SUPREME COURT OF QUEENSLAND

CITATION:	*R v Burton* [2010] QCA 376
PARTIES:	**R** **v** **BURTON, Danny William** (applicant)
FILE NO/S:	CA No 189 of 2010 DC No 2027 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Application for leave s 118 DCA - Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2010
JUDGES:	Margaret McMurdo P, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where applicant pleaded guilty to stealing a sum of $70,000 from his then employer – where applicant stole the sum on money as payment for unauthorised work performed to the benefit of the complainant company – where applicant sentenced to two years imprisonment with court ordered parole after serving five months – where applicant's appeal to the District Court was dismissed – where applicant has applied for extension of time to file a notice of application for leave to appeal pursuant to s 118 of the *District Court of Queensland Act* 1967 (Qld) – where application filed three and a half months out of time – where applicant submitted that his was an exceptional case, with a low level of criminality, and a sentence of imprisonment was not an appropriate sentence – whether applicant demonstrated prospects of success on appeal – whether the learned District Court Judge failed to give effect to s 9(2) of the *Penalties and Sentences Act* 1992 (Qld) that imprisonment is a sentence of last resort – whether the justice of the case demands an extension of time

District Court of Queensland Act 1967 (Qld), s 118
Justices Act 1886 (Qld), s 222, s 223
Penalties and Sentences Act 1992 (Qld), s 9(2), s 12(1)

R v Allen [2005] QCA 73, considered
R v Alexander [2004] QCA 11, considered
R v Blackhall-Cain; ex parte A-G of Qld [2000] QCA 380, considered
R v Fisher [2002] QCA 259, considered
R v Hearnden [2002] QCA 258, considered
R v La Rosa; ex parte A-G (Qld) [2006] QCA 19, applied
R v Mara; ex parte Attorney-General of Queensland [1999] QCA 308, considered
R v Peters [1989] CCA 096, considered
R v Rees [2002] QCA 469, considered
R v Riesenweber; ex parte Attorney-General of Queensland [1996] QCA 504, considered

COUNSEL: The applicant appeared on his own behalf
D L Meredith for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Qld) for the respondent

[1] **MARGARET McMURDO P:** As White JA persuasively demonstrates in her reasons, the applicant has shown neither a satisfactory reason for delay in bringing his application for leave to appeal, nor that he has any prospect of success in such an application. The application for an extension of time to apply for leave to appeal should be refused.

[2] **FRASER JA:** I agree with the reasons for judgment of White JA and the order proposed by her Honour.

[3] **WHITE JA:** The applicant pleaded guilty in the Magistrates Court at Maroochydore on 25 June 2009 to one charge that between 1 November 2005 and 9 April 2008 being the clerk of the complainant company he stole a sum of money, the property of that company which had come into his possession on account of the company. He was sentenced by the Magistrate to two years imprisonment with a parole release order on 25 November 2009, that is, after five months. The applicant lodged an appeal pursuant to s 222 of the *Justices Act* 1886 which was heard in the District Court. The applicant had not applied for bail pending appeal and, by the time the appeal was heard, had served the five months. He was released on parole. The learned District Court Judge dismissed the appeal on 29 March 2010.

[4] The applicant has applied for an extension of time within which to file a notice of application for leave to appeal pursuant to s 118 of the *District Court of Queensland Act* 1967. The notice seeking an extension of time was filed on 13 August 2010 just over three-and-a-half months out of time.

Explanation for delay

[5] The applicant offers as an explanation for not abiding by the time limits stipulated in the Rules that the District Court Judge handed down his decision dismissing the

appeal at the beginning of the academic semester and that the applicant's contact hours at university were quite onerous, as was his preparation time. Although he states in his application that it would be unjust not to extend the time because his reputation and family life have suffered significantly as a consequence of his conviction and incarceration, he does not actually explain why he was unable to put in his notice in time. Nonetheless, if prospects of success can be demonstrated and the justice of the case demands it, there are no other features which would operate against an extension of time.

Circumstances of the offending

[6] The learned District Court Judge has set out a summary of the evidence that was before the Magistrate in his reasons for judgment.[1] There was some attempt to "alter" the facts which were said to be agreed before the Magistrate, which his Honour rejected in the absence of any application to adduce additional material. The applicant was employed by the complainant company as a financial manager on a contractual basis only. He had full control of the company's accounts, including access to internet banking through those accounts. During 2005 and 2006 he was contracted to work 15 hours per week only and to receive $645 per week remuneration. In 2007 he negotiated an increase in his working hours to 20 hours and was paid $845 per week. The applicant was told on numerous occasions that he was to work only those hours and no more.

[7] In April 2008 the directors of the complainant company discovered that over a three month period the applicant had paid himself $20,000 over his entitlements. At a meeting the applicant admitted paying himself the additional funds but said he did so because he performed additional work for the company which needed to be done. He acknowledged that he had no authority to perform the extra work nor to pay himself the additional recompense.

[8] In 2003 the applicant took over the lease payments on a motor vehicle previously used by the company. The arrangement was that the applicant would use the vehicle, maintain the lease payments and be responsible for the residual payment which was due in 2006. When it became due, the directors of the company told him that he was responsible for that payment. The applicant used company funds to pay the residual amount on the vehicle.

[9] Subsequent investigations revealed that the applicant, by internet bank transfers, had paid himself or companies through which he channelled his consultancies $70,000 of company funds to which he was not entitled. That $70,000 comprised $50,000 for extra hours worked and $20,000 for the residual on the car. The period of offending was approximately two-and-a-half years and involved approximately 100 separate transactions.

[10] The applicant had repaid the $70,000 to the complainant company prior to the hearing in the Magistrates Court

Grounds of application for leave to appeal pursuant to s 118

[11] The applicant seeks leave to appeal the District Court decision on the following grounds:

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1 *Burton v Mansfield***,** unreported, Martin SC DCJ, District Court of Queensland, No 2027 of 2009, 29 March 2010 at [8]-[14].

(a) there was an error of law in that the Magistrates Court and the District Court each failed to consider the mandatory requirements of s 9(2) of the *Penalties and Sentences Act* 1992 – imprisonment as a punishment of last resort;

(b) that his accepted lower level of criminality required other forms of punishment to be considered and the failure to consider those other forms of punishment was an error of law;

(c) that some material or "agreed" facts were given too much weight which resulted in a punishment that was unjust;

(d) that the comparable cases relied on to determine punishment were given incorrect weighting which resulted in a punishment that was unjust;

(e) that the level of significant mitigating factors required the consideration of a punishment other than imprisonment; and

(f) that the court gave too much weight to the submissions of the applicant's legal representative requiring a sentence of imprisonment.

Orders sought

[12] The applicant seeks orders, should he be granted an extension of time and leave to appeal his sentence, that his appeal be allowed; that the judgment below be set aside and that a sentence of 240 hours community service be imposed together with an order that he be of good behaviour for a period of four years pursuant to s 19(1)(b)(i) of the *Penalties and Sentences Act*; alternatively that a sentence of 12 months imprisonment be imposed with immediate release on probation and the usual parole conditions be amended to allow him to travel interstate and overseas without restriction for family and academic research purposes. In the further alternative, the applicant contends that a sentence of 12 months imprisonment suspended immediately with an operational period of 12 months with no travel restriction be imposed. The applicant also contends that the time served in custody be in lieu of community service, that he agrees to waive all rights, if any, to compensation and that no conviction be recorded pursuant to s 12(1) of the *Penalties and Sentences Act* 1992.

Hearing before the District Court

[13] An appeal to the District Court pursuant to s 222 of the *Justices Act* 1886 is by way of re-hearing on the original evidence given in the Magistrates Court.[2] In his reasons for decision, the learned District Court Judge noted that the prosecutor submitted before the Magistrate that while the guilty plea was late, it resulted from negotiations which were to be encouraged as there was a saving to the State. After the prosecutor mentioned a number of comparable decisions to the Magistrate, she contended for a penalty of two years imprisonment with release on parole after serving six months.

[14] The applicant's solicitor's submissions on penalty before the Magistrate were summarised by his Honour:[3]

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2 *Justices Act* 1886 (Qld), s 223.

3 At [17].

> "(a) The lower level of criminality in this case sets it apart from any other previous decision. Though unauthorised, the appellant paid himself for work performed to the benefit of the complainant company.
>
> (b) Full compensation was made prior to sentence. This, and other factors, reflected genuine remorse. It was unlikely that the appellant would re-offend.
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> (c) The appellant had excellent antecedents and an excellent work history.
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> (d) The appellant was in employment at the time of sentence and a sentence involving actual incarceration would have a severe impact on him, financially and otherwise.
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> (e) The appellant's wife had left him as a result of the offending but she was intending to re-unite with the appellant.
>
> (f) The offending was unsophisticated and not driven by greed or frivolous pursuits. It occurred during a period of turmoil in the appellant's life – he was endeavouring to provide for his family and therefore working long hours, but at the same time suffering from depression. It was submitted to the effect that all of these issues led to the appellant's error of judgment and out-of-character behaviour."

The applicant's solicitor submitted for a sentence of imprisonment to be imposed but that the applicant be released on parole immediately.

[15] The applicant argued in the District Court that a sentence of imprisonment was not the appropriate sentence but conceded that the submission made by his solicitor before the Magistrate made his job difficult on appeal.[4]

[16] His Honour summarised the factors which were mentioned by the Magistrate when passing sentence:[5]

> "(a) … cases of this type are difficult because they invariably involve a person who has been otherwise a good citizen.
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> (b) The appellant worked for the [complainant] company since 1992.
>
> (c) The appellant fell to be sentenced on the basis that he performed work for the company in excess of the hours contracted for.
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> (d) However, many workers perform work on behalf of the employer after hours (and without additional remuneration).
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> (e) The stealing did not involve a sophisticated method, but, nonetheless, it would have been difficult for the complainant company to discover the theft.

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4 T/S of 25 January 2010 before Martin SC DCJ, 1-24.

5 At [19].

(f) It was unfortunate that the appellant, instead of advising the company that the work he was required to do could not be completed in the time contracted for, decided to help himself to the money.

(g) The comparable decisions referred to by the prosecutor and the solicitor on behalf of the appellant.

(h) The theft occurred over some 26 months and involved $70,000.

(i) The appellant had repaid the entire sum of $70,000 and that feature would result in a significant reduction in the period of imprisonment to be served.

(j) The appellant was 52 years of age with no criminal history.

(k) The appellant was unlikely to re-offend.

(l) He had undertaken courses and studies "completely in another direction".

(m) The criminal conduct was completely out of character.

(n) The misconduct has resulted in an enormous impact on both the appellant and his family.

(o) There were early admissions to the employer and whilst there was some history to the charges, the change of charge had resulted in a plea of guilty which has meant a saving of court time."

[17] His Honour recorded that the Magistrate concluded:[6]

> "…that upon consideration of the comparable decisions, the appropriate range for this offence would be 2 to 3 years imprisonment and that, generally, an offender would be required to serve 6 to 9 months actual incarceration."

Taking into account the factors set out above, the Magistrate concluded that the appropriate sentence was two years imprisonment with a parole release date fixed after serving five months imprisonment.

Approach of the District Court

[18] His Honour noted that the applicant submitted that the sentence of imprisonment be set aside and a conviction not be recorded. He summarised those submissions:[7]

> "The learned Stipendiary Magistrate fell into error in determining that imprisonment was the only appropriate sentence. In arriving at her conclusion, Her Honour failed to consider other sentencing options and failed to have regard to the principles in s. 9(2)(a) of the *Penalties and Sentences Act* that a sentence of imprisonment should only be imposed as a sentence of last resort and that a sentence

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6 At [20].
7 At [23].

> which allows an offender to remain in the community is preferable. Further, Her Honour erred in that she did not consider any other sentencing option because she felt that she was required to impose a sentence of imprisonment as a result of the lack of a precedent indicating that a sentence other than imprisonment might be imposed."

[19] The applicant had argued that his case was to be distinguished from all other comparable decisions considered by the Magistrate because of the his lower level of criminality:[8]

> "That is, whilst the appellant stole the funds of his employer, the stealing was in the context of paying himself for unauthorised work done on behalf of the employer and therefore the employer also received a benefit from the misconduct. It was then argued that this factor, together with all of the other substantial factors in mitigation, including the plea of guilty and full compensation, warranted a sentence other than imprisonment."

[20] The applicant also submitted that as there had been no media coverage of the sentence there was no general deterrent effect and, therefore, the sentence of imprisonment was unwarranted. The applicant did not raise this feature before this Court.

[21] His Honour did note that this case involved a lower level of criminality than the cases considered by the Magistrate and most cases of stealing by a servant, but his offending was, nonetheless, "substantial".[9] His Honour noted that the applicant was a mature man, well aware that he had no authority to work additional hours, "let alone pay himself for the additional work",[10] and had paid himself for that work over a period of 26 months. Furthermore, the applicant had unlawfully paid the residual payment on a motor vehicle lease out of company money contrary to the agreement with his employer. There were approximately 100 separate dishonest transactions. His Honour described the offence as involving:[11]

> "… a gross breach of trust by an employee who had worked for the complainant company since 1992. The offending did not cease voluntarily. Irregularities were discovered by the complainant company leading to the appellant's downfall."

[22] His Honour emphasised that it was important not to attribute too much weight to the benefit the company obtained from the appellant's misconduct; the unauthorised additional hours were done because the appellant could not perform the allotted work in the hours contracted for. His Honour said:[12]

> "By secretly performing the additional hours and paying himself in full for that work, the company was unwittingly paying for work not budgeted for and the company was given no opportunity to restructure to address the problem. On the other hand, the appellant

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8 At [24].
9 At [27].
10 At [27].
11 At [27].
12 At [28].

> created for himself unauthorised employment with virtually infinite hourly remuneration.

His Honour observed that the offence was a serious one carrying a maximum penalty of 10 years imprisonment although, because it was dealt with in the Magistrates Court, that court's jurisdiction was confined to a maximum penalty of three years.

[23] His Honour acknowledged the direction in s 9(2)(a) and said:[13]

> "Whilst a sentence of imprisonment is one of last resort, the nature of the offending in this case is so serious that the only appropriate sentence was one of imprisonment."

He regarded the submission that a sentence other than of imprisonment be imposed was "entirely without merit".[14] His Honour referred to a passage which the applicant had cited from the judgment of Keane JA in *R v La Rosa; ex parte A-G (Qld):*[15]

> "It is clear that where an offender has abused a position of trust in order to steal a substantial amount of money over a lengthy period of time, a non-custodial sentence can only be justified in the most exceptional case."

The applicant had argued that his was an exceptional case. The reference to a "non-custodial sentence" in that passage was a reference to a sentence of imprisonment but one not involving actual incarceration. The respondent to an Attorney-General's appeal had been convicted on a plea of guilty of stealing some $51,000 over an approximately eighteen month period. She was sentenced to three years imprisonment wholly suspended and ordered to make partial restitution. This Court re-sentenced her, requiring her to serve nine months in actual custody of a three year head sentence.

[24] The learned District Court Judge accepted that in a most exceptional case of stealing as a servant, a sentence other than one of imprisonment may be appropriate. Keane JA in *La Rosa* noted that a non-custodial sentence had been imposed in *R v Blackhall-Cain; ex parte A-G of Qld,*[16] another case relied upon by the applicant. It, also, was an Attorney-General's appeal where there was unchallenged evidence of a psychiatric condition from which the offender had suffered at the time of offending. There were no actual losses to the employer.

[25] The applicant argued before his Honour that the Magistrate had fettered her discretion because she could find no authority for a sentence other than one of imprisonment for an offence of this kind. His Honour dealt with this argument by noting, correctly, that what the Magistrate was seeking was any precedent supporting the submission that no actual imprisonment be served. His Honour set out the relevant passage from the transcript in his reasons for judgment which amply supports that understanding. His Honour observed that it was unsurprising, given the nature of the offence and the amount of money involved, that the

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13 At [30].
14 At [30].
15 [2006] QCA 19 at [24].
16 [2000] QCA 380.

Magistrate sought a comparable decision to support the defence submission that a term of actual imprisonment not be imposed.[17] The learned District Court Judge concluded:[18]

> "There is nothing otherwise[19] which would suggest that the Magistrate proceeded on the basis that it was not within her discretion to impose a term of imprisonment without actual incarceration."

[26] His Honour said that the Magistrate identified an appropriate range of two to three yeas imprisonment and imposed a head sentence of two years at the bottom of that range. The Magistrate ameliorated the actual period of incarceration by reducing the period to be served before release on parole which would, in accordance with the usual practice in Queensland,[20] have been eight months after a plea of guilty on a two year term of imprisonment, by reducing the period of actual imprisonment to one of five months. The Magistrate had concluded that while there were significant mitigating factors, they did not warrant a sentence other than imprisonment. His Honour found no sentencing error.

Applicant's contentions as to why leave for this further appeal ought to be granted

[27] The applicant contended that, impermissibly, the Magistrate did not consider any other forms of penalty but imprisonment. He referred to the learned District Court Judge's statement "there was no doubt that a sentence of imprisonment had to be imposed in this case"[21] as a failure to give effect to s 9(2) of the *Penalties and Sentences Act*. The District Court Judge observed to the applicant in argument, that there was no requirement for the Magistrate to "think out loud" and reject other sentencing options if they clearly were not warranted. Sentencing guidelines are set out in s 9 of the *Penalties and Sentences Act*. They provide that the only purposes for which sentences may be imposed are –

- to punish the offender to an extent or in a way that is just in all the circumstances; or
- to provide conditions in the court's order that the court consider will help the offender to be rehabilitated; or
- to deter the offender or other persons from committing the same or a similar offence; or
- to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
- to protect the Queensland community from the offender; or
- a combination of two or more of the purposes mentioned.

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17 At [33].

18 At [33].

19 His Honour was referred to a comment by the Magistrate that the cases all concluded that an actual period of imprisonment *had* to be served and her acceptance that this was not so.

20 *R v PAA* [2006] QCA 56 at [14] per Jerrard JA; *R v Tez* [2007] QCA 227 at [80] per Mullins J; *R v Ungvari* [2010] QCA 134 at [30] per White JA.

21 At [31].

Punishment and general deterrence are the most relevant of the legislated purposes in respect of this offending.

[28] In his several writings to the court and in his oral submissions, the applicant plainly regards his conduct as a far from serious example of the offence of stealing as a servant. In his application for leave to appeal he wrote:

> "the appellant's level of criminality was at best nonexistent or at worse low when compared to the cases considered both at sentencing and on appeal and indeed, in most cases of this type".

[29] The *Penalties and Sentences Act* also provides in s 9(2) that in sentencing an offender a court must have regard to:

> "(a) principles that –
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> (i) a sentence of imprisonment should only be imposed as a last resort; and
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> (ii) a sentence that allows the offender to stay in the community is preferable; and
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> (b) the maximum and any minimum penalty prescribed for the offence; and
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> (c) the nature of the offence and how serious the offence was…"

It is the requirement that a sentence of imprisonment should only be imposed as a last resort and a sentence which allows the offender to stay in the community is preferable which is at the heart of the applicant's complaints about the sentence imposed in the Magistrates Court.

[30] The applicant referred to "strong and exceptional mitigating factors". These included that the applicant had done the work and "believed he had the necessary authority to pay himself" and included the income in his income tax return. This latter factor has been much emphasised by the applicant. He has not been charged with any tax related offences. It is irrelevant that he has not added that kind of offending to the offence with which he was charged. It is also not precisely accurate to say that he believed he had the necessary authority to pay himself. Technically, he had that capacity but if he believed that he was authorised to pay over-time to himself then he had committed no offence of dishonesty or, more correctly, that belief could have been tested at trial. There was no evidence he had that well-founded belief. Indeed, the facts on sentence were to the contrary, that he was limited to 15 hours per week and then to 20 hours.

[31] An aspect of the applicant's submissions was the lack of sophistication in his offending "and, therefore, criminality" by him. He transferred funds to a number of named companies or to himself by entering his initials in the accounts. Sometimes there was no description at all of the destination of the funds.[22] Perhaps by this submission the applicant means that had the directors searched the books and added up the hours, they would have discerned what was happening. The applicant had been with the company for 15 years and was responsible for all its bookkeeping. There was no particular reason for a more sophisticated set-up.

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22 T/S 1-15, 1-16.

[32] The applicant referred to the observation of Atkinson J in *R v Dance*:[23]

> "Subsection 9(2) provides a number of matters to which the court must have regard when sentencing an offender. The first of those is found in subsection 9(2)(a) which mandates that the court must have regard to the principles that a sentence of imprisonment should be imposed as a last resort and that a sentence that allows the offender to stay in the community is preferable."

The applicant emphasised the word "mandate". He accepted that sentencing is a balancing task between the various matters set out in s 9(1). He also submitted that since there was no likelihood of re-offending and that he was a person of good character, there was no need for parole supervision in order to assist in his rehabilitation. The burden of parole means that he cannot freely travel outside the State or overseas, which he regards as excessively burdensome.

[33] The applicant referred to *R v Blackhall-Cain; ex parte A-G of Qld*[24] where a non-custodial sentence was not altered on an Attorney-General's appeal. The respondent was convicted on pleas of guilty on 23 offences of dishonesty involving just over $50,000. The offender was sentenced to two years imprisonment wholly suspended with an operational period of three years. The offences were committed by a 36 year old man who was a registered securities representative, which involved buying and selling shares for clients of his employer. No-one was out of pocket as a consequence of the offender's dishonesty and his career had been destroyed because he would be unable to carry on his former occupation for a period of six years. Each of the offences consisted of taking money in various ways, on the expectation that commissions were to become due to the offender by the employer and when paid, would exceed the sums misappropriated. That was identified as a mitigating feature. The other mitigating feature was the psychiatric opinion that at the time of the offences, the offender was suffering from reactive depression and alcohol abuse so that he might temporarily have met the criteria for a diagnosis of major depressive disorder. The applicant refers particularly to the factor identified by Pincus JA that there were monies which were to fall due from the commissions to cover the misappropriations. The applicant submits that the similarity with his case is that he actually did the work and was entitled to be paid. This demonstrates a significant misunderstanding of his offending. He did the work but he was not entitled to be paid. He was expected to work within the 15-20 hour parameters and this he knew and understood.

[34] The applicant also refers to *R v Riesenweber; ex parte Attorney-General of Queensland*.[25] The offender pleaded guilty to misappropriation of $40,000 as an employee for which she was sentenced to three years imprisonment wholly suspended with an operational period of four years. She was a receptionist/secretary for a dentist and one of her duties was to receive professional fees for dental work. Suspicions were aroused and cash losses noted. Eventually the offender co-operated with police. The offending occurred between 1987 and 1994. The money had been repaid by raising a loan on her family home. The offender was injured immediately prior to sentencing and her condition led the sentencing judge to observe that he would otherwise have sentenced her to a period of imprisonment.

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23 [2009] QCA 371 at [23].

24 [2000] QCA 380.

25 [1996] QCA 504.

The applicant quoted the following passage from the decision of Thomas J (as his Honour then was):[26]

> "What then are the factors which need to be weighed in identifying this particular case as one which requires custody or as one where the discretion of the sentencing Judge was wide enough to permit a non-custodial sentence?"

His Honour set out the personal circumstances of the offender: being of good character, married with a family, genuine remorse, lost her job, suffered shame and loss of reputation. His Honour noted:[27]

> "Previous decisions of this Court show that while it is uncommon for persons who misappropriate sums of this order not to be required to serve some part of the sentence by actual custody, it is by no means impossible."

His Honour noted that an Attorney-General's appeal was not an occasion for substituting a sentence which the court might have imposed or a sentence which would have been preferable. He described the sentence as "marginal" and the offender as "undoubtedly fortunate", both in the timing of the injury which she suffered and the non-custodial result. The decision is not, therefore, a promising one for the applicant.

[35] The applicant also referred to *R v Mara; ex parte Attorney-General of Queensland*.[28] He particularly relied on the following passage in the judgment of the President and Thomas JA:[29]

> "Ordinarily the commission of such offences would warrant a term of actual imprisonment both as a personal deterrent and also as a general deterrent to others. There are however special circumstances in the present case which justify the full suspension of the sentence that was imposed."

That was a particularly unusual case. The offender was sentenced to imprisonment for two years wholly suspended for a period of three years. Her offending involved a general deficiency of some $34,000 and certain electricity cards to the value of $1,000 to the Commonwealth Bank. The offender was a member of an Aboriginal community in far north Queensland employed to run an agency of the bank in that community. She had minimal training and she was responsible for bookkeeping, money management and all other aspects of the agency. She used some of the money herself and lent other money and electricity cards to local people when asked. The offender had been subjected to cultural pressure to distribute the money and cards. The Attorney-General contended that the sentence should have required the offender to serve actual time in prison. It is unnecessary to canvass those facts further as the court recognised that the facts were most unusual. The whole amount of the money had been repaid to the bank through a community insurance scheme. Had the offender been a Caucasian female who had committed a similar offence in the general community this court accepted that a two to three year head sentence

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26 Ibid at 4-5.
27 Ibid at 5.
28 [1999] QCA 308.
29 Ibid at [18].

with some months actual time to be served would have been an appropriate sentence. The court did note that it was "by no means impossible" for a non-custodial term to be ordered in such a case, referring to *Riesenweber*.

[36] Counsel for the respondent referred this Court to the "stealing as a servant" schedule of comparative sentences. As is so often the case, there are none with facts that are identical or even closely similar to the present. There are, however, certain observations and themes which make comparison possible. In *Re Lawrie*,[30] Ann Lyons J quoted from the decision of Williams JA in *R v Alexander*[31] where his Honour said:[32]

> "Each case has to be considered in the light of its own peculiar facts; all one can say is that the amount of money lost and the regularity of offending will always be relevant considerations."

In *R v Peters*,[33] the offender was in a position of trust at a bank. He employed complex fraudulent methods to conceal taking just over $10,000 over a four month period. He took the money due to a gambling problem. At the time of sentence all the money had been repaid. He was sentenced to three years imprisonment with parole recommended after 12 months.

[37] The sentence in *R v La Rosa* which is in the schedule, has been discussed above.

[38] In *R v Rees*,[34] the offender worked as a real estate sales person and over three years embezzled over $51,000, of which $23,852 was outstanding. There were numerous personal mitigating features including a seriously ill husband but the misappropriation was systematic and had taken place over a lengthy period. The offender's appeal was allowed and a sentence of three-and-a-half years imprisonment suspended after 15 months for an operational period of three-and-a-half years was altered to three years imprisonment suspended after nine months with an operational period of three years.

[39] In *R v Hearnden*,[35] the offender processed 507 fraudulent transactions over a period of seven months as a customer returns clerk and thereby obtained $70,944. There was an early plea of guilty with no prior convictions and full admissions and an undertaking to pay the balance of the money if able to return immediately to the workforce. The sentence of three years imprisonment suspended after nine months with an operational period of five years was altered on appeal to three years imprisonment suspended after six months with an operational period of three years.

[40] *R v Riesenweber* is another case on the schedule which has already been mentioned.

[41] The applicant referred to observations in *Veen v The Queen [No 2]*.[36] Wilson J observed that:[37]

> "The decision in the case [*Veen v The Queen*] stands as authority for the proposition that a sentence should not exceed that which is

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30 [2008] QCA 97.
31 [2004] QCA 11.
32 Ibid at [25].
33 [1989] CCA 096.
34 [2002] QCA 469.
35 [2002] QCA 258.
36 (1988) 164 CLR 465; [1988] HCA 14.
37 Ibid at 486.

> appropriate to the gravity of the crime considered in the light of its objective circumstances. In other words, the punishment must fit the crime."

It is the applicant's contention that he has been punished beyond the circumstances of his crime.

[42] In *R v Allen*,[38] a case to which the applicant referred, the offender had pleaded guilty to dishonestly applying to his own use a number of cheques, credit cards and items in the vicinity of $66,000 belonging to his employer over a four year period. He was sentenced to four years imprisonment suspended after he had served 15 months with an operational period of five years. In considering comparable sentences Jerrard JA, with whom the other members of the court agreed, referred to *R v Hearnden*[39](discussed above) and the decision of *R v Fisher*[40] where an offender had pleaded guilty to stealing cigarettes valued at $83,000 over a 12 month period. He had a compulsive gambling addiction but had made restitution of some $53,000 within one month of the date of sentence. The sentence of three years imprisonment suspended after six months was not disturbed. Justice Jerrard noted that the court in *Fisher* had remarked that the sentence was toward the lower end of the range for an offence of that type. After discussing other cases, his Honour observed:[41]

> "Restitution in full is a means of demonstrating that crime need not pay and sometimes does not pay and restitution can also be evidence of remorse quite independently from the benefit that it gives to the victim. That benefit is appropriately extended to the person being sentenced usually by significant reduction in any actual term of imprisonment imposed."

His Honour observed that the offender's significant position of trust meant a head sentence of four years was appropriate and because restitution in full was made possible by the sale of the family home, this meant that the period of actual imprisonment to be served was manifestly excessive when compared to other decisions. The offender was ordered to serve nine months of the four year sentence. In her reasons the President observed:[42]

> "Whilst Courts would never allow wealthy offenders with the capacity to pay compensation to buy their way out of an appropriate custodial sentence, restitution is, as the respondent concedes, a relevant mitigating factor in that it compensates the victim and benefits society and is often, as here, a tangible demonstration of genuine remorse."

[43] The learned District Court Judge noted that too much emphasis ought not be placed on the complainant company being the recipient of extra work by the applicant. The applicant was expressly told not to work more than a certain number of hours per week. Had he worked the extra hours because he needed to complete his tasks, he was not bound to pay himself for that over-time. There were other options.

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38 [2005] QCA 73.
39 [2002] QCA 258.
40 [2002] QCA 259.
41 [2005] QCA 73 at 11.
42 Ibid at 12.

He could have discussed the matter with the directors. That he did not do so tends to suggest that he was aware that they would not have authorised the extra hours. It was a long period of offending and it was in respect of a significant sum of money, whether it be characterised as $50,000 for extra work and $20,000 for the car or in the total of $70,000. There was a significant level of trust reposed in him. He was a person who had been with the company for a very long time. In those circumstances, his breach of trust was more significant than for a more transient worker.

[44] There is nothing that the applicant has pointed to in the authorities or flaws in the approach to sentencing by the Magistrate or the approach of the District Court Judge to the hearing *de no*vo of that sentence which identifies any error of law or any discretionary error by their honours. The applicant has no doubt suffered personally as a consequence of being charged with this offence and enduring the penalty imposed. That is an aspect of punishment. It is not easy to discern any remorse now (even though the courts below accepted that he was remorseful and had written an apology to the company) by the applicant for his wrong doing. His submissions demonstrate that he struggles to accept that he was guilty of any offence at all. This has led him to the erroneous position of submitting, not only that no custodial sentence ought to have been imposed, but also that no conviction should have been recorded. As both the Magistrate and the learned District Court Judge recognised, this was a serious breach of trust by the applicant involving large amounts of money. The important mitigating features were the plea of guilty, no previous criminal history and otherwise good character and work history and full recompense made to the complainant company. These were recognised in a head sentence towards the bottom of the applicable range and an earlier than usual parole release order. No error can be discerned.

[45] I would refuse the application for an extension of time because there is no merit in the application for leave to appeal should that application itself be granted.