BEFORE

LORD JUSTICE WATKINS, MR. JUSTICE KENNETH JONES AND MR. JUSTICE WATERHOUSE

GORDON CAMPBELL TONNER
WILFRID HAYDN REES
WILLIAM HARDING
RONALD EVANS

June 25, 26, 28, 1984

Conspiracy - Conspiracy to Defraud Involving Commission of Substantial Offence - Whether Chargeable Under Common Law - Whether Proviso Applicable - Criminal Appeal Act 1968 (c.19), ss.2(1), 3 - Finance Act 1972 (c.41), s.38(1) - Criminal Law Act 1977 (c.45), s.1(1).
Trial - Trial by jury - Commencement - When Jury Sworn and Prisoner Taken in Charge to Try Issues and Not On Arraignment - Criminal Justice Act 1982 (c.71), s.72.

By the proviso to section 2(1) of the Criminal Appeal Act 1968: ". . . the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred."

By section 3: "(1) This section applies to appeal against conviction where the appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of the other offence. (2) The Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of the other offence, and pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity."

By section 38(1) of the Finance Act 1972: "If any person is knowingly concerned in, or with the taking of steps with the view to, the fraudulent evasion of tax by him or any other person, he shall be liable to a penalty of £1,000, or three times the amount of tax, whichever is the greatest, or to imprisonment for a term not exceeding two years."

By section 1(1) of the Criminal Law Act 1977: "Subject to the provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one of more of the parties to the agreement if the agreement is carried out in accordance with their intentions, he is guilty of conspiracy to commit the offence or offences in question."

By section 72 of the Criminal Justice Act 1982: "(1) Subject to subsections (2) and (3) below, in any criminal proceedings, the accused shall not be entitled to make a statement without being sworn . . . (2) Nothing in subsection (1) above shall prevent the accused making a statement without being sworn— (*a*) if it is one which he is required by law to make personally; or (2) if he makes it by way of mitigation before the court passes sentence upon him. (3)

Nothing in this section applies—(*a*) to a trial . . . which began before the commencement of this section "(*i.e.* May 24, 1983—S.I. 1983 No. 182).

A conspiracy involving the commission of any substantive offence can only be charged under section 1(1) of the Criminal Law Act 1977.

Where an appellant's conviction of conspiracy to defraud at common law is quashed, the proviso to section 2(1) of the Criminal Appeal Act 1968 may only be applied on the basis of an error of pleading in the indictment where there is no prejudice to the appellant.

A trial on indictment commences when the jury is sworn.

The appellants T, R and H were all charged with conspiracy to defraud at common law. It was alleged that they had been involved in a major conspiracy on a huge scale to avoid the payment of value added tax. In May 1983 the appellants T, R and H were convicted. E had been arraigned in April 1983 with others on a similar conspiracy. The judge discharged the jury, after submissions, from returning a verdict and he was re-tried in October 1983 on the same charge, conspiracy to defraud at common law, and convicted in January 1984. All four appealed on the ground, *inter alia*, that the indictments should have been laid as statutory conspiracies contrary to section 1(1) of the Criminal Law Act 1977. In addition E appealed on the ground that his trial had begun before section 72 of the Criminal Justice Act 1972 came into operation and thus the trial judge had erred in ruling that he was not entitled to make an unsworn statement from the dock.

Held, that (1) it was now beyond doubt that if a conspiracy involved the commission of any substantive offence, it could only be charged under section 1(1) of the Criminal Law Act 1977. Accordingly, the appellants had been wrongly charged.

Dictum of Lord Bridge in R. v. AYRES (1984) 78 Cr.App.R. 232, 240; [1984] 2 W.L.R. 257, 265 applied.

(2) As to E's other ground of appeal, as a trial began when a jury was sworn and took the prisoner in charge to try the issues, and not upon a prisoner's arraignment, section 72 of the Criminal Justice Act 1982 being in operation at his re-trial in October 1983, the judge had rightly ruled that he was not entitled to make an unsworn statement from the dock.

MORIN V. R. (1891) 18 S.C.R. 407 applied.

(3) In respect of the convictions in all four cases, the Court exercising its powers under section 3 of the Criminal Appeal Act 1968, would substitute convictions of conspiracy to act contrary to section 38(1) of the Finance Act 1972. Further, the maximum sentence upon those convictions was two years' imprisonment, but having regard to the gravity of the offences (all appellants save H having been sentenced to terms of imprisonment in excess of two years), there was no reason why the Court should not pass consecutive sentences where there were convictions on more than one count.

[For conspiracies at common law and under sections 1 and 5 of the Criminal Law Act 1977, see *Archbold* (41st ed.), paras. 28-1, 2, 3, 4, 10. For conspiracy to defraud, see *ibid* para. 28-24. For the Criminal Appeal Act 1968, ss.2, 3, see, *ibid.* paras. 7-9, 47. Section 1(1) of the Criminal Law Act 1977 has been substituted by section 5 of the Criminal Attempts Act 1981 which came into force on August 27, 1981.]

Appeals against conviction.

Tonner and others

On May 6, 1983, in the Central Criminal Court (Judge Richard Lowry, Q.C.) the appellants Tonner, Rees and Harding were convicted as follows—Tonner on two counts of conspiracy to defraud (by majorities of 10-2) and was sentenced to concurrent terms of seven years' imprisonment and fined £300,000 on count 1 and £100,000 on count 2. In addition he was ordered to pay £20,000 prosecution costs and £10,000 legal aid costs. Rees was similarly convicted by a majority of 10-2 on count 1 and sentenced to two and a half years' imprisonment to run consecutively to the sentence he was then serving. His parole licence was revoked and a deprivation order was made for two rough-cast fine gold bars (1,001.98 troy ounces). Harding was similarly convicted on count 2 by a majority of 11-1 and sentenced to two years' imprisonment and a deprivation order was made for two rough-cast fine gold bars.

The following facts are taken from the judgment.

Between June 1981 and April 1982 the three appellants were involved in a conspiracy to evade payment of value added tax by obtaining gold without paying tax upon it and selling it and charging tax upon the sale. That tax they failed to account for to the Customs and Excise. It was asserted that Tonner was the prime mover and succeeded in respect of a few companies in depriving the Revenue of a total of £3 million in value added tax. Rees and Harding co-operated effectively to the extent of playing notable roles in the operation of one company.

This was an extremely well-conceived, artful and daring plan to deprive the Revenue of vast sums of money. In effect, they or someone on their behalf smuggled into this country gold on which no tax was paid, melted it down and sold it on to bullion dealers in Hatton Garden. In addition, they bought a substantial number of Krugerrand and Canadian coins which they also melted down into gold bars and sold at very substantial cost to bullion dealers in Hatton Garden.

As for some of the transactions a scheme of self-invoicing was resorted to by the buyers, and as for others there was direct invoicing to one or more of the three companies to which reference has already been made. In relation to part of the very substantial amount of gold which was dealt with in those different ways false invoices were created. An account was rendered to the Revenue by the use of false invoices relating to the buying of gold on which it was said that value added tax had been paid. The amount of that was set off against value added tax on true invoices given by bullion dealers in Hatton Garden. That set-off falsely revealed that the companies owed the Revenue a very trifling sum of money.

In relation to another and quite substantial part of value added tax kept away from the Revenue the intention was that one or more of the appellants, and others, would abscond with the money, no doubt leaving this country to spend the rest of their lives in a sunnier clime.

The respective roles played by the appellants and others were canvassed at length before the jury. There can be no doubt whatever that it was for a time a very successful enterprise. It was enabled to be effective because the companies created for the purpose were properly registered for the purposes of value added tax, and had therefore numbers on that register. The third company was however brought into life principally by Rees and Harding, who, using false names, managed to register that company for the purposes of value added tax and improperly thereby to obtain a number on the register, which was thereafter used to further the success of the unlawful enterprise. That was how those three men busied themselves for a number of months in 1982 and early in 1983.

The main ground of appeal was on a point of law, *viz.* that the conspiracies to defraud against common law were wrongly charged, that the statement of offence in each material count should have alleged conspiracy contrary to section 1(1) of the Criminal Law Act 1977: AYRES (1984) 78 Cr.App.R. 232; [1984] 2 W.L.R. 257. Consequently, subject to the exercise of the Court's discretion to apply the proviso to section 2(1) of the Criminal Appeal Act 1968, all the convictions must be quashed. The appellants also applied for leave to appeal against sentence.

R. v. Evans

On January 14, 1984, at the Central Criminal Court (Judge Richard Lowry, Q.C.) after a re-trial the appellant was convicted of conspiracy to defraud contrary to common law and was sentenced to three and a half years' imprisonment.

The following facts are taken from the judgment.

The facts as far as Evans is concerned were these. Four of the men who were found not guilty were directors of a company, Illuminate Ltd, which was formed as a jewellery business, with premises in Hatton Garden. A man called Rajmikant Unadkat ("Raj," for short) and his brother traded as jewellery importers and engaged in buying and selling gold.

On November 2, 1981, a company named. D. Roberts Ltd., with an office in Shoreditch High Street, was registered for value added tax. On November 4 and 5 David Roberts, its so-called director, opened a number of bank accounts in the company's name. Between early November 1981 and early January 1982 nearly 60,000 gold coins were bought by or on behalf of David Roberts at a cost of £17 million. No value added tax was paid on those coins. They were delivered to the premises of the company, Illuminate, where they were melted into bars and sold on the open market by Raj, who charged and received value added tax at 15 per cent. The value of the bars was less than the equivalent weight of the coins. The profit which was pocketed by those unlawfully dealing in this way was made by not handing over the value added tax charged on the sale to the Customs and Excise. The loss to the Commissioners through the dealings of these men was about £$2\frac{1}{2}$ million.

This fraud was concealed for some time by the production of false invoices. Raj produced invoices to show that he had purchased gold at a slightly lower rate from Illuminate. The rate of profit was running at something like 8 per cent. of the value added tax imposed upon sale and purchase. The investigation into this fraud was hindered for a considerable time because no one was able to find Roberts. He it was, whoever he was, who had registered the business of the company, D. Roberts Ltd. He it was who arranged for payment of the coins and had transactions, at any rate on paper, with Raj.

Eventually Roberts was unmasked. A man was arrested on June 30, 1982. His name was not Roberts at all; it was Evans. He had been wearing a wig; a commonplace device to try to hide one's identity. It was effective for some while but eventually it was taken off in the manner which has been very briefly outlined. He too therefore stood his trial and was convicted as already mentioned.

He appealed against conviction on the same ground as Tonner and the others. In addition, on another ground, the appellant had first been arraigned at the Crown Court at Southwark on April 11, 1983. The jury were discharged from giving a verdict on June 22, 1983, and his re-trial commenced on October 19, 1983. On May 27, 1983, section 72 of the Criminal Justice Act 1982 came into force which abolished the right of an accused to make an unsworn statement from the dock, but

which did not apply to a trial which had started before that date. The trial judge had rejected a submission that Evans's trial had begun when he was arraigned in April 1983. It was said that the judge had erred in so ruling and that thereby Evans was denied the right, which he claimed, to make an unsworn statement from the dock.

The appeals were heard together by agreement and were argued on June 25 and 26, 1984 when the following cases were cited in addition to those referred to in the judgment: JONES (JOHN) (1974) 59 Cr.App.R. 120; MCCARTHY [1981] S.J.C. 298; MCLAUGHLIN (1982) 76 Cr.App.R. 42; MCVITIE (1960) 44 Cr.App.R. 201; [1960] 2 Q.B. 483; MOLYNEUX (1980) 72 Cr.App.R. 111; NELSON (1977) 65 Cr.App.R. 119; SIMMONDS (1967) 51 Cr.App.R. 316; [1969] 1 Q.B. 685; PARKER BULTEEL (1916) 25 Cox.C.C. 145 and WELHAM v. DIRECTOR OF PUBLIC PROSECUTIONS (1960) 44 Cr.App.R. 124; [1961] A.C. 103.

Stephen Leslie (assigned by the Registrar of Criminal Appeals) for the appellants Tonner, Rees and Harding. *William Clegg* and *Richard Whittam* (assigned by the Registrar of Criminal Appeals) for the appellant Evans. *Anthony Arlidge, Q.C.* and *P. F. G. Rook* for the Crown in the appeal of Tonner and others. *Paul Purnell, Q.C., Anthony Glass* and *Peter Finnigan* for the Crown in the appeal of Evans.

Cur. adv. vult.

June 28. WATKINS L.J. delivered the judgment of the Court: The appellants Tonner, Rees and Harding, on May 6, 1983, at the Central Criminal Court, after a trial lasting 41 days were convicted, and sentenced by his Honour Judge Lowry Q.C., as follows: Tonner, for conspiracy to defraud, seven years' imprisonment and a fine of £300,000; on a second count for a like offence, seven years' imprisonment concurrent and a fine of £100,000. He was also ordered to pay £20,000 prosecution costs and £10,000 legal aid costs. Those fines were ordered to be paid by November 5, 1983, with 12 months' imprisonment consecutive in default. A suspended sentence of 18 months' imprisonment imposed on June 5, 1981, for handling stolen property was ordered to take effect as six months' imprisonment consecutive. That meant a total term of imprisonment of seven and a half years. Rees, for conspiracy to defraud, was sentenced to two years' and six months' imprisonment consecutive to a sentence which he was then serving. His parole licence, which had been effective until then, was revoked, and by order he was deprived of two rough-cast fine gold bars. Harding, for conspiracy to defraud, was sentenced to two years' imprisonment, and he too was by order deprived of two rough-cast fine gold bars.

A number of counts on the indictment were left, by order of the judge, on the file. They were count 3, conspiracy to defraud, against Tonner alone of these appellants; count 5, conspiracy to contravene section 38(1) of the Finance Act 1972; count 6, a like offence, those two counts being laid against all three appellants; and count 7, conspiracy to contravene the provisions of section 170(2) of the Customs and Excise Management Act 1979, against Tonner alone. All three appellants appealed against conviction.

There were a number of co-accused. One Bingham was found not guilty of conspiracy to defraud and of other conspiracies, as also was a man called Falco. One Furness was sick; the learned judge discharged the jury from returning a verdict in respect of him. Stahl pleaded guilty to count 1, conspiracy to defraud, and was sentenced to two years' imprisonment, 12 months' of which was suspended. Another man, Tryniszewski, was not to be found, despite the issue of a bench

warrant, so he was not tried. [The learned Lord Justice stated the facts and continued:]

Turning now to the appellant Evans: on January 14, 1984, at the Central Criminal Court, after a retrial which lasted three months he was convicted, and sentenced by his Honour Judge Lowry to three and a half years' imprisonment for conspiracy to defraud. He appeals against conviction by leave of Beldam J. Upon the indictment he had co-accused, seven men and a limited company. He alone was convicted. There was a failure to agree in respect of one co-defendant, Wilson, and verdicts of not guilty in respect of the others including the limited company.

This Court heard the appeals against conviction simultaneously, at the invitation of counsel for the appellants, Mr. Leslie and Mr. Clegg respectively, and with the consent of counsel for the Crown, Mr. Arlidge and Mr. Purnell respectively, in the two cases. We acceded to the invitation because the main ground of appeal of all four appellants is identical in one respect. Much time has been saved by avoiding duplication. That ground of appeal is that the conspiracies to defraud contrary to common law were all wrongly charged; that the statement of offence in each material count should have alleged a conspiracy contrary to section 1(1) of the Criminal Law Act 1977: R. v. AYRES (1984) 78 Cr.App.R. 232; [1984] 2 W.L.R. 257. Consequently, subject to the exercise by this Court of its power to apply the proviso to section 2 of the Criminal Appeal Act 1968 all convictions must, so it is said, be quashed.

When these appellants were convicted the appeal of AYRES had not been heard in the House of Lords. There existed at that time an unresolved controversy as to the precise effects of the provisions of section 1(1) and section 5 of the Act of 1977, the terms of which are: "1.(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions, he is guilty of conspiracy to commit the offence or offences in question . . . 5.(1) Subject to the following provisions of this section, the offence of conspiracy at common law is hereby abolished. (2) Subsection (1) above shall not affect the offence of conspiracy at common law so far as it relates to conspiracy to defraud, and section 1 above shall not apply in any case where the agreement in question amounts to a conspiracy to defraud at common law."

The appeal of WALTERS [1979] 69 Cr.App.R. 115, approving as it did a ruling in QUINN [1978] Crim.L.R. 750, and DUNCALF (1979) 69 Cr.App.R. 206; [1979] 1 W.L.R. 918, produced in this Court solutions to the problem which seemingly could not be reconciled. Consequently some judges adopted what might be called the WALTERS solution and others that of DUNCALF. Despite submissions in the joint trials of Tonner, Rees and Harding and in the trial of Evans, his Honour Judge Lowry declined to follow DUNCALF. Accordingly he permitted the Crown in both trials to proceed with charges of conspiracy to defraud contrary to common law.

In AYRES (*supra*) the defendant had been charged upon an indictment with the common law offence of conspiracy to defraud, the particulars of the offence being that he had conspired with his co-defendant and other persons to obtain money from an insurance company by falsely claiming that a lorry and its contents had been stolen while in transit. He was convicted and appealed on the ground *inter alia* that he had been improperly charged with conspiracy to defraud at common law and that he should have been charged with conspiracy to obtain property by

deception contrary to section 1(1). The House of Lords *held* [1984] 2 W.L.R. 257, dismissing the appeal: "(1) that upon the true construction of the Act of 1977 common law conspiracy to defraud and statutory conspiracy contrary to section 1 were mutually exclusive offences; that 'conspiracy to defraud' within the meaning of section 5(2) was limited to those exceptional fraudulent agreements which, if carried into effect, would not necessarily result in the commission of any substantive criminal offence by any of the conspirators and that whenever the evidence supported the commission of a substantive criminal offence if the agreement constituting the conspiracy had been performed, the only proper charge was conspiracy contrary to section 1; that since the evidence against the defendant supported an attempt to obtain property by deception if the conspiracy had been performed, the charge of conspiracy to defraud was improper and that was a material irregularity in the course of the trial. DUNCALF [1979] 1 W.L.R. 918, C.A.approved. But (2) dismissing the appeal, that in all the circumstances of the case there had been no actual miscarriage of justice because the particulars of offence in the indictment and the judge's directions to the jury made it plain that the crime alleged against the defendant was conspiracy to obtain money by deception, and accordingly, the conviction would be upheld under the proviso to section 2(1) of the Criminal Appeal Act 1968."

I shall return to the speech of Lord Bridge in R. V. AYRES (*supra*) a little later.

Mr. Leslie and Mr. Clegg submit that in both their cases there is no room for doubt as to whether common law conspiracy or statutory conspiracy should be charged. The particulars in each of the material counts make it abundantly plain that either the alleged unlawful agreements were to commit substantive offences, or if not, as they contend cannot possibly be the position, they were designed to set in being the unlawful process of defrauding the Revenue, that is to say, the public, in which event they would have acted contrary to common law. All the conduct complained of, they submit, must have been within the contemplation of Parliament when it enacted the provisions of section 38(1) of the Finance Act 1972 or those of section 170(1) of the Customs and Excise Management Act 1979.

Section 38(1) provides: "If any person is knowingly concerned in, or with the taking of steps with a view to, the fraudulent evasion of tax by him or any other person, he shall be liable to a penalty of £1,000, or three times the amount of tax, whichever is the greater, or to imprisonment for a term not exceeding two years."

The maximum penalties for acting contrary to not only section 38(1) but also section 170(1), which we see no need to quote, and of course for acting contrary to section 1(1) of the Act of 1977 by conspiring to do so, which are identical, are almost trifling compared with the maximum penalties which can be and were imposed in these cases for the common law conspiracy.

The Crown, not surprisingly, having regard to the scale of the frauds, here, had this factor very much in mind when laying the charges at common law. But Mr. Leslie and Mr. Clegg argue that Parliament cannot possibly have overlooked the consequences of enacting section 1(1) and 5 of the Act of 1977. Moreover, in hearing the appeal in R. V. AYRES (*supra*) the House of Lords must have had them in contemplation. A copy of the indictment in Evans's case was produced to their Lordships during the hearing of the appeal in R. V. AYRES.

Regardless of that, Mr. Leslie and Mr. Clegg argue that the clear terms of the two sections cannot be expanded into an interpretation that they cannot sensibly bear merely because the conduct complained of was on a uniquely serious scale. And finally they maintain that if the unlawful conduct agreed upon contains a

mixture of that which amounts to a statutory offence and that which does not then the conspiracy is caught by section 1(1).

During the trial of Tonner, Rees and Harding Mr. Arlidge revealed to the judge why he had drafted the material counts in the indictment as he did. We have a transcript of what passed between Mr. Arlidge and the judge in relation to this matter. I refer to p.13, where Mr. Arlidge is recorded as having explained to the judge his reasons for deliberately refraining from charging the three appellants and others with the common law offence of conspiracy to cheat the Revenue. Mr. Leslie pricked up his ears at that and said that if Mr. Arlidge had indicted his client in that way he would have addressed legal argument upon it. At the conclusion of the argument the judge concluded that it was right for the Crown to proceed with the trial against the three appellants upon the indictment as presented.

Mr. Arlidge, whose submissions in this Court have been supported by Mr. Purnell, opened his argument by posing the rhetorical question: what does a lacuna in this context mean? He submitted that section 5 was designed to provide the prosecuting authority with means of charging a defendant with the common law offence of conspiracy in cases where section 1(1) could not be applied. He contended that it covers, obviously, unlawful conduct agreed to be performed which does not constitute an offence within the meaning of section 1 of the Act of 1977, where in subsection (4) the offence is defined thus: "In this Part of this Act 'offence' means an offence triable in England and Wales, except that it includes murder . . ."

There is a lacuna also, he submits, in two other circumstances not considered by the House of Lords in AYRES (*supra*) first, where the agreement is to perform a combination of conduct which constitutes an offence or offences within the meaning of section 1(1) and that which does not. Here some of the conduct contemplated was clearly contrary to section 38(1) and possibly to section 170(1). But there was much else to be done. Some of it admittedly amounted to cheating the public revenue, which by section 32(1) of the Theft Act 1978 is retained as an offence.

Secondly, he says, what is agreed upon is so diverse and complicated as to warrant alleging against a defendant or defendants one all-embracing conspiracy charge which a jury could more easily understand than were it to be faced with a series of conspiracies in different counts all arising out of the same circumstances. Furthermore, he continued, the seriousness of the conduct agreed upon, measured against the punishment available to penalise it, is a legitimate consideration.

If Mr. Arlidge is right it must follow, in our judgment, that the decision in R. V. AYRES (*supra*) left a considerable area of uncertainty as to what constitutes a lacuna, and consequently substantially failed to achieve its purpose, which must have been to remove the doubts which existed about the effects of sections 1(1) and 5.

Regrettable though it may be that serious criminal conduct may appear to be inadequately punished consequent upon the decision in R. V. AYRES, we do not accept that it left in its wake a lacuna of the nature contended for by Mr. Arlidge. We would cite Lord Bridge's conclusion, with which all of their Lordships agreed, in AYRES, at page 244 and page 265 respectively: "For these reasons, and for those expressed in the extract quoted above from the judgment of the Court in DUNCALF AND OTHERS (*supra*), with which I respectfully agree, I conclude that the phrase 'conspiracy to defraud' in section 5(2) of the Act must be construed as limited to an agreement which, if carried into effect, would not necessarily involve the commission

of any substantive criminal offence by any of the conspirators. I would accordingly answer the certified question in the affirmative."

That, effectively and precisely, we think, draws the line between what can and cannot be regarded as conspiracy to defraud at common law. It is now, we think, beyond doubt that if a conspiracy involves the commission of *any* substantive offence, it can be charged only under section 1(1) of the Act of 1977. We therefore find that these appellants were wrongly charged.

This leads us directly to the application of the proviso, on which we have heard argument, a great deal of which has been directed to the definition of cheating the Revenue contrary to common law. Mr. Leslie, and Mr. Clegg too, submit that only positive acts will suffice for this purpose; that if there is one act among a number of positive acts which is passive—in other words, a failure to do this or that—a cheat is not established. In this context we were referred to a number of authorities, including HUDSON (1956) 40 Cr.App.R. 55; [1956] 2 K.B. 252, and to some statutory provisions and old textbooks, which it is submitted establish that proposition. We are not persuaded that any one of them has that effect.

We do not however have to go so far as to decide that point, nor do we have positively to conclude, as we would if we had had to do so, that here were committed barefaced cheats upon the Revenue on a substantial scale. This is because we cannot accede to the joint invitation of Mr. Arlidge and Mr. Purnell to apply the proviso as was done in AYRES (*supra*). In relation to this matter Lord Bridge proposed a test which we adopt. At page 245 and page 266 respectively he said: "If the statement and particulars of the offence in an indictment disclose no criminal offence whatever or charge some offence which has been abolished, in which case the indictment could fairly be described as a nullity, it is obvious that a conviction under that indictment cannot stand. But if the statement and particulars of offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed under the proviso must depend on whether, in all the circumstances, it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant."

Mr. Arlidge and Mr. Purnell submit that there would be no miscarriage of justice here if we were to apply the proviso on the basis that the misdescribed statement of offence were to read "cheating the Revenue contrary to common law"; that the particulars of the offence as set out in the indictment are apposite to cover the charge, and that the evidence amply established it.

If we felt able to accept these submissions, the power to punish would be unaffected. In the sense that the punishment should fit the crime, this is probably what ought to happen. But we are with regret driven to find that there would truly be a miscarriage of justice if we did so. The proviso was not intended to be used in circumstances such as these, where (1) in the case of Tonner, Rees and Harding, the Crown could have charged but refrained from charging these appellants with cheating the Revenue. We have no criticism to make of Mr. Arlidge in this respect; he had a difficult decision to make at the time of drafting the indictment. (2) There would have been legal argument at the trial upon the definition of "cheating." This did not take place, as has already been made plain. If it had, the appellants may have benefited from it. (3) The jury were never directed upon the issues arising from the offence of cheating. (4) Issues involving the admissibility of evidence may have arisen upon a charge of cheating which did not arise in either trial. (5) In the

trial of Evans the offence of cheating was never envisaged. We accept that it is probably wrong in principle to apply the proviso in that circumstance. (6) It is not known what evidence either jury accepted. In the trial of Evans there were wholesale acquittals. (7) No appellant had the opportunity to meet the allegations arising from the offence of cheating.

We turn now to the other ground of appeal which is relied upon by Evans alone. It has been argued before the Court by Mr. Clegg, supported by Mr. Brandt, learned counsel for an appellant called Rhiney, whose appeal is to be heard hereafter. The decision upon this particular ground of appeal will govern Rhiney's appeal against conviction, since the circumstances on which it was founded and the law on which it was based are identical. Thus it was that we allowed Mr. Brandt to make his submissions in support of Mr. Clegg.

The facts which need to be stated as a preliminary to exploring what is undoubtedly an important matter for the appellant Evans, and of course for Rhiney, are these. He was first of all arraigned at the Crown Court at Southwark on April 11, 1983. After some while, and when the prosecution had concluded its case, there were submissions to the judge conducting the trial, as a result of which the jury were discharged from giving a verdict. That was on June 22, 1983. On October 19 of the same year there was a retrial of Evans. That concluded in the manner I have already stated. Between the discharge of the jury in June and the retrial commencing on October 19 the Criminal Justice Act 1982—section 72 of it, anyway—came into force. That section provides: "(1) Subject to subsections (2) and (3) below, in any criminal proceedings the accused shall not be entitled to make a statement without being sworn, and accordingly, if he gives evidence he shall do so on oath and be liable to cross-examination; but this section shall not affect the right of the accused, if not represented by counsel or a solicitor, to address the court or jury otherwise than on oath on any matter on which, if he were so represented, counsel or a solicitor could address the court or jury on his behalf. (2) Nothing in subsection (1) above shall prevent the accused making a statement without being sworn—(*a*) if it is one which he is required by law to make personally; or (*b*) if he makes it by way of mitigation before the court passes sentence upon him. (3) Nothing in this section applies—(*a*) to a trial; or (*b*) to proceedings before a magistrates' court acting as examining justices, which began before the commencement of this section."

His Honour Judge Lowry was addressed at the commencement of the trial of Evans in October upon the effect of section 72. Mr. Clegg's contention was and remains that the trial of Evans had commenced when he was arraigned as long ago as April 1983; and that accordingly, having regard to section 72(3), it was self-evident that that section did not apply; that the trial was, as it were, in midstream. The judge, who took considerable care to listen to those submissions directed to the question when a trial by jury can properly be said to commence, came to the conclusion that it commences at the time when the jury are sworn and the defendant is put in the charge of that jury. It did not begin, and never has begun, he said, with the arraignment of a defendant. Accordingly, the trial proceeded and Evans was denied the right which he claimed to make a statement from the dock. In the event, he did not give evidence and, having been forbidden to do so, made no statement from the dock.

Mr. Clegg's point, made here with commendable brevity and clarity, rests upon a number of provisions in various statutes and certain decided cases. Mr. Brandt adopted Mr. Clegg's argument and supplemented it by citing a Canadian case to

which we will make reference in due course. Beginning, then, with Mr. Clegg's argument and referring to some of the statutory provisions to which he has drawn our attention, we look at the Criminal Evidence Act 1898. That Act of course for the first time gave an accused the right to give evidence on his own behalf. It further provided that the right of an accused to make a statement from the dock was not to be affected. So until 1982 there never had been any doubt that a defendant had the right to make a statement from the dock. The exercise of that right, scarcely used 20 or 30 years ago, has become very fashionable and this doubtless led Parliament to enact section 72. So much, then, for the origins of this state of affairs.

We have been referred to the Courts Act 1971, section 7(1) of which provides for committal for trial on indictment. Mr. Clegg submits that the words therein, "committing a person for trial," can only mean that from the time a person is committed for trial, nowadays to the Crown Court, that trial is in being. We do not find that in the least convincing. We go further into the section and look at section 7(4)(i), which reads: "For the purposes of this subsection—(i) 'the prescribed period' means such period for the respective purposes of paragraphs (*a*) and (*b*) of this subsection as may be prescribed by Crown Court rules, and the rules may make different provision for different places of trial, or for other different circumstances."

What this part of section 7 intended to provide was a time-limit within which a defendant was to be brought to trial once he had been committed to the Crown Court. It cannot, so it seems to us, be said that by enacting section 7 Parliament intended to lay down a rule that a trial begins, for example, on arraignment, because it went on to state in (ii): "the trial shall be deemed to begin when the defendant is arraigned." If there had been any doubt as to when a trial begins it would not have been necessary for Parliament to state in that subsection that a trial begins when the defendant is arraigned. It is quite clear that the intention was to ensure that Crown Court officials, and judges too, should have a clear yardstick which would govern them in determining whether a person had been brought to trial within the prescribed period; it had no other function. So it seems to us that the provisions of section 7 cannot possibly be of assistance in deciding when, legally speaking, a trial by jury can properly be said to begin.

We were referred also to certain provisions in section 4(1)(*a*) of the Criminal Procedure (Insanity) Act 1964. This clearly was a special provision to determine the circumstances in which a person should be found unfit to plead. It is a procedure which is well known to our courts. It takes place inevitably before arraignment, because the whole purpose of endeavouring to discover whether a person is fit to plead is to decide whether or not the charge should be put to him and that he should be required to answer that charge.

We were referred to section 12 of the Juries Act 1974, where the expression, "in proceedings before the trial," is used. The argument is that that expression can only mean that it was envisaged by the legislature that a trial was in being in the circumstances contemplated in section 12, which deals with challenges to jurors and so on. We do not take that view of it; we cannot see how it could possibly mean that.

That leads us to look at the case of VICKERS (1975) 61 Cr.App.R. 48; [1975] 2 All E.R. 945. In that case there had been a ruling on a question of law before the commencement of the trial. I use the words, "the commencement of the trial," in the loosest possible sense for the moment. That was sought to be challenged in the

Court of Appeal. In the course of the judgment Scarman L.J. (as he then was) said, at page 50 and page 948 respectively: "After a short adjournment the charge was then put to the appellant, who pleaded guilty to the conspiracy. We think it clear that the proceedings in which the ruling was given were not part of the trial. Arraignment is the process of calling an accused forward to answer an indictment. It is only after arraignment, which concludes with the plea of the accused to the indictment, that it is known whether there will be a trial and, if so, what manner of trial. Hale, Pleas of the Crown (1736 ed.), Volume 2, p.219, describing arraignment, says that, if the prisoner pleads not guilty 'the clerk joins issue with him . . . and enters the plea: then he demands how he will be tried, the common answer is "By God and the country" and thereupon the clerk enters "*po. se.*" *Ponit se in patriam*.' In Hale's time trial by compurgation or battle were possible alternatives to trial by jury. Not so today; but even today there is no trial on a plea of guilty; for 'an express confession . . . is the highest conviction that can be': Hawkins, *Pleas of the Crown* Chapter 31, section 1. Thus it still remains true that there is no trial until it is known whether one is necessary; on a plea of guilty, no trial is needed for the entering of the plea is the conviction."

It might be said that for the purpose of the determination of the issue in that appeal what Scarman L.J. there said was *obiter dicta*. But *obiter* or not we find it to be a very comprehensive and accurate statement of the law as to the commencement of trial.

We have been referred to and have very carefully examined the decisions in a number of other cases, namely, PALING (1978) 67 Cr.App.R. 299; ELLIS (1973) 57 Cr.App.R. 571; WILLIAMS (1976) 64 Cr.App.R. 106; [1977] 1 All E.R. 874. It is to WILLIAMS that we turn to look in a little detail at the judgment of Shaw L.J. The question when a trial can be truly said to begin had been canvassed, and at p.111 and p.878 respectively Shaw L.J. observed: "He [counsel for the appellant] submitted that there was no trial at all, for there was no proper beginning to a trial. This proposition in an abstruse and abstract sense has an appearance of validity. The fact is however that the proceedings which began on May 25 had all the elements of a duly constituted trial by jury and followed in all particulars the course of such a trial. If on some earlier occasion the appellant had been arraigned, no question could have arisen as to the regularity of the proceedings on May 25. There was a mutual assumption between the Crown and the appellant that the prosecution were put to proof of their accusation so that a trial of the issue was necessary."

It should be interpolated that the charge had never been put; there had been no arraignment. Shaw L.J. continued: "Mr. Wedmore, who appeared for the Crown, has conducted extensive research into the literature relating to the function and significance of arraignment in a criminal trial. The court is much indebted to him for the very helpful results of his labours. They support the view which this court has formed. Counsel for the Crown referred to Roscoe's *Criminal Evidence* (16th ed, 1952) where at page 242 arraignment is dealt with as coming within the proceedings 'before trial.' The author states that 'A person indicted for felony must in all cases appear in person and be arraigned . . .'" Later Shaw L.J. made it plain that the Court was accepting the proposition that the trial began when the jury were seized of the issue.

We were referred to a Canadian case, CATHERWOOD *et al.* v. THOMPSON (1958) 15 D.L.R. 238; (1958) Ont. 326. It arose from a civil action in the county court, and the Court of Appeal held, at page 242 and page 331 respectively: "When a trial

may be said actually to have commenced is often a difficult question but, generally speaking, this stage is reached when all preliminary questions have been determined and the jury, or a judge in a non-jury trial, enter upon the hearing and examination of the facts for the purpose of determining the questions in controversy in the litigation."

Mr. Brandt has made an exploration (it would be a disservice to him to describe it in any other way) into the judgments of the Supreme Court of Canada in MORIN V. R. (1891) 18 S.C.R. 407, in an appeal from the Court of Queen's Bench for Lower Canada (Appeal Side). That case concerned the right of the Crown to stand aside jurors when the panel had already been gone through. The issue before the Court of Appeal was whether or not that matter could be the subject of appeal. It could only be the subject of appeal, so it was said, if the trial had not commenced. That court, constituted of six judges, presided over by Ritchie C.J., reached the conclusion, as to three of them, that the trial started when the jury were seized of the matter, and, as to the other three, to the contrary, that the trial started probably at about the time of arraignment.

Mr. Brandt seeks to persuade us, by an examination of the judgment of Strong J. in that case, that, although that learned judge came down on the side of Ritchie C.J. and another judge in saying that the trial started at the time when the defendant was put in the charge of the jury, he really did so under the duress of what he called authority binding upon him. The result, therefore, said Mr. Brandt very engagingly, was not 3-3 but 4-2 in his favour. Examining law reports in that way is a legitimate forensic exercise and, as we found, a welcome diversion. But the plain fact of the matter is that Strong J. came to the conclusion that he was bound by authority. Accordingly, as I have said, the Canadian court was in an inconclusive state as a result of the decision of those six distinguished judges.

The judgment of Sir W.J. Ritchie C.J. is, we think, worthy of very careful study. It is instructive in that the learned Chief Justice examined a large number of authorities, most of them English. He relied quite heavily upon the work of *Chitty on Criminal Law* in reaching this very clearly stated final conclusion at page 415: "Until a full jury is sworn there can be no trial, because until that is done there is no tribunal competent to try the prisoner. The terms of the jurymen's oath seem to show this. And as is to be inferred as we have seen even from what Lord Campbell says that all that takes place anterior to the completion and swearing of the jury is preliminary to the trial. How can the prisoner be tried until there is a court competent to try him? And how can there be a court until there is a judge on the bench and a jury in the box duly sworn? Until there is a court thus constituted there can be no trial, because there is no tribunal competent to try him. But when there is a court duly constituted the prisoner being present and given in charge to the jury his trial in my opinion commences, and not before."

That expresses more aptly and clearly than we think we could what we deem to be the true position. We go further and say that our experience as judges in the criminal courts leads us inevitably to the conclusion, unassisted by the authorities to which we have referred in the course of this judgment, that it would be wholly insensible to speak of the commencement of a trial as being other than when the jury have been sworn and take the prisoner into their charge, to try the issues and, having heard the evidence, to say whether he is guilty or not of the charge against him; always remembering that it is inevitably a trial by jury, not by a judge. A trial

can take place only if the defendant himself demands it by pleading not guilty. If he pleads guilty there is no issue to be tried.

Mr. Clegg at one stage submitted that there was an issue to be tried on a plea of guilty; sometimes when there is a matter to be resolved which may affect sentence, a question of fact or relating to a state of affairs. It is true of course that a judge sometimes goes to the extent of calling evidence before him on a plea of guilty, to be sure that he has the essential facts established before he passes sentence. To that extent it may be said that there is an issue to be resolved. But it is not the kind of issue which is in contemplation when considering trial by jury; it is a wholly different matter.

For those reasons we are firmly of the opinion, as was stated so eloquently by Ritchie C.J., a trial starts at the time that he adumbrated.

Evans did not give evidence in his trial. Before the trial started he knew the legal position. We are sure that he had been advised on the law as it stood. He must have heard the legal argument which took place before the judge about the time of the commencement of the trial. In Rhiney's case it needs to be said that Rhiney not only gave evidence himself but called various witnesses upon his plea of alibi. We fail to see what hardship there was to either of these two men as a result of the enactment of section 72.

That, however, is not a matter that can affect our judgment. We have to interpret the effect of the plain provisions of section 72. This we have done, with the result that I have already stated.

As that ground of appeal fails, we turn to look at the effect of the other main ground of appeal. It must inevitably lead to the quashing of the convictions of Tonner, Rees, Harding and Evans upon the charge of conspiracy at common law. This Court has however a power to substitute of its own accord a conviction of one or more of these appellants of another offence if it deems it right and just so to do. Mr. Leslie and Mr. Clegg are aware of the intention of the Court in this respect, because we invited argument by them upon it. Both counsel made it absolutely clear that they could not resist, in the whole of the circumstances, the use by the Court of the provisions of section 3 of the Criminal Appeal Act 1968. For present purpose those provisions are contained in subsection (1), *viz.*: "This section applies on an appeal against conviction where the appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of the other offence."

The other offence, as is acknowledged by both counsel, is that of acting contrary to section 38(1). We quash the convictions, as we have said, and substitute for them in every instance in respect of every appellant a verdict of guilty of conspiring to act contrary to the provisions of section 38(1), and such convictions will therefore be recorded.

We turn therefore to the only outstanding matter in these appeals. In doing so we are of course aware that we are circumscribed in our powers by the provisions of section 1(1), and we bear them carefully in mind. The maximum sentence under section 38(1) is two years' imprisonment, but the fines which can be levied are very heavy, as is manifest from the fact that the court has power to impose a fine three times the amount of the value of the tax kept away from the Revenue.

Turning to the individuals concerned here, we look first at Tonner. He is 51 years of age, and he has a criminal record. He has been to borstal for office-breaking and larceny. That was a long time ago, it is true. He has further been convicted of receiving stolen jewellery, and in 1980 of conspiracy to utter counterfeit gold coins. In 1981 he was first convicted of dishonestly handling stolen jewellery. That conviction was the result of information having been passed to police officers by what is nowadays called a "super-grass." The conduct which brought about the conviction was committed as long ago as 1974. That was said to be why, in passing a sentence of 18 months' imprisonment, the court suspended it for two years. Doubtless it was with that fact in mind that his Honour Judge Lowry in activating that sentence reduced it to six months. We think that it is an important feature of Tonner's conduct that it was not very long after the imposition of that suspended sentence that he began the activities which have been of so much concern to this Court in these appeals. Clearly he paid very little heed to the fact that he was subject to a suspended sentence.

Mr. Leslie has urged upon us that in those circumstances we should impose upon Tonner concurrent sentences regardless of the heavy sentences imposed by the judge below. It is, he submitted, wrong in principle to make them consecutive. In that regard he has referred us to LOVELOCK (1956) 40 Cr.App.R. 137. We think that that case is opposed to the principle that Mr. Leslie would have us believe exists. He has said that it exists in his own head. It may be none the worse for that; but we should prefer other assistance before coming to the belief that it really does exist. We are sure that he will not regard that comment as discourteous. We see no reason, having regard to the gravity of the matter, why consecutive sentences should not be passed in this case. This was indeed a very serious affair.

We fully note the terms of the sentences which were imposed by the judge and we bear in mind of course the submissions made to us of Tonner's involvement in the second count. For his part in the conspiracy as found by this Court we think there should be a sentence of two years' imprisonment on count 1 and of two years' imprisonment on count 2, those sentences to run consecutively, and moreover also to run consecutively to the six months' imprisonment which was activated by His Honour Judge Lowry, making overall a term of four and a half years' imprisonment.

Finally, as the matters of costs and legal aid costs are not challenged, we look at the fines. Mr. Leslie very frankly has conceded that he cannot launch an attack upon the fines imposed on the first count. He has therefore confined his attack to the fine on the second count, which he submits is grossly excessive, having regard to a number of factors, notable amongst which is the role played by his client in that count.

We bear those matters in mind, but cannot accept that Tonner was not at the centre of the web and not heavily engaged in what Rees and Harding were doing, as a result of the conviction of the company. We see no reason whatever to reduce the fine of £100,000. This appeal therefore in respect of that must fail.

Accordingly, in relation to the offences for which we deal with Tonner, we fine him £300,000 on the first count and £100,000 on the second count, and order him to pay £20,000 towards the costs of the prosecution and £10,000 towards legal aid costs. So much, then, for Tonner.

Rees is 43 and Harding 45 years of age. Both have criminal records, and they are a pair of scoundrels. They did not receive a day too long. In fact it could be said that the sentences imposed upon them were lenient. We do not regard either of them as deserving of the slightest sympathy or consideration from the point of view

of leniency. They it was who deceived the registrar into accepting the false names they used for the purposes of value added tax, and they it was who sold the gold on to buyers in Hatton Garden.

We should not, we think, be doing our duty unless we were to impose upon Rees and Harding the maximum sentence that it is in our power to pass, that is, two years' imprisonment.

We regard Evans as a man of hitherto good character. He has some spent convictions, of which we take no notice. He is now 42 years of age. He played for very high stakes indeed and was quite ingenious. As we have already said, it took a considerable time to unclothe Mr. Roberts of his wig and to reveal Mr. Evans. But we cannot accede to Mr. Clegg's invitation to this Court, and Evans will also go to prison for two years.

For the reasons that we have given we allow the appeals to the extent of quashing the convictions for conspiracy to defraud at common law and substituting convictions as already stated.

Appeals allowed in part.
Appeals against conviction of conspiracy to defraud against common law quashed.
Conviction under section 38(1) of the Finance Act 1972 substituted.
Sentences varied, save that of Harding.

Solicitors: Solicitor, Customs and Excise for the Crown.