SUPREME COURT OF QUEENSLAND

CITATION:	*R v Williams* [2014] QCA 114
PARTIES:	**R** **v** **WILLIAMS, Makehu Michele Barbara** (appellant/applicant)
FILE NO/S:	CA No 57 of 2013 CA No 239 of 2013 DC No 224 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2014
JUDGES:	Fraser and Gotterson JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed.** **2. Extension of time until 17 September 2013 to apply for leave to appeal against sentence granted.** **3. Leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where the appellant was employed as a bookkeeper – where the appellant was charged with four counts of dishonestly applying funds from her employer for her own use – where Counts 2 and 3 each alleged a circumstance of aggravation being that the dishonestly appropriated property exceeded $30,000 – where the jury were unable to reach a verdict on Count 1, but found the appellant guilty of Count 2 without the circumstance of aggravation and guilty of Counts 3 and 4 as charged – where in a re-direction the trial judge described Count 2 as "an all or nothing" case – where the appellant submitted that the finding of fraud *simpliciter* on Count 2 meant that the jury had reasonable doubt about the transfers subject to the Counts 3 and 4 and the other amounts in the minority of Count 2 – whether the verdicts on Count 2, 3 and 4 were inconsistent CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR

INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to five years imprisonment with parole eligibility after one half of the sentence is served – where the trial judge sentenced on a factual basis that "the fraud in Count 2 approached, but fell short of $30,000" – where there was no explanation behind this basis – whether the sentence was manifestly excessive in all the circumstances

Criminal Code 1899 (Qld), s 408C, s 671(3)

MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited
R v Adams; ex parte A-G (Qld) [2006] QCA 312, cited
R v Dwyer [2008] QCA 117, cited
R v Eveleigh [2009] QCA 257, cited
R v Parker [2007] QCA 22, cited
R v Ward [2008] QCA 222, cited
R v Whiting [2013] QCA 18, cited

COUNSEL: T Ryan for the appellant/applicant
P J McCarthy for the respondent

SOLICITORS: Legal Aid Queensland for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the orders proposed by his Honour.

[2] **GOTTERSON JA:** On 15 February 2013 and at the conclusion of a trial over 10 days in the District Court at Brisbane, the appellant, Makehu Michele Barbara Williams, was found guilty of three offences of fraud against ss 408C(1)(a)(i) and (2)(a) of the *Criminal Code* (Qld). The indictment presented against the appellant contained four counts each of which alleged offending as an employee of a company, Technicool Airconditioning Pty Ltd ("Technicool"). The counts were as follows:

> Count 1: on 17 October 2008 dishonestly applying to her own use credits in Technicool's bank account.
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> Count 2: on divers dates between 9 July 2009 and 17 July 2010 dishonestly applying to her own use credits in Technicool's bank account.
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> Count 3: on divers dates between 9 July 2009 and 17 July 2010 dishonestly applying to the use of Douglas Petley credits in Technicool's bank account.
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> Count 4: on divers dates between 9 July 2009 and 17 July 2010 dishonestly applying to the use of Witana Petley credits in Technicool's bank account.

[3] Douglas Petley and Witana Petley are sons of the appellant. Counts 2 and 3 each alleged a circumstance of aggravation additional to that of offending as an employee

against her employer, namely, that the credits dishonestly applied were property of a value of more than $30,000: *Code* s 408C(2)(d). The jury were unable to reach a verdict on Count 1. On Count 2, the appellant was found guilty without the additional circumstance of aggravation. She was found guilty on Counts 3 and 4 as charged. After the verdicts were taken, the prosecutor endorsed the indictment that the Crown would not proceed further with Count 1 and at the prosecutor's request, the appellant was discharged in respect of that count.

[4] The appellant was sentenced on 26 February 2013. Convictions were recorded for all three offences of which she was found guilty. She was sentenced to five years imprisonment on Count 3 and to concurrent terms of four years imprisonment on Counts 2 and 4. A declaration was made that 11 days pre-sentence custody be deemed time served under the sentences. A parole eligibility date at 13 August 2015 was fixed.

[5] On 15 March 2013, the appellant filed a notice of appeal against conviction. Later, on 17 September 2013, she filed both an application for leave to appeal against sentence and an application for an extension of time to make the leave application. The extension of time was not opposed.

Circumstances of the alleged offending

[6] Technicool carried on a business of airconditioning design, sales, maintenance and repairs for domestic and commercial premises.[1] Its directors were Mr Bradley Miller and Mr Peter Fischer.[2]

[7] The appellant commenced employment with Technicool on about 30 June 2008. Her employment continued until 23 July 2010 when she was dismissed. She was employed as an office manager under a written contract of employment. Her starting salary was $60,000 per annum.[3]

[8] The duties that the appellant was to perform as office manager included supervising administrative staff at the small office at Indooroopilly, pursuing outstanding debts and making payments to creditors. Effectively, she was the bookkeeper.[4] Technicool used an MYOB accounting system. The appellant was responsible for data input into the system. She was given access to internet banking in order to conduct transactions on Technicool's bank account with the Suncorp Bank. Those transactions included the payment of creditors. Her access was via Mr Miller's log-in.[5] Neither Mr Fischer nor any other employee had access to the internet banking.[6]

[9] The appellant was required to work a 38 hour week. Her contract did not provide for payment of overtime. Both directors testified that she was not entitled to any payment, or to be otherwise remunerated, for overtime worked, notwithstanding that staff were expected to work overtime, particularly in the summer months when business was busy.[7]

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1 AB22 Tr2-4 LL48-52.
2 *Ibid* LL24-28.
3 AB27 Tr2-9 L7.
4 AB105 Tr3-4 LL46-58.
5 AB52 Tr2-34 LL5-20.
6 AB106 Tr3-5 LL1-25. With the exception of one casual employee who commenced employment as a bookkeeper in about June 2010: AB53 Tr2-35 LL10-25.
7 AB28 Tr2-10 L46-AB29 Tr2-11 L3; AB106 Tr3-5 L40-AB107 Tr3-6 L8.

[10] Mr Fischer testified that he was not aware of the applicant having worked more than 38 hours in any given week during the course of her employment with Technicool. According to Mr Miller, the appellant worked overtime but he declined to describe it as "extraordinary".[8] She approached him in April or May 2010 proposing an arrangement for time-off in lieu of overtime but he adhered to the position that there was no agreement for compensating any overtime worked.[9] A co-employee of the appellant, Ms Kristin Flavell, testified that she worked "long hours" of overtime herself and was not paid for it. She said that the appellant worked overtime "occasionally".[10]

[11] Schedules tendered in the prosecution case listed transactions whereby money was transferred electronically from the Suncorp bank account to bank accounts in the name of the appellant and of her two sons. The transactions were reflected in debit entries to the Suncorp bank account and reciprocal credit entries to the other accounts. Count 1 concerned a single amount of $3,367.10; Count 2, some 21 separate amounts which totalled $76,316.30; Count 3, some 11 separate amounts totalling $38,576.09; and Count 4, three separate amounts totalling $10,370.85, in all $128,630.34. The transactions were proved by banking records which were also tendered.

[12] The prosecution alleged that the appellant effectuated the banking transactions via the internet. She disguised the destination of the payments to her and her sons' bank accounts in the accounting system. In order to do that, she adopted a *modus operandi* of recording an amount greater than the amount that the creditor concerned had invoiced Technicool. The creditor was then paid the invoiced amount but the excess of the recorded payment over the invoiced amount was directed to a bank account of the appellant or her sons.

[13] The true nature of these transactions was brought to light when Technicool experienced a liquidity crisis in about June 2010. It arose out of the drain that the accumulation of directed payments to those bank accounts had made on Technicool's funds in its Suncorp bank account.

The factual issues at trial

[14] The appellant's counsel at trial opened the defence case by informing the jury that the appellant did not deny that the impugned transactions had occurred. He described the issue at trial as being "who made them, when they were made and with whose consent".[11] These issues were raised through cross-examination of the prosecution witnesses and by the oral testimony of the appellant.

[15] In the course of cross-examination of the directors, counsel put to them that there were various aspects of the way in which Technicool's business was run that allowed for a situation in which money in fact received by the company was not always recorded as received in its accounting records. Such suggestions were rejected by the directors.

[16] The appellant's testimony included the following justifications for the admitted transactions:

(a) Although her employment contract provided for her to be paid a salary of $60,000 per year and she was told when she entered into it that she could not be offered remuneration for overtime, she said that

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8 AB70 Tr2-52 LL35-55.
9 AB54 Tr2-36 L55-AB55 Tr2-37 L20.
10 AB130 Tr3-29 LL50-60.
11 AB296 Tr6-11 LL27-29.

she was then told that, in due course, she would be paid a commission on sales to compensate her for overtime that she would be required to work.[12] In cross-examination, she said that this was agreed within one week of her having commenced employment.[13]

(b) The appellant's workload increased as time passed. The departure of another employee in November 2008 and the resultant absorption of his duties by remaining staff had a "major effect" on her workload.[14]

(c) The appellant estimated that by November 2008, she was working 50 to 65 hours per week.[15] She said that the commission arrangement was re-affirmed in discussions with directors about that time.[16]

(d) According to the appellant, she raised concerns with the directors about their financial practices and often engaged in heated arguments with the directors about them.

(e) An internet banking code co-generator token was required to log on to the Suncorp bank account in order to effect transactions on it. The token was not kept at her desk. Most of the time it was in Mr Miller's possession as it was also used to access his personal bank accounts.[17] The appellant said that on most occasions, Mr Miller was the person who approved the payment of invoices to creditors.

(f) In evidence-in-chief, the appellant asserted that the oral arrangement she had with both directors was that payments would be made to her in respect of overtime worked "when funds permitted".[18]

(g) The appellant asserted that entries were made in Technicool's accounting system to record personal expenses of the directors as business expenses. Moreover, she said that that practice was adopted by the directors in order to disguise the "additional salary" which they knew was, in fact, being paid to her.[19]

(h) According to the appellant, initially her oral agreement with the directors was that the commission she was to be paid would be 2.75 per cent of gross turnover, but that later on it was agreed to increase it to 3 per cent from 1 July 2009.[20]

[17] One of the transactions involving a transfer to her bank account of $5,681.50 was documented as having occurred on a date when, according to Technicool's records, the appellant was absent on sick leave. That date was 15 April 2010. In cross-examination the appellant conceded that she attended the office on that date in order to take in a medical certificate.[21]

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12 AB301 Tr6-16 L54-AB302 Tr6-17 L6.
13 AB358 Tr6-73 L6.
14 AB304 Tr6-19 LL7-48.
15 AB314 Tr6-29 LL11-12.
16 *Ibid* at LL23-29.
17 AB323 Tr6-38 LL25-26; AB337 Tr6-52 LL17-27.
18 AB326 Tr6-41 LL5-6.
19 AB327 Tr6-42 L48-AB328 Tr6-43 L12.
20 AB336 Tr6-51 LL25-44.
21 AB419 Tr7-46 LL14-25.

[18] At trial, the appellant tendered a one page type document which summarised the entitlements that she claimed to have had in respect of overtime both at an hourly rate and as commission on sales.[22] The entitlements claimed were as follows:

June 2008 – 30 June 2009	
Overtime at hourly rate (18 hours per week)	$ 40,214.44
Commission	$ 60,500.00
	$100,714.44
1 July 2009 – 30 June 2010	
Overtime at hourly rate (18 hours per week)	$ 44,052.33
Commission	$ 72,000.00
	$116,052.33
1-23 July 2010	
Overtime at hourly rate (18 hours per week)	$ 2,002.38
Commission	$ 2,769.23
	$ 4,771.61

On these figures, the appellant was paid by way of transfers to her and her sons' bank accounts (in total, $128,630.34) far less than her claimed entitlements (in total, $221,538.37).

[19] It was contended for the appellant that the advantage to Technicool in making payments to her which were not recorded as wages was that the practice gave the appearance that Technicool did not have legal liabilities to make superannuation contributions and to pay group tax based upon money actually paid to her to compensate for overtime worked.

Directions on dishonesty

[20] In the course of summing up, the learned trial judge gave a standard direction on the dishonesty element of the offences. Adapting it to the circumstances of the case, her Honour continued:

> "Now, while it is a matter for you as to what would be dishonest, both sides in this trial seem to acknowledge that dishonesty would be satisfied, this element of dishonesty would be satisfied, if the accused was taking this money behind the directors' backs and then doctoring the records to cover her tracks. The most critical fact here, according to both sides, is whether the directors authorised the payments. The directors say they didn't. The accused says, yes, they did. If you have a reasonable doubt about it, she is not guilty. If you have a reasonable doubt that the directors authorised payments for any one of those charges or transactions, then you would take that into account into assessing whether they authorised the others. If you are not satisfied that the accused was fraudulent on one count, then it is likely that you would have a reasonable doubt about all of the counts and find her not guilty of everything."[23]

[21] The jury retired to consider their verdicts at 11.14 am on the eighth day of the trial. During the ninth day of the trial they provided two notes which posed the following related questions:

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22 Exhibit 36; AB1443.

23 AB460 Tr8-14 LL11-41.

> "Can we find 'guilty' on count 2 if we are not sure of all transactions listed in the schedules, as long as we believe that the total of fraudulent transactions is greater than $30,000, without being specific as to which ones they are?"
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> "In relation to count 2 in particular what if we believe that some is authorised and some not?"[24]

[22] The learned trial judge discussed with the legal representatives of the parties the re-direction that she should give by way of answer to the questions. In the course of the discussion, she proposed that for the Count 2 transactions, it was "an all or nothing" case. The prosecutor said that he agreed with that approach but then added that the jury might not see it that way, regarding some of the transactions as having been authorised and some of them not.[25]

[23] Her Honour took that into account and re-directed the jury as follows:

> "Now, the ... question about count 2 and whether or not you can tease out transactions. I think it is the approach of both sides to treat this as an all or nothing case. That's not to say that that is the way you need to look at it, but the approach of both sides' arguments has been to say, after looking at all the evidence you either believe the directors or you believe the accused or you at least have - and if you have a reasonable doubt, then, of course, it is not guilty.
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> We go back to the elements of the offence. Remember the elements. You can see them in the wording of the charges themselves. Those are the things that need to be proved.
>
> The individual transactions are the particulars that the Crown relies upon to say, 'These are the acts of dishonesty and the acts of applying it, the application of the bank credits to her own use, all of them make up this charge.' The short answer to that question is you don't need to be satisfied that every one of those transactions was done by the accused dishonestly to find her guilty of the offence. You only need be satisfied that there was one or more transactions that met the elements of the offence.
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> You would all have to be in agreement, you would need to be unanimously agreed, on at least one or more of those transactions. So it couldn't be that one of you thought, 'Well, I think number one and I think number two.', or whatever, you have to be - some of you might think there was six, some of you might think there is 10, but as long as 12 of you are agreed on at least one in common, - and you were agreed that it was an application to her own use dishonestly of the banking credits, then you would be satisfied.
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> In the case of the circumstance of aggravation of being over 30,000, of course, that would be dependent upon whether the transactions that you were all agreed upon exceeded $30,000 in value. So the option for you would be to find her guilty of the fraud with a circumstance of aggravation exceeding $30,000, or not guilty of the fraud with the circumstance of aggravation, but guilty of just the

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24 Exhibit MFI "T".

25 AB499 Tr9-5 LL12-21.

> fraud simpliciter, or not guilty of anything. They would be your three options.
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> Now, I did have something else I wanted to talk to you about. As I said, it is a matter for you as to whether or not you find a basis for distinguishing in the evidence, but the way the parties have approached it is really an all or nothing case - with no basis for distinguishing."[26]

The grounds of appeal against conviction

[24] At the commencement of the hearing of the appeal, the appellant was granted leave to amend the grounds of appeal against conviction. As amended, those grounds are:

> "Ground 1 – The verdict reached by the jury was not available to it on the evidence.
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> Ground 2 – The verdict reached by the jury was unreliable because of its inconsistency and therefore cannot be relied upon.
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> Ground 3 – The verdict given by the jury is unreliable because of the lack of directions given to it by the presiding Judge concerning the near identical similarity of each of the individual transactions comprised in each charge and that because of this the jury needed to be satisfied beyond reasonable doubt about each individual allegedly fraudulent transaction which its verdict, it was not.
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> Ground 4 – The learned Trial Judge erred in directing the jury that it was open to convict the appellant of the offence alleged in Count 2 without the circumstance of aggravation.
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> In refining these grounds, the Appellant contends that the jury's verdicts on Counts 2, 3, and 4 are unreasonable and inconsistent with her acquittal on the circumstance of aggravation of Count 2."

[25] Ground 4 was a new ground of appeal. Counsel for the appellant described the paragraph which follows it as arguably a fifth ground distilling the first three grounds. In speaking to the interrelationship of Grounds 1, 2 and 3, counsel pointed out that the total of the 21 transactions the subject of Count 2 was $76,316.30 and that that amount exceeded by some $46,316.30 the requirement for the additional circumstance of aggravation charged. He continued:

> "And my primary submission is that it's quite impossible on the way this case was conducted at trial, to differentiate between the 21 transfers that comprised those – that offence. And presumably that's the reason why the Crown elected to bundle up those transfers into one charge, namely Count 2. There was nothing at all really, that distinguished one transfer from the other and in so far as the appellant's criminal responsibility was concerned. So here it is submitted that the different verdicts that were returned, namely the verdict which resulted in an acquittal of the circumstance of aggravation on Count 2, as opposed to the convictions on Counts 2 of the offence of fraud [*simpliciter*] and Counts 3 and 4, suggest a compromise in the performance of the jury's duty."[27]

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[26] AB504 Tr9-10 L33-AB506 Tr 9-12 L15.

[27] Tr1-3 LL34-43.

[26] It is appropriate therefore to consider the interrelated grounds, Grounds 1, 2, 3 and 5, together. The appellant dealt with them this way in both written and oral submissions. I turn to consider these grounds of appeal first.

The interrelated grounds of appeal

[27] Counsel for the appellant's reference to the way the case was conducted at trial was elaborated in both written and oral submissions as meaning both the parties' legal representatives and the learned trial Judge had treated the case as an "all or nothing" one, that is to say, that there was nothing which rationally differentiated the transactions such that "if they entertained a reasonable doubt about that in relation to what would seem to be the majority of the transfers in relation to Count 2, then it follows logically that they ought to have had a reasonable doubt about the transfers that were the subject of the other offences, Counts 3 and 4 and also for that matter, the other transfers in the minority of Count 2".[28]

[28] This submission anticipated the approach that an appellate court is to take in respect of a claimed inconsistency of verdicts. If there is a way in which convictions and an acquittal on a circumstance of aggravation, which are said to be incompatible, can be rationally reconciled, then the appellate court should uphold them.[29]

[29] The question here is whether the verdicts on Counts 2, 3 and 4 are truly inconsistent. The appellant submits that they are on a footing that in the face of the evidence from the directors that none of the impugned transactions was authorised as a payment in respect of overtime, the only options for the jury were to be satisfied beyond reasonable doubt that all of the transactions were authorised or that none of them were authorised.

[30] That description of the choices open to the jury is apt to mask the detail of both the counts as charged and the evidence before the jury. In my view, when that detail is taken into account, the acquittal on the additional circumstance of aggravation on Count 2 is rationally reconcilable with the conviction on Count 2 of fraud as an employee *simpliciter* and the convictions on Counts 3 and 4.

[31] All three counts related to transactions within the period 9 July 2009 to 17 July 2010. According to the appellant's calculations,[30] she became entitled in respect of overtime worked during the period 1 July 2009 to 17 July 2010 to the following:

Overtime at hourly rates	$ 45,532.35
Commission	$ 74,046.82
	$119,579.17

[32] The jury may have been satisfied beyond reasonable doubt that the appellant did not believe that she had any entitlement to be remunerated for overtime worked in the period prior to 1 July 2009 on the footing that amounts were not regularly transferred to her or her sons' bank accounts prior to that date. They might readily, and rationally, have rejected the proposition that the appellant had an entitlement to be paid commission on gross sales as well as overtime at hourly rates in respect of overtime actually worked.

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28 Tr1-4 LL37-41.

29 *MacKenzie v The Queen* (1996) 190 CLR 348 per Gaudron, Gummow and Kirby JJ at 367, citing with approval King CJ in *R v Kirkman* (1987) 44 SASR 591 at 593.

30 Exhibit 36 adjusted *pro rata* for the period 1-17 July 2010.

[33] As to overtime at hourly rates, the jury might not have been satisfied beyond reasonable doubt that it was dishonest by the standards of ordinary people for the appellant to have paid herself on that basis for overtime actually worked or that the appellant knew that that was so. Their reservation in that regard might have been prompted by a suggestion put to Mr Miller in cross-examination that it might be argued that it was unfair to ask the appellant to work overtime and not pay her anything for it to which he responded that that was the condition of being on a salary.[31] Further, the jury might not have been satisfied beyond reasonable doubt that the transaction which occurred on 15 April 2010, the appellant's sick day, was effectuated by her and that, in any event, it was a payment to which she was not lawfully entitled on some basis other than overtime.

[34] The overtime at hourly rates for the period 1 July 2009 to 17 July 2010 ($45,532.35) together with the amount transferred on 15 April 2010 ($5,681.50) total $51,213.85. When this amount is deducted from the Count 2 total of $76,316.30, the balance remaining is $25,102.45, an amount well less than $30,000 but sufficient for a conviction on the count without the additional circumstance of aggravation charged. It is not at all unlikely that the jury based the acquittal on this factor. It is understandable that they would have attributed all of the $51,213.85 to the transfers to the appellant's bank account given the overtly suspicious circumstance of transfers having been made to her sons' bank accounts.

[35] Moreover, the jury may have concluded that, to the extent of the $51,213.85, they were satisfied beyond reasonable doubt that the transactions the subject of Counts 2, 3 and 4 were committed dishonestly by the appellant. Having given credit to her for all of the $51,213.85 in arriving at the acquittal on the additional circumstance of aggravation for Count 2, they would have reasoned that they should convict on Count 2 without that circumstance of aggravation and on Counts 3 and 4 as charged.

[36] For these reasons, these grounds of appeal cannot succeed.

Ground 4

[37] The appellant submitted that the redirection and answer to the jury's questions was erroneous in so far as it entertained the possibility that the jury might convict on Count 2 without the additional circumstance of aggravation. It was accepted by the appellant's counsel that the direction was legally correct in that the approach the jury was to take required them to consider each transaction individually. Counsel ventured that in another case, a jury might be satisfied of guilt on some transactions and not on others, leaving open the possibility of a conviction of fraud as an employee *simpliciter*. Counsel submitted that here, however, there was no logical or rational basis on which the jury could have differentiated the transactions with the consequence that they had to be satisfied beyond reasonable doubt of guilt on all of them or on none of them, thereby excluding the possibility of being so satisfied on some only of them.[32]

[38] This submission cannot be accepted. As the discussion of the interrelated grounds of appeal explains, there was a rational basis for differentiating the transactions. This ground of appeal also fails.

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31 AB72 Tr2-54 LL3-6.

32 Tr1-6 LL45-47.

Disposition

[39] As all grounds of appeal have failed, the appeal against conviction must be dismissed.

Application for leave to appeal against sentence

[40] As noted, the application for an extension of time to apply for leave to appeal against sentence is not opposed. Here, the appellant-applicant has informed the court that the reason for not applying for leave within time was that she was not told that she had prospects of success in appealing the sentence at the time when her notice of appeal against conviction was filed. I regard that as a sufficient explanation of the delay as would warrant a grant of extension of time under s 671(3) of the *Code*.

[41] There are two grounds of appeal against sentence. First, it is said that the learned judge erred by failing to give a clear explanation of one of the factual basis on which she sentenced, namely, that "the fraud in Count 2 approached, but fell short of $30,000".[33] It is true that her Honour did not explain how she arrived at that basis. Nevertheless, the discussion of the interrelated grounds of appeal explains how such a basis might have been inferred from the evidence consistently with the jury's verdicts. A sum of in excess of $25,000 can fairly be described as approaching $30,000. In short, it was plainly open to her Honour to adopt the basis on which she proceeded. This objection to the sentencing process is without substance.

[42] The second, and principal, ground of appeal is that the sentence was manifestly excessive in all the circumstances. The applicant was born on 27 June 1969. She had no criminal history. In addition to this and to the circumstances of the offending which I have mentioned, her Honour referred to the following matters at sentence:

(a) the applicant's lack of remorse;
(b) the applicant's betrayal of a position of high trust;
(c) that Tehnicool had no prospects of recovering any of the misappropriated moneys and that its business reputation had been damaged;
(d) that both directors had suffered psychological stress; and
(e) that the applicant had a number or children, including two of primary school age who, as a consequence of her offending, would have to stay with their father or other relatives during her imprisonment.

[43] The basis on which the acquittal and convictions can be rationally reconciled suggests that the jury were satisfied of the applicant's guilt with respect to transactions to the aggregate value of about $77,400. Her Honour acknowledged that in her sentencing remark that "in a 12 month period you defrauded your employer of nearly $80,000".[34]

[44] The applicant sought to demonstrate that the sentence of five years imprisonment with parole eligibility after service of one half of that time was manifestly excessive by reference to a number of sentencing decisions, particularly *R v Whiting*,[35] *R v Parker*[36] and *R v Adams; ex-parte Attorney-General of Queensland*.[37]

[45] In *Whiting*, the offender was convicted after a trial on one count of fraud as an employee to a value of over $30,000, one count of fraud to a value of more than

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33 AB536 LL8-10.
34 AB536 LL24-26.
35 [2013] QCA 18.
36 [2007] QCA 22.
37 [2006] QCA 312.

$30,000 and a third count of fraud. The offender was aged between 30 and 35 years old at the time of the offences. She was employed as the manager of a medical practice. Over a period of four years and 10 months, she transferred to her own bank accounts more than $47,000 from the business account of the practice management company and more than $91,000 from a doctor's credit card account. The offender had a criminal history which included an offence of dishonesty for which no conviction was recorded. She had a three and a half year old child. This Court concluded that the sentence imposed was not manifestly excessive.

[46] In *Parker*, the offender was convicted on a plea of guilty of offences of fraud, stealing as a servant and using a computer with intent to commit an indictable offence. She was sentenced to five years imprisonment suspended after 21 months. The offending took place over a period of about 18 months. A total amount of $229,566 involving 96 separate fraudulent transactions was involved. The offender had no relevant previous convictions and was aged between 36 and 38 years old at the time of the offences. She made no restitution. Her criminality was not ameliorated by any particular personal circumstances. This Court was obliged to re-exercise the sentencing discretion because of an error in the sentencing process, but imposed the same head sentence for the most serious of the offences.

[47] In *Adams*, the offender pleaded guilty to one count of stealing as a servant and was sentenced to four years imprisonment suspended after nine months. She was employed as a bookkeeper by a company that sold metal products. The money that was misappropriated was spent mainly on holidays for her family. The fraud occurred over a period of 12 months and involved taking almost $240,000. The offender suffered from chronic adjustment disorder with anxiety and depression. She had repaid a sum of about $12,000. This Court concluded that the learned sentencing judge had placed too great a weight on her psychological dysfunction and unhappy background. The theft in that case was described as protracted and calculated. Whilst not altering the head sentence of four years imprisonment, the period until suspension of it was increased to 15 months.

[48] The respondent referred the court to sentences imposed in *R v Ward*[38] and *R v Eveleigh*.[39] In *Ward,* the offender was sentenced upon his plea to a term of imprisonment of five years with a suspension after 20 months for a single count of defrauding his employer of about $98,000. No error was found by this Court in the imposition of that sentence. The *modus operandi* adopted by the offender to commit the fraud was not dissimilar to that of the applicant. The offender made full admissions, was 32 to 33 years old and had no prior criminal convictions.

[49] In *Eveleigh*, the offender was sentenced upon her plea to a term of imprisonment of four years with an eligibility date for parole at 14 months for a single count of defrauding her employer of about $87,000. No error was found by this Court in the imposition of that sentence. The offender occupied a position of trust. The money was stolen over a comparatively shorter period (two months and five days) than in the case of the applicant. She was young (22 years old) and had had a dysfunctional upbringing. The offender had made full admissions.

[50] In using the above sentences for comparative purposes, it need by borne in mind that for the offending as an employee in *Parker*, *Adams*, *Ward* and *Eveleigh*, the

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38 [2008] QCA 222.

39 [2009] QCA 257.

maximum penalty was 10 years imprisonment. For comparable offending on and after 1 December 2008, the maximum penalty was increased to 12 years imprisonment. The applicant's offending occurred after that date.

[51] The sentences to which the Court was taken illustrate, as Keane JA observed in *R v Dwyer*,[40] that there is no correct sentence for the combination of aggravating and mitigating factors which attend a particular offending. They also illustrate, in my view, that the sentence imposed on the applicant is comparable with sentences imposed for similar offending. That there have been instances where slightly shorter terms of imprisonment have been imposed does not warrant a conclusion that the appellant's sentence is manifestly excessive allowing for the factors that she persisted in her denial of the offending over a 10 day trial, showed no remorse, and can make no restitution.

Disposition

[52] For these reasons, I consider that the application for leave to appeal against sentence should be refused.

Orders

[53] I would propose the following orders:

1. Appeal against conviction dismissed.
2. Extension of time until 17 September 2013 to apply for leave to appeal against sentence granted.
3. Leave to appeal against sentence refused.

[54] **DAUBNEY J:** I respectfully agree with Gotterson JA.

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40 [2008] QCA 117 at [37].