Muir v Dixon [2006] NTSC 69

PARTIES:	MUIR, George Kevin v DIXON, Garnet Alan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 21 of 2006 (20422966)
DELIVERED:	18 September 2006
HEARING DATES:	1 August 2006
JUDGMENT OF:	OLSSON AJ
ON APPEAL:	Court of Summary Jurisdiction sentence, 18 April 2006

CATCHWORDS:

APPEAL – JUSTICES

Appeal against conviction – whether unsafe and unsatisfactory – whether findings of fact supported by the evidence – election of accused not to give evidence – inferences that may be drawn –

Appeal against sentence – whether aggregate sentence manifestly excessive – appellant not entitled to discount for an early plea – no indications of remorse – sentence not manifestly excessive – whether order for restitution ought to have been made – *Appeal allowed - Restitution order set aside*

RPS v The Queen (2000) 199 CLR 620,M v The Queen (1994) 181 CLR 487, Weissensteiner v The Queen (1993) 178 CLR 217, Gipp v R (1998) 155 ALR 15, Jones v R (1997) 149 ALR 598, applied.

REPRESENTATION:

Counsel:

Appellant:	In Person
Respondent:	R Noble

Solicitors:

Apellant:	In Person
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Muir v Dixon [2006] NTSC 69
No JA 21 of 2006 (20422966)

BETWEEN:

MUIR, George Kevin
Plaintiff

AND:

DIXON, Garnet Alan
Defendant

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 18 September 2006)

[1] This is an appeal against convictions recorded against the appellant by a stipendiary magistrate on 18 April 2006, following his trial on two charges of stealing.

[2] He had pleaded not guilty to the following counts:

- That, on 11 October 2002 at Alice Springs, he stole cash valued at $5,000, the property of Central Australian Junior Soccer Association (CAJSA); and
- that, on 9 January 2003 at Alice Springs, he stole cash valued at $4660, also the property of CAJSA.

[3] In his notice of appeal against convictions the appellant pleads five grounds, namely that:

(1) The findings of fact were not supported by the evidence;

(2) The learned magistrate misdirected himself in relation to the evidence generally and, in doing so, placed undue emphasis upon irrelevant matters and insufficient regard to relevant matters, rendering the verdict unsafe and unsatisfactory;

(3) The learned magistrate failed to properly consider material raised by the appellant in his final submissions;

(4) The learned magistrate failed to accord procedural fairness to the appellant, including refusing to allow the appellant to cross-examine the witness Blom on relevant issues; and

(5) The verdict was generally unsafe and unsatisfactory.

[4] The appellant further appeals against the orders made by the learned magistrate, consequent upon his convictions.

[5] The learned magistrate imposed an aggregate sentence of eight months imprisonment, suspended after service of three months, with an operative period of two years. He ordered that the appellant pay $9,660 by way of restitution to the Fines Recovery Unit, for payment out to CAJSA.

[6] The appellant complains that the sentence is manifestly excessive in the circumstances and that the order for restitution was inappropriate, in that it failed to recognise restitution that had already been made

Relevant background

[7] The appellant is said to be a man upwards of 50 years of age at the time of the first alleged offence. He was then employed by the Department of Employment, Education and Training on contract as an Executive Teacher, Level 2.

[8] The prosecution case was that, whilst holding office as the voluntary treasurer of the CAJSA, the appellant, without lawful authority, appropriated the sums of money referred to in the two counts from the funds of that association and applied them to his own purposes.

[9] Consequent upon the entry by the appellant of pleas of not guilty to the charges against him, a full trial on oral evidence was held before the learned magistrate. This extended over some six separate hearing days. The appellant was self represented and cross-examined the various witnesses called by the prosecution. He elected not to give evidence himself, but the prosecutor tendered a video record of interview that police had conducted with the appellant on 8 October 2004. There is no transcript of that interview, but I have viewed and listened to the original tape of it.

[10] The police had earlier conducted a separate video record of interview with the appellant on 17 July 2003, concerning certain other matters. This was not relied upon in relation to the charges against the appellant, although the appellant insisted on its production at the trial and sought to cross-examine

a police witness concerning certain matters related to it. It was not tendered and I have not viewed it.

[11] At the end of the trial, the learned magistrate invited the prosecutor and the appellant to make written submissions to him on the whole of the evidence and they subsequently did so, in lieu of oral addresses. On 18 April 2006 the learned magistrate expressed oral reasons for the conclusions to which he had ultimately come and recorded convictions against the appellant on both counts. Having regard to the issues arising on the appeal against convictions, it is necessary to recite those reasons *in extenso*.

[12] The learned magistrate said:

> "George Kevin Muir, the defendant has been charged with two offences of stealing in the following terms: Count 1 on 11 October 2002 at Alice Springs in the Northern Territory of Australia did steal cash to the value of $5,000, the property of Central Australia Junior Soccer Association and Count 2 on 9 January 2003 at Alice Springs in the Northern Territory of Australia did steal cash to the value of $4660 the property of Central Australia Junior Soccer Association, each count being contrary to s210 of the Criminal Code.
>
> It is incumbent upon the prosecution to prove each count beyond reasonable doubt. The prosecution must prove each element of the offences: namely,
>
> 1. That the defendant unlawfully stole;
>
> 2. The cash to the value of $9,660; and
>
> 3. It being the property of the Central Australia Junior Soccer Association (CAJSA).
>
> In the circumstances of this case by definition pursuant to s209 of the Criminal Code "steal" means unlawfully appropriates property of another with the intention of depriving that person of it. "Unlawfully" means without authorisation, justification or excuse.

"Appropriates" means assumes the rights of the owner of the property and keeps it or deals with it as owner.

"Depriving" means permanently depriving of, appropriating or borrowing property without meaning the person to whom it belongs permanently to lose the property. If the intention of the person appropriating or borrowing it is to treat the property as his own to dispose of (including to dispose of by lending or under a condition as to its return that he may not be able to perform) regardless of the rights of the person to whom it belongs. "Property" means everything inanimate, capable of being the subject of ownership including things in action or other intangible property. And "person" includes a body politic and a body corporate such as CAJSA.

Throughout the hearing of this matter, Mr Fay appeared for the prosecution and Mr Muir, the defendant appeared unrepresented. The case was heard on 17 March 2005, 17 May 2005, 17 [sic] July 2005, 16 September 2005, 28 November 2005 and 13 March 2006. The prosecution called a number of witnesses who were cross-examined by the defendant. The prosecutor also tendered a number of exhibits, P1 through to 8, during the proceedings. The defendant did not give evidence, but participated in a record of interview which, in these proceedings, is marked Exhibit P2, and I intend now to deal with the evidence of those witnesses as it appeared before me.

First of all, Stephen McKinlay gave evidence in the following terms: that he was involved in the junior soccer in Alice Springs before 2003 and in June 2002 he became the president of CAJSA. Prior to his election the defendant, so far as he was aware, was acting president and treasurer of the association. The financial position of the association after he became president was of concern. There were no financial reports being provided to the association and there were a large number of unpaid accounts and the balance of the account with the Westpac Bank of the CAJSA was not what it should have been.

A decision was made by the committee to relieve the defendant of the position of treasurer on 4 July 2003. Arrangements were then made by Mr McKinlay for PFA Moloney, Chartered Accountants to audit the accounts of the association. Following the disclosure of the cheques, which had been marked Exhibit P4, through the audit it is this witness’s evidence that there was no approval given by the association's committee for the drawing of the cheques and certainly no approval given for the cheques to be made payable to the defendant. This witness had no knowledge of the nature or purpose of those cheques.

Of course, I should say that there was a lot of evidence given by each of the witnesses to which I am not referring today, but I have taken it into account in my deliberation.

The next witness, Gregory Borchers. Mr Borchers was elected to the association's committee in 2002 on his evidence. He sat on the executive committee and the management committee. At each monthly meeting, apart from general business of the committee, the treasurer would present the accounts of the association which the management committee would authorise payment of. Amounts expended by individuals on behalf of the association in his experience never exceeded about $200 and the amounts on the cheques, Exhibit P4 had not been seen before in his experience.

Furthermore, by July 2003 the circumstances of the association's finances were a concern and there was a general feeling of crisis amongst the committee. The treasurer, namely the defendant, had not on at least three occasions presented the financial records of the association and a decision was made to remove the defendant from his position and report the matter to the police.

Barbara Glover gave evidence that at the dates of October 2002 and January 2003 Mrs Glover was no longer a member the committee of the association, but was still the public officer of the association and at those times she was still a cheque signatory upon the association's Westpac Account No 035303156731.

On two occasions in October 2002 and December 2002 or perhaps January 2003 the defendant visited this witness at her place of employment for her to sign cheques for payment of accounts by the association. On each occasion she signed one blank cheque and on no occasion did she sign any cheque made out to the defendant.

Rainer Holinghausen [sic] gave evidence that he was the treasurer of the association between 1997 and 2001 when he resigned and so far as he was aware he was replaced by the defendant who took over in September 2001. While he was treasurer the accounts were reconciled and then audited by PFA Maloney, Chartered Accountants. The association banked with Westpac. Money of the association was never banked into a personal account. Cheques were made out for the payment of accounts, but not without receipts and usually for amounts of no more than about $150.

Whilst treasurer, some funds were invested with the TIO, but documentation was available for the audit and it was very odd placing money into a personal account as it was unnecessary, in his view, as the association had its own account in which to place its

funds. He gave evidence that the defendant during the course of the proceedings had telephoned him concerning this particular case, seeking confirmation about pre-signing cheques and the defendant told this witness, amongst other things, that he had put them, namely the cheques into some sort of short-term investment thing but also, when it was put to him in cross examination, he said that the defendant did not mention to him that he had banked the money into his own account.

Lyn Blom gave evidence and following her appointment as treasurer for the association in July 2003 she undertook a reconciliation of the association's finances and the Westpac account. Mrs Blom is a bookkeeper of some 15 years experience and is, in my view, well qualified to undertake that task. She undertook the reconciliation by examination of the records provided to her by the police and once the books had been reconciled by her they were submitted to PFA Maloney, Chartered Accountants for audit.

It is Mrs Blom's evidence that, for the period between October 2001 and June 2003, there was in excess of $17,000 in takings unaccounted for and not banked, together with the two outstanding cheques marked Exhibit P4. No records given to this witness explained what the money drawn on the account by the cheques was for.

Karen Baronet [sic] was at that particular time a signatory on the association's account with Westpac and it was she who obtained copies of the cheques, which were marked MFIA in these proceedings. The copy cheques revealed that they were payable to G. Muir and these copies were later given to police. The records of the association established that the account upon which the cheques were drawn were funds of the association. The records show the association had no knowledge of the withdrawal of funds and that the defendant had no permission from the association to deal with the moneys.

The witness agreed with the defendant that the bank records established a continuous trail from the cheques to money being deposited in the defendant's Samford [sic] account. The records also established money being withdrawn from the Samford [sic] accounts and funds being deposited into the association's account on 17 July 2003 and 21 July 2003, the total deposit being $17049.50. Despite this deposit, there was on her evidence a shortfall of funds including the funds drawn on the cheques, Exhibit P4.

Andrew Maloney, chartered accountant and principal of the firm of PFA Maloney, Chartered Accountants signed the audit report, which

is marked Exhibit P1, which was prepared and conducted by an accountant in his employment. The cheques, Exhibit P4, had no supporting documentation and the audit did not determine what the cheques were for other than being made payable to G. Muir for the total sum of $9,660. The issue of the cheques was reported in the audit, as it was unusual for there to be no supporting documentation.

Deborah Bray, the manager of the Westpac Bank here in Alice Springs also gave evidence. As the manager, she was the custodian of the bank records. Her statutory declaration was tendered as an exhibit and marked P3. This witness produced the original cheques, Exhibit P4. Cheque 200466 dated 11 October 2002 payable to G. Muir for the sum of $5,000 was drawn on the CAJSA account on 11 October 2002. Cheque 200472 dated 9 January 2003 payable to G.Muir for the sum of $4660 was drawn on CAJSA account on 9 January 2003 from its account 156731. Each cheque was signed by Barbara Glover and Kay[sic] Muir who was [sic] authorised signatories of that account at the time.

Rebecca Gage is the service adviser with the National Australia Bank here in Alice Springs. Her statutory declaration, Exhibit P5 was tendered. On 11 October the Westpac Bank cheque 200466 was deposited into the defendant's account with the National Australia Bank. On 14 October 2002 this account was debited in the sum of $4000 via an Internet BPAY to Samford [sic] Securities.

Lee Mucow, the general manager of Samford [sic] Securities gave evidence in these proceedings. Unfortunately, due to some technical problem his evidence was not sound recorded but he did say that the defendant had three accounts with Samford [sic] Securities: namely a trust account, a cash account and a trading account (see Exhibits P6 and P8). The witness confirmed that on 14 October 2002 a BPAY deposit in the sum of $4000 was made to Samford [sic] Securities from the NAB Alice Springs to the defendant's account.

Furthermore, on 10 January 2003 a BPAY deposit in the sum of $4200 was made to Samford [sic] Securities from the NAB Alice Springs to the defendant's account. On each occasion share transactions took place and continued through the period of the account history reports, see Exhibit P8 and between 21 July 2003 and 24 July 2003 the defendant sold a number of shares realising the sum $7,505, see Exhibit P6.

Detective Wayne Newell gave evidence and he was the officer in charge of the police investigation into this matter. On 8 October 2004 he conducted a record of interview with the defendant about the matter and put the issue of the cheques to the defendant. He said,

amongst other things, Newell: Westpac Bank 200466 dated 11 October 2000 for the sum of $5,000 payable to G Muir signed by two people". The defendant said "One signatory is mine, the other is Barbara Glover. I can't recall why the cheques are written out to me. I was the treasurer of the association. Judy's involved in writing cheques and I don't recall what the $5,000 was for.

In regard to the other cheque, Westpac 200472, dated 9/01/2003 payable to G. Muir for $4660 the defendant said in the record of interview that he did not recall what it was written for, "Myself and Glover signed the cheque" and so it went on with answers generally to the effect that, "I don't recall."

I have had a good opportunity to listen to and observe each of the witnesses in this matter and I accept them to be credible and reliable witnesses. They were attentive to the questions asked of them and showed, I must say, a great restraint whilst being vigorously cross-examined by the defendant whose questions at times were more in the form of being a personal attack upon them rather than being an attempt to elicit evidence.

Despite the delay between the incident and giving evidence, each witness was a good historian and demonstrated a sound recollection of events, in my view.

Mr Fay submits that the court would be satisfied beyond reasonable doubt that each of the elements of the charges are made out. The documentary evidence, which is undisputed, establishes the signing of the cheques by the defendant, the deposit into his account, subsequent transfer to Samford [sic] Securities via BPAY and share dealings.

The sum of $1400 remains in the defendant's account with $1000 being withdrawn shortly afterwards. There is no evidence in the proceedings to show where the $17049.50 came from that was deposited into the CAJSA account following the arrest of the defendant except as set out in the record of interview.

It is the defendant's submission the evidence shows nothing more than him investing the funds on behalf of CAJSA in his capacity as treasurer. When called upon to return the property to the association he did so, as he explained in the record of interview, thus the three deposits made in July of money belonging to the association.

Although at the time of the interview in October 2004 the defendant stated he did not recall the dealings of 17 July deposit, he did not recall depositing money by cash or cheque into the CAJSA Westpac account, but during cross examination of Detective Newell it was

accepted by that witness based upon the financial records of the association that the July deposits consisted of an amount of $7,549.50 deposited on 17 July 2003; $3500 deposited on 23 July 2003 and $6,000 deposited on 25 July 2003 being a total of $17,049.50. It was also accepted by Mr Newell when put to him by the defendant in cross examination that each of these deposits were made by the defendant drawn upon his NAB account and paid by his personal cheque into the CAJSA's Westpac account.

Based on the evidence before me and the statements made from the Bar table to the court and the cross examination of the witnesses by the defendant it seems, in my opinion, to be accepted by Mr Muir that the funds drawn on the cheques in the total amount of $9,660 were the property of CAJSA, also that the funds were deposited into the defendant's NAB account and subsequently transferred to his Samford [sic] Securities account and invested in shares and I am satisfied of those facts based on the evidence before me beyond reasonable doubt.

The evidence is also clear in regard to the defendant's authority to deal with the CAJSA funds as he did. Based on that evidence of particularly Mr McKinlay, Borchers, Mrs Glover and Holinghausen [sic], I am satisfied beyond reasonable doubt that the defendant had no authority to deal with the funds as he did. In fact, it was extraordinary having regard to the nature of the association's operation. I am satisfied his dealings with those funds were unlawful.

Furthermore, I am satisfied the issue of mistake, although not mentioned by the parties, has not been raised on the evidence. That is, I am satisfied beyond reasonable doubt the defendant did not deal with CAJSA funds on the mistaken belief that he had the authority to do so, either because he was the treasurer of the association or for some other inexplicable reason.

At no time did the defendant disclose to CAJSA committee or its members that he had removed funds from the Westpac Bank, see the record of interview. For the period October 2002 to July 2003 the association had absolutely no knowledge of the funds being removed. The defendant as treasurer did deliberately embark on a course of conduct that would allow him not to disclose his dealings to CAJSA. He had the blank cheques signed by Mrs Glover and then proceeded to deal with the funds as his own. He did not present the financial records of the association to further hide his conduct. Not until 17 July when spoken to by the police did the defendant do anything about the return of the funds to the association.

> I do not accept the defendant's explanation in the record of interview of 8 October, marked Exhibit P2, that he was merely returning all the association's property. The defendant in the record of interview stated he did not know what the cheques were for, why the funds had been deposited into his account or the Samford [sic] account. He cannot say why the money came into his account and had nothing to say about the share transactions but he did accept it was unusual for CAJSA funds to be deposited into his account.
>
> I am satisfied his conduct was as a result of the police executing the search warrant and speaking to him on 17 July. I am satisfied beyond reasonable doubt based on the evidence the defendant's explanation in the record of interview is not a reasonable one consistent with innocence, as I stated, and I reject it.
>
> The defendant did not give evidence in these proceedings, as was his right. The only evidence I have before me from the defendant himself is in the record of interview, Exhibit P2. Throughout it the defendant was evasive, equivocal and presented as a person lacking much credibility. I explained to him his rights throughout the proceedings including his right to give or call evidence on his behalf. He chose not to. I also discussed with him that having regard to the nature of the evidence some explanation might be called for from him as to his conduct. Again, he chose not to.
>
> Unfortunately, much of the defendant's document, response to prosecution submissions, which I have marked Exhibit D10, is by way of evidence from him and where it is, I don't have regard to it. I should note that I have marked the prosecution and defence submissions as exhibits merely for the purpose of them being part of the court record not as evidence.
>
> After considering the evidence in this matter and the submissions of the parties, I am satisfied beyond reasonable doubt that the prosecution has proved each of the charges against the defendant and I find counts 1 and 2 proven."

[13] The learned magistrate subsequently received submissions as to sentence, following which he imposed the sentence and made the order for restitution that are now both sought to be impugned by the appellant.

Relevant principles

[14] Although the appellant has relied upon multiple grounds of appeal, it is fair to say that he relies heavily on his assertion that the verdicts returned by the learned magistrate were generally unsafe and unsatisfactory, having regard to the overall state of the evidence. The other specific grounds pleaded touch on a number of discrete issues to which I will come in due course but, in practical terms, they are somewhat complementary to the appellant's core complaint.

[15] In those circumstances it is necessary, at the outset, to reflect on the key principles that ought to govern my approach to the matters debated in this case.

[16] I take as my commencement point what fell from the High Court in *M v The Queen* (1994) 181 CLR 487 at 493. The majority there held that, where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of appeal is asked to conclude that a verdict is unsafe or unsatisfactory, the question that the Court must ask itself is whether it thinks that, upon the whole of the evidence, it was open to the trial court to be satisfied beyond reasonable doubt that the accused was guilty. Before answering that question the appellate court must not disregard or discount either the consideration that the trial court is the entity entrusted with the primary responsibility of determining guilt or innocence, or the

consideration that such court has had the benefit of having seen and heard the witnesses.

[17] The High Court went on to make the point that, if the appellate court considers that the relevant evidence contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead that court to conclude that, even after making full allowance for the advantages enjoyed by the trial court, there is a significant possibility that an innocent person has been convicted, it is bound to act and set aside the relevant verdict or verdicts.

[18] In the same case Brennan and McHugh JJ each stressed that is incumbent upon the appellate court to make its own independent assessment of the evidence with a view to concluding whether the trial court, acting reasonably, ought to have entertained a reasonable doubt as to guilt. In doing so, it will pay close attention to any summing up [*in the instant case expressed reasons for judgment]* by the trial judge.

[19] Those approaches have since been confirmed in cases such as *Jones v R* (1997) 149 ALR 598 and *Gipp v R* (1998) 155 ALR 15. They must be regarded as trite law.

[20] Accordingly, I have carefully examined both the reasons expressed by the learned magistrate and the substance of the evidence that was before him. As there was no transcript of the record of interview of the appellant and he

elected not to give evidence, I have been constrained to screen the video record and satisfy myself as to its content.

The relevant chronology

[21] It seems to me that an important first step in any review of the evidence in this case is to extract from it the key chronological facts and circumstances that were either common ground or plainly established beyond reasonable doubt. The balance of the evidence can then be considered in light of that material.

[22] In my opinion these facts and circumstances were incontrovertible:

(1) The Central Australian Junior Soccer Association Incorporated (CAJSA) was an incorporated body, the management of which was vested in a committee of management. (No documentary evidence was led as to the detailed Constitution of the corporate body, the management structure of it, the number and mode of appointment of its executive officers or their powers and authorities. No minute book or other formal record of meetings of either the committee of management or the executive committee was tendered at the trial, although some photo copy minutes of the Annual General Meeting for 2001 and certain other meetings were put to the witness Glover in cross examination).

(2) The appellant was appointed as treasurer of the CAJSA in September 2001 and remained in that role until, on 4 July 2003, a meeting of members of the committee of management purported to remove him from that office. (There is some doubt as to whether that meeting was validly convened or whether the requisite quorum was present, but the fact remains that, ultimately, the appellant seems to have accepted his at least *de facto* ouster).

(3) The witness Barbara Glover was president of the Association for nine or ten years immediately prior to her standing down at the Annual General Meeting held in about September 2002.

(4) For a time thereafter it was not possible to identify an aspirant for that office. The appellant filled the role as Acting President (as well as Treasurer) until the witness McKinlay assumed office as President on or about 4 July 2003.

(5) McKinlay had not previously been a member of the committee of management nor held executive office in the CAJSA. He therefore had no direct knowledge of events related to the management of the Association prior to his assumption of office.

(6) In absence of a copy of the Constitution of the Association, it is difficult to be certain of its true formal management structure. However, it was not disputed that, within a broader committee of management, there were seven executive committee members when

all offices were filled. These were respectively, the President, Vice President, Treasurer, Publicity Officer, the Secretary, Assistant Secretary and Registrar.

(7) In practice, the committee of management normally met at least once per month, although, outside of the normal playing season, it may have met less frequently. Within the committee of management, the executive members formed what was, at least *de facto*, an executive committee. The meetings of the latter group often coincided with meetings of the general committee, but, at times, it seems to have met to transact day-to-day business at other times, particularly during the busier periods of the year.

(8) The witness Borchers was elected to the management committee sometime in the first half of 2002 and was ultimately elected vice president at about the end of 2002 or early 2003. He gave evidence of the normal mode of transaction of financial business at monthly meetings. In essence, his uncontroverted evidence was to the effect that:

(a) the Treasurer would normally give a financial report and present any outstanding accounts, seeking approval for payment of them;

(b) the necessary approval would be given either by the executive committee (if it met separately) or the general committee;

(c) on occasions when seven day accounts had to be paid, actual payment would be confirmed after the event. These were normally accounts for relatively small amounts and were often associated with reimbursement to individual committee members who, in the first instance, had actually paid the accounts personally; and

(d) the witness Borchers had never seen two cheques drawn in favour of the appellant (Exhibit P4, being a cheque for $5,000 dated 11 October 2002 and a cheque for $4660 dated 9 January 2003) and knew nothing of any transactions to which they related.

(9) The two cheques comprising Exhibit P4 were co-signed by the appellant and the witness Barbara Glover. She testified that she remained a cheque signatory for some time after she resigned as President. She gave evidence to the effect that, some time in October 2002, at a busy time of the day, the appellant came to her office at the school where she worked and requested her to sign some cheques and a change of signatories form. When she had signed the cheques he "*Then mentioned that there was another account that he had forgotten about*". So, at his request, she signed a blank cheque. This was, she assumed, the cheque dated 11 October 2002 forming portion of Exhibit P4, later filled out in favour of the appellant.

(10) Mrs Glover testified that, subsequently, the appellant again came to her office at a busy time on a Friday in (she thought) January 2003 and said that he was in a hurry and "*needed some things signed*", including another change of signatories form. Her evidence was to the following effect –

> "He said that the previous one had been lost by the secretary. So I re-signed a change of signatories again in January and then there were some cheques to be signed. Some were made out and then there were four or five blank ones and I said these were to be made out to the people who had money still owing and we actually filled in some of the things on the top and left a few blank ones and I signed some blank cheques there".

(11) Her ultimate memory was that there was only one cheque left signed in blank on the lastmentioned occasion. Several others had been blank, but the details were filled in at the time. She identified her signature on the cheque dated 9 January 2003 forming a portion of Exhibit P4, although, in cross examination, she conceded that she could not recall exactly when it was in January 2003 that she was actually asked to sign the blank cheque. I took her to accept that the school at which she worked did not resume until about 29 January 2003, having closed on the preceding 14 December. In re-examination she accepted that it was possible that the second occasion was some time in December 2002.

(12) Mrs Glover at first said that there were only two occasions on which she ever signed a blank cheque. In cross examination, she conceded

there may have been one or two other occasions when this occurred, but said that the cheques were accounted for within the same week, at the next meeting.

(13) This witness attended a meeting with some members of the committee of management in May 2003 that had been convened because of concerns that no financial statements had been presented for some time and because she, personally, had been approached by unpaid creditors of the CAJSA with regard to outstanding unpaid accounts. The appellant put it to Mrs Glover that, on 22 May 2003, he had been asked to present a Treasurer's report at the next meeting on 2 June 2003.

(14) This witness was taken through a series of cheques during the course of her cross examination. She conceded that it was apparent that some of them did not appear to bear the date on which she had actually signed them as co--signatory. She was also constrained to agree that the cheque records indicated that, on the two occasions on which the appellant came to her office, she must have signed considerably more cheques than her present memory suggested.

(15) On or about 17 July 2003, following a formal complaint received from the witness McKinlay in his new role as President of the CAJSA, police attended at the appellant's residence and, in pursuance

of a search warrant, seized all of the books, records and other property of the Association then in his possession.

(16) The witness Lyn Blom, a highly experienced bookkeeper, accepted the role of Treasurer of the CAJSA on 9 October 2003, following the Annual General Meeting held shortly after the time at which the appellant was ousted from that office. She undertook "*to reconcile the financials of CAJSA*" for the period October 2001 to June 2003. It is my understanding of the evidence that she did so with the aid of the financial records that had been seized by the police pursuant to the search warrant.

(17) Ms Blom ascertained that there were several discrepancies in the records. Although a canteen had been operated on a weekly basis during the playing season, no takings receipts had been recorded or banked. Further, although a large sum had been receipted as registration fees received from players, there was a cash deposit deficiency of the order of $17,000 - $19,000. Moreover, there were two blank cheque butts in the cheque book. Inquiries made of the association's bank revealed that these related to the two cheques now comprising Exhibit P4, payable to the appellant.

(18) She further ascertained that, during the period from 17 to 25 July 2003, three cash deposits totalling slightly in excess of $17,000 had been made into the association' s account. She simply treated this as

income received that had not previously been banked. In so doing, she treated the amounts of the two cheques payable to the appellant as still outstanding. She gave evidence to the effect that she did so –

> "Because the outstanding deposits were actually more than the monies repaid. So that the moneys that were repaid, I put against the outstanding deposit which was the income that was not banked. Based on the receipts that I received from the police".

She later went on to say –

> "Because over those two financial years in question, there was an amount of over $18966 undeposited funds that had been receipted and not banked. When we received $17,000.49 -- $17,049.50, I placed that [sic] funds against those outstanding deposits, as undeposited monies, which still left a balance of approximately $1900 that had still not been banked".

I will return to a consideration of the validity of the approach adopted by Ms Blom in relation to the appropriation of the monies that were deposited by the appellant into the association's account in July 2003 in due course.

(19) Curiously, the documentation raised by Ms Blom as her reconciliation was never tendered before the learned magistrate, despite the fact that she told him that it had been supplied to the police.

(20) An explanation for that emerges from the portion of the transcript that reveals that, in the course of his re-examination of the witness Blom, the prosecutor sought, for the first time, to introduce into

evidence detailed documentation said to found the basis of the reconciliation that she had made. The appellant objected to that proposed course of action and made the point that he had not had any opportunity of asking the witness any questions about it. When the objection was raised, the learned magistrate said that, from his recollection, the appellant had never put it to Ms Blom that her reconciliation was incorrect. To that the prosecutor replied that he would therefore not pursue the matter "*The reconciliation stands*" -- to which proposition I take the learned magistrate to have acceded at the time.

(21) Following those exchanges the prosecutor elicited the following evidence from the witness in re-examination:

> "How do you arrive at that conclusion through your reconciliation? -- Because when I was going through the reconciliations there was a -- I have all the receipts, I believe I have all the receipts, they were given to the police by Mr Muir. Based on those receipts there was $18,966 of un-banked monies that had been collected in the receipts. Mr Muir repaid $17,049.50. There still remained a shortfall of $1917 and a few cents. I can't work that out quickly enough, your worship. Therefore he repaid -- in my opinion -- he repaid money from the receipts that were written, that were not deposited, part repaid them, there is still an extra $1900 outstanding. Then there was [sic] two cheques that were expenses that were not repaid, which was $9,660. Then there was two years of canteen takings because according to Mr Muir's records we never sold one snake, one can of drink, one hotdog, nothing for two years. So that would again be monies that was missing. There was a raffle that was run during that time. There was no receipt for any moneys received, although there were cheques written out against prizes. There was a competition run every year at the YMCA in which the children gave Mr Muir, I believe, $3 per player per night, that money was --".

(22) The learned magistrate refused a request by the appellant that he be given "*an opportunity to ask Mrs Blom any questions about this*".

(23) The evidence indicates that the reconciliation carried out by Ms Blom was that which founded the basis of the seeking by the association of an independent audit by PFA, Chartered Accountants late in 2003. The documentation placed before the learned magistrate indicates that a final audit report was signed by Mr Maloney on 25 February 2004.

(24) In the course of his evidence Mr Maloney indicated that the audit process did not reveal any irregularities in respect of the 2001 - 2002 financial year. In the following year, however, there were the two unexplained cheques comprising Exhibit P4 and it also appeared that bankings did not reflect the receipts issued.

(25) Evidence was led before the learned magistrate to establish that the proceeds of the two cheques comprising Exhibit P4 were paid to the credit of an account in the name of the appellant with the National Australia Bank, on the same respective dates as appear on those cheques.

(26) The documentation and oral evidence before the learned magistrate indicated that, on 14 October 2002, $4000 was remitted to Sanford Securities from the appellant's personal account. A further amount of $4,200 was also remitted from that account to Sanford Securities

on 10 January 2003. It follows that, of the total amount of $9,660 proceeds of the two cheques drawn in favour of the appellant, a balance of $1,460 remained in his personal account intermingled with his own monies.

(27) As the appellant was at pains to point out to Ms Blom in his cross examination of her, the bulk of the proceeds of those cheques was, within the course of a few days later in each instance, paid to the credit of an account in his name with Sanford Securities, a discount sharebroker. It readily appears from documentation comprising Exhibit P8, that account evidenced a significant number of transactions related to the buying and selling of shares, at least in the period from 14 October 2002 to 10 January 2003. [The relevant statement only specifically focused on the period 11 October 2002 to 11 January 2003. It is therefore not known what other trading (if any) had occurred outside of those dates].

(28) During the course of the trial, evidence was taken from a witness Mucow, who was a principal of Sanford Securities. Unfortunately, some technical problem arose in relation to the recording of his evidence: with the result that no transcript of it was eventually available. At the conclusion of the trial evidence some discussion occurred in relation to this problem. The appellant made the point that the evidence had indicated that there had been a credit of $18,830.80 in his account with Sanford at the time when the relevant

initial cheque was drawn in October 2002. The prosecutor indicated that he did not take any issue with that assertion.

(29) It is common ground that, in the period 21 - 24 July 2003, that is, shortly after the execution of the police search warrant, the appellant made three sales of shares on the Sanford account, for which he received three separate settlements on 24 July 2003. Those settlements totalled $7,504.85, made up of the sums of $948.55, $3,741.75 and $2,814.55.

(30) It is undisputed that, in July 2003, the appellant made the following credit deposits into the CAJSA bank account:

17/7/03	$ 7,549.50
23/7/03	$ 3,500.00
25/7/03	$ 6,000.00
	$17,049.50

(31) The witness Debra Bray, who was the Westpac bank manager, verified the above credit deposits. She also said that two other deposits had been made at about the same time. The first was on 27 July 2003 for an amount of $2,988.70. The second was on 30 July 2003 for an amount of $1,750. It was impossible to determine from the relevant vouchers who had paid in those amounts, although a credit dissection voucher indicated that a deposit appears to have

been made by Karen Bahnert *[also referred to in some documentation as Baronet]* who took over from the appellant as Treasurer.

In cross-examination Ms Bray said that it appeared that nine credit deposits had been made during July 2003, but that only four deposit vouchers had been located in the Bank records. The others were missing.

(32) It was the consistent assertion of the appellant and never controverted by the prosecution that the total sums paid to the credit of the CAJSA account included the share sale proceeds totalling $7,504.85 above referred to.

(33) Finally, evidence was led from the witness Rainer Holdinghausen to the effect that he had been the Treasurer of the CAJSA from 1997 to 2001, when he handed over to the appellant. He resigned at that stage because his children were no longer involved in junior soccer.

This witness described the accounting processes that had existed in his time as Treasurer and said that he had had a hand-over meeting with the appellant, at which he had been through those processes with him.

[23] It seems to me that the evidence of Mr Holdinghausen was of relatively peripheral relevance to the issues before the learned magistrate, because he had no involvement in the affairs of the CAJSA post-2001. The fact that he

adopted certain procedures was really irrelevant, although his evidence threw some light on certain established general practices within the association. For example, he said that it was not unusual to have the cheque co-signatory pre-sign some cheques in blank, in anticipation of accounts coming in over the then forthcoming few days. He also made the point that all moneys received were promptly paid to the credit of the association's bank account and that he could not recall any occasion on which CAJSA funds were ever paid to the credit of a personal bank account. "*Paperwork*" was always raised to back up any financial transaction.

[24] This witness said that, on one or more occasions, association funds were invested on a short fixed term investment with the TIO, on a properly documented basis.

[25] Of more direct relevance for present purposes, was the evidence of Mr Holdinghausen that, early in 2005, the appellant had telephoned him twice, wishing to discuss some aspects of allegations that had been made against him to the effect that he had been stealing association funds. This witness testified that:

> "… the first one was to do with, like I said, that he'd been accused with taking this money here and he said that he'd invested - put the money in his own account, it was like I say one or two $8,000 cheques, I don't recall exactly which. It was difficult to determine which one it was. And that he'd invested it in a short-term investment and I believe he said it was around - thought it was around 17% return on this short-term investment and he paid back the money into the Junior Soccer Association some stage later, but he didn't have the records at this point because everything was in disarray".

[26] I have viewed and listened to the video record of interview conducted by Detective Senior Constable Newell with the appellant on 8 October 2004. It runs for just under one hour. It is neither necessary nor practical to recite the content of that interview in detail. It will be sufficient if I merely identify certain key features of it.

[27] The appellant professed no present memory of the drawing of the two cheques here in question in favour of himself, or of their disposition. He said that he did not recall the purposes for which the cheques were drawn, although he acknowledged that the two signatures on them were those of himself and Barbara Glover. He stated that he could tell the police officers nothing about the deposit of the cheques into his personal account with the National Australia Bank and did not recall why funds were remitted to Sanford Securities in close proximity to the deposit of the cheques into his account.

[28] When asked why, following the deposit of the $5,000 cheque and payment of $4,000 to Sanford Securities an ATM cash withdrawal of a further $1,000 was made some three days later, the appellant responded that he did not recall. Similarly, he professed no memory as to why, three days after remitting the $4,200 to Sanford Securities on 10 January 2003, he made an ATM cash withdrawal of $500.

[29] Upon it again being asked of him why the total of $9,660 was paid into his personal account with the National Australia Bank and the subsequent

payments were then made to Sanford Securities, the replies of the appellant were "*I can't answer that question. I'm not prepared to answer that question*".

[30] When questioned concerning the deposits into the CAJSA account in late July 2003, the appellant accepted that the bank records indicated that he made those deposits, but he asserted that he could not remember any of the details of or even having done so.

[31] As was his right, the appellant elected not to give evidence at the conclusion of the Crown case. However, in the particular circumstances of this case what was said by the High Court in *Weissensteiner v The Queen* (1993) 178 CLR 217 at 227-228 and in *RPS v The Queen* (2000) 199 CLR 620 at 632-633 is particularly apposite. As was there pointed out, there are some criminal cases in which evidence or an explanation contradicting an apparently damning inference to be drawn from proven facts could come only from the accused. In absence of such evidence or explanation, the [court] may more readily draw the conclusion that the prosecution seeks. It was said in *Weissensteiner*:

> "[I]n a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it existed at all, must be within the knowledge of the accused".

[32] It is fair to say that, before the learned magistrate, the only explanation that was ultimately forthcoming was in the form of certain statements made by

the appellant in the course of his final written response to the prosecution submissions. In that document he made these comments:

> "I used my own accounts (with National Australia Bank and Sanford Securities) to invest the monies in my capacities as Treasurer and Acting President of CAJSA. This was a highly efficient method for investing the funds in terms of time and transaction costs. I used my personal accounts in performing my duties as Treasurer and Acting President, for the benefit of CAJSA…… just as I used my own computer, Internet service, telephone: motor vehicles, filing cabinet, storage space and other personal resources for these purposes……
>
> This documentation establishes a clear and continuous audit trail of the funds from CAJSA's bank account, through my personal National Australia Bank and Sanford Securities accounts; their investment in the stock market; the subsequent sale of the shares purchased with these funds, and their deposit back into CAJSA's bank account. The funds remained, at all times, the property of CAJSA. They were invested to advance the interests of the Association and its members……
>
> What I told Mr Holdinghausen was that I had invested the funds on behalf of CAJSA in my capacity as Treasurer and Acting President, and that, following my removal from these positions, I had liquidated the investments and deposited the funds back into CAJSA's bank account…".

[33] The learned magistrate pointed out in his reasons that these comments were really of the nature of evidence that had not been given at trial, rather than submissions as to the evidence. Whilst he properly indicated that such material could not be accepted as evidence, nevertheless it did, in effect, constitute a clear concession on the part of the appellant of the accuracy of the core prosecution evidence concerning the relevant progression of events.

[34] It also evidenced a detailed then present memory of what had transpired that stood in stark contrast with what had been said by the appellant in his record

of interview. The appellant sought to explain that situation by saying that he had suddenly and unexpectedly been arrested at his place of employment some two years after the date of the first alleged offence. He had immediately been subjected to a record of interview process without opportunity for reflection and when the detailed financial records had long since been removed from his custody.

The issues on the appeal as to conviction

[35] The nub of the appellant's case on appeal was that, not only were there serious gaps in the prosecution evidentiary case, but that, also, such evidence as did exist fell far short of establishing that, as he put it, the CAJSA was ever permanently deprived of the relevant cheque proceeds - they "*remained at all times assets of the Association*". This was, he submitted, because "*They remained at all times under the association's direct control through its Treasurer and Acting President [himself], performing his duties in accord with the interests of the association and its members*". The association was never deprived of those funds, they remained at all times assets of the Association and the funds were not expended as alleged by the witness Blom… "*In fact the treatment of those funds in the reconciliation as an expense was a total error based on a total lack of evidence*". This was, he said, because "*they were invested on behalf of the association as an extraordinary item*".

[36] The appellant argued that the prosecution had never established that his dealings with the relevant funds had been unauthorised or outside his authority as Treasurer and Acting President.

[37] Further, he contended that the state of the evidence was such that it could not reasonably be said that the proceeds of the two cheques had not been repaid into the account of the CAJSA. He submitted that there had been no legal warrant for the appropriation, by Ms Blom, of the monies paid to the credit of the association's account against any general funds deficiency, in preference to a reimbursement of cheque proceeds, at least *pro tanto*.

[38] He argued that the so-called reconciliation carried out by Ms Blom was fundamentally flawed on the face of it and that no documentation had ever been tendered in verification of the process. He asserted that she, herself, had conceded that the documentation on which she had proceeded was far from complete, the process of compiling a reconciliation had, as she accepted, been problematic and that it had involved a degree of guesswork on her part. This was particularly so in relation to canteen takings, raffle proceeds and the specific competition to which she had referred.

[39] The appellant submitted that the state of the evidence had been such that it was not fairly open to the learned magistrate that to conclude, beyond reasonable doubt, that the investment of the [cheque proceeds] was not authorised; that he had intended to permanently deprive the Association of the funds when he deposited the cheque proceeds into his personal bank

account; that the Blom reconciliation was accurate; and that he had not reimbursed the cheque proceeds.

[40] The appellant asserted that the learned magistrate had misdirected himself in relation to certain aspects of the evidence, with the result that he had placed undue emphasis on irrelevant matters and paid insufficient regard to relevant matters.

[41] As to this he referred to what he said was Ms Blom's allegation that funds other than the cheque proceeds had been stolen and what he said was the unsubstantiated reconciliation. This was implicit in the finding that none of the monies paid into the association's account "*included any of the $9,660*". This was, he said, compounded by allowing the evidence related to canteen takings and raffle and competition proceeds that was both irrelevant and unsubstantiated and then refusing permission to cross-examine Ms Blom on those topics.

[42] The appellant complained of the conclusion of the learned magistrate that he had never put to Ms Blom that her reconciliation was incorrect. He challenged that assertion and contended that, at numerous points in his cross examination, he had raised important questions as to and cast serious doubt on the accuracy of the reconciliation and that that was the very reason why the prosecutor had sought to pursue the re-examination as he did. He sought to illustrate, by reference to the course of Ms Blom's cross examination, that he had in fact made the point to her that there had been significant gaps in

the supporting documentation and that this necessarily produced the consequence, at least by inference, that the reconciliation could not have been accurate.

[43] The appellant further argued that, having regard to the state of the evidence, the learned Magistrate misdirected himself in accepting "*witness Blom's evidence that none of the $9,660 formed any part of the $17,049.50*" re-credited to the association.

[44] It was further contended that the reasons expressed by the learned magistrate were unsatisfactory, because they failed to define what aspects of the appellant's final submissions he had declined to take into consideration and had not adequately justified his refusal to do so. The appellant argued that this aspect, and the refusal to allow the appellant to further cross-examine Ms Blom, constituted a failure to accord procedural fairness to him.

Consideration of the issues related to the appeal against conviction

[45] In my opinion there is considerable force in certain of the criticisms advanced by the appellant, in the sense that I consider that the subject trial somehow seems to have lost its real focus along the way, with the result that a great deal of time was spent in pursuing what were, in large measure, irrelevancies and evidentiary "*red herrings"*. Moreover, at the conclusion of the trial, there were some surprising evidentiary omissions.

[46] It must firmly be borne in mind that the core issues to be addressed were simple, clear cut and of quite limited compass. The essence of the charges against the appellant was that, without any authority or colour of right, he had drawn the subject two cheques in favour of himself and then applied the proceeds of them for his own private purposes and not those of the CAJSA. He was never charged with misappropriating any other moneys of the CAJSA and a consideration of the details of the asserted reconciliation in relation to them was largely irrelevant.

[47] In such a setting it was more than a little surprising that, although reference was made to such documents in the course of the trial, the prosecution did not seek to tender in evidence either the Constitution of the CAJSA (which was said to spell out the powers and duties of the various executive officers of the Association) or the minutes of the committee of management or executive committee of that body. As a consequence, none of that documentation was before the learned magistrate.

[48] Furthermore, I agree that the manner in which evidence was led from Ms Blom left a good deal to be desired. To the extent to which her reconciliation was relevant to demonstrate what may or may not have been reimbursed to the CAJSA, then the documentation evidencing that reconciliation and any primary documentation supporting it ought, plainly, to have been tendered in the course of her examination in chief. This would then have afforded the appellant a proper opportunity of cross examination in relation to it. What occurred was little more than a backdoor method of

attempting to overcome what was a clear deficiency in the examination in chief.

[49] Additionally, I have difficulty with the assessment of the learned magistrate that the appellant had not set out to challenge the reconciliation. This was the more so as he was dealing with an unrepresented party. It seems to me that, on any view, the appellant was very much seeking to place key aspects of Ms Blom's evidence relating to the reconciliation in issue.

[50] It must further be said that it is difficult to perceive the relevance and admissibility of certain of the other evidence led before the learned magistrate from persons who did not hold executive office at the time of the relevant transactions and who manifestly had no direct personal knowledge of the circumstances giving rise to them. I am here speaking of the evidence of the witness Glover as to what had previously transpired during her term of office as President, the evidence of the witness Holdinghausen as to processes that had been in vogue when he was Treasurer and certain aspects of the evidence of the witness McKinlay, related to the period immediately after his accession to the office of President.

[51] However, having made those points, which may well, in other circumstances, have invalidated convictions stemming from the evidence in question, it must be said that, in the context of this case, they had little logical bearing on the outcome of it.

[52] At the end of the day, bearing in mind the appellant's own concessions in cross examination and his submissions to the learned magistrate, the incontrovertible admissible evidence really came to this:

(1) The appellant undoubtedly drew the two cheques, the subject of the charges against him;

(2) The compelling inference arising from the evidence was that he procured Mrs Glover to sign them in blank and later filled in the amounts and names of the payee himself;

(3) Absent specific contrary evidence and any explanation by the appellant, the further compelling inference that arose was that he did so without consultation with anyone else and without any specific or general authority of the committee of management or the executive committee or otherwise;

(4) He paid the proceeds of each cheque into his own personal banking account, where they were intermingled with his own funds, although at the times in question, he only had nominal amounts of his own money to the credit of his account;

(5) The evidence of Mr Mucow and the relevant documentary evidence before the learned magistrate plainly established that, at the times when the proceeds of the cheques had been paid into his account, the appellant had

been engaged and was continuing to engage in a course of buying and selling securities on the stock exchange on his own personal account;

(6) Within a few days of each appropriation of the cheque proceeds into his account, the appellant applied the bulk of those monies towards payment for shares purchased on his trading account. However, not all the monies were so applied. The two sums of $1,000 and $500 respectively previously referred to were withdrawn by the appellant from his bank account in cash through an ATM and no explanation has ever been forthcoming as to how that money was expended. The compelling inference is that he applied them for his own private purposes;

(7) Not only was the share trading account in the personal name of the appellant, but there was no record that any specific share purchases were segregated out and clearly earmarked as being made by the appellant as trustee for or agent of the CAJSA;

(8) When, immediately following the execution of the search warrant, shares were sold by the appellant and amounts were credited by him to the CAJSA account, there was no clear or specific correlation between any sales and the amounts of the two cheques. Nor was there any apparent correlation between the total of the amounts credited by the appellant to the CAJSA and any other sums for which he may have been liable to account to that association; and

(9) It did, however, remain a distinct possibility, that the monies paid by the appellant to the credit of the CAJSA account may well have included the proceeds of the sales of shares to the original purchase of which the cheque proceeds were applied - which were intended (possibly with the $6,000, the source of which is not clear) as reimbursement, either wholly or in part, of the cheque proceeds.

[53] On that basis, putting any evidentiary irrelevancies to one side, the evidence compellingly established the guilt of the appellant.

[54] On any view, it is clear beyond reasonable doubt that, in the relevant legal sense, the appellant appropriated the proceeds of the two cheques by paying them to the credit of his personal account. Absent some plausible contrary explanation, the only logical inference to be drawn was that he positively intended to deprive the CAJSA of the funds and that he had no lawful authority or excuse for doing what he did.

[55] As the learned magistrate correctly appreciated, the suggestion made by the appellant, in his final submissions (and which he sought to reiterate before me) that he did no more than invest the moneys on behalf of the CAJSA was never the subject of any positive evidence. It emerged for the first time in certain propositions that were advanced by way of cross examination of witnesses.

[56] When the objective evidence was assessed, such a suggestion could not fairly have been entertained as a reasonable possibility. As I have

demonstrated, the evidence disclosed that not all of the monies appear to have been applied toward share purchases and there is no evidence that indicates any specific appropriation of shares in trust for the CAJSA following payment of moneys to Sanford Securities. The appellant's account with Sanford Securities was, on the face of it, no more than his general trading account operated for his own personal benefit.

[57] There was not a scintilla of evidence before the learned magistrate to rebut the obvious inference, arising from the evidence of the witness Borchers and the relevant evidence generally, that the drawing of the cheques was both irregular and unauthorised; that the appellant must have appreciated that fact; and that the appellant intended to utilise the proceeds of the cheques as his own, for his private purposes.

[58] His actions were plainly inconsistent with any intention to act as a trustee or agent for the association and it is significant, in the absence of contrary explanation, that the appellant rapidly attempted to make some degree of restitution, albeit not precisely aligned to the amount of the cheques, after the execution of the police search warrant.

[59] His failure to render appropriate financial reports to the committee of management in the months immediately leading up to his removal from the office of Treasurer spoke volumes as to his guilty mind. Had his actions been innocent, one would have expected him to frankly report his investment strategy to the relevant committee. He made no attempt to do so.

Bearing in mind the unusual nature of the cheque transactions, it is inexplicable why, in his record of interview, the appellant professed no memory of them if they were innocent transactions related to investment on behalf of the association.

[60] It is small wonder that the learned magistrate had no hesitation in arriving at the ultimate conclusions expressed by him. In my opinion, findings of guilt were well-nigh inevitable. In so saying I do not accept the appellant's criticism of the alleged inadequacy of the reasons expressed, particularly concerning the attempted evidentiary content of the appellant's final submission. All that the learned magistrate was seeking to convey was that, in so far as the submissions sought to advance factual assertions concerning the intentions of the appellant, in doing what he did, they were an impermissible attempt to proffer evidence from the bar table that could not be entertained. It is perfectly clear what the learned magistrate was adverting to.

[61] I am not persuaded that the conviction of the appellant of the two counts was other than proper. On the contrary, as I have said, such an outcome was virtually inevitable, given the state of the evidence. The appeal against the convictions must therefore be dismissed.

The issues on the appeal against sentence and the order for restitution

[62] In the course of his sentencing remarks the learned magistrate intimated that he intended to proceed on the basis that the appellant had set out upon a

course of conduct to obtain the funds in question by having Mrs Glover sign blank cheques which were later completed by the appellant. Upon receipt of the proceeds of the cheque they were substantially applied to the appellant's own use "*for the purposes of buying shares on the stock market and some of the money was also withdrawn from your account and unaccounted for*".

[63] The learned magistrate noted that the appellant had been convicted following a full trial and that he had not demonstrated any remorse whatsoever. He pointed out that the offences had been committed whilst the appellant was in a position of trust and in circumstances that were even more serious than a case of theft from an employer.

[64] It was noted that the appellant had a record of some prior convictions, although not a great deal of weight was placed upon them because of their minor and generally unrelated nature. The learned magistrate referred to the fact that the matter had taken some time to bring to finality, but was not satisfied that there was any basis for allowing a discount in sentence for that reason.

[65] He was of the view that the offences were too serious to permit a wholly suspended sentence. He concluded his remarks by commenting:

> "Taking into account the authorities, and the circumstances of the case, I am of the view that I should impose an actual sentence of imprisonment, but also taking into account the matters that you have placed before me in Exhibit 13, I accept that there has been a major impact on your life. You have lost employment as a result of these offences, and no doubt that has caused you considerable personal anxiety as well as considerable cost, and all those other things that

> go with having your name put in the paper and being held out as somebody that has stolen funds from an organisation like the Junior Soccer Association.
>
> I am satisfied albeit on very scant information that taking into account your work history, your prior criminal record, that you do have a prospect of rehabilitation, and I am of the view that I should partially suspend the sentence that I am going to impose upon you today for those reasons, and also give you an opportunity to pay back the money that you stole from the organisation".

[66] The learned magistrate then proceeded to impose an aggregate sentence of eight months imprisonment, to be suspended after service of three months with operative period of two years from the date of sentence. He also ordered payment of restitution in the sum of $9,660, such sum to be paid to the Fines Recovery Unit on behalf of the association. As to that order, he allowed six months within which to pay with a default imprisonment period of three months.

[67] The appellant complained that the sentence imposed was manifestly excessive. It must be said that the reasons advanced by him for that contention verge on the ingenuous.

[68] His first point was that the offences involved only two acts on two separate occasions and were not part of a long series of many acts over an extensive time period. He sought to argue that the individual sums of money in question were small. He pointed out that legal actions for amounts under $10,000 are normally heard in the small claims jurisdiction of the Local Court.

[69] The appellant further contended that the learned magistrate had not given adequate consideration to the financial loss, hardship, disadvantage, deprivation, pain and suffering already endured by him as a result of him being charged and convicted. Nor, he complained, had due allowance been made for the fact that almost 20 months had elapsed from the date of his arrest to the date when he was sentenced and what he described as the severe hardship that he had suffered throughout that period. He argued that the learned magistrate had overestimated the length of time the CAJSA had been out of its funds, as well as the seriousness of his previous antecedent record.

[70] He sought to challenge the assessment of the learned magistrate that his offence was more serious than an offence of stealing from an employer. He argued that, as a paid employee, he would have committed both a breach of faith and a breach of contract. As it was, he had been acting in a purely voluntary capacity without reward and it was unfair that he should be severely punished for a breach of trust whilst doing so.

[71] He complained of a reference by the learned magistrate to the effect of the alleged offences on the association when there had been no detailed evidence that specific damage had been caused to it. He contended that adequate consideration had not been given to the option of home detention.

[72] It must be said that these submissions amply serve to illustrate the fact that, even now, the appellant has little appreciation of the enormity of his conduct and that he appears to continue to demonstrate little or no remorse.

[73] True it is that there were only two acts involved and that this was not a long series of depredations. However, it verges on the ridiculous to suggest that the amounts of money involved were small or that the appropriation of them would not, manifestly, have had a serious adverse affect on the Association. Indeed, it was the serious situation of its financial position that caused the committee of management to oust the appellant from his position as Treasurer.

[74] There is not the slightest question whether the learned magistrate properly considered the impact of the arrest and conviction of the appellant upon him. Further, the sentencing remarks indicate that little weight was given to his prior criminal history, although he could scarcely be treated as a first offender.

[75] Finally, the distinctions sought to be made by the appellant between a paid employee and a voluntary worker simply serve to reinforce a conclusion that, even now, he still has no real appreciation of the seriousness of his conduct. The offences in question constituted a serious breach of trust by any standard and it is profitless to embark upon the type of distinction sought to be relied upon by him.

[76] Having regard to all the circumstances, the appellant has fallen far short of demonstrating that the sentence imposed upon him was manifestly excessive. Bearing in mind that he was not entitled to any discount for a timely plea a head sentence of eight months imprisonment was well within

an acceptable range, particularly bearing in mind considerations of general deterrence and the inherent seriousness of the offending. The suspension after service of three months was a merciful approach that particularly recognised some potential for rehabilitation and the mitigatory matters personal to the appellant. A home detention option would not adequately have recognised the gravity of the offences.

[77] That being so, the appeal against the custodial sentence imposed must be dismissed.

[78] There only remains for consideration that aspect of the appeal that seeks to impugn the order for restitution made against the appellant.

[79] The appellant argues that, having regard to the state of the evidence before him, the learned magistrate could not properly have concluded beyond reasonable doubt that restitution had not been made in respect of the sum of $9,660, the subject of the charges against him.

[80] It is his contention that the purported appropriation by Ms Blom of the monies paid to the credit of the CAJSA account following the execution of the search warrant as against what she treated as a general deficiency of funds was a unilateral act on her part. He argued that it failed to take into account the fact that at least a substantial portion of those monies was obviously the product of the sale of shares said to have been purchased by the cheque proceeds and that it remained at least a reasonable possibility

that the payments made had been intended as a reimbursement of those proceeds.

[81] In my opinion there is considerable force in those contentions and I did not take Mr Noble, of counsel for the respondent, to argue strongly to the contrary. It was only open to the learned magistrate to make the order for restitution if he could fairly be satisfied beyond reasonable doubt, on the whole of the relevant evidence, that the proceeds of the cheques had *not* been reimbursed by reason of the credits passed to the CAJSA account. Such satisfaction was not possible in the circumstances, as I have outlined them.

[82] This appeal must therefore be allowed for the limited purpose of setting aside the order for restitution. The custodial sentence imposed will, however, be confirmed. It will be for the CAJSA to take such civil action as it may be advised to pursue any residual monetary claims that it may have against the appellant.

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