SUPREME COURT OF QUEENSLAND

CITATION:	*R v Matauaina* [2011] QCA 344
PARTIES:	**R** **v** **MATAUAINA, Leafaitulagi** (applicant)
FILE NO/S:	CA No 92 of 2011 DC No 763 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	29 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	21 October 2011
JUDGES:	Margaret McMurdo P, Fraser JA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal against sentence is granted.** **2. The appeal is allowed.** **3. The sentence is varied by setting aside the order that the applicant pay compensation in the sum of $27,080 to Black & White Cabs Pty Ltd.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was found guilty after a trial of dishonestly obtaining money from her employer – where the applicant was sentenced to three and a half years imprisonment with parole eligibility after serving one half of that term – where the applicant argued that the sentencing judge was led into error by defence counsel's failure to dissent from the range contended for by the prosecutor – where the sentencing judge ordered the applicant to pay compensation without hearing submissions – where the applicant argued that the imposition of the compensation order rendered the sentence manifestly excessive as a result of the serious consequences which might follow if the applicant is unable to pay – where the applicant argued that she was denied procedural fairness by the imposition of the compensation order – whether the sentence

imposed is manifestly excessive – whether the compensation order ought to be set aside

Penalties and Sentences Act 1992 (Qld), s 35, s 36(1)(c)
State Penalties Enforcement Act 1999 (Qld), s 34, s 36, s 62, s 104, s 119, s 155

In re Hamilton; In re Forrest [1981] AC 1038, cited
Kirk v Industrial Court (NSW) (2009) 239 CLR 531; [2010] HCA 1, cited
R v Docherty [2009] QCA 379, considered
R v Ferrari [1997] 2 Qd R 472; [1997] QCA 73, cited
R v Frame [2009] QCA 9, cited
R v Grant-Watson [2004] QCA 77, considered
R v Jeffree [2010] QCA 47, considered
R v Robinson; ex parte A-G (Qld) [2004] QCA 169, considered
R v Scott [1997] QCA 300, considered
R v Shillingsworth [2002] 1 Qd R 527; [2001] QCA 172, cited
R v Silasack [2009] QCA 88, cited
R v Vinson [2002] QCA 379, considered
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, applied

COUNSEL: K Prskalo for the applicant
R G Martin SC for the respondent

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

[1] **MARGARET McMURDO P:** This application for leave to appeal against sentence should be granted and the appeal allowed to the extent of setting aside the order that the applicant pay compensation. I agree with Fraser JA's reasons and proposed orders.

[2] **FRASER JA:** After a trial which occupied four days in the District Court, the applicant was found guilty by a jury of an offence against s 408C(1)(b) and (2)(b) of the *Criminal Code* 1899 (Qld), that between 11 August and 4 November 2008 she dishonestly obtained money from Black & White Cabs Pty Ltd, with the circumstance of aggravation that she was an employee of that company. A conviction was recorded and the applicant was sentenced to three and a half years imprisonment with a parole eligibility date fixed at 31 December 2012 (after serving one half of the term of imprisonment). It was ordered pursuant to s 35 of the *Penalties and Sentences Act* 1992 (Qld) that the applicant pay compensation in the sum of $27,080 to be transmitted to Black & White Cabs Pty Ltd, with a reference to the State Penalties Enforcement Registry.

[3] The applicant has applied for leave to appeal against the sentence on the ground that it was manifestly excessive. I will discuss that ground after I have first summarised the circumstances of the offence and the applicant's personal circumstances.

[4] At the time of the offence the applicant was the supervisor of the company's fleet services and she had been an employee of the company for some time before the

offence. She committed the offence over a period of about three months. She took $27,080 from a cash float and engaged in a complex process to cover that theft. I will briefly explain what this involved.

[5] Most passengers who use the taxis associated with the company paid either in cash or electronically, in the latter case using cards, including Cabcharge cards. The company's system provided for drivers to use manual dockets when Cabcharge cards were used and where the case was exceptional, such as when the electronic processing did not work. Some drivers could receive cash payment for the dockets from the company by taking them to the company. The company would pay the face value of the dockets less a percentage representing an administration charge. The company could then obtain reimbursement from Cabcharge, which was based interstate and which was ultimately responsible for paying the drivers.

[6] A cash float was kept at the company's premises to enable it to pay the face value of the dockets. The details of the dockets were entered into the company's computer system. One of the applicant's responsibilities was to reconcile the cash float with the dockets that the company's employees had paid at the end of each day. In the relevant period her reconciliations were always successful, within trivial limits. As part of that reconciliation process, the applicant batched the dockets together and prepared a header sheet, which was generated from details entered into the company's computer system and which should have totalled the value of the batched dockets. Another section within the company would receive that material and reconfigure it for despatch to Cabcharge at the end of every month. Cabcharge received the original dockets. The weakness in the system was that no one else within the company reconciled the original dockets with the header sheets created by the applicant.

[7] After the money was remitted by Cabcharge to the company it was discovered that the amounts received did not tally with the header sheets. In other words, the company had paid out as cash, apparently to drivers, more than the company was reimbursed by Cabcharge. The applicant had entered what purported to be details of dockets into the company's computer system to cover the shortfall, but those dockets did not exist. The respondent submitted, accurately, that this attempt at concealing the fraud required substantial effort and creativity by the applicant, but that some imperfections in her scheme led to her being identified as the culprit.

[8] In the course of argument the sentencing judge, who was the trial judge, observed that the offence was always going to be discovered, but added that the applicant may not have understood that Cabcharge only paid on dockets and not on the summary which she prepared.

[9] The applicant was 41 years of age when she committed the offence and 44 years of age when she was sentenced. She had a criminal history. She had been sentenced to probation in 2000 and again in 2002. On the first occasion the applicant was convicted of assault occasioning bodily harm, involving excessive force in disciplining a child. On the second occasion she was convicted of common assault. More relevantly, in 2004 the applicant was sentenced to an aggregate period of imprisonment of two and a half years to be released after serving five months upon entering into a recognizance to be of good behaviour for three years. She was also ordered to pay $76,203.03 reparation to the Commonwealth. She had defrauded the Commonwealth in 2000 and 2001, causing a total loss of nearly $110,000, of which she had personally received about $37,000. The applicant had held herself out to

the Samoan community as a person who could prepare taxation returns and obtain large refunds. She submitted 30 taxation returns containing false information which caused the Commonwealth to pay larger refunds than the taxpayer was entitled to receive. She had persisted in her offending in the 2001 year, changing her *modus operandi* after investigators first spoke to her.

[10] The applicant did not mount any substantial challenge to the evidence adduced against her at the trial but she argued that the jury might not find that the evidence satisfied them beyond a reasonable doubt of her guilt. The sentencing judge observed that the evidence against the applicant was very strong and any verdict other than a conviction was hardly likely. The sentencing judge referred to the applicant's personal circumstances, the period and amount taken in the offence, and the applicant's prior conviction for a fraud type offence. His Honour remarked that the offending was regarded seriously and that the applicant had breached the trust which businesses should be able to repose in their employees.

Consideration

[11] The maximum penalty at the time of the commission of the offence was 10 years imprisonment. Section 408C was amended by Act No 55 of 2008 (*Criminal Code and Other Acts Amendment Act* 2008 (Qld), s 71(1)) which came into force on 1 December 2008.[1] That amendment increased the maximum penalty to 12 years imprisonment.

[12] At the hearing before the sentencing judge the prosecutor referred to *R v Jeffree*[2] and *R v Scott*[3] and submitted that the range of appropriate sentences was three and a half to four years imprisonment. Defence counsel referred also to *R v Caldwell*[4] and submitted that nothing in the cases supported a less severe sentence than three and a half years imprisonment.

[13] In this Court, the applicant's counsel submitted that the sentencing judge was led into error by defence counsel's failure to dissent from the range contended for by the prosecutor. The correct analysis is instead that the applicant must face a difficult task in seeking to establish that the sentence imposed upon her was manifestly excessive when the sentence accorded with her counsel's submission before the sentencing judge.[5]

[14] The applicant's counsel also submitted that the sentencing range in cases of dishonesty against employers involving similar amounts of monetary loss was two to three years imprisonment. Counsel cited numerous decisions which were relied upon to support that proposition. In particular, the applicant's counsel submitted that *R v Rees*,[6] *R v Hearnden*,[7] *R v Fisher*,[8] *R v La Rosa*,[9] *R v Lawrie*,[10] *R v Allen*,[11]

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1 SL No 386 of 2008.
2 [2010] QCA 47.
3 [1997] QCA 300.
4 [1990] CCA 276.
5 See *R v Frame* [2009] QCA 9 at [5] - [6].
6 [2002] QCA 469.
7 [2002] QCA 258.
8 [2002] QCA 259.
9 [2006] QCA 19.
10 [2008] QCA 97.
11 [2005] QCA 73.

R v Burton,[12] and *R v Thacker*[13] established a "broad range" of two to four years imprisonment for dishonesty offences involving amounts over $50,000, and that *R v Robinson*,[14] *R v Vinson*,[15] *R v Docherty*,[16] and *R v Jeffree*[17] established that, for offences of dishonesty involving amounts up to $50,000, the sentence range is two to three years imprisonment.

[15] It is necessary to discuss only the decisions cited for the last proposition. In *Robinson*, the Attorney-General appealed against a sentence of six months imprisonment, wholly suspended for an operational period of two years, and $28,928.74 compensation to be paid within three months or in default imprisonment for six months. The offender had dishonestly obtained just over $33,000 over a period of about 14 months. In allowing the appeal, McMurdo P (Chesterman and Atkinson JJ agreeing) took into account in the offender's favour that he had pleaded guilty, cooperated with the administration of justice, had a prior good history, was well thought of by past and current employers, and cared for his elderly ill mother with whom he lived. The Court set aside the sentence imposed below, including the compensation order, and substituted a sentence of two and a half years imprisonment suspended after serving six months.

[16] In *Vinson*, the offender was a 25 year old man with no previous convictions for offending behaviour. He had dishonestly applied just over $24,500 to his own use over a period of about 10 months. The offender was sentenced to two years imprisonment suspended after six months. No restitution or compensation was ordered or voluntarily made by the offender. In refusing the offender's application for leave to appeal against sentence, Jerrard JA (Williams JA and Atkinson J agreeing) noted that the sentencing judge accurately described the offender as having cooperated with the police by making confessions and with the administration of justice by reason of his plea of guilty to an ex officio indictment.

[17] In *Docherty*, the offender was convicted of one count of stealing and one count of fraud. The offender stole a diamond ring valued at nearly $300,000, although she was unaware that its value was so great, and sold it to a jewellery dealer for $33,500. The Court allowed the offender's appeal against sentence, substituting a sentence of two years imprisonment with release on parole after serving six months, for the original sentence of three years imprisonment with release on parole after 12 months. In allowing the appeal, Holmes JA (myself and Daubney J agreeing) referred to the offender's cooperation (she had entered an early plea of guilty), her previous unblemished history, her poor health, and the personal circumstances in which she committed the offence. Her de facto husband was a drug user and a gambler who had run through what money they had, she had been forced into a disadvantageous sale of a business, and she had spent the next year nursing her terminally ill aunt before she began the employment in which she had committed the theft. After being interviewed by the police she had attempted suicide.

[18] In *Jeffree*, the offender was sentenced to three years imprisonment, suspended after serving nine months for an operational period of three years, for dishonestly

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12 [2010] QCA 376.
13 [2010] QCA 168.
14 [2004] QCA 169.
15 [2002] QCA 379.
16 [2009] QCA 379.
17 [2010] QCA 47.

obtaining about $43,500 from his employer. The sentencing judge took into account that the offender had no criminal history, had cooperated with the authorities and pleaded guilty, had made admissions to his employer, voluntarily attended upon the police and made full admissions in a police interview, was the sole bread winner for a family with three young children, had prospects of re-employment upon release from prison, suffered from a gambling habit which consumed his wages and he took the money in order to maintain his family, had voluntarily desisted from further perpetrating the fraud shortly before it was uncovered, and since committing the fraud had undertaken counselling with a psychologist and had made positive steps with respect to his gambling addiction. Daubney J (myself and Peter Lyons J agreeing) did not consider the sentence to be manifestly excessive.

[19] In each of those decisions the offender pleaded guilty and cooperated with the administration of justice. The applicant could not claim any such mitigating circumstances and nor could she invoke any personal circumstances which were as compelling as those relied upon in most of the cited decisions. Furthermore, in none of those decisions did the offender have a relevant criminal history. For these reasons, those decisions did not limit the sentencing discretion in this case.

[20] It was submitted for the applicant that her previous criminal history justified a sentence at the higher end of the range, but not beyond the range. A flaw in that submission is that it focussed upon the criminal history to the exclusion of other relevant circumstances. The submission also begged the question as to the appropriate range in a case in which an offender has earlier been convicted of a serious offence of dishonesty. An offender's criminal history cannot justify a sentence which is out of proportion to the gravity of the offence, but the criminal history may be taken into account both in assessing any claim for leniency and in deciding whether considerations such as retribution, deterrence, and protection of society indicate that a more severe penalty should be imposed.[18] In this case, the applicant's criminal history increased the significance of personal deterrence and retribution.

[21] The respondent submitted that the range in this case extended at least as high as four years when regard was had to cases such as *R v Grant-Watson*[19] and *R v Scott*.[20] I accept the submission. In *R v Scott*, the offender was convicted after a trial of making false entries with intent to defraud. The loss exceeded $48,000. The offender was a 48 year old man with a criminal history which included convictions for dishonesty. A sentence of four years imprisonment was held to be not manifestly excessive.

[22] In *R v Grant-Watson*, the offender pleaded guilty to dishonestly applying to her own use money held on account of her employer, and dishonestly applying to her own use cheques belonging to a Parents and Friends school committee of which she was treasurer. She took nearly $28,000 from the school committee, paid about $19,500 of that to her employer, and took about $37,000 from her employer from which she paid about $7,500 to the school committee. She repaid some of the money to the committee and to the employer, leaving a total balance outstanding of some $19,000. The offender was aged 36 and 37 at the time of the offences, and was

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18 See *Veen v The Queen [No. 2]* (1988) 164 CLR 465 at 477 - 478.

19 [2004] QCA 77.

20 [1997] QCA 300.

married with two school-going children. She had a "not inconsiderable criminal record of offences of dishonesty", including convictions in 1985 and 1993 for which she was sentenced to imprisonment for six months, and three years suspended after six months, respectively. After those convictions she was convicted of another offence of dishonesty in 1999, for which she was fined in the Magistrates Court. McPherson JA (with whose reasons Davies and Williams JJA agreed) accepted that the offender's affective or depressive order, which approached the level of mental illness, justified a reduction in the sentence, but observed that she was not entitled to be treated leniently on every occasion on which she came before the Court, having served a sentence which was designed to encourage her to mend her ways. That offender was sentenced to concurrent terms of imprisonment of four years to be suspended after 18 months for a period of four and a half years. McPherson JA described the sentence as "if anything lenient compared with others in similar circumstances".

[23] The applicant's counsel sought to distinguish *Scott*, on the ground that it involved a significantly greater amount, and *Grant-Watson*, on the ground that the offender had a more significant criminal history. Those factors are reflected in the sentences of four years imprisonment imposed in those cases. In light of those decisions it is difficult to sustain the contention that the sentence of three and a half years imprisonment in this case was outside the sentencing judge's discretion. Subject only to considering the effect of the compensation order, the sentence was not manifestly excessive.

[24] The applicant's counsel submitted that the sentence was rendered manifestly excessive by the inclusion of the compensation order, and that the imposition of that order denied her procedural fairness.

[25] If the complaint about procedural fairness is made out, the compensation order must be set aside. Because such an order would adversely affect the interests of the beneficiary of that order, Black & White Cabs Pty Ltd, that company was entitled to be given an opportunity to be heard upon the question whether the order should be set aside.[21] Accordingly the registrar was directed to notify the company of its entitlement to make submissions directed to this question. On 22 November 2011 the company replied to the registrar that it did not wish to make any submissions.

[26] Senior counsel for the respondent acknowledged that the principles of procedural fairness apply in sentencing, including in relation to an order for compensation made under s 35 of the *Penalties and Sentences Act*. One of those principles is that a person is entitled to "adequate notice and opportunity to be heard" before any judicial order is pronounced against the person so that the person, or someone acting on that person's behalf, may make representations about the proposed order.[22] So far as the record reveals, no notice was given to the applicant that a compensation order might be made. Senior counsel for the respondent did not contradict the submissions for the applicant that no such notice was given and that compensation orders are not generally made in the District Court without an application for such an order being made by the prosecutor. There was also no submission or evidence at the sentence hearing about the capacity of the applicant to pay any compensation which might be ordered. In these circumstances, the Court should proceed on the

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21 *R v Ferrari* [1997] 2 Qd R 472 at 479 per McPherson JA (Davies JA and White J agreeing).

22 *In re Hamilton*; *In re Forrest* [1981] AC 1038 at 1045 per Lord Fraser of Tullybelton, referred to in *R v Kitson* [2008] QCA 86 at [22] - [23].

footing that the applicant had no notice or opportunity to be heard about the appropriateness of making the compensation order. That being so, the applicant is entitled to have the compensation order set aside if it was materially adverse to her interests.

[27] At the hearing of the application it was initially submitted on behalf of the respondent that the inclusion of the compensation order did not materially affect the applicant because she was in any event legally obliged to repay the money to her employer. Because neither counsel was then in a position to make submissions about the effect given to a compensation order by the *State Penalties Enforcement Act* 1999 (Qld) ("*SPEA*") the Court gave the parties leave to file a written submission dealing with that point. Counsel subsequently provided a helpful joint submission. The joint submission was to the effect that the compensation order did not merely provide the applicant's employer with a summary remedy to enforce her existing civil liability; it also exposed her to the prospect of serious, adverse consequences, extending to a further term of imprisonment, if she is unable to pay or for any other reason fails to pay the compensation.

[28] Section 35 of the *Penalties and Sentences Act* empowers a court to order an offender to make restitution or pay compensation in certain circumstances. Pursuant to s 36(l)(c) of the *Penalties and Sentences Act* a court may order that the proper officer of the court is to give particulars of the amount of the restitution or compensation to "SPER" (the State Penalties Enforcement Registry) for registration under s 34 of *SPEA*. In any event, s 34(2A) of *SPEA* provides that the court registrar may give to SPER for registration the prescribed particulars of an unpaid amount of restitution or compensation which the court has ordered under s 35 of the *Penalties and Sentences Act*.[23]

[29] Upon registration, SPER becomes responsible for collecting the debt.[24] Pursuant to s 34(4), the registrar may issue an enforcement order or an enforcement warrant against the person for the unpaid amount. Pursuant to s 36, if a person served with an instalment payment notice fails to pay within the time allowed, the registrar may cancel the instalment payment notice. Upon cancellation the registrar must issue an enforcement order for the total of the unpaid amount.[25] The enforcement debtor must pay the amounted stated in the order in full to SPER or apply to pay by instalments within 28 days of the date of the order.[26]

[30] Under Pt 4, Div 4, in the event of default after an enforcement order, the registrar may issue an enforcement warrant or an arrest and imprisonment warrant for the balance of the unpaid amount stated in the enforcement order or instalment payment notice. Pt 5 of *SPEA* then deals with civil enforcement of the debt. Pt 5 does not prevent the issue of an arrest and imprisonment warrant.[27] Under Pt 5, Div 2, an enforcement warrant authorises the seizure and sale of real or personal property. Pt 5, Div 7 provides for the suspension of the person's driver licence.[28] Pt 5, Div 7A authorises enforcement by vehicle immobilisation.

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23 Section 34 of *SPEA* also applies in that way to other orders, including for fines for an offence and for payment of amounts on the forfeiture of a recognisance.

24 *SPEA*, s 35(2)(b).

25 *SPEA*, s 37.

26 *SPEA*, s 41.

27 *SPEA*, s 62.

28 *SPEA*, s 104.

[31] Pt 6 authorises enforcement by imprisonment. The registrar may issue an arrest and imprisonment warrant.[29] Section 52A sets out the method of calculating the period of imprisonment;[30] in effect, each day of imprisonment is treated as payment of $100 of the debt. Accordingly, if the applicant does not pay any of the compensation she has been ordered to pay, she may be imprisoned for 270 days.[31]

[32] The Court was informed that SPER administratively applies the remedies hierarchically in the following order until the debt is recovered: firstly by suspension of the person's driver licence, secondly by conducting property searches for prospective seizure and sale, thirdly by either seizing or immobilising vehicles, and, as a last resort, enforcement by imprisonment. Ultimately, however, the effect of s 119(1) and s 119(2) is that a debtor may be imprisoned either if the registrar of SPER (a public servant employed pursuant to s 10) is satisfied, after attempting to enforce an enforcement warrant or immobilisation warrant against the debtor, that the unpaid amount cannot be satisfied in any other way authorised under *SPEA*, or if the registrar issues an instalment payment notice or fine collection notice or makes a fine option order for an enforcement debtor after attempting to enforce an enforcement warrant or immobilisation warrant and the debtor fails to comply with the notice or order.

[33] Section 155 of *SPEA* provides that the decision to issue an arrest and imprisonment warrant is non-reviewable. That could not exclude the Supreme Court's jurisdiction to review any arrest, imprisonment, or other executive action for jurisdictional error,[32] but *SPEA* does not give the sentencing court or any other court the power to review the merits of any executive decision, including any decision to arrest or imprison a debtor. Thus the consequences for a debtor of non-payment, even if that is merely a consequence of poverty, might extend to the imposition of a further term of imprisonment without any intervention by the sentencing court.

[34] No party submitted that the legislation was constitutionally invalid.[33] Accordingly, the Court should proceed on the footing that a consequence of the legislation is that the applicant may be imprisoned for up to 270 days if she defaults in payment of the compensation she has been ordered to pay. The conclusion is inevitable that the applicant was adversely affected by the order and the adverse consequences extended well beyond the mere summary enforcement of her existing civil liability. Because the applicant was not given any notice or opportunity to be heard about this order at the sentence hearing, the compensation order must be set aside.

[35] For that reason, and in the absence of any fresh application for any similar order upon notice to the applicant, it is not necessary to decide whether the effect of the order was to render the sentence manifestly excessive. Nevertheless I should briefly discuss the respondent's submission that the compensation order was severable

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29 *SPEA*, s 119.

30 By reference to *SPEA*, Sch 2 and the *State Penalties Enforcement Regulation* 2000 (Qld), s 27A(1).

31 $27,080 ÷ $100 = 270.8; s 52A would require that number to be rounded down and expressed as 270 days.

32 See *Kirk v Industrial Court (NSW)* (2009) 239 CLR 531 at 580 [98] - 581 [100] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

33 The Court was not referred to any authority on this topic. A similar question, whether a State legislature may authorise a body other than a court to enforce the criminal law by ordering the detention of a person, was adverted to in *Fardon v Attorney–General (Qld)* (2004) 223 CLR 575 by McHugh J at [40] and in *South Australia v Totani* (2010) 85 ALJR 19 at 54 – 55 [146] – [147] by Gummow J (French CJ agreeing at [76]).

from and did not affect the issue concerning the length of imprisonment. As a matter of principle, that submission must be rejected. In *R v Ferrari*,[34] McPherson JA observed that an order under s 35, although part of the sentence or judgment, is not a form of punishment. Nevertheless, the potentially punitive consequences of such an order are certainly relevant in considering the appropriateness of the overall sentence.[35] The appropriateness of the term of imprisonment imposed by the sentencing judge cannot be considered in isolation from the consequence that an offender might be sent to prison for non-payment of compensation.

Proposed orders

[36] The appropriate orders are:

1. The application for leave to appeal against sentence is granted.
2. The appeal is allowed.
3. The sentence is varied by setting aside the order that the applicant pay compensation in the sum of $27,080 to Black & White Cabs Pty Ltd.

[37] **MARGARET WILSON AJA:** I agree with the orders proposed by Fraser JA and with his Honour's reasons for judgment.

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34 [1997] 2 Qd R 472 at 477.

35 See *R v Silasack* [2009] QCA 88 at [31] - [35], [49]; *R v Shillingsworth* [2002] 1 Qd R 527 at 528 [3] per Thomas JA.