# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Bailey* [2003] QCA 506 |
| PARTIES: | **R**<br>**v**<br>**BAILEY, Frances Amy**<br>(applicant/appellant) |
| FILE NO/S: | CA No 266 of 2003<br>DC No 30 of 2002 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction & Sentence |
| ORIGINATING COURT: | District Court at Emerald |
| DELIVERED ON: | 14 November 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 4 November 2003 |
| JUDGES: | McPherson and Williams JJA and Mackenzie J<br>Separate reasons for judgment |
| ORDER: | **1. The appeal against conviction is allowed to the extent of setting aside so much of the verdict and judgment as refers to the appellant being found guilty or convicted as a servant**<br>**2. Allow the application and appeal against sentence and vary the sentence by setting aside the recording of conviction and ordering that no conviction be recorded** |
| CATCHWORDS: | CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – SUMMING-UP – appellant employed by school used purchase order from department to purchase items for personal use – later paid for items – judge did not mention the word 'victim' in summing up – whether judge left to jury to decide if appellant was employee and if department was victim<br><br>CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – circumstance of aggravation wrongly considered when sentencing – conviction recorded – whether appropriate<br><br>*Criminal Code Act* 1899 (Qld), s 408C |

*Dearnley v The King* [1947] St R Qd 51, referred to
*Re Austin* (1994) 1 Qd R 225, considered
*The Queen v de Simoni* (1981) 147 CLR 38, followed
*Yager v The Queen* (1977) 139 CLR 28, followed

COUNSEL: S Hamlyn-Harris for the applicant/appellant
C Heaton for the respondent

SOLICITORS: Mullins Lawyers for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA**: The appellant was tried before a jury in the District at Emerald and convicted of an offence under s 408C of the Criminal Code of having dishonestly gained a quantity of manchester and haberdashery for herself. The single count in the indictment was accompanied by the averment of a circumstance of aggravation that the appellant "was an employee of the Minister for Education of Queensland." The notice of appeal as now amended claims that her conviction of the circumstance of aggravation should be set aside as it was not properly before the jury, or alternatively that it was not open to the jury to be satisfied of it. The appeal against conviction in that respect is brought at least partly in order to support an application to vary the sentence imposed on the appellant in so far as it directs the recording of the conviction.

[2] The appellant was on 18 May 2002 the acting principal of the State School at Springsure. As such, she was authorised in that capacity to purchase items needed for the school or for school purposes on the credit of the Minister for Education, who was her employer. At the time she was the custodian of certain items of furniture available for the use of teachers at the school while they resided in the district. They included a three-piece lounge suite consisting of a couch and chairs, which for convenience were being stored in the appellant's house. She decided that they needed refurbishing and approached another school employee Ms Ritchings who was responsible for handling requisitions for official purchase orders used for school purposes. Ms Ritchings provided the appellant with the necessary requisition, which the appellant filled out and signed in an amount of $75.00 representing the purchase price of couch covers and fabric needed for re-covering that furniture. There was evidence to the effect that an official purchase order like that may not be used for private purposes.

[3] The appellant took the purchase order with her to a Spotlight Store in Rockhampton where she planned to buy these items. She bought the couch covers, but was also tempted to buy a number of other items of manchester and haberdashery for personal domestic use. The total purchase price was $627.91, which was charged to the official purchase order which she produced to the Store. Later, in June, after the transaction came under investigation by the Department, she paid the amount of $627.91 in full out of her own money. At the trial at which she gave evidence, she gave a somewhat involved account of having given the Store a cheque on her private account with a credit union; but no such cheque could be located; her account with the union was already overdrawn; and the jury rejected her testimony and found her guilty.

[4] At an early stage of the trial, a question was raised by defence counsel whether the circumstance of aggravation had been correctly framed in the indictment. Section 408C(1) makes it an offence described as "fraud" to do any of a number of things dishonestly including by s 408C(1)(d) gaining "a benefit or advantage, pecuniary or otherwise, for any person." It was evidently under this paragraph of s 408C(1) that the charge was laid. Subsection(2) renders an offender liable to imprisonment for five years, or 10 years if the offender or the property satisfies any of paragraphs (a) to (d) which follow. It therefore involves a "circumstance of aggravation" within the meaning of the definition in s 1 of the Criminal Code. The particular circumstance of aggravation attracting the higher maximum penalty in this instance relied on paragraph (b) of s 408C(2), which is applicable:

> "(b) if the offender is an employee of another person, and the victim is the other person".

[5] The appellant was an employee of the Minister for Education, which is why he is identified in the indictment. Counsel for the defence submitted that it was not the Minister but Spotlight Stores Pty Ltd that was the "victim" of the appellant's fraud. At the close of the Crown case, his Honour made the following ruling:

> "The victim of an offence, in my view, is the person who suffers an adverse consequence as a result of the commission of the offence. The ascertaining of the identity of the victim, in my view, is to be done immediately upon the completion of the offence; that is, in this case the moment when the accused gained the goods.
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> On the prosecution case she gained the goods dishonestly by effectively charging the price of the goods to the account of the Springsure State School with Spotlight. On the face of the purchase order she presented on the prosecution case, she was … the apparent authorised agent of the Springsure State School and, therefore, of the Minister of Education. In my view, upon the completion of the transaction, the Springsure State School and, therefore, the Minister for Education owed a debt to the Spotlight store.
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> A possible issue arises because of condition number 3 on the purchase order, and it may well have been that the Minister for Education may have been able to dispute part of the debt successfully, but, in any event, in my view, the Minister for Education could not have successfully disputed the whole of the debt. Therefore, in my view, the Minister for Education of Queensland suffered an adverse result or an adverse outcome as a result of the allegedly dishonest act of the accused and, therefore, the Minister for Education of Queensland in my view is rightly described as the victim.
>
> In my view, therefore, the circumstance of aggravation is properly alleged on the prosecution case."

[6] In my respectful opinion, this ruling was correct. It is a mistake to assume that, in the way in which his Honour defined it, the "victim" of an offence is necessarily restricted to only one person. It is possible that in the circumstance of

this case both the Minister and Spotlight Stores were victims of the appellant's fraud. For that reason, it might have been simpler here if the charge had been laid under s 408C(1)(e) of causing a detriment, pecuniary or otherwise, to any person. But the uncontradicted evidence was that the appellant was the employee of the Minister, who, within the meaning of s 408C(2)(b), was the person who, it was being alleged, was the victim who had suffered an adverse consequence as the result of the fraud of the appellant in dishonestly gaining a benefit for herself.

[7] Section 564(2) of the Code requires that if it is intended to rely on a circumstance of aggravation, it must be charged in the indictment. The form in which the circumstance of aggravation was charged in the indictment against the appellant did not in terms allege that the Minister was the "victim". It alleged no more than that the appellant was an employee of the Minister. This, however, accords with the version ("And AB was an employee of EF") prescribed in Case 6 of Form 241 of Schedule 3 to the *Criminal Practice Rules 1999*, which sets out Forms for indictments, information and complaints - Statement of offences under the Code. Section 707 of the Criminal Code provides:

> **"707.** A form prescribed under a rule of court for a criminal proceeding is taken to be --
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> (a) sufficient for the purpose for which it is to be used; and
>
> (b) if used, a sufficient statement of the relevant offence or matter."

[8] The form in which the circumstance of aggravation was charged in the indictment against the appellant was, under s 707, therefore a sufficient statement of the relevant matter or circumstance of aggravation under s 408C(2)(b) of the Code: see *Binge v Bennett* (1988) 13 NSWLR 578, 582, 593, for the reference to which this Court is indebted to Mackenzie J. The omission in the indictment to allege that the Minister was the "victim" was therefore not fatal to the validity of the circumstance of aggravation being charged against the appellant. The appellant might nevertheless have been entitled to particulars if sought of the person whom the prosecution alleged to be the "victim" of the fraud; but it received them, if not before, then in the course of discussing the question at the beginning of the trial. The Crown made it clear it was alleging that the Minister was the victim.

[9] On behalf of the appellant, Mr Hamlyn-Harris submitted on appeal, as counsel for the defence had done at the trial, that it was Spotlight Stores and not the Minister who was the victim. That was said to be so because it and not the Minister had parted with the goods and it was said, on the Crown case, the goods were dishonestly charged against it. The submission advanced by the defence was that the Minister (or the Education Department) did not incur any liability because the purchase order issued by the school did not authorise the appellant to purchase goods of the amount specified in that order, or indeed any goods for the purposes of personal use. It was, therefore, only Spotlight Stores that suffered any adverse consequence as a result of commission of the offence.

[10] The submission calls for a closer look at the Departmental purchase order and the authority of the appellant to use it on this occasion. In the passage from the ruling that has been set out earlier in these reasons, his Honour referred to the fact that the purchase order contained a condition numbered 3. It was printed at the foot of the order form under the heading Conditions of Contract, and was as follows:

"3. No material in excess of specifications will be accepted."

[11] The "specifications" were typed out in the body of the purchase order form and referred to "couch covers … total payable $50.00" and "fabric 8 – 10 metres … $25.00". That was on the face of it an express limitation on the authority of the appellant in making purchases on the strength of the Departmental purchase order. According to the evidence of Mr Netherwood, who worked in the receiving and despatch section of the Store, the Store accepted purchase orders, and it was his function to "process" the purchase order if one was presented to pay for goods selected by a customer. The procedure was that, having seen the purchase order itself, he entered details from it and of the goods selected and prices into a computer, which generated an invoice in duplicate one copy of which the customer was asked to sign. The appellant did so in this case. Mr Netherwood accepted in effect that condition 3 meant that only goods specified in the purchase order should be on the list of purchases being made by the customer. It was not his practice to ask questions. He simply recorded the items and the prices, and presented the invoice for signature by the customer, who was then free to take the goods away.

[12] Analysing the transaction in strictly legal terms, the appellant selected the goods she wished to buy and tendered in payment the purchase order, which the Store acting through Mr Netherwood accepted as authorising payment by the School and inferentially by the Minister. The contract to sell was then concluded; but it was a condition of the Minister's offer contained in condition 3 of the purchase order that no liability for goods in excess of specifications would be accepted. The Store accepted this condition as part of the offer when it processed the transaction and delivered the goods to the appellant. It was therefore bound by the condition 3 limiting her authority and the Minister's liability to $75.00, which was the total specified in the purchase order. As to the balance of the liability for the total purchase price of $627.91, the Minister would on the evidence before us have incurred no liability to Spotlight Stores. Among the goods she bought there were some that were capable of answering the description in the purchase order. To that extent, at the very least, the Minister was the "victim" of the appellant's fraud.

[13] Mr Hamlyn-Harris sought to press this reasoning even further, submitting that the evidence showed that, on arriving at the Store, the appellant had formed the intention of using the purchase order for private purposes, and therefore ceased to have any authority at all to use it to pledge the Minister's credit at the Store. But this mistakes the nature and extent of her authority. Up to the limit of $75.00 she had actual, or ostensible, authority to make purchases on behalf of the Minister. Her authority to that effect was set out in the purchase order which she presented to the Store and which it acted on by allowing her to take delivery of the goods purchased without paying for them at once. As between the Minister and the Store, her uncommunicated intention to use the purchase order wholly or partly for private purposes did not terminate her agency.

[14] The matter does not, however, end there. Although the charge of aggravation in the indictment, being in the form prescribed, was declared by s 707 of the Code to be sufficient, the learned trial judge was nevertheless required to direct the jury in terms of the relevant section or sections of the Code, which for the purpose of the circumstance of aggravation was s 408C(2)(b). It was for the jury to decide, after being given a proper direction under that provision, whether or not the appellant was an employee of the Minister, and whether or not the Minister was the victim. It

was the duty of the trial judge to direct the jury in conformity with the provisions of the law as enacted in the Criminal Code, and that remained so even though the indictment, being in the form prescribed, was sufficient. See *Dearnley v The King* [1947] St R Qd 51 and *R v Ariba* (CA 248 of 1995), to which Mr Hamlyn-Harris referred us.

[15] Once the Crown charged the aggravating circumstance, as it did in this case, it became a matter for the jury, and not the judge, to determine whether it was present. As was said by Gibbs J in *Yager v The Queen* (1977) 139 CLR 28, 38:

> "It goes without saying that if there is any issue of fact, however clearly the evidence may point in one or other direction, it is for the jury to decide."

Here, it was submitted, the learned trial judge had himself determined the question whether the circumstance of aggravation was present instead of leaving it with a proper direction to the jury to decide on the evidence. That the jury did in fact determine that question is shown by their verdict. They found the appellant guilty of fraud "as an employee". The only question on appeal is whether his Honour gave them a direction sufficient to enable them to arrive at a proper verdict on that issue.

[16] In his summing up, the trial judge told the jury that:

> "It must be proved that at the time [the appellant] was an employee of the Minister for Education of Queensland, and it must be proved that she did it dishonestly."

He made it clear that these were matters for the jury to decide. No issue was raised on appeal about the appellant's employment or the direction with respect to it. The challenge on appeal was confined to the question whether or not the Minister was the "victim" or one of the victims of the offence. As to that, his Honour gave no explicit direction to the jury. In fact the word "victim" was not mentioned in his summing up; nor was anything said about the need to find that the Minister was a person who had suffered an adverse consequence as a result of the appellant's commission of this offence.

[17] It is true that at one stage his Honour directed the jury as to the meaning of dishonesty or "dishonestly" in s 408C(1), and also that at another stage in the summing up he said that, "if [the appellant] did have the goods charged to the account of the Springsure State School by using the purchase order to do it … you might think that is dishonest." It was, of course, not necessary for his Honour to provide the jury with a discourse on the general law relating to agency or contract, or to explain the matters that governed the respective rights and liabilities of the Minister and the Store under their contract in the way I have done earlier in these reasons. But it was, I consider, essential for him to direct the jury's attention to the question whether the Minister had suffered as a result of the appellant's dishonesty and in what way the Minister might have done so.

[18] In the result, I have concluded that the summing up on this aspect of the matter was not adequate; and that, to the extent that the jury found the aggravating circumstance against the appellant, their verdict cannot stand but must be set aside. Admittedly, no redirection was sought on this question; but in view of the

shortcoming in the direction that was given, I would not be prepared to say it was capable of being overlooked by applying the proviso in s 668E(1A) of the Code.

[19] That has the consequence that, presumptively at least, the learned judge in arriving at the sentence imposed took account of an aggravating circumstance which, in the respect referred to, was not founded on a verdict properly arrived at. It follows that this Court is bound now to undertake the sentencing process afresh. In doing so, it would not be legitimate for us to proceed on the footing that, because the appellant was the Minister's employee and had caused him loss, the offence was more serious and merited heavier punishment than if those features were absent. To do so would be to resurrect the circumstance of aggravation in another form, which would, in my opinion, be contrary to what was decided in *The Queen v de Simoni* (1981) 147 CLR 383. On the other hand, it is true to say that, whether or not the Minister suffered loss as a result of the appellant's action in the capacity of his employee, it remained a case in which she misused her authority for personal advantage, which on one view takes it into a category that in another context has been regarded as constituting a form of corruption. See *Re Austin* [1994] 1 QdR 225, where a Cabinet Minister, who had been convicted of appropriation under s 408C by using his official credit card for private purposes, was held to have corruptly used a power incidental to his office.

[20] Here the appellant used her authority to make purchases on behalf of the School for her private benefit. Despite that factor, however, the offence was in monetary terms a small one. It involved an amount of only $627.91, which was paid in full within about a month or less, and neither the Minister nor Spotlight Stores has, in the end, suffered from it financially. It is true that afterwards the appellant took steps to cover her tracks, and, consistently with the jury verdict, she must in doing so have acted with dishonesty. As the judge said in his sentencing remarks, her conduct demonstrated an absence of remorse on her part; but his Honour also accepted that her decision to act dishonestly in making the purchase was not premeditated but was formed only after the appellant entered the store. What she later did or said seems to have been undertaken in an apparently desperate but futile effort to escape prosecution and the probable loss of her position as a school teacher. She is not, however, being punished for it in these proceedings.

[21] In the result, the learned judge fined the appellant an amount of $1,500, with imprisonment for 30 days if not paid within six months, and he ordered that a conviction be recorded. On the material before us, it seems probably that the appellant will lose her employment as a teacher with the Department even if a conviction is not recorded. The matter is said to be awaiting the outcome of these proceedings. If she is dismissed, it will no doubt not be easy for her to find other employment. She is now 47 years old, and has hitherto had a completely unblemished record. She has been paying for her house by means of deductions out of her departmental salary, and that will cease if she loses her job. In a relatively small rural community, it would be surprising if news of her offence is not already widely known. Not recording a conviction may therefore not be of much assistance to her. But having regard to the matters previously mentioned, this is, I think on reflection, a case in which the discretion not to record should in the particular circumstances be exercised by the Court in favour of the appellant. I refer especially to the small sum involved, the fact that the offence was not premeditated, and that the appellant paid the amount in full within a short time of committing the offence.

[22] I may add that had I not been persuaded that, for the reason given, it was necessary to undertake the sentencing process anew, I would not have regarded it as open to the Court on this appeal to set aside the decision to record a conviction. A decision to record a conviction is so much an exercise of judicial discretion that it is not often possible in the circumstances of a particular case to say that it was wrong and should be set aside.

[23] I would allow the appeal against conviction to the extent of setting aside so much of the verdict and judgment as refers to her being found guilty or convicted as a servant. I would allow the application and appeal and vary the sentence by setting aside the recording of conviction and ordering that no conviction be recorded.

[24] **WILLIAMS JA:** I will not repeat facts set out in the reasons for judgment of McPherson JA.

[25] Relevantly s 408C of the Criminal Code provides:

> "(1) A person who dishonestly –
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> . . .
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> (b) obtains property from any person; or
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> . . .
>
> (d) gains a benefit or advantage, pecuniary or otherwise, for any person; or
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> (e) causes a detriment, pecuniary or otherwise, to any person; or
>
> . . .
>
> commits the crime of fraud."

[26] Later in the section there is a definition of "obtain"; it "includes to get, gain, receive or acquire in any way."

[27] The essence of the offence of fraud is that one person, the offender, dishonestly obtains an advantage or benefit whilst another person, the victim, suffers a loss or disadvantage. Frequently there may be more than one victim where fraud is established.

[28] Fraud may be committed in a variety of ways and a particular set of circumstances will often call into play more than one of the limbs of the definition of the offence contained in s 408C. The circumstances of this case, are set out in the reasons of McPherson JA, provide a good example.

[29] In broad terms the appellant, the offender, dishonestly obtained goods from the Spotlight Store in Rockhampton and charged the purchase price of those goods to The Minister for Education of Queensland. The indictment in those circumstances could adopt of any one of at least three forms of wording used in Form 241 in the Schedule to the *Criminal Practice Rules* 1999 (illustrations 3, 4 and 6):

1. The appellant "dishonestly obtained property (manchester and haberdashery) from Spotlight Store".

2. The appellant "dishonestly gained a quantity of manchester and haberdashery for herself."

3. The appellant "dishonestly caused a pecuniary detriment to The Minister for Education of Queensland."

[30] It can be seen that in examples 1 and 3 the wording of the indictment identifies a victim, though on the facts of this case there could be in an objective sense another victim in each case. In example 1 The Minister for Education of Queensland could also be a victim, and in example 3 Spotlight Store could also be a victim.

[31] In the present case the indictment followed example 2, where no victim for the principal offence is identified.

[32] Theoretically the indictment in this case could have followed any one of the three forms without there being any consequential impact on the nature of the offence or the evidence admissible to establish it.

[33] The differences in wording does, however, become of some significance where the circumstance of aggravation defined in s 408C(2)(b) is alleged; that provides that "if the offender is an employee of another person, and the victim is the other person" the offender is liable to double the maximum penalty which would otherwise apply.

[34] The present indictment alleged as a circumstance of aggravation, that the appellant "was an employee of The Minister for Eduction of Queensland". What is immediately obvious is that, given the wording of the indictment here, there is no apparent identity between the victim (because none is named) and the employer. But as illustration 5 in Form 241 indicates, that does not mean that an indictment cannot be so framed and the circumstance of aggravation established by the evidence. In such circumstances it would be necessary for the jury to be satisfied beyond reasonable doubt on the evidence that the named employer was a victim of the fraud.

[35] As the other illustrations in Form 241 suggest, where possible the coincidence of identity between the victim and the employer should be apparent on the face of the indictment. Where that is the case, some of the problems thrown up by this appeal would not arise.

[36] Whilst this indictment is clearly sufficient (having recourse to s 707 of the Code if necessary) it was necessary for the jury to be satisfied beyond reasonable doubt that The Minister for Education of Queensland was a "victim" before the appellant's employment by the Minister operated as a circumstance of aggravation. As McPherson JA has pointed out, the jury was not directed by the summing up to consider whether the Minister was a victim. Given passages in the summing up which referred to the dishonesty being established if the goods were charged to the account of the school, it may well be that the jury perceived the broad thrust of the summing up to be that it was the Minister who was the victim, rather than the Spotlight Store. But as the jury was not instructed in any way on who was a victim in any relevant sense one could only speculate that the jury so reasoned. It would have been wrong for the jury to conclude that the circumstance of aggravation was

established because the Spotlight Store was a victim (because it parted with property in the goods) and the appellant was the employee of the Minister regardless of whether or not it was satisfied beyond reasonable doubt the Minister was also a victim. The jury was not told that such reasoning was impermissible. For those reasons this is not an appropriate case, in my view, to apply the proviso in s 668E(1A) of the Code.

[37] It follows, for the reasons given by McPherson JA, that the finding of the circumstance of aggravation must be set aside.

[38] I have highlighted the different wording on the indictment which might be used in circumstances such as existed here. The choice of the appropriate wording may often be dependent upon whether or not employment is being alleged as a circumstance of aggravation. Here, it seems to me it would have been preferable for the indictment to follow example 3 above. In those circumstances there would have been an obvious coincidence on the face of the indictment between the victim and the employer. That makes the task of the judge in summing up easier, and the jury will be more readily focussed on the critical issues.

[39] Once the circumstance of aggravation is set aside I agree with McPherson JA that no conviction should be recorded though the offence is established.

[40] I agree with the orders proposed by McPherson JA.

[41] **MACKENZIE J:** I have had the advantage of reading the reasons of both McPherson JA and Williams JA. I agree with McPherson JA's analysis of the matter in the first 17 paragraphs of his judgment and with the first 12 paragraphs of Williams JA's reasons. However, I regrettably do not agree that the case is one where the finding of guilty of the circumstance of aggravation must be set aside.

[42] The focus of the appellant's argument is that an omission of a direction to the jury to consider whether the Minister for Education of Queensland was a "victim" was a fatal flaw in the trial. What the jury was directed to consider included the following:

> "What you have to decide or consider, you might think, it is this issue that will lead you to your verdict, did she do it dishonestly. Did she get the goods dishonestly? If you are satisfied beyond reasonable doubt that she did get the goods dishonestly, your verdict will be guilty;
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> …
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> … if she did have the goods charged to the account of the Springsure State School by using the purchase order to do it and by not paying the cheque, you might think that is dishonest….Are you satisfied beyond reasonable doubt that she got the goods by…deliberately using the purchase order to get them and without herself paying for them at the time…
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> …
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> If you reject Mrs Bailey's account of what occurred, you are entitled to draw the inference that she acted dishonestly. There is no dispute

> that she was not entitled to use the purchase order. So, if everything went according to the system at the Spotlight store, you are entitled to draw the inference that she deliberately handed over that purchase order to Mr Netherwood to have the goods charged to the state school account and did not pay for them, herself….
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> …
>
> If you are satisfied beyond reasonable doubt that the only inference to be drawn from the evidence you accept is that she deliberately used that purchase order without paying for the goods, your verdict would be guilty."

[43] The absence of any reference to a "victim" in the summing up suggests that the jury would not have concerned itself with questions whether there could be multiple victims and whether the Minister for Education was a victim. It was plainly appropriate for a direction to be given that one element of the circumstance of aggravation was that the Minister for Education was a "victim", accompanied by a direction that a consequence of paying for goods by a purchase order, if that was what they found, was that the Minister for Education incurred a liability to pay for at least part of the sum under the purchase order. Those directions were not given. The summing up was flawed in that regard.

[44] In *Festa v The Queen* (2001) 185 ALR 394, 447, Hayne J said the following concerning the application of the proviso:

> "**[226]** It follows that for a court of criminal appeal to apply the proviso the court must conclude that the evidence properly before the jury would, if the jury had been properly instructed, have inevitably required the jury, acting reasonably, to return a guilty verdict. A court of criminal appeal must approach the consideration of the proviso in any particular case paying close attention to the nature and consequences of the error that has been identified in the trial. To take but one example, in some cases it may be possible to conclude that the jury could not have reached the verdict it did, unless it accepted some evidence and rejected other evidence. In such a case, could the error that has been identified have affected those conclusions? Often enough, that question will require an affirmative answer. If, however, the answer is no, what does that say about whether there has been a substantial miscarriage of justice?"

[45] McHugh J, at 423, observed that statements by Barwick CJ in *Storey v The Queen* (1978) 140 CLR 364, 376 and *Driscoll v The Queen* (1977) 137 CLR 517, 524-525, contained the correct principles to apply. He said:

> "**[119]** … as Barwick CJ pointed out in *Driscoll*, the use of the word 'substantial' performs the function of denying the proposition that, of necessity, the existence of any of the enumerated circumstances in the subsection amounts to a miscarriage of justice. As his Honour also pointed out in that case, understanding the significance of the word 'substantial' runs the risk of focusing on the error at the expense of assessing the effect, if any, of the error on the jury's verdict." *(footnotes omitted)*

[46] The point at which I depart from the views expressed by McPherson JA and Williams JA is that in my view the proviso ought to apply in the particular circumstances of the case. The focus in the summing up was on dishonest use of the purchase order to acquire goods. Once the jury found that the appellant had dishonestly used the order, it was a legal consequence of such use that the Minister for Education suffered a liability to pay at least part of the sum charged to the purchase order. On that factual basis, there was no doubt that the Minister was a "victim". If, in relation to the circumstance of aggravation, the jury had been directed that if it found that the appellant's conduct was dishonest:

- that a "victim" was someone who had suffered a detriment;
- that legal liability for debt was a detriment;
- that the legal liability had been incurred because of the appellant's dishonest conduct; and
- that, but for the appellant's dishonest conduct, the Minister would not have incurred the debt;

there was no rational basis upon which the jury could have found that the circumstance of aggravation was not proven. Since the notion of a "victim" was not mentioned in the summing up, the risk that the jury may have considered the issue let alone proceeded on the basis that the store which supplied the goods was the victim was minimal.

[47] In my view, since the legal principles in the direction that should have been given were uncontroversial and the necessary factual findings were to be necessarily inferred from the jury's conclusion that the applicant had deliberately used the purchase order to have the goods charged to the State School account and not to pay for them herself, the proviso applies since proof of the circumstance of aggravation was inevitable on the findings made despite the defect in the directions.

[48] I would therefore dismiss the appeal against conviction. With regard to the application for leave to appeal against sentence, I would dismiss the application on the basis referred to in paragraph 22 of McPherson JA's reasons.