SUPREME COURT OF QUEENSLAND

CITATION:	*R v Alwis* [2012] QCA 308
PARTIES:	**R** **v** **ALWIS, Dalugama Mudiyanselage Prabath** (applicant/appellant)
FILE NO/S:	CA No 118 of 2011 DC No 755 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	13 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	11 July 2012
JUDGES:	Margaret McMurdo P and Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence granted.** **3. Appeal allowed and sentence set aside.** **4. Instead, order that the appellant be sentenced to four and a half years imprisonment to be suspended on the date of the delivery of these reasons with an operational period of five years.** **5. Declare that six days of presentence custody from 21 April to 27 April 2007 be time served under the sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where the appellant was convicted after a three day trial of defrauding his employer of $159,000 over approximately six months – where the appellant was the complainant's accountant – where after the appellant's employment was terminated, irregularities were discovered in the companies' books – where the appellant admitted transactions took place wherein money was transferred from the companies' accounts for his personal use – where conflicting evidence as to whether the

companies' managing director authorised the appellant to use the money – where appellant made restitution of the funds taken plus an additional $20,000 – whether the appellant acted dishonestly – whether jury verdict was unreasonable or cannot be supported having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – whether the trial judge complied with *Jury Act* 1995 (Qld), s 51 – whether trial judge's noting the upcoming Easter Break placed undue pressure on the jury to reach a quick verdict

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF PROSECUTOR OR PROSECUTION – whether the prosecutor made statements in her closing address that were not supported by the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant had no prior criminal history – where the appellant's admission of the transactions greatly shortened the duration of the trial – where the appellant made restitution plus an additional $20,000 – where the trial judge was misinformed that the maximum term of imprisonment for the offence was 14 years, instead of 12 – where appellant was sentenced to five years imprisonment suspended after 24 months with an operational period of five years – whether the sentence was manifestly excessive in the circumstances

Jury Act 1995 (Qld), s 51

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Allen [2005] QCA 73, discussed
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: S Fajardo for the applicant/appellant
B G Campbell for the respondent

SOLICITORS: No appearance for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant, Prabath Alwis, was convicted after a three day trial in the District Court at Brisbane of defrauding his employer of $159,000 between May and November 2007. He was sentenced to five years imprisonment suspended after 24 months with an operational period of five years.

[2] He has appealed against his conviction. His grounds are lengthy and not easily summarised so I will set them out in full:

"1. The verdict of the jury was unreasonable, or can not be supported having regard to the evidence or lack of it.

1.1. The prosecution failed to prove beyond reasonable doubt that the [appellant] did not hold an honest though mistaken belief that there was a loan agreement between the [appellant] and the Company represented by N Rosenlund.

1.2. The prosecution failed to prove beyond reasonable doubt that the [appellant] did not hold an honest belief that he had the right to transfer money into his personal account or use the money for his personal benefit believing that he was authorized by N Rosenlund to do what he did because of the loan agreement he believed existed.

1.3. The guilty verdict of the jury was not supported by the available evidence presented at the trial by both the prosecution and the defence. The jury failed to take into account the credibility and reliability of the witnesses who gave evidence at the trial.

1.4. Based on the evidence presented at the trial, there was more than one inference that was reasonably open to the jury to consider, inferences that were favourable to the [appellant]. But somehow the jury made their conclusion hastily.

2. There was an actual and substantial miscarriage of justice due to the following grounds:

2.1. The trial judge failed to inform the jury in appropriate details of the charge contained in the indictment in accordance with s 51 of the *Jury Act* 1995. In particular, the trial judge failed to inform the jury of the elements of the offence and defence at the outset as required by the Bench Book and the *Jury Act* to enable the jury to focus primarily on these issues. The failure of the trial judge in informing the jury of the elements of the offence and defence at the outset could have most likely affected the way the jury paid attention to and focused on the evidence. It is most likely that the jury failed to consider the evidence that were most relevant to the main issues in the case because they were not made aware of what to look for in the evidence.

2.2. The trial judge failed to give direction or make a comment to the jury regarding the nature of the evidence given by the accountant M Poulsen. The evidence given by the accountant was technical in nature and was something that an ordinary person without the requisite technical or accounting background would have difficulty to comprehend. The trial judge should have given direction that the accountant was not giving evidence as an expert witness, that his evidence was not an expert opinion as to the guilt or innocence of the [appellant] but that the evidence was a mere explanation of the

accounting process employed by the [appellant] in recording the transactions.

2.2. The trial judge failed to give direction or comment as to the list of admissions made by the appellant that the admissions made were not admissions of guilt. It was likely that the jury accepted the admissions as admissions of guilt by the appellant.

2.3. The trial judge failed to give direction to the jury at the outset regarding the element of "intention" to defraud in accordance with the Benchbook.

2.4. The trial judge erred in making the following comments to counsels in the presence of the jury just before the matter was adjourned on the Wednesday before the long Easter holiday: "*But bear in mind that after tomorrow there's an unusually lengthy Easter ... My preference would be to avoid any – as far as possible -- further delay, we need to commence 9:30 tomorrow morning, unless that's going to be inconvenient to counsel?*" This comment could have placed undue pressure on the jury to reach a verdict the following day, Thursday. As it was, the jury only took three hours to deliberate and reach a verdict. The three hours was not enough to deliberate on the matter considering that, in the words of the trial judge, '*some quite complex matters have been raised*'. The evidence alone of the external accountant would require longer time to analyse and understand, let alone the rival contentions of the parties.

2.5. It was highly likely that the jury was pressured to reach a verdict on the Thursday before the Easter break so that they would not have to come back during the Easter holidays because of their personal plans. It was also likely that some of the jurors were forced to agree with the verdict and that they were not fully convinced that the [appellant] was guilty of the offence beyond reasonable doubt, but were forced to reach a guilty verdict anyway because of time constraint, hence the apparent distress displayed by some of the jurors when they came back to deliver the verdict.

3. The Court made an error of law in accepting the verdict of the jury because the prosecution failed to prove beyond reasonable doubt that the [appellant] did not hold an honest though mistaken belief that there was an agreement of a loan to the [appellant]. The prosecution did not provide any evidence of the absence of an honest but mistaken belief of the [appellant]. All the prosecution attempted to prove at the trial was that there was no loan agreement. The Prosecution argued that there was no mistaken belief because the purported conversations, agreement with N Rosenlund never happened.

4. The Court made an error of law in accepting the verdict of the jury because the prosecution failed to prove beyond reasonable doubt

that the [appellant] did not hold an honest belief that he had a claim of right specifically an honest belief that he had the right to transfer the money into his personal account or use the money for his personal use as a loan from the company and that the [appellant] did not have any intention to defraud. The Prosecution did not provide any evidence of this. The honest belief of the [appellant] that he had a right to transfer some money into his personal account and the accounts of certain people or businesses stemmed from his honest belief that he had the authority from N Rosenlund to use company funds for the purchase of his property and related costs by virtue of a loan agreement between him and N Rosenlund.

5. The Court made an error of law in accepting the verdict of the jury because the prosecution failed to prove beyond reasonable doubt that the [appellant] dishonestly transferred the money into his personal accounts and the accounts of other people and businesses. The prosecution did not provide any evidence of the [appellant]'s dishonesty. The evidence of the transactions and how these transactions were entered or not entered in the ledgers were not evidence of dishonesty but of mere bad bookkeeping practice."

[3] He has also applied for leave to appeal against his sentence on the following grounds:

"6. The sentence of 5 years suspended after 24 months for an operational period of 5 years is excessive.

7. The sentencing judge erred in making various conclusions in his sentencing remarks which were the factors taken into consideration in sentencing:

7.1. that the appellant made 14 false transactions involving false names, and also a system designed to superficially balance the books involving an element of sophistication and took a deliberate course of action to avoid detection by falsifying the books;

7.2. that the funds were used to fund a lifestyle;

7.3. that the appellant had available funds which could have met the various personal expenses but instead used the defrauded funds;

7.4. that the funds were repaid after the appellant was detected;

7.5. that the appellant revealed a fanciful story which the jury was quite correct in disbelieving. The evidence of the appellant did not have an element of fancy as the story was likely to have happened.

8. The sentencing judge erred in dismissing the appellant's evidence about the managing director avoiding fringe benefits tax because the witness, K Dale corroborated the appellant's evidence about the fringe benefits tax."

The appeal against conviction

[4] I will deal first with the appeal against conviction.

The relevant evidence

[5] Before returning to discuss the grounds, I will summarise the relevant evidence at trial.

[6] The appellant, a Sri Lankan national living in Australia, was employed as an accountant from 5 February until 23 November 2007 by a group of companies involved in the construction industry ("the companies"). The prosecution case was that between May and November he made 14 false transactions using company funds for his own purposes. The prosecution and the appellant jointly admitted in exhibit 19 the following facts:

> "**1.** On 17 May 2007 the [appellant] transferred $20,000 from [the companies'] Chq Account #64-223-3156 to his own ANZ Bank Account.
>
> This amount was not entered into the company ledger.
>
> This amount was returned to [the companies'] Chq Account #64-223-3156 on 18 May 2007 as the incorrect account number had been supplied for the transfer.
>
> **2.** On 25 June 2007 the [appellant] transferred $2,467.00 from [the companies'] Chq Account #64-223-3156 to the Bank of Queensland account of PC Ezy Pty Ltd for the computer equipment he had purchased for his private use.
>
> This amount was entered into the company ledger as 'Loan – [the companies].'
>
> **3.** On 28 September 2007 the [appellant] wrote a cheque for $80,000.00 from [the companies'] Cheque Account #64-223-3156 to David Colwell Trust Account for the deposit for the purchase of the [appellant's] house at 3 Syma Street, Chermside West.
>
> This amount was entered into the company ledger as 'S/C Landscaping'.
>
> **4.** On 29 [October 2007] the [appellant] transferred $10,067.00 from [the companies'] Cheque Account #64-223-3156 to the ANZ Bank Account of Harvey Norman Electrics Aspley for electrical goods he had purchased for his own use.
>
> This amount was not entered into the company ledger.
>
> **5.** On 5 November 2007 the [appellant] transferred $2077.00 from [the companies'] Chq Account #64-223-3156 to the ANZ bank account of Australian Kitchen Industries Pty Ltd for work contracted by the [appellant] for 3 Syma Street, Chermside West.
>
> This amount was not entered into the company ledger.

6. On 5 November 2007 the [appellant] transferred $4800.00 from [the companies'] Chq Account #64-223-3156 to the Bank of Queensland Bank account of Wag Corp Pty Ltd for the supply and installation of a new hot water system at 3 Syma Street, Chermside West.

This amount was not entered into the company ledger.

7. On 18 May 2007 the [appellant] transferred $20,000 from [the companies'] Cheque Account #50-853-2841 to his own ANZ Bank Account.

8. On 26 June 2007 the [appellant] transferred $2,120.00 from [the companies'] Cheque Account #50-853-2841 to the University of Queensland for payment of his tuition fees.

9. On 26 June 2007 the [appellant] transferred $940.05 from [the companies'] Cheque Account #50-853-2841 to his own ANZ Bank Account.

10. On 26 June 2007 the [appellant] transferred $1,699.00 from [the companies'] Cheque Account #50-853-2841 to H Technology (WBC).

11. On 23 July 2007 the [appellant] transferred $1,000.00 from [the companies'] Cheque Account #50-853-2841 to Casselman Pty Ltd trading as Ray White Chermside as an initial deposit on a house purchase at 3 Syma Street, Chermside West.

This amount was entered into the company ledger as 'Suspense'.

12. On 25 May 2007 the [appellant] transferred $20,000 from [the companies'] Cheque Account #56-673-9701 to his own ANZ Bank Account.

13. On 22 August 2007 the [appellant] transferred $7,000.00 from [the companies'] Cheque Account #56-673-9701 to the Commonwealth Bank of Australia Account of Venturi Pty Ltd trading as Homeshield – The Home Improvers as a deposit for work contracted by the [appellant] to build a carport, deck, and room enclosure at 3 Syma Street, Chermside West.

This amount was entered into the company ledger as 'S/C Building'.

14. On 15 November 2007 the [appellant] transferred $7270.61 from DTA Pty Ltd as Trustee for [the companies'] Account # 04-760-8152 to the ANZ bank account of Australian Kitchen Industries Pty Ltd for work contracted by the [appellant] for 3 Syma Street, Chermside West.

This amount was not entered into the company ledger."

[7] The companies terminated the appellant's employment on 23 November 2007 as they were not satisfied with his performance. They were then unaware of any missing money. Ms Kathryn Dale, who had formerly undertaken the appellant's duties, resumed her role. She informed managing director Mr Neile Rosenlund of anomalies in the accounts which suggested the appellant had taken money without authorisation. He told her to contact the appellant and tell him that if he paid the

money back no further action would be taken. On 7 February 2008, she emailed the appellant, asking for "a full reconciliation of all personal monies (amounts, dates & accounts) … transferred in and out". He responded that he would contact her the next day and requested a copy of the suspense accounts. She responded:

> "No, Prabath, I will not send you suspense accounts. Please confirm to me what you have bought with the company money and how you have repaid this money. If you are not prepared to work with me to square the accounts up, I will pass the matter onto other parties. As I stated, I don't want to take this matter further, and I will not, providing the accounts balance."

[8] He first responded:

> "I will certainly assist to resolve this. My all matters are in a real mess. Will workout over night and get back to you tomorrow."

[9] He then added:

> "I really don't know what to say. I think Neile should be aware of this. Him and you both have helped me and I cannot ask you not to inform Neile. …" (errors in original)

[10] At 9.20 pm he emailed Ms Dale the following information:

> "

Date	Company	Amount
Refund from Solarhart 5/11/07	CNT	4,800
Kitchenconnection 15/11/07	CNT	2,077.00
	DTA	7,270.61

> Transferred $7,000 to RC (Aus) in last week of November or 1st week of December."

[11] At 9.27 am the following day, 8 February, he emailed Ms Dale in these terms:

> "Could you please conatact me when you are free. I need some information to sort this out. I couldn't locate my documents last night. As I mentioned I am in a big mess. Even my family life is rather unfortunate since my wife has decided to go back with kids. I did verything to keep them happy.
>
> Please let me settle this today." (errors in original)

[12] At 11.40 am he emailed Ms Dale in these terms:

> "Mark [Poulsen, the companies' external chartered accountant] contacted me. I am trying my best to reconcile verything and will transfer first thing Monday morning. I will never let it negative." (errors in the original)

[13] He then sent her the following list of transactions:[1]

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[1] Exhibit 9.

"**Date**	**Company**	**Amount**
26/06/2007	CNT	2,120.00
28/06/2007	CNT	940.05
26.06.2007	CNT	1,699.00
23/07/2007	CNT	1,000.00
25/06/2007	CNT	2,467.00
28/10/2007	CNT	10,067.00
22-Aug-07	CNT/RC (Aus)	7,000.00
		25,293.05
		25,293.05"

together with a bank cheque for that amount.

[14] A subsequent audit of the companies' accounts located further anomalies including an $80,000 deposit for the purchase of the appellant's house which was sent to the appellant's solicitors' trust account. Ms Dale contacted those solicitors. At 11.43 pm on 22 February that night the appellant sent Ms Dale a further email stating:

> "I have reconciled the final balance due and arranged a cheque for $133,000. You will receive the cheque on Monday morning.
>
> | Details | | |
> |---|---|---|
> | 18/05/07 | CNS | 20,000 |
> | 17/05/07 | CNT | 20,000 |
> | 25/05/07 | CNT | 20,000 |
> | Sep 2007 | CNT | 80,000 |
> | Total | | 140,000 |
> | Less: | | |
> | Paid on 27/11/07 | | (7,000) Paid to AC No: 56-673-9701 |
> | Balance | | 133,000 |
>
> Regards
> Prabath" [2]

[15] The following Monday a courier delivered a cheque for $133,000 to the companies.

[16] Ms Dale gave evidence that at no time during the appellant's employment with the companies did he tell her that he had the companies' authority for or consent to these transactions.

[17] Mr Poulsen was present at the companies' premises with Mr Neile Rosenlund and his brother, Mr Des Rosenlund, also a director of the companies, when the appellant's employment was terminated in November 2007. The appellant seemed shocked. He stated that he had saved the companies a lot of money on an insurance policy. Mr Neile Rosenlund offered him one month's severance pay but the appellant wanted three. He also wished to stay on for a period to tidy up the books. He was about to take annual leave and offered to come back afterwards to work as required. He asked to take his mobile phone and laptop to extract personal records. Mr Neile Rosenlund let him take only his mobile phone.

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[2] Exhibit 10.

[18] Mr Poulsen telephoned the appellant in February 2008 to discuss the missing money. The appellant apologised. Mr Poulsen responded that "Neile was very upset". Mr Poulsen asked the appellant to prepare a reconciliation of the amounts taken; if he then repaid those amounts, no further action would be taken. Mr Poulsen contacted the appellant the following Monday. The appellant told him he had reconciled the accounts and he would send a bank cheque for about $25,000. The next day a cheque for that amount was delivered.

[19] In relation to the admitted transactions 7, 8, 9, 10 and 12,[3] Mr Poulsen pointed out that the appellant created an impression that the bank account balances matched the ledger balances by creating false ledger entries.

[20] Mr Des Rosenlund was a director of the companies at the relevant time. He knew the appellant as the companies' accountant, but his brother, Neile, as managing director, had the principal dealings with the appellant. Mr Des Rosenlund did not give the appellant permission to use the companies' money in the admitted transactions.[4]

[21] Mr Neile Rosenlund denied allowing the appellant to borrow money through the business. He also denied allowing him to borrow money in a way that avoided tax liability. The appellant did not ask for his financial help. The appellant did not show him a statement from Lloyds TSB Offshore Treasury confirming that Dalugama Mudiyanselage (the appellant's first two names) had deposited £100,000 from 20 May 2005 to 20 May 2008 at 13.85 per cent interest and that on maturity the investment would be £113,850.[5] He did not offer to assist the appellant with a loan and he did not tell the appellant to keep this loan confidential. He did not have "sweetheart deals" with other employees in relation to motor vehicles or other items to reduce taxation liabilities. These suggestions were "pure fallacy". At the November 2007 termination meeting, the appellant said he wanted to resolve some outstanding accountancy issues and asked to be kept on for that purpose. Mr Rosenlund said that he would make contact if his assistance was needed.

[22] The appellant gave evidence that Mr Neile Rosenlund gave him permission to take the money the subject of the 14 admitted transactions in ex 19 as a loan pending the maturity of the term deposit described in ex 22. This was so the appellant could buy a house without losing the interest on the term deposit. He also became aware that other staff had "sweetheart deals" concerning vehicles transferred into their names. Some used the companies' heavy machinery, such as diggers and bobcats, without charge when building their own houses. His relationship with Mr Rosenlund was always good but he and Ms Dale differed about how the accounts should deal with taxation issues.

[23] When the appellant found a house he was interested in purchasing, Mr Rosenlund allowed him to take $60,000 from the business and told him not to tell anyone. He took the money in the 14 admitted transactions with Mr Rosenlund's permission in the manner described by Mr Poulsen. He always intended to repay the money when his term deposit matured. He used the proceeds for university fees; a computer for his studies; a deposit on his house; relocation expenses; furniture and home renovations.

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3 Set out at [6] of these reasons.

4 Above.

5 Exhibit 22.

[24] After his employment was terminated, he withdrew the term deposit and paid back the borrowed money. As he was not permitted to keep his computer which contained all his business records, he could not immediately and accurately calculate how much he owed. His home situation was also chaotic at this time as he was unemployed, with a six year old and 18 month old twins. He apologised to Mr Poulsen only in the sense that he regretted that he had not been able to repay the money sooner. He was adamant that he was not dishonest in his use of the money. Had he been dishonest he could have taken a lot more. He would not have done anything dishonest as this would have jeopardised his future and that of his children.

[25] In cross-examination, he continued to deny taking the money dishonestly. He stated that when he came to Australia he had half a million dollars in cash. He repeated that he was not initially able to calculate the precise amount he should repay as he did not have access to records.

[26] In re-examination he stated that the companies did not claim that he still owed them money.

[27] Mr James Barbeler, a chartered accountant, gave evidence that he had known the appellant since October 2010 when he joined Mr Barbeler's company as a financial accountant. The appellant had always appeared to be honest. He had access to cash. His accounting reconciliations were all scrutinised and were satisfactory. He was awarded employee of the month in January 2011, and as a result a $200 award was paid into his account. He was unaware that he had won the award and questioned this payment on the next working day in case it was an error.

Grounds 1, 3, 4 and 5: the jury verdict was unreasonable

[28] Whilst grounds 3, 4 and 5 are peculiarly worded, after considering the written and oral submissions, they can be taken, in conjunction with ground 1, as an assertion that, under s 668E(1) *Criminal Code* 1899 (Qld), the jury verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence as the jury could not be satisfied that the appellant acted dishonestly in his use of the companies' money.

[29] In her oral submissions, the appellant's counsel, Ms Fajardo (who was not trial counsel), submitted there was no evidence of the false accounting entries and that the actual books of accounts should have been tendered. The tendered spreadsheets prepared by Ms Dale were inadmissible.

[30] This submission is entirely misconceived in light of the way the trial was conducted. Ms Dale's evidence was given without objection and was consistent with the appellant's formal admissions in ex 19.[6] This contention is baseless.

[31] Ms Fajardo's primary contention was that there was no evidence that the appellant acted dishonestly. Mr Rosenlund was an astute business man who would have discovered the false entries from the monthly bank statements. He clearly acquiesced in the appellant's conduct. The jury were not entitled to reject the inference open on the evidence that the appellant was acting honestly when he used the companies' money.

[32] The appellant gave evidence that Mr Rosenlund allowed him to use the money as a loan pending the maturation of his fixed term deposit. Mr Rosenlund strenuously denied this. The jury had to determine whether the prosecution had proved beyond

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6 Set out in [6] of these reasons.

reasonable doubt that the appellant did not honestly believe that he had permission to use the money. There was ample evidence supporting the jury's rejection of the appellant's evidence and their acceptance of the prosecution case beyond reasonable doubt. It was objectively unlikely that Mr Rosenlund would allow the appellant to draw from the companies' funds for his personal needs without any written or even oral framework as to when and how much money would be taken and when and how much would be repaid. Had Mr Rosenlund agreed, why would he have terminated the appellant's employment without raising these issues and ensuring all outstanding amounts were repaid. And, when Mr Rosenlund learned of the missing money, why did he arrange for his external accountant, Mr Poulsen, to audit the accounts and refer the matter to police. Mr Rosenlund's conduct was completely inconsistent with him allowing the appellant using the companies' accounts as his private bank.

[33] By contrast, the appellant's conduct was inconsistent with the appellant's account. When Mr Rosenlund terminated his employment, the appellant did not immediately state he would have to make arrangements to repay the loan. His emails and his apology to Mr Poulsen were consistent with dishonesty. Had the money been taken with permission, or had the appellant honestly believed he had permission, even mistakenly, why did he not say so. On the appellant's version, no apology would have been required.

[34] Ms Fajardo's contention that Mr Rosenlund must have known about the payments and acquiesced in them is not supported by the evidence. He could not be expected to have discovered that the appellant was taking the companies' money merely from perusing the monthly bank statements.

[35] Ms Fajardo also submitted that Ms Dale's evidence should not have been accepted as she was "the kind of person who has a propensity for lying if it serves her own purpose". Similarly, she submitted, Mr Rosenlund had "a propensity for lying when it suits him as he most likely did in giving evidence at the trial". This was demonstrated, Ms Fajardo submitted, by Ms Dale's lack of candour in her first email to the appellant where, colluding with Mr Rosenlund, she falsely stated that Mr Rosenlund was not aware of the matter. Ms Dale clearly did this with the blessing of her employer, Mr Rosenlund, in an effort to gain as much information from the appellant as possible.

[36] The fact that Ms Dale and Mr Rosenlund successfully used this ploy to retrieve misappropriated money did not require the jury to reject either as a credible witness. This contention is not made out.

[37] Ms Fajardo submitted that Ms Dale made inconsistent statements and did not like the appellant and for these reasons her evidence should not have been accepted. Any inconsistencies in Ms Dale's evidence were minor and did not require the jury to reject her evidence generally. And whilst it is true that, as Ms Fajardo contends, that Ms Dale conceded that she and the appellant did not get along for some time before the fraud was discovered, this did not require the jury to reject her evidence. These contentions are not made out.

[38] The more weighty aspects of Ms Fajardo's written and oral submissions on this ground were canvassed at trial. Her contentions, neither individually nor collectively, required the jury to reject the evidence of Mr Rosenlund, Ms Dale or

Mr Poulsen. For the reasons stated earlier, Mr Rosenlund's account seemed much more plausible than that of the appellant. After reviewing the whole of the evidence, I am satisfied it was well open to the jury to be satisfied on that evidence beyond reasonable doubt of the appellant's guilt: *M v The Queen*;[7] *SKA v The Queen*.[8] This ground of appeal fails.

Ground 2: the judge's directions to the jury

[39] Ms Fajardo's first complaint about the judge's directions to the jury was that his Honour failed to comply with s 51 *Jury Act* 1995 (Qld). That provision requires a trial judge to inform the jury when it is sworn, in appropriate detail, of the charge in the indictment and of the jury's duty on the trial. His Honour gave the following direction at the commencement of the trial after the jury was sworn:

> "You've had the long hand version of the charge against the [appellant] read to you on a number of occasions already. The short hand version is that he is charged with fraud as an employee to the value of more than $30,000.
>
> Now, you've been given, through my associate, the responsibility of returning the verdict and the verdict is your judgement as to whether the [appellant] is guilty or not guilty of the charge against him.
>
> Now, the defendant in a criminal trial is presumed to be innocent so before you may return a verdict of guilty, the prosecution must satisfy that the defendant is guilty of the charge in question and must satisfy you of that beyond reasonable doubt.
>
> Now, the way the prosecution will endeavour to discharge the burden upon it will be by presenting evidence before you during the conduct of the case. Now, evidence will be what witnesses tell you from the jury box. And there may also be documents tendered during the conduct of the - during the conduct of the trial it will be through that evidence, be it oral testimony or documentary evidence that the prosecution will rely on.
>
> Just a few words about our various functions, I've already identified the functions of counsel at the Bar table, in respect of my function; it is to ensure that the trial is conducted according to Law. Questions of Law, which may arise from time to time, are for me to decide usually following discussion with counsel. During those discussions you will usually be asked to retire to the jury room. Now, the – the reason for that is not to in anyway have you excluded from the process of the - the trial, but to ensure that your minds are not distracted by legal argument which are really irrelevant to the fundamental - your fundamental purpose, namely, about deciding based on the evidence the guilt or innocence of the defendant.
>
> Now, during the course of the trial it's important that you pay careful attention to the evidence. But it's also important that you ignore anything that you may have heard or read about this case or that you may hear or read about this case during the course of the trial. Of

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7 (1994) 181 CLR 487, 493–495.

8 (2011) 243 CLR 400, 405 [12].

course, you will discuss this matter amongst yourselves, as the trial proceeds but you must not discuss it with anyone else other than your fellow juror members.

And you must also - you should not attempt to carry out any independent enquiries or investigations. And - and the reason why your prevented from discussing this case, other than amongst your fellow juror members, and required to ignore anything you may hear or read about this case other than in this Court room and prohibited from making independent inquiries, is because that you are to decide this case solely on the evidence presented to you during the course of the trial. You must avoid any risk of your minds being influenced by factors other than the evidence presented during the conduct of this case.

Now, if during the course of the trial you see or read anything about this case or your told something about this case, do not pass that information onto your fellow jurors, rather report it immediately to the bailiff and the bailiff will pass that information on to me and after I've discussed that with counsel we will decide how to proceed. But it's important that if information comes into any of your possession, other than through the trial process, you do not raise it with other jury members; you bring it to my attention first.

Now, the reason for all these warnings is that its inherently unjust for you to act on anything other than the evidence that you hear, or is presented - otherwise presented to you during the conducted of the trial. Because it is only that evidence that the counsel representing the various parties in this case - it is only the evidence presented that they are aware of. Any information that you glean or may glean from outside of this Court room, they - they will have no knowledge of it and therefore will not know upon what it is you may be acting. And equally importantly, if not more so, that information will not have had its accuracy or veracity tested through cross-examination or otherwise. And as we all know from our own world experiences everything that you see and read is not always accurate information, and there have been instances where jurors have attempted to make their own enquiries and trials have had to be aborted.

Now, typically during the conduct of a criminal trial the prosecutor will, when I've finished addressing you, will outline the case against the defendant. Usually, by way of a summary of the evidence that is intended to be presented against the defendant. Following that the prosecution witnesses will be called, one by one, and they – [the prosecutor] will ask questions and then [counsel for the appellant] on behalf of the [appellant], will have the opportunity to cross-examine that witnesses if he considers it necessary or appropriate. Following the cross-examination, there may be some need for some re-examination but that would tend to be rather limited.

Now, that process will apply to each of the prosecution witnesses called. After all the prosecution witnesses have been exhausted, the [appellant] will be asked whether he intends to give or adduce evidence.

> Now, you'll be reminded of this at a later stage, but consistent with the presumption of innocence, a defendant is not obliged to call or give any evidence. If however, he elects to do so then the process will be along the same lines as I've already indicated. Namely, [counsel for the appellant] will call a witness; ask questions. [The prosecutor] will cross-examine it - cross-examine if she considers it necessary or appropriate.
>
> After the conclusion of the evidence you will then be addressed by counsel and then following those addresses I will sum-up the case to you. And then following my summing-up you will then be asked to retire to consider your verdict.
>
> If I could remind you again what I said at a very stage, namely, that you approach this case in an entirely impartial manner and keep an open mind.
>
> I note that all of you have been provided with writing material to take notes. If I can just say a couple of things about that, firstly, you can be confident that any notes that you make will not fall into the public arena, they'll be destroyed after the process - this process is exhausted. But if I could, perhaps, for general observation namely, don't become too obsessed with keeping a detailed record or every word that's said by the witnesses by writing it down. It's more important that you actually listen to what the witnesses is saying and observe the witness in the - in the witness box. If you are too busy trying to write things down you might, in fact, miss an important piece of evidence that comes from the witnesses lips.
>
> Finally, if during the course of the trial you're experiencing any difficulties and that may involve something to do with the trial but it may be more of a - of a personal nature, if you could notify the bailiff at the earliest opportunity and he'll bring that information to my attention.
>
> If questions arising during the course of the trial then the usual course would be that the any question that anyone of you might have would be reduced to writing and then given to the speaker who you will elect and then that note will then be passed from the speaker to the bailiff and then to me.
>
> Essentially, the bailiff will be the conduct of information between you and myself and the barristers in this trial. But consistent with what I said to you earlier, whilst you can discuss these administrative matters with the bailiff you cannot discuss the case with him or her." (errors in original)

[40] Ms Fajardo has not demonstrated any shortcomings in those comprehensive and thoughtful directions amounting to non-compliance with s 51. Contrary to her assertions, the judge was not required to tell the jury the elements of the offence and potential defences at the commencement of the trial. The appellant's trial counsel could have requested to make an opening statement outlining the appellant's case had he considered it advantageous to place the issue of dishonesty at the forefront of the jury's consideration before they heard the prosecution evidence. For

understandable forensic reasons, he chose not to take this course. This contention is not made out.

[41] Ms Fajardo's next contention was that the judge erred in not directing the jury that the evidence of Mr Poulsen, the accountant, was not expert opinion as to the guilt or innocence of the appellant but merely an explanation of the accounting process the appellant used in recording the transactions the subject of the charge.

[42] During the appellant's evidence when the jury were absent from the court room, the judge raised with counsel the matters of law identified from the evidence. The judge stated that he had initially thought he should give a direction on expert evidence concerning Mr Poulsen's evidence but his evidence was more by way of an explanation of tendered documents rather than expert evidence as to their effect. Defence counsel agreed that Mr Poulsen was not presented as an expert witness.[9] In accordance with that intimation, the judge did not give any direction on expert evidence. No redirection was sought. This ground can only succeed if it amounted to a miscarriage of justice. The judge's assessment of Mr Poulsen's evidence was accurate. The jury had access to the tendered exhibits to which Mr Poulsen referred. In light of the appellant's admissions in ex 19,[10] these matters were not contentious. The omission to explain to the jury how to deal with expert evidence has not caused a miscarriage of justice. This contention is not made out.

[43] Ms Fajardo's next submission under this ground of appeal was that the judge omitted to direct the jury that the appellant's admissions in ex 19 were not admissions of guilt so that the jury likely accepted them as admissions of guilt.

[44] The judge correctly told the jury, both when the admissions were tendered and later in his final directions, that they should accept the admissions as proof of the facts set out in them. Elsewhere in his final directions his Honour made abundantly clear to the jury that the issue for their consideration was whether the appellant had acted dishonestly and whether he believed, perhaps mistakenly, that he was honestly entitled to use the companies' money as he did. If the prosecution did not prove those matters beyond reasonable doubt, they must acquit. The judge's directions would not have led the jury to treat the admissions in ex 19 as admissions of guilt. This contention is also baseless.

[45] Ms Fajardo next submitted that the trial judge erred in failing to direct the jury at the commencement of the trial as to the element of intention to defraud. As I have explained, his Honour was not obliged to direct the jury in those terms at the commencement of the trial. No miscarriage of justice has arisen from not exploring the meaning of intention to defraud at the beginning of the trial. As is clear from the next paragraphs, the judge's final directions on this issue were unassailable.

[46] In her oral submissions, Ms Fajardo asserted that the judge's directions as to dishonesty were flawed as he referred to the standards of decent, ordinary people instead of the test under s 22 *Criminal Code*.

[47] His Honour's directions on intention to defraud were as follows:

> "The second element is that the prosecution must prove beyond reasonable doubt that the action or actions of the [appellant] must

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9 AB 187; Transcript 2-81 (20 April 2011).

10 See [6] of these reasons.

> have been done dishonestly, and to prove that the [appellant] acted dishonestly the prosecution must prove that what the [appellant] did was dishonest, by reference to the standards of ordinary, honest people. Third, that at all relevant times, the [appellant] was an employee of the Rosenlund Contractors Proprietary Limited and, last, that the value or worth of the money involved exceeded $30,000.
>
> And I should have also added that in respect of that second element, in addition to the Crown having to prove that the [appellant] acted dishonestly that the Crown must also prove that the [appellant] realised that what he was doing at the time was dishonest, by reference to the standards of ordinary people."

[48] This direction accords with the law: see *R v Laurie*.[11] His Honour then explained honest claim of right under s 22 *Criminal Code* and gave appropriate directions on that section, emphasising that the appellant did not have the burden of proving that he made an honest claim of right. The judge also gave directions that it was for the prosecution to satisfy the jury beyond reasonable doubt that, when the appellant carried out the admitted transfers,[12] he did not honestly believe he was entitled to do so. The judge directed the jury as to honest and reasonable mistake of fact under s 24 *Criminal Code*. He also directed them to consider Mr Barbeler's evidence of the appellant's good character in determining both whether he was likely to commit the offence and his credibility. The judge could not have been more accommodating to the appellant. Little wonder there was no application for any redirection on this aspect of the summing up. The contention that the judge's directions as to the meaning of dishonesty were flawed is wrong.

[49] Ms Fajardo's next contention arose from the fact that the trial took place during the week preceding the Easter break. At the end of the second day, at the conclusion of the evidence, the judge told the jury that he would adjourn a little early so that counsel's final addresses were not split. He asked counsel and the jury if it was convenient to start at 9.30 am the following morning, adding: "But bear in mind that after tomorrow, there's an unusually lengthy Easter." It seems that everyone was content to commence at 9.30 am. Ms Fajardo contends that this comment may have placed undue pressure on the jury to reach a verdict the following day prior to Easter. She submitted that the jury deliberated for only three hours. This, she contended, was not long enough for them to consider the complex matters raised in the trial. She also asserted that:

> "[i]t was highly likely that the jury was pressured to reach a verdict … so that they would not have to come back during the Easter holidays because of their personal plans … [and] that some of the jurors were forced to agree with the verdict"

[50] The jury retired to consider their verdict at 12.00 noon on the third day of the trial, the Thursday before Easter. The judge reconvened the court at 3.59 pm, four hours later, in the absence of the jury. His Honour expressed his concern to counsel about the jury continuing to deliberate because of the pending Easter break. Whilst still discussing what directions may be appropriate, the jury returned with a verdict at

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11 [1987] 2 Qd R 762, 763.

12 Exhibit 19.

4.15 pm, that is, four and a quarter hours after they first retired to consider their verdict. Contrary to Ms Fajardo's contentions, the case was straightforward. The only issue was whether the prosecution had proved that the appellant was dishonest. There is no reason to conclude that the jury did not conscientiously undertake their task over their more than four hours of deliberation, fully heeding the primary judge's comprehensive and appropriate directions. This contention is not made out.

[51] Ms Fajardo's contention in the notice of appeal that some jurors displayed apparent distress when they delivered their verdict appears to arise from defence counsel's statement in his sentencing submissions on 27 April 2011:

> "[I]t did take the jury some time in reaching their verdict and some members of the jury appeared visibly upset, so there seemed to be some sympathy there, if you like, given the circumstances of the case and the facts that came out during the trial."

[52] The fact that some jurors were distressed at carrying out their difficult duty does not establish that they did not conscientiously undertake that duty. It does not establish they were pressured to reach their verdict because of the pending Easter break. This contention is not made out.

[53] It follows that as none of the many contentions in ground 2 have been made out, this ground also fails.

The prosecutor's closing address

[54] Although not supported by any ground of appeal against conviction, Ms Fajardo, in her written and oral contentions, asserted that the prosecutor made statements in her closing address that were not supported by the evidence. Ms Fajardo's first contention relates to the following extract from the prosecutor's address:

> "'If I can't have what I want, I'll just take it.' That was the [appellant's] motto when he took, unlawfully may I say, in excess of $179,000 from his employer who gave him the job, who put his trust in him only to find out later that he abused the trust when he misappropriated a lot of money when we think about it, to virtually support his lifestyle choices."

[55] Ms Fajardo made no complaint that the prosecutor erred in stating that $179,000 was taken. (That was the total amount of the admitted transactions,[13] but the first of those transactions for $20,000 was unsuccessful; the total amount actually taken was $159,000.) This error did not affect the only real issue for the jury's considerations, namely, whether the prosecution proved beyond reasonable doubt that the appellant acted dishonestly. Ms Fajardo's concern was with the prosecutor's reference to "lifestyle choices".

[56] It is true that there was no evidence the appellant was living a particularly high lifestyle, but there was evidence that he had chosen to purchase a house rather than to rent, to attend university, to buy a computer and furniture, and to undertake house renovations. It was uncontentious at the trial that he funded these lifestyle choices with the money he took from his employer. The prosecutor's impugned comments were unobjectionable and have not resulted in a miscarriage of justice.

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13 Exhibit 19 set out at [6] of these reasons.

[57] Ms Fajardo also complained about the following comments from the prosecutor in her closing address concerning the meeting when the appellant's employment was terminated:

> "We've heard from not just Mr Rosenlund, but also his brother and also an external accountant, that nothing was said about the [appellant's] questions concerning the so-called outstanding balances. I suggest it to you that nothing was said because the [appellant] didn't want to get himself in more mess. Nothing was said because by this time Mr [Rosenlund] had no idea, absolutely no idea that that man over time was taking his company funds."

[58] Ms Fajardo contends that this statement "was a lie because N Rosenlund and the accountant testified otherwise". Her contention refers to the concession made by both Mr Rosenlund and Mr Poulsen in cross-examination that the appellant offered to assist with tidying up the companies' books after his employment was terminated. The prosecutor's submission to the jury as to the inference they should draw from that evidence was legitimate, rational and open. Ms Fajardo's assertion that in making that submission the prosecutor lied is not made out. It was quite wrong of Ms Fajardo to make this baseless assertion against another legal practitioner.

[59] Ms Fajardo's next complaint about the prosecutor's closing address related to the following submission:

> "By September of 2007, he took, or attempted to take more than $88,000 on nine separate occasions. We know he did his utmost best to cover his tracks."

[60] Ms Fajardo contended that the appellant's entries in the accounting records did not cover his tracks; he entered withdrawals in the books in the wrong account; this was bad bookkeeping, not dishonesty.

[61] There was no suggestion at trial that the appellant's entries were bad bookkeeping. On his evidence, he took the money with Mr Rosenlund's permission and hid the transactions at the behest of Mr Rosenlund to avoid paying tax. The prosecutor was entitled to urge the jury to reject that evidence and instead to find that he made false entries in the accounts to cover his tracks. This contention is not made out.

[62] Ms Fajardo further asserted that the prosecutor lied in making the following submission to the jury:

> "Did the [appellant] come forward in November when he was dismissed, and volunteer all repayments, he didn't. In fact, he made repayments in a [piecemeal] fashion; only when he became aware that his actions were discovered by the company."

[63] This submission was consistent with the undisputed evidence that the appellant's initial reconciliation to Ms Dale was incomplete. He only attempted to repay the full amount after the $80,000 transaction was discovered. The prosecutor's submission was unsurprising and appropriate. Ms Fajardo had no basis whatsoever to support her assertion that this was a lie. She should not have made this baseless and serious allegation against a fellow legal practitioner.

[64] I note that when the Court explained to Ms Fajardo at the hearing that she should not allege a fellow practitioner is lying without clear evidence, she apologised. But the fact that she made these allegations without a skerrick of justification is most improper conduct for a legal practitioner.

[65] Ms Fajardo's final complaint against the prosecutor was that she wrongly asserted that the appellant came to Australia with half a million dollars when there was no evidence of this. This contention is also entirely misconceived. The appellant gave this evidence in cross-examination.[14]

[66] The contention of impropriety on the part of the prosecutor is not made out.

Conclusion - appeal against conviction

[67] The appellant has not made out any of the grounds of appeal against conviction. It follows that the appeal against conviction must be dismissed.

The application for leave to appeal against sentence

The appellant's contentions

[68] Ms Fajardo contends the sentence was excessive and that the trial judge erred in the view he took of the facts. Whilst the head sentence was within range, the judge should have suspended it after nine months as the appellant honestly believed he was entitled to use the money as a loan and later repaid it. The case did not involve an elaborate or deliberate scheme to conceal the withdrawals. The judge was not entitled to make the factual findings listed in grounds 7 and 8 of the appeal.[15]

The sentencing proceeding

[69] The appellant has no criminal history. He was aged 42 at sentence and was between 38 and 39 at the time of the offending.

[70] The prosecutor at sentence emphasised the following matters. In excess of $179,000 was misappropriated over about six months. (As I have noted, in fact only $159,000 was actually misappropriated.) The appellant attempted to conceal the true nature of his transactions. He repaid the money, but only after his actions were discovered and his employment terminated. The prosecution proceeded by way of a full hand up committal in February 2009. The trial was listed on five occasions. It was adjourned once to meet the convenience of defence counsel, once because the appellant was admitted to a psychiatric hospital, and once because Mr Neile Rosenlund had been injured in a traffic accident. The offence was a betrayal of trust by an employee on whose honesty his employer depended. There was a degree of sophistication, planning and persistence. The appellant showed no remorse and attacked Mr Rosenlund's credibility and honesty. He had repaid the missing funds plus an additional $20,000 which the companies had appropriated towards offsetting the costs arising from the offending. This favoured the appellant but could not save him from a jail term. A deterrent sentence was required. The comparable cases, *R v Parker*;[16] *R v Allen*[17] *and R v Gourley*,[18] supported a sentence of five years imprisonment with no early parole eligibility.

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14 See [25] of these reasons.
15 See [3] of these reasons.
16 [2007] QCA 22.
17 [2005] QCA 73.
18 [2003] QCA 307.

[71] Defence counsel made the following submissions. None of the trial adjournments was through the fault of the appellant. (The judge accepted that submission.) The appellant had been married for 10 years. He came from a stable Sri Lankan village family. His wife and children may soon become naturalised Australians. They lived in a suburban Brisbane house with a substantial mortgage which his wife would be unable to meet as she earned only $12,500 a year as a child care provider. It was likely he would be deported after he served his jail sentence. His wife and children may be naturalised by then and were likely to stay in Australia. As a result of his offending, he may lose contact with them.

[72] Counsel tendered a medical report which recorded that the appellant was admitted to Prince Charles Hospital for one week in February 2010 suffering from depressive symptoms. He had a long history of depression since he was a university student. He was a chartered accountant, qualified in Sri Lanka and completing bridging subjects in Australia. Since his conviction he had spent about seven days in presentence custody. He was treasurer of the Sri Lankan Charity Society of Queensland in 2008 and its sports secretary in 2009. A number of favourable work references were tendered. Counsel reminded the judge of Mr Barbeler's character evidence. The appellant had an excellent work history and was held in high regard by many people. He had made full restitution with an additional $20,000 so that the companies were not out of pocket. His payment of restitution was an indication of remorse. After referring to *R v Jensen*[19] and *R v Ward*,[20] he submitted that a head sentence of four to five years imprisonment was appropriate, with parole after about 20 months.

[73] The judge enquired of the prosecutor whether the maximum penalty was 14 years imprisonment. The prosecutor responded affirmatively.

[74] His Honour stated the following matters in his sentencing remarks. The fraud involved about $180,000. The maximum penalty was 14 years. The offending involved a significant breach of trust. Over about six months the appellant made 14 fraudulent transactions using false names and a system designed to superficially balance the books. The course of conduct involved an element of sophistication and continuing acts of dishonesty to avoid detection. There was no evidence of a gambling addiction; the funds were used to support a lifestyle to which the appellant believed he was entitled. He had funds available but instead chose to use those of his employer. It was significant that he had more than repaid the money he took, but only after he was detected. This may well reflect remorse but the appellant had not pleaded guilty or assisted in any way in the administration of justice. The appellant's version at trial was fanciful and the jury rightly disbelieved it.

[75] His Honour further noted that the appellant's evidence implicated Mr Rosenlund and others in serious tax offences without any evidence. The appellant appeared willing to do anything to avoid the consequences of his wrongful actions. His conduct was inconsistent with remorse. The judge noted the appellant's history of depression, his excellent work history, the absence of previous convictions and his work for the Sri Lankan community. It was common ground that a head sentence in the range of five years was appropriate. Whilst rehabilitation was a significant factor, deterrence was also important. Balancing the competing considerations, his Honour determined that the five year sentence should be suspended after a period of 24 months.

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19 [1998] QCA 300.

20 [2008] QCA 222.

Conclusion – application for leave to appeal against sentence

[76] Contrary to Ms Fajardo's submissions as to grounds 7 and 8 of the appeal, the judge was entitled on the evidence at trial to make all the findings of fact which she sought to impugn. She did not take the Court to any evidence from Ms Dale "corroborat[ing] the appellant's evidence about the fringe benefit tax".

[77] But counsel for the respondent, Mr Campbell, in his customary evenhanded way, has correctly identified a number of errors in the exercise of the sentencing discretion. The first is that the judge failed to declare six days of presentence custody. Mr Campbell handed up a schedule showing that the appellant was in custody from 21 April 2012 to 27 April 2012, a period of six days. This Court should now make that declaration.

[78] The second error is, as already identified, that the sum misappropriated was $159,000 not $179,000.

[79] The third error is that the judge considered that this was not a case where the appellant assisted in any way in the administration of justice. Whilst the appellant did not plead guilty, he did at an early stage admit the physical acts constituting the offences and his comprehensive admissions at trial[21] greatly shortened the issues in and the length of the trial. He also had a full hand up committal proceeding. Cooperation of this sort should be encouraged by an appropriate albeit modest reduction in sentence.

[80] The fourth error was that the judge's sentencing remarks do not suggest that his Honour apprehended that the appellant repaid large amounts of misappropriated money before the companies understood the full extent of his defalcation.

[81] The fifth error is that the prosecutor misinformed the judge as to the maximum term of imprisonment. It was 12 not 14 years: see s 408C(2), (b) and (d) *Criminal Code*. The judge's exercise of the sentencing discretion was unquestionably informed by his wrong understanding of the maximum penalty, especially when combined with the other noted errors. For these reasons, the application for leave to appeal must be granted, the appeal allowed and this Court should re-exercise the sentencing discretion.

[82] Bearing in mind the large amount of the fraud and the significant abuse of trust involved, the comparable sentences referred to by counsel at sentence and in this Court support a head sentence in the range of four to five years imprisonment. Perhaps the most relevant is *Allen* in that, unusually, the money defrauded was repaid, as in the present case. Allen pleaded guilty to a fraud in 2004 yielding him goods and services in the range of $66,000 whilst he was the complainant company's general manager. He claimed the sentence was excessive. He had no prior convictions and had been a hard working and productive community member, well regarded in the engineering field. He had cooperated substantially with the law enforcement authorities by an early plea of guilty to an *ex officio* indictment. He bore a heavy burden of guilt as a result of his father's suicide after learning of the charges. He made full restitution by selling his family home. Full restitution in such a matter usually results in a significant reduction in the actual term of imprisonment imposed. This Court did not reduce the four year head sentence but

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[21] Exhibit 19.

considered suspension after 15 months did not adequately recognise the unique combination of mitigating circumstances. Instead, suspension after nine months was ordered.

[83] In the present case, the appellant paid not only full restitution but an additional $20,000 which he appears to have accepted to be appropriate compensation to the companies for the cost and inconvenience resulting from his fraud. As this Court stated in *Allen*, the significant mitigating factor of full restitution (and here, further compensation) should be reflected by reducing the term of imprisonment (including the term of actual imprisonment) which would otherwise have been imposed. The appellant began to make restitution before the full extent of his fraud was known. He had no prior convictions. The amount he defrauded was, however, more than in *Allen*, although it seems he was always intending to repay the money. Even so, employees who would dishonestly treat their employers as private banks in this way must be deterred by the imposition of significant sentences of imprisonment. A head sentence of four and a half years imprisonment is appropriate here. Unlike Allen, the appellant did not plead guilty at an early stage and nor were his mitigating features as compelling. He did, however, cooperate in a limited way with the prosecuting authorities. His significant admissions considerably shortened the trial. He should receive some recognition for that cooperation through a parole recommendation or suspension earlier than the half way point of the term of imprisonment imposed but not nearly as early as that given to Allen. A parole eligibility date between 18 and 20 months is appropriate. The appellant has now served slightly more than 18 months. In the circumstances, I would suspend his sentence from the date of the delivery of the following orders.

ORDERS:

1. Appeal against conviction dismissed.
2. Application for leave to appeal against sentence granted.
3. Appeal allowed and sentence set aside.
4. Instead, order that the appellant be sentenced to four and a half years imprisonment to be suspended on the date of the delivery of these reasons with an operational period of five years.
5. Declare that six days of presentence custody from 21 April to 27 April 2007 be time served under the sentence.

[84] **FRASER JA:** I have had the advantage of reading the reasons for judgment of the President. I agree with those reasons and with the orders proposed by her Honour.

[85] **WHITE JA:** I have read the reasons for judgment of the President and I agree with those reasons and the orders proposed by her Honour.