithstanding the omission, the particulars of the offence, together with the reference to the correct section of the repealed Act under which the appellant was charged, complied with the above provisions, and fairly indicated to him the nature of the case he had to meet. He was therefore not prejudiced or embarrassed in his defence.

21. The appellant further relies on section 86(16) of the Gaming Act 2014 ("the Act") and submits that his conviction should be vacated based on the retrospective application of that subsection, which provides:

"Subject to subsection (17), and pending the award of gaming house operator and gaming house premises licences, it shall be lawful for any establishment (which, at the effective date, had been carrying n the business which shall be authorized under sections 44, 45 and 46 of this Act), to continue the operation of such business for a period commencing on the effective date and ending on such date as the Minister may specify by notice in the Gazette for the closure of all such businesses in The Bahamas (hereinafter referred to as "the transitional period"); provided that the owner of such business shall –

(a) make full and frank disclosure,...of all turnover...in respect of a period of six years prior to the effective date...(hereinafter referred to as "the review period");

(b) make payment in full, within such period as the Minister may require writing of –

(i) all fees payable under the Business Licence Act (No. 25 of 2010) in respect of that business for the review period...;

(ii) all gaming taxes which would have been payable by that business had such business been licensed under this Act...; and

(iii) a penalty, in the amount of –

(aa) three hundred and fifty thousand dollars in respect of a business with a gross turnover of less than five million dollars;

(bb) seven hundred and fifty thousand dollars in respect of a business with a gross

turnover in excess of five million dollars,

in lieu of gaming taxes which would have been payable by that business had such business been licensed under this Act; and

(c) cease the operation of such business on the date on which the transitional period ends." [Emphasis added]

22. One of the most well known statements of the rule against retrospectivity is contained in the judgment of RS Wright J. in **Re Athlumney** [1898] 2 QB 547 at pages 551 and 552:

> **"Perhaps no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."**

23. The rule has, in fact, two aspects, for it involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.

24. According to Craie's on Statute Law 6th Edn. p. 386, a statute is retrospective:

> **"...which takes away or impairs any vested right acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."**

25. If, of course, the language of the enactment so demands, the Act must be construed as retrospective in its operation for as Scarman J said in **Carson v Carson** [1964] 1 WLR 511 at p. 517:

> **"... the rule against the retrospective effect of statutes is not a rigid or inflexible rule but is one to be applied always in the light of the language of the statute and the subject matter with which the statute is dealing."**

26. The Act repealed the whole of Chapter 387, including the provisions of section 11 under which the appellant was convicted.

27. In that regard, section 20 (b) of the Interpretation and General Clauses Act, Chapter 2 provides:

> **"20. Where a written law repeals in whole or in part any other written law, the repeal shall not –**
>
> . . .
>
> **(b) affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed.**
>
> . . ."

28. It is clear from a reading of subsection (16) of section 86 of the Act (above), that it does no more than stipulate conditions which must be met so that establishments, seeking to obtain licences under the Act, may legitimately operate during the transitional period. It further seeks to tax gaming operations which, going forward, would be authorised by the Act. It simply gives a prospective benefit based on antecedent facts.

29. Indeed, subsection (17), to which subsection (16) is subject, confirms this position in prescribing:

> **"Any contravention of the provisions of subsection 16(a), (b) or (c) by any business establishment permitted to operate under subsection (16) will -**
>
> **(a) render the continued operation of such business unlawful notwithstanding anything to the contrary in this Act; and**
>
> **(b) be grounds for the disqualification of such business for any licence provided for by this Act." [Emphasis added]**

30. Ineluctably, the language of subsections (16) and (17) (above) does not admit of the interpretation urged by the appellant's counsel that the acts prohibited by section 11 are retrospectively decriminalised, and the conviction pursuant thereto consequently vacated.

31. That submission is simply unsustainable in light of the clear and unambiguous language of those provisions, and indeed, in light of section

20 of the Interpretation and General Clauses Act (above) which clearly states that the repeal of an Act does not affect anything duly done or suffered under the repealed Act.

32. Also submitted by the appellant as a reason for allowing his appeal is his assertion that the magistrate considered extraneous matters. In particular, he alleges that evidence was admitted which related to conduct on a date other than that on which the offence was alleged to have been committed, and was therefore irrelevant and inadmissible.

33. This submission was met by the objection of the respondent that during the preliminary stage of the trial, before any witnesses were called, the prosecutor sought to amend the particulars of the count to allege that the offence was committed between 23 April and 28 April 2009. The reason for the amendment, as posited by the prosecutor at the time, was to accommodate the evidence intended to be led.

34. The proposed amendment was, according to counsel for the respondent, objected to by counsel for the appellant in the court below on the basis that in any event the charge was duplicitous, and for that there was no cure. Counsel for the respondent insists that it would be unfair for the appellant to be allowed to advance this ground on appeal when the amendment which would have cured this defect was objected to below, and upheld by the magistrate.

35. As it turned out, the learned magistrate found that the charges were not bad for duplicity, and ordered them to remain as framed. In effect, the learned magistrate upheld the objection but not for the reason proffered by counsel. In the premises, I did not agree that to allow the appellant to pursue that ground of appeal would be unfair.

36. In support of his submission that the evidence of 23 April 2009 was irrelevant and inadmissible, the appellant relies on the case of **Collie and others v Commissioner of Police** [1965-70] 2 LRB 84. In that case, the appellants were charged with the offence of conducting a lottery on 28 August 1965. The prosecution relied on previous observations, namely, events which occurred on 21, 22 and 23 July, the events of 28 August and the 'expert' evidence of one ASP Strachan who professed to have a wide experience in the investigation of lottery cases.

37. The evidence was that on 21 and 22 July two of the appellants were seen receiving money from persons, writing in a book and dealing with packages from the driver of a car. On 23 July, the other appellant was seen taking money from persons and writing in a book. Cunningham Smith J., giving the judgment of the court, stated at pages 85 and 86:

> **"The transactions that were alleged to have taken place on these prior dates could relate just as easily to 101 matters besides that of a lottery – 'asue' to mention even one possibility.**
> **In the circumstances, we are of the view that the evidence given in regard to 21, 22 and 23 July was irrelevant and inadmissible to prove the charges of conducting a lottery on 28 August 1965.**
>
> ...
>
> **To prove the offence it was incumbent on the prosecution to prove that the lottery was in process and actively being conducted at the particular time charged."**

38. While the case of **Collie** (above) is instructive, the fact that the evidence at trial differs from the date laid in the count is not necessarily fatal where the offence charged may be continuous or intermittent over a period of time. (See **Hodgetts v Chiltern District Council** [1983] 2 AC 120, 128).

39. Indeed, "lottery" in the repealed Act includes:

> **"any sweepstake and any other game, method or device whereby money or money's worth is distributed or allotted in any manner depending upon or to be determined by chance, or lot, held, drawn, exercised or managed whether in The Bahamas or elsewhere or upon the basis of the outcome of a future contingent event whether occurring in The Bahamas or elsewhere and also includes the game called and known as 'numbers'."**

40. Permitting premises to be used for a purpose connected to the conduct or promotion of a lottery may well involve continuous or intermittent acts; and in my view, the evidence of 23 April 2009 was relevant and admissible.

41. To prove the premises were being used for a purpose connected to promoting or conducting a lottery, the evidence adduced included that of Officer Nicholas Huyler who testified that on 28 April 2009, upon entering FML Webshop's Wulff Road location he sat down at one of the computer terminals, and used that computer to check the day's winning numbers for early New York, Miami, and Chicago.

42. After checking, the numbers he approached the cashiers and placed $3 on the account of Tyrone Clarke; he had previously received the account number from Clarke who alleges that he opened the account at FML

'Village Road' on 23 April 2009. The Court takes judicial notice of the fact that the Wulff Road premises and the Village Road premises are the same.

43. Huyler alleges he was provided with a receipt by FML evidencing his $3 deposit, but that immediately thereafter officers entered the building and detained the occupants of the premises.

44. No receipt was adduced in support of his evidence that he had opened an account at FML's premises, as the receipt tendered for admission was rejected on the basis that the prosecution was unable to prove its authenticity, and indeed its relevance, as there was nothing on it to indicate who generated the receipt.

45. It emerged on cross-examination of Huyler that what he did on the computer while he was at FML Wulff Road could have been done from any computer terminal anywhere. He further testified that he was at the establishment for about an hour before the officers came and during that time no one solicited him to use the computer to go to any particular site.

46. Also before the court was the evidence of Officer Tyrone Clarke who, notwithstanding strenuous objection by counsel for the appellant, gave evidence of events which occurred on 23 April 2009.

47. The events of which he testified included his evidence that he visited FML Webshop's 'Village Road' location on 23 April 2009, and opened an account. To do so he said he entered the business section of the Web Shop where he gave an employee by the name of Ms. Stubbs $20, the amount required to open an account. The account opening process included the taking of his name, photograph, contact number and a copy of his drivers licence.

48. He said he was given a plastic card, similar to a credit card, the front of which contained his account number. The account number, coupled with a pin number, enabled him to access his account through the internet.

49. In response to the question of whether or not he received any instructions as to how to play the game, Officer Clarke testified:

> **"A. You have to open up your account with $20 and then you will be logged into the internet.**
> **Q. Is there any particular site?**
> **A. Yes ma'am; www.nassaugames.com. And once I would log onto that site, I would put my account number in...I would enter my pin number...and that would give me**

access to the webpage where you can purchase numbers."

50. Officer Clarke further testified that on 28 April 2009 he accessed the site and purchased numbers while at his office which is located at the police headquarters. On cross-examination, Officer Clarke admitted that he never tried to use the card to visit any other websites and could not say with certainty whether the card gave him access to other websites. Notably, he also stated that the numbers purchased online could have been purchased from any location where there was a computer.

51. The game of 'numbers' is specifically included in the definition of lottery; and the evidence clearly shows that Officer Clarke was facilitated in playing numbers through the account he set up at the premises at Wulff Road, and by the access card he was given when he set up that account. It matters not that he used a computer at some other location to play.

52. Indeed, as the actus reus of the offence under section 11, is permitting premises to be used for any purpose connected with the promotion or conduct of a lottery, at the least, Officer Clarke's evidence established that the premises at Wulff Road were used to promote a lottery.

53. However, the appellant further challenges the conviction on the ground that there was no admissible evidence connecting him to the premises, i.e. that there was no evidence capable of proving that he was either the owner, or occupier, of the premises.

54. In relation to this ground, counsel protests that the business licence taken from the Wulff Road premises purportedly showing that the appellant was licensed to use the premises as a webshop, was wrongly admitted and accepted by the learned magistrate as evidence of that connection. He urged us to find that the learned magistrate admitted the business licence in contravention of section 18 of the Business Licence Act; and wrongly applied section 98 of the Evidence Act to admit it.

55. Section 18(1)(a) of the Business Licence Act, and section 98 of the Evidence Act state:

"18 (1) In any proceedings in a court, the fact that -

(a) a licence has been issued to a person may be established by the production of an extract, certified by the Secretary from the books of the Ministry, of the entry recording the issue of the licence and of proof that that person and the person named in the entry are one and the same;

(b) there was not in force at a specified time a licence in respect of the carrying on of a business whether by a particular person or not may be established by the production of a statement to that effect signed by the Secretary."

"98. When any document is produced before a court purporting to be a document which by any statute at the time in force is admissible in evidence provided that it is signed or stamped or sealed, or otherwise authenticated as required by the statute, the court shall presume until the contrary is shown -

(a) that the signature, stamp, seal or other authentication of the document is genuine;

(b) that the person signing, stamping, sealing or otherwise authenticating it had at the time when he so signed, stamped, sealed or authenticated it the official or other character which he claims:

Provided that the document is substantially in the form, and purports to be executed in the manner directed by the law in that behalf."

56. I am unable to find any merit in the argument of counsel. Section 18 does not provide that a business licence cannot be received in evidence unless it satisfies the requirements of subsection 1 (a). The provision, in my view applies in cases where no physical licence is produced and a party otherwise seeks to establish the fact that a licence has been issued. The section permits that fact to be proven as prescribed in (a). Similarly, if a party wishes to establish that no licence has been issued, they may do so pursuant to the provisions in (b).

57. In my view, the business licence was properly received in evidence and presumed genuine pursuant to section 98, in the absence of evidence that it was not signed, sealed and authenticated as required by the statute under which it was issued.

58. Notwithstanding that the evidence shows that the appellant had a licence to use the premises as a webshop however, the prosecution has singularly failed to adduce any admissible evidence capable of proving that the appellant knew, and nevertheless permitted the premises to be used for the purpose of promoting or conducting a lottery.

59. In this regard, I accept counsel's submission that the statements made by the appellant's co-accused were improperly admitted by the magistrate and wrongly used to convict him. It is trite that an out of court statement by a co-accused asserting the participation of the other in the crime, is not evidence against the other; and consequently the statements given by the appellant's co-accused implicating him, were not evidence against him.

60. Moreover, there was no evidence adduced that he was present on the premises when either Officer Clarke opened his account, or when Officer Huyler topped it up; nor was there evidence of his presence there at any other time prior to the date of the alleged offence.

61. Similarly, there was no evidence of any arrangement between the appellant and any of the persons found to have been promoting or conducting a lottery on the premises; and no evidence from which it may be reasonably inferred that he ought to have known but turned a blind eye to what was going on. In essence, there was no evidence that the appellant knowingly permitted the premises at Wulff Road to be used for any purpose connected to promoting or conducting of a lottery.

62. I am therefore satisfied that an essential element of the offence under section 11 was not established; that the conviction was not supported by the evidence and is, in the circumstances, unsafe.

63. In relation to the money which was purportedly forfeited to the Crown by the learned magistrate, Inspector Cedric Bullard testified that on 28 April 2009, armed with a search warrant, he went to FML Webshop situated on Wulff Road. He searched the premises in the presence of the appellant and discovered a quantity of sealed packages of money in the form of both cash and coins. The money was taken to the police headquarters and secured.

64. The following day, on 29 April 2009, the appellant Officer Bullard and one Sgt. Bowe counted the funds and agreed the amount to be $834,241.32 comprising "$768,382.52 in cash the remaining amount in coins". After this count the cash was taken to the Central Bank and the coins to the Central Detective Unit for safekeeping.

65. However, a count of the money during Officer Bullard's oral testimony revealed a higher amount, namely, $786,831.00 cash and while the court acknowledged that it would take a look at the coins it never happened.

66. During the attempt by the prosecutor to have the cash and coins exhibited, she was met by an objection from counsel for the appellant to the effect that there was never any agreement on the amount of coins found at the premises and further, while the amount of cash was agreed during the

count, there was a discrepancy between that count and the count of 29 April 2009. Notwithstanding counsel's objections, the total amount of cash and coins postulated by Officer Bullard as exhibited was $834,629.32.

67. In relation to this money, the learned magistrate at page 432 of the record stated:

> **"In relation to section 72 of the Act, having reviewed that section, the court is satisfied that the court does have the power to forfeit any items that were brought in relation to the charge. The court is satisfied that the proceeds obtained and collected on the date of the charges and of the trial itself, the sum of $834,639.32 ought to be forfeited to the Crown."**

68. Section 72 of the repealed Act under which the learned magistrate purported to forfeit the funds, states:

> **"The court by or before which a person is convicted of an offence under this Act may order anything produced to the court, and shown to the satisfaction of the court to relate to the offence, to be forfeited and either destroyed or dealt with in such other manner as the court may order." [Emphasis added]**

69. It is clear from the record of the learned magistrate's decision that he did not make an order as section 72 requires. Moreover, he failed to demonstrate on what evidence he was satisfied of the connection of the money to the offence.

70. In conclusion, and for all of the reasons stated, I would allow the appeal, quash both convictions and sentences imposed upon the appellant, and order the amount of $834,639.32 returned to the premises of FML Webshop's Wulff Road location.

The Honourable Mrs. Justice Allen, P

71. I agree with the disposition of this appeal for the reasons given by Allen, P and Isaacs, JA.

72. Mr. Williams, Deputy Director of Public Prosecutions, properly conceded that count one, as laid, was unsustainable. This is so for the simple reason that, as was contended by the appellant, the charge did not disclose any offence known to the law, particularly the offence under section 12.

73. In relation count two the appellant can obtain no relief by immunity or amnesty from the new Gaming Act, as argued by his counsel. The Act does not immunize past convictions pursuant to the old law, under which he was convicted, but his conviction on the second count was clearly unsustainable as there was no evidence showing that he knowingly permitted premises to be used for lottery.

74. The magistrate clearly misconceived his powers relating to forfeiture. Before a forfeiture order may be made the thing produced to the court must be shown to the satisfaction of the court to relate to the offence. That was the effect of section 72 of the Act, under which the magistrate purported to forfeit the money.

75. Therefore, I also agree that the money confiscated by the magistrate on the conviction of the appellant and his co-accused should be returned as the magistrate did not indicate that he was satisfied that the money related to the offences. As such, there was no basis for its confiscation, nor was there any order by the magistrate in respect of it other than his opinion that the money ought to be forfeited.

The Honourable Mr. Justice Conteh, JA

Judgment delivered by the Honourable Mr. Justice Isaacs, JA:

76. On 29 April 2015 having heard the submissions of Counsel, we adjourned this appeal with the promise to deliver our decision later. I have read the draft decision of Allen, P and I concur with her disposition of this appeal for the reasons given. I wish to, however, add a few observations of my own.

77. The appellant was convicted in the magistrate's court by Stipendiary and Circuit Magistrate Derrence Rolle-Davis (the magistrate) on 28 September 2011 of two offences laid pursuant to the Lotteries and Gaming Act (Ch. 387) (the Act). They were: Permitting premises to promote, organise or conduct a lottery, contrary to section 12 of the Act and Permitting

premises to be used for lottery, contrary to section 11 of the Act. He was ordered to pay a fine of $5,000.00 on each count or in default, serve a concurrent term of imprisonment of two years on each count.

The Trial

78. The appellant was charged with eighteen other persons with various offences under the Act. He faced the two charges mentioned above. The particulars of the first count read:

> **"That you on Tuesday 28th April, 2009 at New Providence, The Bahamas, being concerned together did knowingly permitted (sic) your premises namely: FML Web Shop situated at Wulff Road to Promote, Organize and Conduct a Lottery."**

The particulars of the second count read:

> **"That you on Tuesday 28th April, 2009 at New Providence, being concerned together did knowingly permitted (sic) your premises namely FML Web Shop situated at Wulff Road to be used for the purpose of a lottery."**

79. The evidence led at the trial revealed that on 23 April 2009 and 28 April 2009 members of the Royal Bahamas Police Force carried out an operation to gather evidence against the FML Web Shop (FWS) businesses. They were investigating what is commonly called the "numbers" game. An officer set up an account on 23 April 2009 and on 28 April 2009 another officer placed money on that account. The first officer then went online to a website and played the game.

80. While the second officer was onsite at the Wulff Road branch of FWS (FWS, Wulff Road) the Police conducted a raid and seized a number of items including computers and money; and arrested a number of people. The appellant was not at that branch at the outset of the raid, but subsequently attended that location. He too was arrested.

The Appeal

81. By Notice of Motion to Appeal Against Conviction filed on 3 October 2011, the appellant challenged his conviction on a number of grounds. However, when the matter came on for hearing Counsel for the appellant, Mr. Sears, applied for and was granted leave to amend the grounds of appeal. On 8 April 2015 the amended Notice was filed and the grounds were as follows:

> "1. The Learned Magistrate erred in law in the ruling dated 2nd September, 2009 in rejecting the submission on behalf of the

Appellant that charges under Section 11 and 12 were bad for duplicity and that the search warrant was valid.

2. The Learned Magistrate wrongly admitted inadmissible evidence, contrary, inter alia, of Sections 66, 67 and 68 of the Evidence Act, 1996 without which the prosecution would not have been able to make out a sufficient case against the appellant under sections 11 and 12 of the Lotteries and Gaming Act and in finding that there was admissible evidence against the appellant establishing a "lottery" within the meaning of section 2 of the Lotteries and Gaming Act, Chapter 387.

3. The Learned Magistrate took extraneous matters into consideration.

4. The decision of the Learned Magistrate was erroneous in point of law when he:-

    (i) Expressly or impliedly took into account the evidence from the statements made by other defendants to the police against the applicant;

    (ii) Found that a lottery was conducted on the day which was the subject of the charge and on the premises of the appellant.

    (iii) Allowed evidence to be adduced by the prosecution with respect to an alleged offence occurring on the 23rd April, 2009 which evidence was irrelevant and inadmissible to prove the above charges alleged to have occurred on 28th April, 2009.

    (iv) Rejected the No Case Submission on behalf of the appellant in the oral ruling, made on the 19th July, 2011 that the charges as framed on the Charge Sheet purportedly pursuant to Sections 11 and 12 of the Lotteries and Gaming Act, did not contain the statutory elements of the offences charged; that Exhibits #14 and 15 were admitted contrary to Sections

66, 67 and 68 of the Evidence Act; and that there was not a sufficient case made out against him in accordance with section 203 of the Criminal Procedure Code Act.

(v) Failed to comply with the mandatory provisions of Section 108 of the Criminal Procedure Code Act in that he did not date and sign the judgment in open court at the time of pronouncing it and the judgment was not made available to the appellant up to the expiration of the time limited for appealing.

5. The decision of the Learned Magistrate was unreasonable and could not be supported having regard to the evidence.

6. The Learned Trial Magistrate erred in law in finding the appellant guilty of offences relating to the operation of a lottery in circumstances in which there was no evidence to show that he had control over all the steps necessary to constitute the actus reus of the offences.

7. That in the circumstances the conviction of the appellant ought not to be allowed to stand having regard to the passing by Parliament of the Gaming Act 2014 as that Act retroactively legitimatized/decriminalize the gaming activities/ operations of the appellant (FML Web Shop) in respect of the period six years prior to the effective date, 24th November, 2014; upon his compliance with the conditions specified in the Gaming Act, 2014 which said conditions have been complied with.

8. The order of the Learned Magistrate in forfeiting the sum of $834,629.36 was erroneous in point of law in that he wrongly interpreted section 72 of the Lotteries and Gaming Act, Chapter 387 to mean that once there was a conviction he was able to forfeit anything produced to the Court notwithstanding that nothing was produced to the court and there was no admissible evidence adduced by the prosecution to show the satisfaction of the court that the said sum of $834,629.36 related to the offences for which the appellant was charged.

9. That under all the circumstances of the case, the decision is unsafe or unsatisfactory."

Count One

82. The appeal was simplified somewhat due to Counsel for the Respondent, Mr. Williams, beginning his response to the appellant's submissions with a concession that the conviction on the first count could not stand. This concession in my view, although rightly made because the offence charged was not one known to the law, should have been made earlier as that would have served to expedite the hearing.

83. Section 12 of the Act states:

> **"12. Any person who promotes, organises or conducts, a lottery, other than a lottery permitted by section 14, 15 or 16, shall be guilty of an offence and liable on summary conviction, in the case of a first conviction for such offence, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment and, in the case of a second or subsequent conviction for such offence, shall be liable to a fine not exceeding five thousand dollars and shall be sentenced to imprisonment for a term not exceeding two years."**

84. Under section 12 the offence is committed by a person who promotes, organises or conducts a lottery other than a lottery permitted by sections 14, 15 or 16 of the Act. Two things are evident. First, there must be an actus reus by the accused, i.e. he must be engaged actively in the promotion, organisation or conduct of a lottery. Second, the Prosecution must prove his activity was not permitted under sections 14, 15 or 16 of the Act.

85. The charge laid against the appellant was defective because it alleged the appellant permitted his premises to promote, organise or conduct a lottery. This ambiguous formulation does not remotely comply with section 73 of the Criminal Procedure Code (the CPC). That section permits a degree of latitude in framing a charge. It reads:

> "**73.** Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence alleged."

86. I do not think the law is so strict as to derail a prosecution merely because the statement of the charge fails to include a word or phrase mentioned in the particular statute so long as the particulars and the statement give **"reasonable information as to the nature of the offence alleged"**. But for the flaw mentioned above, I opine that reference to the relevant section of the law in the nature of the charge and the inclusion of the word "knowingly" in the particulars of offence is sufficient to satisfy section 73 of the CPC.

87. What is important is that a person is alerted to the case he must meet. Parliament intended that an accused ought not to be able to avail himself of technical devices to avoid a trial on the merits of the case. Sections 76, 208 and 251 of the CPC lend support for that view.

88. However, the Prosecution in this case has gone so far wrong that the error is incapable of remediation at this point, and the appeal against conviction on count one is therefore allowed. Therefore, the conviction on count one is quashed and the sentence set aside.

Count Two

89. The Prosecution was not so magnanimous on count two; and required Mr. Sears and Sir Richard to deploy their entire arsenal to attack the appellant's conviction.

90. Section 11 of the Act states:

> **"11. Any person who uses any premises or knowingly permits any premises to be used for any purposes connected with the promotion or conduct of a lottery, shall be guilty of an offence and liable on summary conviction, in the case of a first conviction for such offence, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment, and in the case of a second or subsequent conviction for such offence, shall be liable to a fine not exceeding five thousand dollars and shall be sentenced to imprisonment for a term not exceeding two years."**

91. It is evident that the elements of the offence under section 11 are disclosed if a person:

1. uses premises; or
2. knowingly permits premises to be used;
3. for <u>any purpose connected</u> with the promotion or conduct of a lottery.

92. Thus, the Prosecution in this case was obliged to prove the appellant knowingly permitted premises over which he exercised a degree of control to be used for a purpose connected with the promotion or conduct of a lottery.

What is a Lottery?

93. The starting point for the magistrate was whether or not a "lottery" was disclosed on the Prosecution's evidence.

94. Mr. Sears helpfully directed us to the United Kingdom's Betting, Gaming and Lotteries Act 1963 by way of contrast. That Act did not have a definition of "lottery" as the Act did. However, in **Atkinson v Murrell** [1972] 2 All ER 1131 the House of Lords provided a definition. The case involved a scheme whereby a person paid £1 for an envelope containing six names and addresses. He then wrote his name and address at the bottom of the list and sent the list and £1 to the promoters. He also sent £1 to the person whose name was at the top of the list.

95. On receipt of the list, the promoters then supplied the participant with three envelopes for the participant to sell at £1 each. The participant waited for his name to reach the top position at which stage the participant hoped to receive £729 but only if the chain was not broken. The appellant in that case was charged with using premises for the promotion of a lottery, contrary to section 42 (1) (f) of the Betting, Gaming and Lotteries Act 1963. He contended that the scheme was not a lottery within the meaning of section 41 of the Act, for there was no prize fund which was a necessary ingredient of a lottery. He further contended that the scheme did not constitute a distribution of money by lot or chance because the money sent by new participants to participants whose name was at the head of the list was not a matter of chance but one of deliberate choice. The justices held that the scheme constituted an unlawful lottery and convicted the appellant. On appeal the Divisional Court affirmed the conviction.

96. The appellant was granted leave to appeal on the question whether in order to constitute a lottery which was unlawful under section 41 of the Act of 1963 there must be either (a) a prize fund for profits in the hands of the promoter to which the participants had contributed and out of which profits were provided; or (b) a prize or prizes in the hands of the promoter provided by a third party who was not a participant.

97. The Divisional Court dismissed the appeal, holding inter alia:

(1) that a scheme which was a lottery if the prizes were in the hands of the promoter for him to give to the winners did not cease to be a lottery if the scheme provided that each participant should send a contribution direct to the winner, a contribution to his prize.

(2) That, although in a lottery a participant had to pay for his chance to participate, it was not an essential ingredient of a lottery that there should be a prize fund provided the scheme devised had the overall object of the distribution of money by chance.

98. In **Reader's Digest Association Limited v Williams** (1976) 3 All ER 737 the defendant's conviction in connection with the promotion or conduct of a lottery contrary to section 21 of the Betting, Gaming and Lottery Act, 1963 was quashed. Section 21 provided that "subject to the provisions of this Act, all lotteries which do not constitute gaming are unlawful".

99. The facts as extracted from the decision of Widgery, CJ were as follows:

> **Reader's Digest ran an advertising campaign, and they addressed this campaign to no less than 4,700,000 people in the UK. Amongst those 4,700,000 people were to be distributed 2,103 prizes. Each of the 4,700,000 would receive through the post an envelope and letter addressed to him personally. Inside, he would find that it contained, first of all, an offer to sell some of the Reader's Digest material, their magazine, one of their books, a gramophone record or something of that kind. Secondly, there was a list of six numbers. There were also two envelopes—one marked 'Yes, please' and the other marked 'No, thank you'.**
>
> **You had to consider whether you wished to take advantage of the sale offer contained in the paper, whatever that might be. If you wished to take advantage of the sale offer, you returned the envelope marked 'Yes, please'; if you did not wish to take advantage of the offer, you returned the 'No, thank you' envelope, and there was no sort of obligation on you to buy the article in question at all. But whether you returned the 'Yes' or 'No' envelope, by doing so you made yourself eligible to receive one of the 2,103 prizes because if any of your six numbers which you returned in your 'Yes' or 'No' envelope, as the case may be, proved to be one of the prize numbers, then you had a prize attributable to that number. The numbers were chosen at random before the campaign began, and the numbers were unique in that there was no duplication at all throughout the entire scope of this mammoth enterprise. If therefore 107,164, to take an example, happened to be a prize number and you had it in**

your envelope, then you qualified for the appropriate prize whether you returned the 'No' label or the 'Yes' label.

100. At page 3 the learned Chief Justice said as follows:

> **"The question, as I say, has been: is this a lottery as a matter of law? A lottery is the distribution of prizes by chance where the persons taking part in the operation, or a substantial number of them, make a payment or consideration in return for obtaining their chance of a prize. There are really three points one must look for in deciding whether a lottery has been established: first of all, the distribution of prizes; secondly, the fact this was to be done by means of chance; and thirdly, that there must be some actual contribution made by the participants in return for their obtaining a chance to take part in the lottery."**

101. We need not have ventured further afield than the Act since section 2 tells us what qualifies as a "lottery". So while the cases may be of some academic interest, they do not provide any further assistance in defining a "lottery" than the Act itself.

102. The definition of a "lottery" appears in section 2 of the Act as:

> **"'lottery' includes any sweepstake and any game, method or device whereby money or money's worth is distributed or allotted in any manner depending upon or to be determined by chance or lot, held, drawn, exercised or managed whether in The Bahamas or elsewhere or upon the basis of the outcome of a future contingent event whether occurring in The Bahamas or elsewhere and also includes the game called or known as 'numbers'".**

The game called "numbers" is considered a lottery.

Was a Lottery Disclosed?

103. The evidence of Corporal 3095 Nicholas Huyler was that on 28 April 2009 about 2:30pm he entered FWS, Wulff Road and sat down at a computer terminal. The screen was up and he checked early New York, early Miami and early Chicago winning numbers. On the screen was a caption which said the winning numbers and specified which house the number one was looking for was under. He then went by a cashier seated behind a desk in a glass enclosed area and paid $3.00 on account 295057. This was a Sergeant Tyrone Clarke's account; and his purpose

for paying the $3.00, was to enable Clarke to purchase numbers. He received a receipt.

104. When asked if he was able to play the game of numbers he replied that he did not because police officers entered the building and detained everybody. Under cross-examination he said no one promoted any particular activity to him while he was there.

105. Sergeant 1399 Clarke (Sgt. Clarke) testified that he went to the FWS, Village Road on 23 April 2009 to open an account to purchase numbers. He went into the business section and gave $20.00 to a Miss Stubbs to open the account. She in turn, took his name and phone contact and logged it into the computer. Also, she took a copy of his driver's licence.

106. He sat in a chair and Miss Stubbs took his photograph. She then gave him a card with his picture and account number, 295057, on it. He also received a pin number, 9406. He said the account number was needed to purchase numbers. He testified that Miss Stubbs instructed him how to play the game, viz, about opening his account by putting in the number, entering his pin number and gaining access to the website, nassaugames.com where he could purchase his numbers.

107. Sgt. Clarke said that on 28 April 2009 about 5:00pm he was at his office at the Security & Intelligence Branch (SIB) when he went through the process and purchased three numbers at one dollar apiece. The numbers he played were not the winning numbers. He indicated that he would have known if he won because his account balance would have quadrupled. Notably, he does not say if the game was one of purely chance or whether skill was involved. The absence of skill is an element of a lottery.

108. This absence of explanation is not important because the definition of a lottery includes the game called "numbers" which is what the officers said was played by Sgt. Clarke. This is evidence the magistrate could have regard to when determining whether or not the Prosecution had made out a case against the appellant.

109. Under cross-examination by Mrs. Butler he admitted that he received no money from the Village Road premises nor did he use the ATM machine he had seen there. He maintained that he played numbers at the nassaugames.com website.

110. The appellant took issue with the dearth of evidence to show the premises were being used for the purpose of a lottery. Much emphasis was placed on the responses given by Sgt. Clarke to the effect that the website nassaugames.com could be located anywhere. Nothing turns on this as the physical location of the lottery does not defeat a section 11

charge if the evidence led discloses conduct or activities at FWS, Wulff Road connected to the game of numbers. The facilitation of the lottery is the evil attacked by the legislation and all that needs to be shown is an activity on the premises is connected to a lottery.

111. The evidence in this case disclosed that at FWS, Wulff Road, money was placed on an account that enabled a person to log on to nassaugames.com to play the numbers game; and Sgt. Clarke did play the game using his account. This is evidence of the premises being used in connection with the conduct of a lottery. It is evidence to which the magistrate could have regard in arriving at a conclusion that activities connected to a lottery were taking place on the premises.

The Retrospective Effect

112. The appellant claims that having complied with all of the requirements set by the recently enacted Gaming Act, to wit, pursuant to section 85(16)(b)(1) he was required to pay Business Licence fees for the six years prior to the effective date of the Gaming Act, which he paid, he ought to obtain the benefits under the Gaming Act. He submitted that he is entitled to the retrospective legitimising/decriminalising of the web shop industry in The Bahamas.

113. His argument in essence, therefore, is that he would no longer bear the stigma of the conviction of the section 12 offence inasmuch as his compliance with the requirements for a future license, combined with the retroactive effect of the legislation absolved him of criminal liability under the Act. With respect, I do not think this is a tenable argument. Clearly, the Gaming Act is intended to have prospective and not retrospective effect. Had it been the intention of Parliament to affect past criminal behaviour, they could have so provided explicitly.

114. Notwithstanding the very able arguments and authorities deployed by the appellant, I am unable to agree with his position. I think I need not go into any greater detail regarding this particular submission particularly due to the Respondent's concession in regards to the first count which relates to section 12 of the Act.

Computer Records

115. There may be some force in Mr. Sears' argument that the Prosecution failed to produce evidence in accordance with section 67 of the Evidence Act in relation to the computer records, e.g., the training manual said to have been downloaded from a computer seized at FWS, Wulff Road. It appears the manual found on the computer was downloaded offsite by someone who had no familiarity with how the computer operated, on a date subsequent to the day on which the computer was seized.

116. Mr. Sears contends that is the prosecution wished to rely on the computer records they had to comply with the provisions of section 67 which states:

> **"(1) In any criminal proceedings, a statement contained in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown -**
>
> > **(a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer;**
> >
> > **(b) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and**
> >
> > **(c) that any relevant conditions specified in rules of court under subsection (2) are satisfied.**
> >
> > **..."**

117. He contended further, that the Prosecution had to lead evidence through a witness who was sufficiently familiar with the working of the computer to demonstrate that the computer was working as it should at the material time. He cited the case of **R v Shepherd** [1993] 1 All ER 225 as authority for this proposition. However, as Mr. Williams has pointed out, Lord Griffiths stated in **Shepherd**:

> **"Documents produced by computers are an increasingly common feature of all business and more and more people are becoming familiar with their uses and operation. Computers vary immensely in their complexity and in the operations they perform. The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly."**

118. Even if this submission is sustained, I doubt it could of itself, cause us to set aside the conviction on count 2. Hence, as it is not necessary for the determination of this appeal, I offer no concluded view on it.

The $834,000.00

119. The magistrate evidenced an intention to confiscate the money found in a safe at FWS, Wulff Road. The money amounted to $834,629.32. He stated at page 432 of the transcript:

> **"In relation to section 72 of the Act. Having reviewed that Section, the Court is satisfied the court does have the power to forfeit any items that were brought in relation to the charge. The court is satisfied that the proceeds obtained and collected on the date of the charges and of the trial itself the sum of $834,629.32 ought to be forfeited to the Crown."**

120. Section 72 of the Act provides:

> **"The court by or before which a person is convicted of an offence under this Act may order anything produced to the court, and shown to the satisfaction of the court to relate to the offence, to be forfeited and either destroyed or dealt with in such other manner as the court may order."**

121. Mr. Sears argued that the sum seized had to be shown to relate to the offence(s) charged. He submitted that no such evidence was adduced on the Prosecution's case. Thus, the magistrate was incompetent to order the forfeiture of the money. The Court added the observation, if indeed he made a forfeiture order at all.

122. The Respondent submitted that the appellant failed to appreciate the money was seized under section 63(6)(a) of the Act which states:

> **"(6) Any police officer who enters any premises under the authority of a warrant issued under subsection (5) may —**
>
> **(a) seize and remove any document, money or valuable thing, instrument or other thing whatsoever found on the premises which he has reasonable cause to believe may be required as evidence for the purpose of proceedings in respect of an offence under this Act;"**

123. They submitted further, that there was a nexus between the money and the offences committed. They mentioned that one of the appellant's co-

accused was convicted of Being Found on Premises Where Lottery is Taking Place, contrary to section 10 of the Act. Rhodista Rolle, gave an interview with the police during their investigations and she was asked if illegal gambling was being done at FWS, she responded, **"Yes, ma'am."** When asked to explain the process she said, **"The people come in, they buy their numbers and they put the money on their account, and if they win anything they come and collect their money ..."**.

124. Mr. Williams contended that that bit of evidence of the course of business at the premises raised a reasonable inference the money was being kept there to pay customers' winnings.

125. Despite the Sir Richard's criticisms of the way the questions to Miss Rolle were framed, the fact remains that she answered them and her answers may have provided a basis for the magistrate to infer the money was connected to the offence for which Miss Rolle was convicted. In that event, he could not be faulted for so inferring and moving to forfeit pursuant to section 72 of the Act.

126. The Respondent strove valiantly to retain this not insubstantial sum of money but in the end, I am convinced their efforts were in vain for the simple reason that no forfeiture order has been disclosed on the transcripts of the trial. The magistrate merely said, **"the sum of $834,629.32 ought to be forfeited to the Crown"**. He did not order that the money be forfeited to the Crown.

127. Even if the language employed by the magistrate could be construed to amount to an order for forfeiture of the money I would have held the process was flawed because the magistrate failed to record the evidence which satisfied him of th163e connection between the money and the offence. Additionally, he does not specify the offence to which the money is connected bearing in mind the several offences that were charged against some nineteen defendants.

128. In the premises, I would allow the appeal against the putative forfeiture order of the magistrate. The $834,629.32 is to be returned to FWS, Wulff Road.

The Honourable Mr. Justice Isaacs, JA