

**NOTE: ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF C, H AND W PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA657/2022  
[2023] NZCA 551**

BETWEEN HENGJIA ZHENG  
Appellant

AND THE KING  
Respondent

**CA658/2022**

BETWEEN YIKUN ZHANG  
Appellant

AND THE KING  
Respondent

**CA659/2022**

BETWEEN SHIJIA ZHENG  
Appellant

AND THE KING  
Respondent

Hearing: 15–16 August 2023

Court: French, Collins and Wylie JJ

Counsel: R L Thomson and A Y H Young for Appellant H Zheng  
R J Katz KC, B H Dickey and N J Small for Appellant Y Zhang  
P E Dacre KC and D Lye for Appellant S Zheng  
P F Wicks KC and K E Hogan for Respondent

Judgment: 9 November 2023 at 9.00 am

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## JUDGMENT OF THE COURT

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- A Hengjia Zheng’s appeal against his conviction in respect of charge 5 is allowed. The conviction is quashed. No retrial is ordered. Hengjia Zheng’s appeal against his conviction in respect of charge 7 is dismissed. The sentence imposed in relation to his conviction for charge 7 remains in place.**
- B Yikun Zhang’s appeal against his conviction in relation to charge 5 is allowed. The conviction is quashed. No retrial is ordered. Yikun Zhang’s appeal against sentence is dismissed.**
- C Shijia Zheng’s appeals against his convictions in relation to charges 3 and 5 are allowed. The convictions are quashed. No retrial is ordered.**
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## REASONS OF THE COURT

(Given by Collins J)

### Introduction

[1] Following a judge-alone trial the appellants were convicted of obtaining a benefit by deception contrary to s 240(1)(a) of the Crimes Act 1961.<sup>1</sup> We explain s 240 of the Crimes Act at [70] to [75]. Four other defendants were tried with the appellants. The charges against them were dismissed by Gault J.<sup>2</sup>

[2] The convictions stemmed from the appellants’ roles in a strategy that hid the true source of donations to the National Party in 2017 and 2018. Mr Hengjia (Joe) Zheng was also convicted of providing false or misleading information to the Serious Fraud Office (SFO), which is an offence under s 45 of the Serious Fraud Office Act 1990 (the SFO Act).<sup>3</sup> The appellants were sentenced by Gault J, the trial judge, to community-based sentences.<sup>4</sup>

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<sup>1</sup> *R v Zhang* [2022] NZHC 2540 [Verdicts judgment] at [8].

<sup>2</sup> At [2] and [8].

<sup>3</sup> At [8].

<sup>4</sup> *R v Zhang* [2022] NZHC 3168 [Sentencing judgment] at [66], [81], and [98]–[99].

[3] The appeal challenges all convictions and also the sentence imposed on Yikun Zhang. In his sentence appeal, Mr Zhang argues he should have been discharged without conviction. As we are allowing Mr Zhang's appeal against conviction, it is not necessary for us to deal with his sentence appeal. Nor is it necessary for us to consider the grounds of appeal challenging a pre-trial decision directing that the appellants be tried by judge-alone.

[4] Seven charges were set out in the Crown charge notice. Six of those charges alleged various defendants breached s 240(1)(a) of the Crimes Act. The seventh charge concerned Joe Zheng's breach of s 45 of the SFO Act.

[5] The obtaining of a benefit by deception charges concerned three tranches of donations to political parties:

- (a) Charges 1 and 2 arose from donations made in March 2017 to the Labour Party. In addition to the appellants, C, H and W<sup>5</sup> were charged in relation to these donations. All defendants were found not guilty of the two Labour Party donations charges.<sup>6</sup>
- (b) Charges 3 and 4 arose from donations made to the National Party in June 2017. Mr Zhang, Mr Shijia (Colin) Zheng and Mr Jami-Lee Ross were charged in relation to these donations. Colin Zheng was found guilty in relation to charge 3. No verdict was entered for Colin Zheng in relation to charge 4. Mr Zhang and Mr Ross were found not guilty in relation to charges 3 and 4.<sup>7</sup>
- (c) Charges 5 and 6 arose from donations made to the National Party in June 2018. Mr Zhang, Colin Zheng, Joe Zheng, and Mr Ross were charged in relation to these donations. The three appellants were convicted in relation to charge five. Mr Ross was found not guilty of charge 5. Charge 6 was laid as an alternative to charge 5. No verdict

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<sup>5</sup> The names of these defendants were permanently suppressed by the High Court pursuant to s 200 of the Criminal Procedure Act 2011, see *R v C* [2023] NZHC 275.

<sup>6</sup> Verdicts judgment, above n 1, at [8].

<sup>7</sup> At [8].

was entered in respect of the appellants in relation to charge 6. Mr Ross was found not guilty in respect of charge 6.<sup>8</sup>

[6] The principal question raised by the appeals concerning the convictions for breaching s 240(1)(a) of the Crimes Act is whether the appellants could be convicted when it was accepted they did not receive, directly or indirectly, a benefit for themselves from the donations. Instead, before us, the SFO argued the National Party was the victim and correspondingly, the beneficiary of the same deceptive transaction. As we shall explain, at trial, the SFO alleged the National Party was the beneficiary of the transaction and the Electoral Commission and/or the National Party Secretary were deceived.

### *The appellants*

#### Mr Zhang

[7] Mr Zhang first came to New Zealand from China in about 2000, and moved here permanently with his family in 2011. He does not speak English, and he maintains close connections with the Teochew community, which comprises immigrants from the eastern part of Guangdong Province in China. Mr Zhang was the first chairman of the Chao Shan Association in Auckland, which serves the Teochew community.

[8] Mr Zhang is a successful and wealthy businessman. Prior to his conviction, he was a director of multiple companies,<sup>9</sup> and he remains a shareholder in a number of companies.

#### Colin Zheng

[9] Colin Zheng came to New Zealand as a secondary school student. He was also prohibited from managing companies following his conviction, but was granted leave

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<sup>8</sup> At [8].

<sup>9</sup> Following his conviction, Mr Zhang was prohibited from managing companies pursuant to ss 151 and 382 of the Companies Act 1993.

by the High Court to be a director of several companies. He is a director and shareholder of multiple companies.

[10] Colin Zheng has also been highly involved with the Chao Shan Association, including serving as the chairman in 2017.

Joe Zheng

[11] Joe Zheng is the twin brother of Colin Zheng. He also came to New Zealand as a student and has lived in this country for more than 20 years. He currently works for KCC Construction.<sup>10</sup>

### *Electoral Act 1993*

[12] The Electoral Act is integral to New Zealand's constitutional arrangements.<sup>11</sup> In addition to regulating the way parliamentary elections are conducted the Electoral Act provides for the registration of electors and political parties. It also governs, amongst other matters, the way donations can be lawfully made to political parties.

[13] A cornerstone of the law governing donations to political parties is the process which enables the public to learn the identity of persons who make donations in excess of a specified statutory threshold, presently \$5,000, to a political party in any one year.<sup>12</sup> At the time of the donations in this case the threshold for public disclosure was \$15,000.<sup>13</sup>

[14] There are different timeframes for reporting donations above the \$5000 threshold to the Electoral Commission depending on the amount donated. When a political party receives in one year a donation greater than \$5,000 from a single donor, the secretary of the party must inform the Electoral Commission of that donation in

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<sup>10</sup> Colin Zheng is a director and shareholder of KCC Construction. Mr Zhang is a shareholder.

<sup>11</sup> See Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [2.4].

<sup>12</sup> Electoral Act 1993, s 210(1)(a).

<sup>13</sup> Section 210(1)(a) as at 1 January 2020.

the party's annual return to the Commission. The return must identify the name and address of the donor and the amount of the donation or donations.<sup>14</sup>

[15] When a political party receives a donation that exceeds \$20,000 from a single donor during the election year, the party's secretary must file a return with the Electoral Commission within 10 days of the donation being received. The return must identify, amongst other matters, the name and address of the donor (if known).<sup>15</sup> At the relevant times, the single donation threshold was \$30,000.<sup>16</sup>

[16] The information provided by political parties about donors is able to be made publicly available by the Electoral Commission, whether it is provided in an annual report or a special report made under s 210C.<sup>17</sup>

[17] A political party secretary who unwittingly fails to comply with the provisions we have summarised at [14] and [15] commits an offence and is liable on conviction to a fine not exceeding \$40,000.<sup>18</sup> If a return is filed that is false in any material particular and the party secretary knew about it, then they may be liable on conviction to a fine not exceeding \$100,000.<sup>19</sup>

[18] Section 207E of the Electoral Act concerns the transmission of donations via an intermediary. It provides:

**207E Identity of donor to be disclosed by transmitter, if known**

- (1) When a transmitter transmits a donation to a candidate or party secretary on behalf of the donor, the transmitter must disclose to the candidate or party secretary—
  - (a) the fact that the donation is transmitted on behalf of the donor; and
  - (b) the name and address of the donor; and...

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<sup>14</sup> Section 210(1)(a) and (2).

<sup>15</sup> Section 210C(1), (4) and (6).

<sup>16</sup> Section 210C(1) as at 1 January 2020.

<sup>17</sup> Section 210F.

<sup>18</sup> Sections 210D(2)(b) and 224(2)(a).

<sup>19</sup> Sections 210D(2)(a) and 224(1)(b)(i).

- (2) Where a transmitter does not disclose, or is unable to disclose, the information required by subsection (1), then the donation must be treated as an anonymous donation.

[19] The failure of a transmitter to comply with s 207E with the intention of concealing the identity of the donor commits an offence and is liable on conviction to a fine not exceeding \$40,000.<sup>20</sup>

[20] The Electoral Act also regulates anonymous donations, but none of the donations in this case were anonymous.<sup>21</sup>

[21] The SFO concluded it was unable to charge any of the defendants with committing offences under the Electoral Act. The inability to charge the defendants with offences under the Electoral Act exposes a significant weakness in the offence provisions of that Act.

### **The donations**

[22] We now set out the facts underlying the charges. As we have explained at [5], the only convictions under s 240(1)(a) of the Crimes Act concern the donations made to the National Party in June 2017 and June 2018. It is, however, helpful to complete the scene by briefly describing the allegations concerning the donations to the Labour Party.

#### *Labour Party donations — March 2017*

[23] Charges 1 and 2 arose from these donations.

[24] In early 2017, Mr Zhang was preparing an application on behalf of the Chao Shan Association to host a Teochew International Convention in Auckland. The convention was scheduled for 2019 and it was anticipated that it would attract approximately 3,000 overseas visitors. The Chao Shan Association obtained a number of letters of support from leading New Zealanders, including a number of politicians from the Labour and National parties.

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<sup>20</sup> Section 207F.

<sup>21</sup> Section 210(1)(c).

[25] In addition to the three appellants, the following people were involved in the 2017 Labour Party donations arrangement:<sup>22</sup>

- (a) C, an official in the Chao Shan Association who was assisting Mr Zhang gain support for the bid to host the Teochew International Convention;
- (b) H, who was a senior figure in the Labour Party; and
- (c) W, who worked closely with H during the relevant period.

[26] In early 2017, Mr Zhang agreed with H and W to purchase artworks for \$60,000 from the Labour Party in order to provide financial support to the party. Mr Zhang did not, however, want his name to be publicly associated with being a donor to the Labour Party.

[27] On 14 March 2017, H purchased five paintings for \$13,600 from an art gallery in Ōhope.<sup>23</sup> At some point H swapped two of the paintings he purchased from the Ōhope gallery with two paintings he and his wife already owned. He estimated one of those paintings was worth \$12,000 and the other \$5,000.

[28] On 15 March 2017, W sent Mr Zhang a message telling him that H had selected some paintings that would interest him and that she would send him the details of the artworks.

[29] On 24 March 2017, H and W went to Mr Zhang's house to discuss the paintings and support for the Teochew International Convention. Thereafter, W gave Colin Zheng details to enable money to be transferred into a Labour Party account.

[30] Mr Zhang and Colin Zheng then arranged for the equivalent of \$60,000 to be transferred from China into Joe Zheng's New Zealand bank account. Colin Zheng

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<sup>22</sup> All three were found not guilty at trial, see Verdicts judgment, above n 1, at [8].

<sup>23</sup> We note that the relevant invoice is dated 15 March 2017.



then gave details of the Labour Party bank account to enable money to be transferred to the Labour Party.

[31] Mr Zhang received five paintings from H and W, which he hung on a wall in his house.

[32] Two days after the money was transferred into the Labour Party account, W sent Colin Zheng a message saying that five names needed to be provided as purchasers of the paintings.

[33] In due course, details were supplied to the Labour Party identifying five people, including Joe Zheng who had supposedly purchased the artworks for the following sums:

C	\$16,000
Zhang David	\$ 8,000
Tu The Cuong	\$12,000
Chen Hongni	\$14,000
Joe Zheng	\$10,000

[34] On 5 April 2017, W forwarded the details of the five purported purchasers to the Secretary of the Labour Party even though she knew that the paintings had in fact been acquired by Mr Zhang.

[35] On 7 April, H, together with some senior officers of the Labour Party, attended Mr Zhang's house for a dinner and were photographed in front of the paintings.

[36] H took no steps to advise the Labour Party that Mr Zhang was the purchaser of the paintings and therefore the real donor of the difference between the price paid for the paintings and their true value.

*Labour Party donations — September 2017*

[37] No charges arose from these particular donations. The SFO did, however, rely on these donations as propensity evidence.<sup>24</sup>

[38] In August 2017, W and H organised a dinner that was to raise funds for the Labour Party. Mr Zhang and Colin Zheng were approached by W to attend a dinner at which various items were to be sold by auction. The items included a Chinese imperial robe, a painting signed by the Rt Hon Helen Clark and a quantity of wine. The robe, which was donated to the Labour Party, was sold to Mr Zhang for \$90,000. The other items were also purchased by Mr Zhang for \$10,000.

[39] Approximately \$75,000 of the purchase money was sent from an account in China to Colin Zheng's New Zealand account. Another approximately \$25,000 was paid into Colin Zheng's New Zealand account from a New Zealand account in the name of Shaona Zhang, Mr Zhang's sister. Arrangements were then made to transmit the funds from Colin Zheng's account to the Labour Party via an account held by his mother.

[40] The Labour Party returns for 2017 did not disclose any donations from Mr Zhang.

*National Party donations — June 2017*

[41] Charges 3 and 4 arose from these donations.

[42] On 15 May 2017, Mr Zhang, Colin Zheng and Mr Ross, then the National Party MP for the Botany electorate, met for dinner at an Auckland restaurant. During the dinner Mr Ross was told that Mr Zhang wished to donate \$100,000 to the National Party. It was made clear, however, that Mr Zhang did not wish to be publicly identified as a political donor.

[43] On 18 May 2017, \$50,000 was transferred to Colin Zheng's bank account from a bank account held in China by Mr Zhang.

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<sup>24</sup> *Zhang v R* [2022] NZHC 2541 [Reasons judgment] at [330] and [446]

[44] On 9 June 2017, approximately \$100,000 was transferred from a bank account owned by Mr Chunyat Cheng, the father of Colin and Joe Zheng. The money from Mr Cheng came from ANCO Construction Ltd. Mr Cheng owned 70 per cent of the shares in that company through his company, ANCO International Ltd.

[45] On 25 May 2017, Mr Ross sent an email to Colin Zheng providing the bank account details for the National Party Botany branch. Mr Ross explained in that email “any donation from a donor above \$15,000 in one year will be declared publicly. Any donations above \$30,000 will be declared within 10 working days”. Colin Zheng replied, “[t]hanks for your information, [w]e will all follow the law. :)”.

[46] Between 1 June 2017 and 9 June 2017, Colin Zheng transferred \$100,000 from his bank account to seven people who were either members of his family or otherwise associated with him. The sums transferred from Colin Zheng’s account were all slightly under \$15,000. Each recipient was instructed to transfer the sum they received to the National Party Botany branch. The sums that Colin Zheng had transferred to his family and associates were ultimately transferred to the National Party head office by the Botany branch of the National Party.

[47] Colin Zheng provided Mr Ross with the names of the seven transmitters. In turn, Mr Ross supplied those details to the National Party’s Secretary. Mr Ross failed to tell the National Party’s Secretary the true identity of the donor.

#### *2018 National Party donation*

[48] Charges 5 and 6 arose from these donations.

[49] On 20 April 2018, Mr Ross sent Colin Zheng a message telling him he wanted Mr Zhang to meet the Hon Simon Bridges, the recently elected leader of the National Party. A dinner was held at Mr Zhang’s house on 14 May 2018. At that dinner Mr Ross told Mr Zhang and Colin Zheng that the National Party needed their financial support.

[50] On 21 May 2018, Mr Bridges attended a function where he spoke to Mr Zhang and Colin Zheng. Later that evening, Mr Bridges telephoned Mr Ross and told him

that the National Party was to receive a donation of \$100,000 from Mr Zhang and/or Colin Zheng and that Mr Ross was to be responsible for collecting it.

[51] The funds in question came from the sale of a quantity of wine owned by HLG Holding Ltd, a company which Mr Zhang and Colin Zheng were directors and shareholders of. The wine was sold by HLG in China for \$108,463.23.

[52] On 31 May 2018, \$108,463.23 was transferred from a bank account in the name of Shaona Zhang to Joe Zheng's bank account in New Zealand. The same evening, Colin Zheng sent Joe Zheng a copy of the National Party Botany branch bank deposit slip.

[53] Between 1 June 2018 and 8 June 2018, Joe Zheng transferred \$98,000 from his bank account to seven different people who were members of his family or people with whom he was associated. Joe Zheng told the recipients to then transfer the money they received to the National Party Botany branch bank account. On 7 June 2018, Joe Zheng transferred a further \$2,050 into that account.

[54] On 8 June 2018, Joe Zheng created a list of the transmitters' names, addresses and bank account details and provided that list to Colin Zheng. Colin Zheng in turn provided the list of the names and addresses of the transmitters to Mr Ross.

[55] In August 2018, Mr Ross provided the names of the transmitters to the National Party. The National Party was not informed that Mr Zhang was the real donor of the money it received or that the named transmitters were merely conduits used to ensure Mr Zhang was not publicly identified as a significant donor to the National Party.

[56] The balance of the \$108,463.23 sent to Joe Zheng's bank account was used by Colin Zheng and Mr Zhang to purchase cognac.

### **Joe Zheng's interviews with SFO**

[57] Following allegations made by Mr Ross that Mr Bridges had committed breaches of the donation provisions of the Electoral Act, the SFO commenced

inquiries into the donations we have summarised above. Joe Zheng was interviewed by the SFO on 3 December 2019 and 15 January 2020. In his first interview Joe Zheng was asked about the source of the funds that formed the basis of the \$100,050 donation to the National Party in June 2018.

[58] The explanation given by Joe Zheng was that the money came from Shaona Zhang, and that the money was paid in May 2018 as a deposit on a house that Shaona Zhang wanted to have built at Weiti Bay on the North Shore by ANCO Properties Development Ltd.<sup>25</sup> Joe Zheng said a building contract was executed between Shaona Zhang and ANCO Properties at about the time she paid the deposit. Colin Zheng was one of the directors and shareholders of ANCO Properties and Joe Zheng worked for that company.

[59] After the first interview with Joe Zheng, the SFO conducted further inquiries about the Weiti Bay property. The following information emerged:

- (a) The sum paid by Shaona Zhang to Joe Zheng on 31 May 2018 was \$108,463.23. This was the same amount remitted to Joe Zheng, via Shaona Zhang from the sale of the wine by HLG in China.
- (b) A contract between Shaona Zhang and ANCO Property Development was found to have been created on Joe Zheng's computer on 16 August 2019.
- (c) The contract was backdated to May 2018 and the details of the contract were copied from another contract relating to a development in South Auckland.
- (d) Mr Cong Ren, who at the time was a director and 30 per cent shareholder of ANCO Properties was unaware of any contract between the company and Shaona Zhang in 2018.

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<sup>25</sup> There was some confusion as to whether the contract was with ANCO Properties or KCC Construction, however Joe Zheng's evidence was that the companies were considered "nearly the same" and work was often carried out jointly between the two.

- (e) The Weiti Bay property was not surveyed until 27 June 2019 and an architect for that building project was not engaged until July 2019.

[60] In his second interview with the SFO, Joe Zheng:

- (a) reaffirmed his earlier explanation that on 31 May 2018 he received \$108,463.23 from Shaona Zhang as a deposit for a house to be constructed at Weiti Bay and that Shaona Zhang and ANCO signed the contract in May 2018; and
- (b) when it was put to him that the contract was created in August 2019, said that the original contract had been lost so he just created another contract using the same amounts.

[61] When Joe Zheng was asked by the SFO if the August 2019 contract was created by himself, Colin Zheng and Shaona Zhang as a cover up, he said:

I don't know. Because I just told everything – I just did everything Colin told me to do it. Yeah.

### **The charges**

[62] We shall now explain the charges in more detail.

[63] The appeals concern convictions in relation to charges 3, 5 and 7. To recap:

- (a) Colin Zheng was convicted in relation to charge 3.
- (b) Mr Zhang, Colin and Joe Zheng were convicted in relation to charge 5.
- (c) Joe Zheng was convicted in relation to charge 7.

[64] Charge 3 alleged:

That **JAMI-LEE MATENGA ROSS, YIKUN ZHANG** and **SHIJIA ZHENG**, between 14 May 2017 and 1 May 2018 at Auckland, by deception and without claim of right, directly or indirectly, obtained possession of, or control over, any property, or any pecuniary advantage or benefit.

**Particulars of the deception:**

With intent to deceive the National Party Secretary and/or the Electoral Commission, the defendants adopted a fraudulent device, trick, or stratagem whereby a \$100,000 donation made to the National Party between 1 June 2017 and 9 June 2017 (“the 2017 Donation”) was split into sums of money less than \$15,000, and transferred into the bank accounts of seven different people, before being paid to, and retained by, the National Party.

**Particulars of the benefit:**

The National Party obtained possession of, or control over, property, namely, the 2017 Donation, in circumstances where the amount of the 2017 Donation and the identity of the true donor(s) was not disclosed in the National Party’s Annual Return of Party Donations.

[65] Charge 5 was almost identical to charge 3 and alleged:

That **JAMI-LEE MATENGA ROSS, YIKUN ZHANG, HENGJIA ZHENG** and **SHIJIA ZHENG**, between 13 May 2018 and 1 May 2019 at Auckland, by deception and without claim of right, directly or indirectly, obtained possession of, or control over, any property, or any pecuniary advantage or benefit.

**Particulars of the deception:**

With intent to deceive the National Party Secretary and/or the Electoral Commission, the defendants adopted a fraudulent device, trick, or stratagem whereby a \$100,050 donation made to the National Party between 1 June 2018 and 8 June 2018 (“the 2018 Donation”) was split into sums of money less than \$15,000, and transferred into the bank accounts of eight different people, before being paid to, and retained by, the National Party.

**Particulars of the benefit:**

The National Party obtained possession of, or control over, property, namely, the 2018 Donation, in circumstances where the amount of the 2018 Donation and the identity of the true donor was not disclosed in the National Party’s Annual Return of Party Donations.

[66] Charge 7 alleged:

That **HENGJIA ZHENG**, between 2 December 2019 and 16 January 2020, in the course of complying with a requirement pursuant to s 9 of the Serious Fraud Office Act 1990, supplied information knowing that it was false or misleading in a material particular.

**Particulars:**

During his interviews with the Serious Fraud Office on 3 December 2019 and/or 15 January 2020, Hengjia Zheng advised:

- (a) That the money paid from Shaona Zhang's bank account into his bank account on 31 May 2018 was a deposit to [ANCO] Property Development for building a house on the North Shore, when in fact, the money originated from Yijun Zhang and was intended to be used to pay a \$100,000 donation to the National Party through transmitters.
- (b) That around the time the money was transferred into his account, he drafted a building quotation contract for [ANCO] Property Development to build a house on Shaona Zhang's land ("the Contract"), and that he and Shaona Zhang signed it, when in fact:
  - i. the Contract was only created and signed in August 2019;
  - ii. the specifications on the Contract had been copied from an unrelated quote; and
  - iii. the date of the signatures of the Contract were backdated to 21 May 2018.
- (c) That the Contract was lost, and when he discovered this in approximately August 2019, he created, signed and backdated another contract on Colin Zheng's instructions, when in fact:
  - i. the Contract was only created and signed in August 2019; and
  - ii. a contract for [ANCO] Property Development to build a house on Shaona Zhang's land drafted around the time that Shaona Zhang paid the money into Joe Zheng's account never existed.

[67] We also set out charge 6 which was the alternative to charge 5:

That **JAMI-LEE MATENGA ROSS, YIKUN ZHANG, HENGJIA ZHENG** and **SHIJIA ZHENG**, between 13 May 2018 and 1 May 2019 at Auckland, by deception and without claim of right, directly or indirectly, obtained possession of, or control over, any property, or any pecuniary advantage or benefit.

**Particulars of the deception:**

With intent to deceive the National Party Secretary and/or the Electoral Commission, the defendants adopted a fraudulent device, trick, or stratagem whereby a \$100,050 donation made to the National Party between 1 June 2018 and 8 June 2018 ("the 2018 Donation") was split into sums of money less than \$15,000, and transferred into the bank accounts of eight different people, before being paid to, and retained by, the National Party.



**Particulars of the benefit:**

The true donor of the 2018 Donation obtained freedom from any public scrutiny regarding the [2018] Donation, in circumstances where the amount of the [2018] Donation and the identity of the true donor should have been disclosed in the National Party's Annual Return of Party Donations.

**Sections 240 and 241 of the Crimes Act**

[68] Sections 240 and 241 provide:

**240 Obtaining by deception or causing loss by deception**

- (1) Every one is guilty of obtaining by deception or causing loss by deception who, by any deception and without claim of right,—
- (a) obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly; or
  - (b) in incurring any debt or liability, obtains credit; or
  - (c) induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage; or
  - (d) causes loss to any other person.

...

- (2) In this section, **deception** means—
- (a) a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and—
    - (i) knows that it is false in a material particular; or
    - (ii) is reckless as to whether it is false in a material particular; or
  - (b) an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or
  - (c) a fraudulent device, trick, or stratagem used with intent to deceive any person.

**241 Punishment of obtaining by deception or causing loss by deception**

Every one who is guilty of obtaining by deception or causing loss by deception is liable as follows:

- (a) if the loss caused or the value of what is obtained or sought to be obtained exceeds \$1,000, to imprisonment for a term not exceeding 7 years:
- (b) if the loss caused or the value of what is obtained or sought to be obtained exceeds \$500 but does not exceed \$1,000, to imprisonment for a term not exceeding 1 year:
- (c) if the loss caused or the value of what is obtained or sought to be obtained does not exceed \$500, to imprisonment for a term not exceeding 3 months.

[69] “Obtain” is defined in s 217 of the Crimes Act in the following way:

**obtain**, in relation to any person, means obtain or retain for himself or herself or for any other person.

[70] As is apparent from the Crown charge notice, the SFO relied on s 240(1)(a) and 240(2)(c) of the Crimes Act, namely:<sup>26</sup>

- (1) Everyone is guilty of obtaining by deception or causing loss by deception who, by any deception and without claim of right,—
    - (a) obtains ownership or possession of, or control over, any ... benefit ... directly or indirectly;
- ...

[71] The alleged “deception” comprised:<sup>27</sup>

- (c) a fraudulent device, trick, or stratagem used with intent to deceive any person.

[72] Section 240 was enacted in its present form with effect from 1 October 2003 via s 15 of the Crimes Amendment Act 2003. Prior to then, the obtaining by false pretence offence was set out in s 246 of the Crimes Act:<sup>28</sup>

**246. Obtaining by false pretence ...**

- (1) Everyone is liable to imprisonment for a term not exceeding 7 years who, with intent to defraud or cause loss to any person by any false pretence, causes or induces any person to execute, make, accept, endorse, or destroy the whole or any part of any valuable security, or to write, impress, or affix any

<sup>26</sup> Crimes Act 1961, s 240(1)(a).

<sup>27</sup> Section 240(2)(c).

<sup>28</sup> *Morley v R* [2009] NZCA 618, [2010] 2 NZLR 608 at [4].

name or seal on any document in order that it may afterwards be made or converted into or used or dealt with as a valuable security.

(2) Everyone who, with intent to defraud by any false pretence, either directly or through the medium of any contract obtained by the false pretence, obtains possession of or title to anything capable of being stolen, or procures anything capable of being stolen to be delivered to any person other than himself, is liable —

- (a) To imprisonment for a term not exceeding 7 years if the value of the thing so obtained or procured exceeds the sum of \$300:
- (b) To imprisonment for a term not exceeding one year if the value of the thing so obtained or procured exceeds the sum of \$100 and does not exceed the sum of \$300:
- (c) To imprisonment for a term not exceeding 3 months if the value of the thing so obtained or procured does not exceed the sum of \$100.

[73] Prior to 1 October 2003, the Crimes Act also contained specific offences concerning obtaining credit fraudulently (s 247) and conspiracy to defraud (s 257). Sections 246, 247 and 257 of the Crimes Act (as they were prior to 8 October 2003), could be traced to ss 252, 253 and 259 of the Crimes Act 1908.

[74] The following three key points emerge from the authorities decided under the earlier iterations of the obtaining by false pretence provisions of the Crimes Acts:

- (a) The meaning of the verb “obtain”, did not require the defendant to gain legal title to the goods in issue. Physical possession would suffice.<sup>29</sup>
- (b) The offence required either:
  - (i) intent to defraud; or
  - (ii) intent to cause loss (earlier versions of the Crimes Act referred to causing injury rather than loss).

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<sup>29</sup> *R v Miller* [1955] NZLR 1038 (CA) at 1047.

- (c) In *R v Miller*, this Court approved a summing up in which the trial judge said words to effect that the Crown need not prove:<sup>30</sup>

... that the accused gained anything, or even that he stood to gain anything materially by what he did, but it was sufficient for the Crown to establish that the appellant made a representation which he knew to be false, and that he made it with a fraudulent intent to induce the person to whom it was made to act upon it ...

[75] The Bill containing what is now s 240 of the Crimes Act was changed by a Supplementary Order Paper which added what is now s 240(1)(d), namely causing “loss to any other person”.<sup>31</sup> This amendment ensured the offence of causing “loss to any person by any false pretence” previously set out in s 246 of the Crimes Act was not inadvertently removed from the Crimes Act.

### Case law

[76] It is helpful at this juncture to explain the leading cases since s 240 was enacted in its present form.

*Morley v R* [2009] NZCA 618, [2010] 2 NZLR 608

[77] Mr Morley was convicted of four counts of causing loss by deception under s 240(1)(d). The Crown case was that Mr Morley represented that he had the ability to complete contracts for the purchase of four properties when he knew he did not. His convictions were quashed on appeal because the vendors did not suffer the loss required by s 240(1)(d). This Court said:<sup>32</sup>

[15] There are at least two marked differences between the obtaining by deception offences, on the one hand, and the offence of causing loss by deception, on the other. The obtaining offences each specify a defined outcome. The offender must either obtain ownership, possession or control of something of value (s 240(1)(a)), or obtain credit (s 240(1)(b)), or induce or cause someone to perform a physical act in relation to a pecuniary document (s 240(1)(c)). By comparison, the offence of causing loss by deception describes an outcome but the nature of the loss is not defined.

[16] Secondly, the commission of the obtaining by deception offences necessarily contemplates an identifiable benefit obtained by the offender and

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<sup>30</sup> At 1048.

<sup>31</sup> Supplementary Order Paper 2003 (84) Crimes Amendment Bill (No 6) 1999 (322-1) at 3.

<sup>32</sup> *Morley v R*, above n 28.

a corresponding disadvantage to the victim. The offender will have obtained something of value, or obtained credit or will have secured some physical act in relation to a pecuniary document. Typically, the benefit received and the detriment suffered by the victim will be immediate, as where the offender consumes a meal and fails to pay for it. But the same cannot be said of the new offence of causing loss by deception.

[17] As the facts of the present case demonstrate, the appellant obtained no apparent benefit upon signing the agreements for sale and purchase. Ownership, possession and control of the properties was to remain with the vendors until the day of settlement. At no stage were the vendors deprived of their properties. Hence, they did not suffer an immediate detriment as do victims of the offences of obtaining by deception. We consider these differences are significant, particularly in defining a loss as contemplated by s 240(1)(d), an issue to which we shall return shortly.

*Li v R* [2016] NZCA 237

[78] Mr Li was convicted under s 240(1)(a) of obtaining a benefit by deception, namely a New Zealand Diploma in Business issued by NZQA to Mr Chen, who was an investigative journalist inquiring into fraud in the foreign student education market. Mr Chen never intended to use the diploma he obtained. The deception Mr Li engaged in involved him arranging for an academy called NZAS to complete assignments and examinations for Mr Chen to enable him to get a qualification from NZAS and then a diploma from NZQA. Mr Chen paid Mr Li \$12,000 for his fraudulent services, of which \$3,000 was kept by Mr Li and the balance paid by Mr Li to NZAS.

[79] One of the issues on appeal was whether Mr Li obtained a benefit for the purposes of s 240(1)(a). It was argued that the “benefit” obtained was the NZQA business diploma, but that because the diploma was issued directly to Mr Chen by NZQA, it was never “obtained” by Mr Li. This Court said that the definition of obtained in s 217 of the Crimes Act was “sufficiently broad to cover the situation where the defendant obtained possession of the property or benefit for another person”,<sup>33</sup> and that it would “suffice if the defendant causes some other person to deliver the property in question to someone other than the defendant”.<sup>34</sup>

[80] There is nothing controversial about the conclusions reached by the Court. It may also have been possible for Mr Li to have been convicted on the basis that he

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<sup>33</sup> *Li v R* [2016] NZCA 237 at [16].

<sup>34</sup> At [16].

obtained a benefit in the sum of \$3,000 for agreeing to deceive authorities by “taking care” of the assignments and examinations Mr Chen was meant to complete. For reasons that are not clear from the judgment, however, Mr Li was not charged on that basis.<sup>35</sup>

[81] Before us the SFO relied on the following paragraph from *Li*:<sup>36</sup>

[28] The benefit obtained by the deceit will normally be matched by the disadvantage suffered by the victim. The example given in *Morley* was where the offender consumes a meal and fails to pay for it. Even though a corresponding disadvantage may follow, s 240 does not require proof of it. In any event, we consider that the certified endorsement of NZQA that was obtained by deception in this case carried with it a corresponding detriment or disadvantage to NZQA. NZQA provided the certificate and confirmed that it had endorsed the qualification on its database. It would not have been prepared to take these steps if it had not been deceived and had been aware of the true position. It follows that NZQA acted to its detriment by providing this endorsement in reliance on the dishonest representations, which was contrary to its role of assuring and protecting the credibility of the New Zealand qualifications it endorses.

[82] The SFO acknowledged that in *Morley* this Court said the commission of an offence under s 240(1)(a) necessarily “contemplates an identifiable benefit obtained by the offender and a corresponding disadvantage to the victim”.<sup>37</sup> But, the SFO also submitted, *Li* “expressly overruled *Morley* on this point”.

### *Benefit and value*

[83] Benefit is not defined in ss 217 or 240 of the Crimes Act. It is, however, defined in ss 237, 267 and 269, which deal with the offences of blackmail, intentionally causing damage by fire and intentionally causing damage “with intent to obtain any benefit”. Benefit is defined in these sections to mean “any benefit, pecuniary advantage, privilege, property, service, or valuable consideration”.

[84] The terms benefit, privilege and service in s 240(1)(a) are broad concepts that may extend beyond things that have a direct financial value.<sup>38</sup> It is, however, necessary to be able to place some value on what is obtained when dealing with an

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<sup>35</sup> At [30].

<sup>36</sup> Footnotes omitted.

<sup>37</sup> *Morley v R*, above n 28, at [16].

<sup>38</sup> See *Watchorn v R* [2014] NZCA 493 at [72]–[73]; and *Stollery v R* [2020] NZCA 429 at [25].

offence under s 240(1)(a), (b) or (c), or the loss caused when dealing with an offence under para (d). This is because s 241 creates three tiers of sentence that hinge upon the value of the property obtained or the loss caused by the defendant's deception.

[85] In *Pure v Police*, this Court noted that “[v]alue’ is a word of ‘protean nature’: its meaning is context dependent”.<sup>39</sup> The Court said that when it can be ascertained, market price will be evidence of value.<sup>40</sup> Similarly, in *O’Brien v R*, this Court said value must be determined at the time the thing in issue is obtained and that where the value of a privilege or licence cannot be ascertained by other means, the Court may assess the value by reference to the costs involved in obtaining the privilege or licence (including any licence fee paid and legal costs incurred).<sup>41</sup>

### **How were charges 3 and 5 prosecuted?**

[86] A question trail was prepared by Gault J in consultation with counsel. Seven questions were posed in relation to charges 3 and 5.

[87] Question one in relation to charges 3 and 5 asked:

Are you sure the National Party, directly or indirectly, obtained or retained a benefit, namely possession of or control over a donation of \$100,000? [\$100,050 in relation to charge 5]

[88] Question two asked if the appellants engaged in a “fraudulent device, trick, or stratagem”?. Question three asked if the appellants used the stratagem with intent to deceive the National Party Secretary and/or Electoral Commission. Question four asked if the stratagem was the material cause of the benefit.

[89] For present purposes it is not necessary to set out the balance of the question trails. Suffice to record that no part of the question trails asked if the appellants obtained a benefit. Indeed, the prosecution was premised upon:

- (a) the National Party Secretary being the victim in the sense that the Secretary, and/or the Electoral Commission, was deceived by the

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<sup>39</sup> *Pure v Police* [2020] NZCA 525, [2020] 3 NZLR 467 at [18] (footnote omitted).

<sup>40</sup> At [25]–[38].

<sup>41</sup> *O’Brien v R* [2019] NZCA 83 at [87].

defendants when the defendants donated \$100,000 and \$100,050 respectively of the defendants' money; and

- (b) simultaneously, the National Party obtained a benefit from the donations.

### **High Court judgment**

[90] Gault J reached the following conclusions when convicting Colin Zheng in relation to charge 3:

- (a) “[T]he National Party obtained the benefit of a donation of \$100,000 between 1 and 12 June 2017”.<sup>42</sup>
- (b) Colin Zheng engaged in a deceptive stratagem “whereby the \$100,000 donation was split into sums of money less than \$15,000 by way of transfer into the bank accounts of the seven transmitters, before being paid to, and retained by, the National Party. The transmitters’ bank transfers concealed the true position from the National Party”.<sup>43</sup>
- (c) Colin Zheng knowingly breached the Electoral Act and engaged in the stratagem with “an intention to deceive”<sup>44</sup> and that “in the absence of the stratagem the donation would not have occurred”.<sup>45</sup>

[91] The Judge reached the following similar conclusions when convicting Mr Zhang, Colin and Joe Zheng in relation to charge 5.<sup>46</sup>

- (a) The National Party obtained a benefit, namely a donation of \$100,050 which it received between 1 and 11 June 2018.

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<sup>42</sup> Reasons judgment, above n 24, at [528].

<sup>43</sup> At [530].

<sup>44</sup> At [535].

<sup>45</sup> At [536].

<sup>46</sup> At [557]–[591].



- (b) The appellants were all involved in the deceptive stratagem, which involved the sale of the wine by HLG in China for \$108,463.23 and the transfer of that money to Joe Zheng's bank account in New Zealand. The appellants were also involved in the splitting of the money into sums under \$15,000 and the transfer of those sums to intermediaries with instructions that the sums in question be transferred to the National Party.
- (c) The appellants knowingly breached the Electoral Act when they engaged in the stratagem which was designed to hide the real sources of the donation to the National Party and that the stratagem played a material part in the acquisition of the benefit obtained by the National Party.

### **Grounds of appeal: charges 3 and 5**

[92] Mr Dickey argued this part of the appeal for Mr Zhang. Counsel for the Zheng brothers adopted Mr Dickey's submissions.

[93] The principal submission advanced by Mr Dickey was that an error was made in the High Court when the Judge and counsel proceeded on the basis that it was not necessary to demonstrate the defendants obtained either directly or indirectly, a benefit. Mr Dickey submitted that in the present case the SFO had wrongly argued that the requirements of s 240(1)(a) were satisfied if the National Party obtained a benefit, even though it was alleged that the National Party Secretary and/or the Electoral Commission were victims of the same transaction.

[94] A second argument advanced by Mr Dickey was that there was insufficient evidence to establish Mr Zhang benefitted directly or indirectly from the donations in issue.

### **Analysis**

[95] The appellants were charged under s 240(1)(a), which requires the prosecution to prove that the appellants obtained a benefit through their own deceptive conduct.

[96] There is no doubt that the National Party Secretary and/or the Electoral Commission were deceived by the appellants. The only issue in relation to charges 3 and 5 is whether the appellants obtained a benefit directly or indirectly, bearing in mind the definition of “obtained” in s 217 of the Crimes Act.

[97] The SFO did not attempt to argue before us that the appellants obtained a benefit. Instead, the SFO continued to argue that it was sufficient for the National Party to obtain the benefit, and simultaneously suffer a detriment in relation to the same transaction. It is not surprising the SFO was unable to point to any authority to support this proposition, other than its interpretation of *Li*.

[98] The authors of *Adams on Criminal Law* properly explain *Morley* and *Li*. They say in relation to *Morley*:<sup>47</sup>

It was held, at [15]–[16], the section as enacted in 2003 created two different kinds of offences. First there are, in subs (1)(a), (1)(b) and (1)(c), three similar offences involving the obtaining of property, credit or the execution etc of a document. Obtaining in these contexts bears its extended meaning given by s 217... Secondly, there is the significantly different offence in subs (1)(d) of causing loss by deception. The first three require proof of a defined outcome, in that the offender must either obtain ownership, possession or control of something of value (subs (1)(a)), or obtain credit (subs (1)(b)), or induce or cause someone to perform a physical act in relation to a pecuniary document (subs (1)(c)).

[99] When explaining para [28] of *Li*, they state:<sup>48</sup>

The requirement that the defendant must obtain a benefit does not require proof of any corresponding detriment to another person: *Li v R* ... at [28]. By contrast, there is no requirement of the conferment of any benefit in subs (1)(d) offences, but the victim must suffer loss. There is no definition of the nature of the kinds of loss required.

[100] We agree that where it is established a defendant obtained a benefit, there is no requirement to prove that any person suffered a corresponding detriment. In any case, it is not controversial that the appellants’ deceptions caused the National Party detriment in that it was not able to comply with its reporting obligations under the Electoral Act.

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<sup>47</sup> Mathew Downs (ed) *Adams on Criminal Law – Offences and Defences* (online ed, Thomson Reuters) at [CA240.01].

<sup>48</sup> At [CA240.01].

[101] The SFO's argument that it is sufficient that the National Party obtained a benefit does not gain traction for two reasons.

[102] First, the approach taken by the SFO conflates the deception with the benefit and it fails to acknowledge the law, under which it is clear that for an offence to be committed under s 240(1)(a), the defendant must obtain, either directly or indirectly, a benefit or some other asset of value through deception. Even where the extended definition of "obtained" in s 217 of the Crimes Act is engaged, the benefit must be obtained or retained by the defendant for themselves or for another person.

[103] The SFO relied on *Li* for this aspect of their submission that it was sufficient that the National Party obtained a benefit as a result of the appellants' deception. As discussed earlier, in *Li* the defendant's deceptive conduct in *Li* resulted in a third party obtaining a diploma.

[104] In our view, we consider that *Li* does not go so far as to support the proposition, as advanced by the SFO, that the requirements of s 240(1)(a) will be met where the defendant has not obtained any benefit for themselves. To the extent that *Li* suggests otherwise, we consider that it should be confined to its own facts.

[105] The intention of s 240(1)(a) is clear: there must be a benefit obtained *by the defendant*. *Li* stands for the proposition that a defendant can obtain a benefit by causing an intermediary "to deliver the [benefit] in question to someone other than the defendant".<sup>49</sup> It does not suggest that the requirement for the defendant to obtain a benefit can be fulfilled by a third party obtaining a benefit.

[106] Second, because the money paid to the National Party through deception was, in effect the appellants' own money, it was not possible for the appellants to personally obtain directly or indirectly any benefit. The appellants were divesting themselves of any benefit in this case.

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<sup>49</sup> *Li v R*, above n 33, at [16].

[107] We do not accept that s 240(1)(a) can apply where A donates his money to B thereby conferring a benefit on B without providing any benefit to A or his nominee, even where the donation involves A engaging in deceptive conduct.

[108] Absent evidence of the appellants obtaining directly or indirectly a benefit, or directing that benefit to someone other than the victim, no conviction was possible in relation to charges 3 and 5.

### **The alternative charge**

[109] Unlike charge 5, charge 6 alleged the appellants obtained a benefit, namely not being identified as the true donors to the National Party. The SFO argued that anonymity was important to the appellants and in particular, Mr Zhang.

[110] Charge 2 alleged a similar benefit; namely, freedom from public scrutiny. That charge alleged the appellants and three other defendants arranged for a payment of \$34,840 to be made to the Labour Party via five transmitters paying sums less than \$15,000. The \$34,840 was the net proceeds of the sale of five paintings to Mr Zhang.

[111] When discussing whether or not being free from public scrutiny was a benefit for the purposes of s 240(1)(a), the Judge recorded the parties' respective arguments in the following way:<sup>50</sup>

[470] Mr Katz submitted that freedom from public scrutiny is not tangible and is not capable of monetary valuation. The Crown says that freedom from public scrutiny is valuable and in excess of \$1,000. It says that the true donor would have obtained anonymity with a donation under the \$15,000 threshold so that the value of the additional anonymity is over the \$1,000 threshold, that is it can be valued at the donation amount minus \$15,000.

[112] The Judge fully recognised the maximum penalty for an offence under s 240 is determined by reference to the value of the loss or benefit in the value bands in s 241.<sup>51</sup>

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<sup>50</sup> Reasons judgment, above n 1.

<sup>51</sup> At [468]–[469].

[113] The Judge said he “doubt[ed]” the value of freedom from public scrutiny could simply be equated with the amount of the donation.<sup>52</sup> The Judge also said:<sup>53</sup>

[471] I am not saying that freedom from public scrutiny can never have value. Here, however, apart from the donation amount which I have not accepted, the Crown simply points to the extensive steps it says the defendants went to in order to obtain the benefit. Such a submission may answer a challenge to a valuation, but it is not itself evidence of the value of the freedom from public scrutiny. In this context, I cannot accept the submission that the benefit essentially proves itself – *res ipsa loquitur* – with the rhetorical question why would the deception have been practised by the true donor if it was not of value to him? In these circumstances, having concluded that a donation was not proved, I cannot be sure that Mr Zhang obtained a benefit of any value.

[114] Before us, the SFO argued that the value of the benefit obtained by the appellants in relation to charge 6 was easier to ascertain than the alleged value of the benefit they obtained in relation to charge 2. Underpinning the SFO’s case however was the proposition that the value was to be determined by deducting \$15,000 from the amount of the donation.

[115] Like the Judge, we would not want to suggest that freedom from public scrutiny can never have a value. We are, however, not persuaded that the value of the benefit for the purposes of s 241 of the Crimes Act can be calculated simply by deducting \$15,000 from the amount of the donation. The value of the donation and the value of an individual’s privacy are two different concepts that should not be conflated. To do otherwise creates strange results. For example, under the SFO’s submission, undisclosed donor A who donates \$100,000 through a number of transmitters is treated as having their privacy valued at \$85,000. Undisclosed donor B who donates \$20,000 through two transmitters is treated as having their privacy valued at \$5,000. These scenarios show that valuing a donor’s privacy simply by reference to the value of their donation confuses the value of privacy with the value of the donations.

[116] It may have been possible in this case to have charged the appellants under s 240(1)(d) for causing loss by deception. Such an approach would have required

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<sup>52</sup> At [470].

<sup>53</sup> Emphasis in original.

evidence about by the National Party either returning the donation,<sup>54</sup> or relinquishing it to the Electoral Commission pursuant to s 207I of the Electoral Act. It would also have required evidence about the costs incurred by the National Party in investigating the appellants' conduct (including any audit and legal fees, etc). Such an approach would have been entirely consistent with *Morley* and *O'Brien*. We cannot, however, find any evidence from the trial that directly addresses this issue.

[117] We conclude in relation to the alternative charge that there is insufficient evidence to demonstrate the value of the alleged benefit obtained by the appellants.

### **Substituted charges**

[118] We gave consideration to substituting the s 240 Crimes Act offences with charges under the Electoral Act. However, Ms Hogan made clear the SFO was not asking us to substitute convictions pursuant to s 234 of the Criminal Procedure Act 2011, and in any event, the SFO candidly acknowledged that it was vexed by the lack of connection between the conduct in this case and the offence provisions in the Electoral Act.

### **Charge 7**

#### *High Court judgment*

[119] Gault J was in no doubt that Joe Zheng lied to the SFO about the building contract and the purpose of the funds he received in his bank account on 31 May 2018. The Judge's reasons for finding charge 7 proven are succinctly contained in the following two paragraphs of his judgment:<sup>55</sup>

[629] Even allowing for possible confusion at times during the interviews between when the money was received in May 2018 and when the contract was signed in August 2019, I am sure that, against the background of Mr Joe Zheng's earlier statement that the money paid from [Shaona] Zhang's bank account into his bank account on 31 May 2018 was a deposit to ANCO Properties for building a house on the North Shore rather than money for the National Party donation, he maintained in his second interview that there was a contract in May 2018 and the August 2019 contract was a replacement.

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<sup>54</sup> Electoral Act, ss 207C(4) and (5).

<sup>55</sup> Reasons judgment, above n 24 (footnotes omitted).

[630] I am sure Mr Joe Zheng must have known that was false, even accepting that he followed his brother's instructions and allowing for memory lapse. Taking the following facts together, I am sure there was no earlier contract. There were no communications or documents relating to preparatory work for building on [Shaona] Zhang's property on the North Shore until mid-2019, which was consistent with the contract document created and signed in August 2019. No contract document created in May 2018 was identified despite the SFO's extensive review of electronic devices. The 2019 contract document was backdated. There was no good reason to do so. The specifications in the 2019 contract were copied from another contract only created in July 2019. The deposit amount of \$108,463.23 in the August 2019 contract document exactly matched the NZD amount of the wine proceeds, even though the original contract was said to be dated 21 May 2018; 10 days before the wine proceeds were transferred into that NZD amount on 31 May 2018. Thus, even if there had been an original contract document, it would not have contained the same deposit amount to explain the transfer 10 days later. A house deposit to ANCO Properties should not be paid into a personal bank account. The wine proceeds were used for the National Party donation, and I do not accept the exact same amount of \$108,463.23 was inserted as the deposit amount in the August 2019 contract by mistake. Finally, the surplus was used to buy cognac.

### *Grounds of appeal*

[120] There were two parts to Joe Zheng's appeal in relation to his conviction for charge 7.

[121] The first part comprised submissions which were advanced on behalf of other appellants and Joe Zheng. In essence, it was argued that the Judge erred by failing to assess the evidence through the appellant's Chinese socio-cultural world view. We will refer to these submissions as the "cultural" submissions.

[122] The second part of Joe Zheng's appeal focused upon the adequacy of the evidence adduced by the SFO in relation to charge 7.

### *Cultural submissions*

[123] This part of the appellant's case was presented by Mr Lye, junior counsel for Colin Zheng. Joe Zheng adopted Mr Lye's submissions.

[124] Mr Lye submitted that Gault J erred by failing to apply observations made by the Supreme Court in *Deng v Zheng*.<sup>56</sup> That case concerned civil litigation between

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<sup>56</sup> *Deng v Zheng* [2022] NZSC 76, [2022] 1 NZLR 151.

two Chinese businessmen in Auckland. The crucial question was whether their business relationship had been governed by a partnership. The High Court held there was no partnership but that finding was overturned by this Court. An appeal was dismissed by the Supreme Court. In concluding that there had in fact been a partnership, the Supreme Court:

- (a) warned of the need to exercise caution when assessing evidence in cases in which one or more of the parties have a cultural background that differs from that of the Judge;<sup>57</sup> and
- (b) said “[i]t is critical that judges and counsel maintain a sense of proportionality and recognise that many, perhaps most, cases, in which the parties operate within a social and cultural framework that differs from that of the judge” can be dealt with by examining “consistency of a narrative over time with other evidence (particularly contemporaneous documents) and general plausibility”.<sup>58</sup>

[125] Mr Lye argued that Gault J examined the evidence through a “pākehā lens” and failed to heed the cautions expressed in *Deng v Zheng*.

[126] Mr Lye also relied upon articles and publications to explain the socio-cultural context in which the appellants were functioning. Those articles and publications refer to a number of Teochew Chinese cultural concepts, which included:

- (a) functioning in a context that was highly relational and contextual. This was underpinned by *guānxi*, which refers to individuals having strong relationships with each other that are underpinned by trust and mutual moral obligations;
- (b) *rénqíng*, which loosely means doing someone a favour. Mr Lye submitted that “[t]he intersection of *guānxi* with the moral, emotional and ethical aspect of *rénqíng* ... is what distinguishes *guānxi* practices

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<sup>57</sup> At [78(a) and (b)].

<sup>58</sup> At [78(d)].



from impersonal, instrumental and transactional money and bribe relations”; and

- (c) familial ties, which were extremely important in this case, as was the concept of loyalty.

[127] The SFO challenged the way in which Mr Lye sought to rely on publications that explained Teochew cultural values. It was contended that the material relied upon by Mr Lye should have been the subject of an application to adduce fresh evidence and that in any event, the material in issue was neither fresh nor cogent. For reasons which will become clear, we do not need to rule on the admissibility of the “fresh” evidence.

#### *Adequacy of the evidence*

[128] Ms Thompson, senior counsel for Joe Zheng, challenged the High Court’s findings that the evidence demonstrated Joe Zheng breached s 45 of the SFO Act during his two compulsory interviews. Ms Thompson’s submissions can be distilled to the following 10 succinct points.

[129] First, the Judge erred by pointing to a lack of documents and communications concerning the building of Shaona Zhang’s house until mid-2019 to support his finding that no earlier contract existed. Ms Thompson said this was entirely consistent with Joe Zheng’s statements to the SFO that Shaona Zhang was continuing to think about the project through to the middle of 2019.

[130] Second, Ms Thompson said it was wrong of the Judge to rely on the absence of any evidence of a building contract prior to the one created in August 2019. She submitted this was explained by Joe Zheng when he told the SFO that the original contract was lost and a new one was therefore required.

[131] Third, Ms Thompson said the Judge made a mistake when he said there was no good reason to backdate the August 2019 version of the contract. It was submitted that the contract was backdated because it was replacing the one that was lost.

[132] Fourth, Ms Thompson focused on the Judge's comments about the August 2019 version of the contract having been copied from a contract for a different property. It was explained by Joe Zheng in his SFO interviews that he always used ANCO standard contracts as a template.

[133] Fifth, Ms Thompson said the Judge placed too much emphasis on the fact the deposit paid to Joe Zheng by Shaona Zhang matched the amount received from the sale of wine in China by HLG in May 2018. Joe Zheng told the SFO that he created the quotation for Shaona Zhang at about the time the funds were transferred to him and that he was relying on his memory when he was interviewed.

[134] Sixth, the Judge placed too much emphasis on the fact the money in question was paid into Joe Zheng's personal account. Ms Thompson said nothing hinged upon this as Shaona Zhang had not been asked to pay money directly to ANCO and, as the money would not be needed for some time, it was appropriately paid into Joe Zheng's account.

[135] Seventh, the Judge erred when he concluded that the \$108,468.23 was probably not inserted by mistake into the August 2019 version of the contract. Ms Thompson said this was not right as the funds in question were the deposit for Shaona Zhang's building contract.

[136] Eighth, Ms Thompson submitted the Judge failed to recognise the evidence that the Chinese government placed controls over the transfer of funds out of China to restrict Chinese investment into real estate overseas and that the transfer of the funds to Joe Zheng's bank account was consistent with these restrictions.

[137] Ninth, Ms Thompson argued that the evidence did not demonstrate Joe Zheng knew the information he was providing to the SFO was false or misleading or that he was otherwise reckless as to whether the information he gave the SFO was false or misleading.

[138] Finally, Ms Thompson reiterated part of the submissions made by Mr Lye, when she emphasised the informal and unstructured approach to the arrangements between Shaona Zhang, Colin and Joe Zheng reflected their cultural relational ties.

*Analysis: charge 7*

[139] We appreciate that the appellants are respected leaders of the Chinese Teochew community in Auckland and that Mr Zhang is deeply influenced by Teochew cultural values. Colin and Joe Zheng came to New Zealand to attend secondary school and have lived, studied and worked in this country for many years. While they undoubtedly value and regularly live by Teochew cultural principles, they will also be familiar with New Zealand cultural norms.

[140] Even if we were to grant some allowance for Joe Zheng's cultural background, such leniency would fall well short of providing a basis for allowing his appeal.

[141] Joe Zheng's cultural argument was that his loyalty to his brother compelled him to follow Colin Zheng's instructions. It was also argued that the absence of records of any contract in May 2018 between Shaona Zhang and ANCO reflected the high level of trust that characterised the relationship between Shaona Zhang and the Zheng brothers.

[142] We do not accept that these considerations relieve Joe Zheng from culpability. There are three fundamental reasons why this is so:

- (a) Sections 5 and 9 of the Crimes Act 1961 make clear that all offences committed in New Zealand are to be tried in accordance with the law of this country. By way of example, the courts have rejected suggestions that Māori may be tried by a separate criminal justice system, or on the basis of different laws to those which apply to all other persons in New Zealand.<sup>59</sup>

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<sup>59</sup> *Mason v R* [2013] NZCA 310, (2013) 26 CRNZ 464 at [23]–[26] and [35]; and *Wallace v R* [2011] NZSC 10 at [2] in which the Supreme Court said when dismissing an application for leave to appeal that arguments to the effect the High Court lacked jurisdiction to try Māori were “plainly unsound legally”.

- (b) The logical consequence of Joe Zheng's submission is that cultural factors meant he was obliged to deliberately mislead the SFO out of respect for or obligation to his brother and/or Shaona Zhang, and that this could act as a complete defence to the charge. None of the material relied upon by Mr Lye goes so far as to suggest that Teochew cultural concepts justify lying to law enforcement authorities.
- (c) Cultural considerations may play an important role in our criminal justice system when assessing the appropriate sentence or penalty that should be imposed upon an offender.<sup>60</sup> In this context however, the criminal law draws a clear line between culpability and punishment.

[143] We are satisfied that the evidence clearly demonstrated Joe Zheng lied to the SFO in three general ways, namely:

- (a) When providing his explanations as to why he received \$108,463.23 from Shaona Zhang.
- (b) When explaining why, on 16 August 2019 he created the building contract between Shaona Zhang and ANCO.
- (c) When explaining why he backdated the building contract to May 2018.

[144] We have summarised at [57]–[61] the evidence concerning these lies. That evidence was carefully assessed by Gault J, who also had the advantage of watching video recordings of Joe Zheng's SFO compulsory interviews. The Judge's reasons for concluding that Joe Zheng deliberately set out to mislead the SFO are unimpeachable.

### **Judge-alone trial**

[145] The appellants challenged a pre-trial ruling that the trial be conducted by a judge sitting without a jury. We have concluded that the appeals against conviction

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<sup>60</sup> Sentencing Act 2002, s 27.

succeed. The challenge to the judge-alone trial ruling therefore disappears. This is because the only conviction which survives the appeal concerns charge 7. The maximum penalty that can be imposed for that offence is a fine of \$40,000 if committed by a corporation or 12 months' imprisonment if committed by an individual, which is well below the two-year imprisonment threshold for trial by jury set out in the New Zealand Bill of Rights Act 1990.<sup>61</sup>

### **Joe Zheng's sentence**

[146] Joe and Colin Zheng abandoned their sentence appeals before the appeals were heard. We make the following comments for completeness.

[147] When sentencing Joe Zheng, Gault J imposed two sentences. In relation to the charge of obtaining by deception, Joe Zheng was sentenced to two months' community detention with a daily curfew from 10:00 pm to 6:00 am and 100 hours' community work.<sup>62</sup>

[148] On the charge of providing false or misleading information to the SFO, Joe Zheng was sentenced to one month's community detention with a daily curfew from 10.00 pm to 6.00 am and 50 hours' community work, to be served cumulatively.<sup>63</sup>

[149] In view of the abandonment of Joe Zheng's sentence appeal, the sentence imposed by the High Court in relation to Joe Zheng's conviction for providing false or misleading information under s 45 of the SFO Act remains in place.

### **Result**

[150] Hengjia Zheng's appeal against his conviction in respect of charge 5 is allowed. The conviction is quashed. No retrial is ordered. Hengjia Zheng's appeal against his conviction in respect of charge 7 is dismissed. The sentence imposed in relation to his conviction for charge 7 remains in place.

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<sup>61</sup> New Zealand Bill of Rights Act 1990, s 24(e); and Criminal Procedure Act 2011 ss 6(1) and 50.

<sup>62</sup> Sentencing judgment, above n 4, at [98].

<sup>63</sup> At [99].

[151] Yikun Zhang's appeal against his conviction in relation to charge 5 is allowed. The conviction is quashed. No retrial is ordered. Yikun Zhang's appeal against sentence is dismissed.

[152] Shijia Zheng's appeals against his convictions in relation to charges 3 and 5 are allowed. The convictions are quashed. No retrial is ordered.

Solicitors:

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