SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kiviranta* [2007] QCA 371
PARTIES:	**R** **v** **KIVIRANTA, Karen** (appellant)
FILE NO/S:	CA No 114 of 2007 DC No 1005 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	19 October 2007
JUDGES:	Jerrard and Holmes JJA and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – PARTICULAR CASES – where the appellant was convicted by a jury of six offences of fraud as an employee, each with the circumstance of aggravation that the yield to the appellant from her dishonesty was of a value of more than $5,000 – whether the conviction should be set aside
COUNSEL:	D Lynch for the appellant D Mackenzie for the respondent
SOLICITORS:	Ryan & Bosscher for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **JERRARD JA**: On 18 April 2007 the appellant Ms Kiviranta was convicted by a jury of six offences of fraud as an employee, each with the circumstance of aggravation that the yield to Ms Kiviranta from her dishonesty was of a value of more than $5,000. On 19 April 2007 she was sentenced to three years imprisonment on each count and the learned judge fixed 30 June 2008 as her earliest

date for release on parole. She has appealed on the ground that each conviction was unsafe and unsatisfactory.

[2] Ms Kiviranta was employed as an accounts clerk for a company, Centenary Suburbs Sales and Management Pty Ltd, which traded as a real estate business in the name of Harcourts Centenary Suburbs. The two directors were Mr William Cooper and Mr Mangala Rodrigo, both called as witnesses. Ms Kiviranta's position as accounts clerk meant that she was responsible for the disbursement of money held in the company's trust account. On the six separate occasions constituting the six offences, she banked cheques drawn on the trust account, and signed by both directors, into her own personal account. Four cheques showed the payee as "cash", and two others as the appellant. The evidence established that the amounts for each cheque drawn corresponded to the amount payable from the trust account to the company, as commission on a recently completed sale. The paperwork accompanying each cheque justified the payment out of the trust account, and into the firm's general account, of an amount in that sum. The cheques and cheque butts had each been written out by Ms Kiviranta, and the cheque butts showed that the payments had been made to the company's general account.

[3] The prosecution alleged that Ms Kiviranta had no authority to bank cheques in her own account, but the case advanced on her behalf at the trial was that those payments were in fact authorised by the two directors. The directors were called by the prosecution, and each of them acknowledged that he had signed the cheques in question, and each denied authorising the appellant to pay those cheques to herself. Mr Cooper denied having given her any permission or authority to write cheques out for cash, or in her own name, as well as denying giving any permission or authority to deposit cheques from the trust account into her account. Mr Rodrigo gave evidence-in-chief to the same effect.

[4] It was put to each of them, and each agreed, that when first employed in 2002 Ms Kiviranta's salary was set at $40,000 per annum, and that it had been increased by verbal agreement at a later stage, in or about 2003. The increase, it was agreed, was not recorded in any document, other than in the weekly wages book. Both directors denied any agreement having been made with Ms Kiviranta to pay her any extra amounts over and above her salary.

[5] Mr Cooper agreed that her salary had been increased from $40,000 to $53,000 per annum, in 2003, but denied that when she presented the cheques, the subject of the charges, to him, she was simply fulfilling the bargain he had made with her in 2003. He described the suggestion as "absolute rubbish".[1] Mr Rodrigo swore likewise, and specifically denied the suggestion put to him that he had agreed to backdate the increase in salary to May 2001 (the increase to $53,000 per year), and also denied a further suggestion put to him that he had agreed that she would receive an effective overall payment of up to $65,000 per year. He swore there were no other payments involved and that she received wages.[2]

[6] Mr Cooper was forced to agree in further cross-examination, that regarding another named employee, a salesman, that employee had sought assistance because of an issue the employee had with the "Child Support Agency", and that:

> "We tried to give him every assistance with that."

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1 At AR 49.

2 At AR 79.

Mr Cooper denied that meant that employee was given money "under the table" but could not deny the further proposition that that employee received sums not recorded in the company's books. Mr Rodrigo denied any knowledge of that having happened.[3] There was also a good deal of cross-examination about payments made to a third employee, who had been permitted to draw a weekly wage against amounts to be credited to him as commission; it was suggested that to allow the employee to carry a credit balance from one financial year to the next, and thus avoided the employee's obligation to pay tax on that income.

[7] The appellant's counsel essentially relied on those matters involving those other two employees in support of the submission that the six convictions should be set aside. Counsel, who was also counsel at the trial, submitted that on the whole of the evidence it was not open to the jury to be satisfied beyond reasonable doubt that Ms Kiviranta was guilty, referring to *M v R* (1994) 181 CLR 487 at 493.

[8] Ms Kiviranta's counsel specifically and readily conceded that counsel had no complaint about any of the directions given by the learned judge to the jury, including those on dishonesty and whether the jury was satisfied beyond reasonable doubt that there was no agreement to "top up" Ms Kiviranta's salary, by her drawing amounts from the trust account. In those circumstances, the fact that an arrangement had been made to assist another employee in that employee's dealings with the Child Support Agency was unlikely to take Ms Kiviranta's claim of prior authorisation very far. That was particularly so because the first four counts, of offences happening in February and May 2004, recorded her paying herself a total of $32,995.44 from moneys payable as commission to the company. Even if the bargain that was suggested to the directors on her behalf had been made with them, contrary to their sworn denials, the bargain would not entitle her to an extra amount of almost $33,000, in the financial year ending on 30 June 2004.

[9] The payment in count 5 was for an amount of $8,575, allegedly misappropriated on 26 August 2005, and in count 6 was for an amount of $10,800 allegedly misappropriated on 11 January 2006. The learned trial judge pointed out to the jury that in the 2005 financial year no cheque was taken out, and two cheques amounting to about $19,000 had been taken out in the last financial year of relevance. The judge instructed the jury – and there is no complaint about this – that the jury could look at that circumstance in determining whether it was satisfied, or had any doubt about the point, that an agreement of the kind alleged had been made.

[10] The fact that the directors had assisted another employee, by an apparent false recording of payments, certainly gave Ms Kiviranta's counsel matters for submission to the jury, repeated on this appeal. But that did not prevent the jury being satisfied beyond reasonable doubt that the directors were truthful when they denied having agreed to allow Ms Kiviranta to pay herself money from the company's trust account, actually payable to the company. That was the only direct evidence on the point, since Ms Kiviranta elected neither to call nor give evidence.

[11] There was some other evidence relevant to proof of dishonesty. A witness Wendy Fairhurst gave evidence of having searched for a record of the payment of the $10,800 cheque, the subject of count 6, into the company's general account. That witness rang Ms Kiviranta, who said she had mistakenly banked that cheque into the

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3 At AR 83.

company's GST account. That explanation was untrue. Later, Ms Kiviranta paid the amount of $10,800 by cheque into the company GST account.

[12] In the circumstances, it was open to the jury to be satisfied beyond reasonable doubt that she had been dishonest, as alleged. I would dismiss the appeal against the convictions.

[13] **HOLMES JA**: I have read and agree with the reasons of Jerrard JA, and with the order he proposes.

[14] **DUTNEY J**: I agree.