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DELIVERED 8TH JUNE 1988

ROBERTSON v. FLAVEL

File No.981 of 1986

Dates of Hearing: 7th, 14th, 22nd, 23rd and 26th October, 1987
11th and 17th May, 1988

JUSTICES APPEAL

J U D G M E N T of the Honourable Justice White

(On appeal from Mr P.M.StL. Kelly, Supervising Magistrate,
sitting as a court of summary jurisdiction at Adelaide)

Appeal - necessity to show some error or omission
by the magistrate as to fact or law - none shown.

Companies Act 1962 s.374c(2) - conviction of an
export consultant for aiding and abetting certain
companies and their director Semmens to carry on
business for a fraudulent purpose, namely, to
defraud the Export Development Grants Board -
whether fresh evidence should be allowed on appeal
- whether the proved facts consistent with some
rational explanation reasonably open on the
evidence other than guilt - appeal against
conviction dismissed.

Disqualification - whether judge should accede too
readily to a request to disqualify himself -
challenges to many other judges made by this
appellant.

Export Market Development Grants Act 1974 (C/wth)
s.4, sub-s.(2)

"expenditure" - whether expenditure likely to be
incurred in the next financial year or "incurred"
in the present financial year.

Fresh evidence - application to call fresh evidence
rejected because the so-called fresh facts were
known to counsel for the appellant before and
during the hearing.

Maximum penalty - one year imprisonment - six months too close to maximum in circumstances.

Sentencing - where co-offender previously sentenced to six months imprisonment, the sentencer of the second offender is not entitled to assume the correctness of the first penalty nor is he relieved of the obligation to fix the appropriate penalty for the second offender.

Appellant in person in 1988

Counsel for Appellant in 1987: Mr J.M. Kilby

Solicitors for Appellant in 1987: Johnsons

Counsel for Respondent: Mr S.T. Lane

Solicitor for Respondent: Corporate Affairs Commission

ROBERTSON v. FLAVEL

White J.

This appeal from a decision of a magistrate was heard in three stages. At the first stage, the appellant requested that I disqualify myself from hearing the appeal. His grounds were, first, that some ten years ago I adjudicated, as judge in bankruptcy, upon a disputed question of fact between himself and a judgment creditor, namely, whether the bankruptcy notice had been served on the appellant. I resolved the dispute in the appellant's favour. He said that in the course of the hearing I said something which reflected upon his credibility. Perhaps I did so reflect in the course of my written reasons. I have no memory of doing so. In any event, his credibility as a witness was not in issue on this appeal. The magistrate had made unchallenged findings of fact. The truth of the matter is that the appellant wishes to call some fresh evidence on this appeal but, if allowed, it is to come from witnesses other than himself. It seems that he fears that I would not be impressed with evidence from these other witnesses if I do allow fresh evidence to be called. This aspect of the challenge was far too tenuous for me to disqualify myself.

Secondly, the appellant said that I had been a member of a Full Court a few years ago which had ruled adversely to his cause on an appeal in some civil proceedings. I have some faint recollection of a brief hearing on some such matter. However, I did not think that this objection is worthy of serious consideration, especially in view of the background of his challenges to other judges.

Prior to the appeal the appellant filed a list of judges who

were disqualified, in his view, from hearing his appeal. The list includes the Chief Justice (who would not be hearing the appeal anyway), Zelling J. (who has now retired), Jacobs J., Prior J. and O'Loughlin J. who had been involved in the Full Court appeal in an associated appeal in Semmens v. Flavel. Semmens was convicted as principal of the offence and subsequently this appellant was convicted as accessory. The appellant also challenged Bollen J. who heard the Semmens Justices Appeal; and he challenged Legoe and Matheson JJ. because they were, he said, concerned in some litigation with which he was involved. He challenges half of the judges of the Supreme Court.

Counsel for the commission, Mr Lane, pointed out, with more than a hint of controlled exasperation, that this prosecution against the appellant has a long history of delay after delay and that this appeal from a magistrate to a single judge had already been put off twice before and was in danger of being put off a third time and perhaps again and again as judges unacceptable to the appellant were listed for justices appeals. He said that in the original hearing of this prosecution in the magistrates' court, a magistrate had ordered a joint trial of a complaint against Semmens as principal and the appellant as accessory in a fraud charge relating to the way a company carried on its business. Another magistrate, who eventually heard the charges against Semmens, ordered separate trials. Semmens was later found guilty by that magistrate. Semmens appealed to a single judge of the Supreme Court about 15 months ago. While that appeal was pending, the appellant's trial was proceeding before yet another magistrate. The appellant was convicted. Semmens

was later successful in his justices appeal to a judge who ruled that the relevant section in the Companies Act 1962 did not apply to this type of fraud. Semmens' conviction was quashed. The commission thereupon appealed to the Full Court against the dismissal of the complaint against Semmens. The Full Court agreed with the magistrate's ruling that the section in the Companies Act applied to Semmens' conduct. Semmens' conviction was restored and the question of penalty was referred back to the single judge.

The relevance of the course of Semmens' appeal is this. The commission had consented to the adjournment of the Semmens' Full Court appeal month by month, because the appellant, having been convicted, indicated a wish to have his appeal joined to Semmens' Full Court appeal. However, the appellant eventually decided not to join in Semmens' Full Court appeal. That equivocation put back the date of hearing of the Semmens' appeal by many months. Since then, the commission has been attempting to have this appellant's justices appeal heard by a single judge. Olsson J. was to hear it but he was involved in a long civil case. Bollen J. was to hear it but he was involved in Semmens' matter and felt himself disqualified. Next, the appellant came before me with his list of disqualified judges and he claimed on tenuous grounds that I was disqualified.

I had regard to the comments of Mason J. in Re Renaud; ex parte C.J.L. (1986) 60 A.L.J.R. 528 in rejecting the challenge. Mason J. said at p.531:

"The problem is governed by the principle that a judge should disqualify himself from hearing, or continuing to hear, the matter if the parties or

the public entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the issues. ...

It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities ...

Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

I directed that the appeal should proceed.

The second stage of the appeal was a week later when Mr Kilby, counsel for the appellant, sought leave to introduce "fresh" evidence of various kinds on the basis that in its absence the cumulative effect was to deny him a fair trial. Most of the so-called fresh evidence was known to the appellant's counsel at the trial, Mr Martin, Q.C. The only inference I could draw from knowledge of the evidence and able representation was that a

deliberate decision was made at the time not to call the known evidence. Certain witnesses were available and not called. The trial was a long one. There was time for the appellant to arrange for the evidence to be called. And Mr Martin did not apply for an adjournment for the purpose of obtaining evidence.

Prior to hearing the second stage of the appeal, I required the appellant to file an affidavit raising the heads of fresh evidence and other complaints about deprivation of a fair trial. His affidavit and argument disclosed, first of all, a number of complaints of alleged prejudice arising out of an application to the Administrative Appeals Tribunal for the release of certain confidential documents lodged with an Export Market Board.

Prior to the commencement of the prosecution, the commission came into possession of certain documents which had been presented to the Export Market Development Board by Semmens and nine partnerships. A company was a member of each partnership. The nine partnerships (and Semmens and the companies associated with the partnerships) had sought subsidies totalling \$630,000 from the board for alleged expenditure during the financial year 1978/1979 of about \$70,000 by each partnership. The claims were based on the appellant's account for fees and for expenses incurred or to be incurred in the future. Documents associated with such applications to the board were and are protected by the confidentiality provisions of the Act which creates the board and provides for the subsidies as an incentive to the export industry. Confidential documents can only be released when a case is made out to the Administrative Appeals Tribunal for their release. The commission was investigating Semmens and this appellant and the partnerships. Late in the investigation, the

commission applied to the board by letter for the release of the documents. This letter became one of the matters raised by the appellant as supporting his claim of denial of a fair trial. The commission did not produce the letter to the appellant in answer to his subpoena to produce all relevant documents. The commission said that the letter was irrelevant, being merely a letter by an investigating officer asking the board how to go about obtaining the release of confidential documents. The board informed the officer that it was necessary to apply to the Administrative Appeals Tribunal. The appellant could not explain why this letter was important to him. In the end, I held that this was a mere fishing expedition for a red herring.

The commission did apply to the Administrative Appeals Tribunal sitting in Adelaide for the release of the Semmens' documents before the board. In making out its case before the tribunal, Mr Lane said certain things which the appellant said amounted to misrepresentations. One such complaint was that Mr Lane obtained the release of the documents on the misrepresentation to the tribunal that the commission had the support of the liquidator of the nine companies, Mr Raphael. However, Mr Raphael was in Europe. Mr Lane in fact did have the support of Mr Thomas, an accountant in charge of Mr Raphael's office while Mr Raphael was in Europe. Mr Thomas filed an affidavit that he rang Mr Raphael and got his support. When Mr Raphael was asked a question in the magistrate's court about his support for the commission's application to the tribunal, he said that he had not given his support. I have affidavits from Mr Lane and Mr Thomas that Mr Thomas said to Mr Lane that he had the liquidator's authority to support the application. Mr Lane did

not, therefore, misrepresent the position. Mr Thomas was in charge of the office whether or not he rang Mr Raphael. It was not put to Mr Raphael that Mr Thomas said he rang Mr Raphael in Europe or that he, Mr Raphael, might have forgotten a telephone call from Mr Thomas. In any event, the application for release of documents was made not only with respect to the nine companies but also with respect to the documents of nine partnerships and as many individuals. The liquidator's consent was not necessary with respect to non-company parties.

I held that there was no substance in the appellant's complaint that the tribunal's discretion to release the documents would have been exercised otherwise than by release. In any event, even if there is some substance in the complaint, the magistrate would have had a discretion to admit the evidence "illegally" obtained. There is every reason to believe that he would have exercised his discretion to admit it having regard to the gravity of the charges.

The appellant next complained that Mr Lane had made a submission to the tribunal in the course of distinguishing earlier cases in a way which could have given the tribunal the false impression as to the commission's intentions after the documents were released. The transcript was read to me. I reject the complaint as being without substance.

The appellant next complained of the way in which Mr Lane put his submissions to the tribunal, complaining that he gave the impression that the commission's investigations had virtually finished and that he only needed the confidential documents to "round off" evidence whereas later the commission made out a different kind of case against the appellant after it obtained

the documents. Initially the commission seemed to be looking for evidence that the companies, partnerships and individuals had been defrauding creditors whereas the charge finally laid by the commission was that the companies and others were defrauding the board.

The Full Court held in Semmens' case that s.374c(2) of the Companies Act embraced both conduct which defrauded creditors and conduct which defrauded non-creditors.

I fail to see the relevance of the complaint. It matters not that the commission went to the tribunal in one frame of mind and later decided, after perusing the released documents, to change the nature of the charge. That does not mean that the evidence was improperly obtained. Nor does it mean that the appellant was denied a fair trial. The transcript was again read to me. I found that there was nothing in the conduct of Mr Lane or the commission before the tribunal (or in correspondence with the board) which even began to support a rational suggestion that Mr Lane's conduct was improper or that a fair trial was eventually denied to the appellant in the magistrate's court.

The appellant next complained that he was barred by the magistrate hearing the Semmens' complaint from remaining in court to hear counsel's opening address in that prosecution. The trials had been made separate trials at the appellant's request. For some reason, the magistrate in the Semmens' case made an order suppressing from publication, not only to the public but particularly to the appellant, any part of the opening address or the evidence in the Semmens' case. Whatever harm might have been done to the appellant in the preparation of his own case by virtue of that order by another magistrate, such harm was later

reversed. The commission not only gave the appellant very full particulars of the charges against him but also made available to him and to his counsel from the opening of his trial and on each day thereafter, all of the documents which had been obtained from the board following the order of the tribunal. It so happened that the appellant's trial was adjourned for several days immediately after counsel's opening address. Mr Martin and the appellant had access to the documents from that time onwards as well as to the evidence in the Semmens' trial. Mr Martin did not claim prejudice nor did he ask for any further adjournment. I asked for an affidavit from either the appellant's instructing solicitor or from Mr Martin if they had any other version of the availability of any documents or of any possible prejudice. No such affidavit was forthcoming.

The appellant's counsel next argued that the commission's application to the tribunal and the proceedings in the court were affected by an allegedly tainted handwritten record of interview of the appellant made by Miss Thorpe. She was an accountant employed by the commission. Mr Calabie was the investigating officer who conducted the interview. The appellant said that he did not know at the time of the trial but has discovered afterwards that staple marks at the corners of certain pages of Miss Thorpe's record of interview indicated that some pages may have been changed. I was told that some investigations are still being made into this complaint. Nothing has happened so far. The investigation is inconclusive. I do not have any view about the matter. Let it be assumed for the sake of discussion that she did replace a page or pages of that interview for some reason. I invited Mr Kilby, counsel for the appellant, to point

to any passage in the record of interview which was alleged by the appellant to be incorrectly recorded or was otherwise challenged by him. Mr Kilby could not challenge any specific passage or even any word in the record of interview. The magistrate did not refer to nor did he seem to rely upon the contents of the appellant's self-exculpatory statements in the record of interview. I find that if the pages were for any reason changed (and I make no finding whatsoever about that allegation), it could not have had any influence on the result of the appellant's case.

The appellant next said that the long delay between events in 1979 and the prosecution in 1985 caused him to forget a number of the facts which could otherwise have been proved at the trial. Some of the delay was due to the complexity of the investigation and the necessity to obtain a release from the tribunal. Some of the more recent delay was due to tactical moves over joint and several trials.

I reject any suggestion that Mr Martin might have overlooked significant matters or failed to seek evidence from potential central witnesses such as Konstas and Forgan to whom reference will be made.

Konstas was a central figure in the early stages of the exporting and advertising activities which were said to have been very costly. His company in New Zealand (Trans Tasman Co-ordinators Pty Ltd) and his firm (Trans Tasman Co-ordinators) played a large part in certain "round robins" of cheques which moved huge sums of money away from the nine partnerships and back again to Adelaide. These round robins were strongly suggestive of a fraudulent scheme unless explained. I received an affidavit

as to alleged "fresh evidence" from Konstas in which he deposed that one of the appellant's companies, J. Robertson Exports Limited, engaged his company or firm or both to undertake large advertising and promotional work on behalf of the nine exporting partnerships formed later by Semmens. He deposed that his company/firm did not have the expertise to do all of the promotional work, so he arranged for it to be spread between his company/firm and a Sydney firm of advertising consultants, Harris Robinson & Associates Pty Ltd. One Harris of that Sydney company did give evidence. The magistrate was most unimpressed with his exaggerated and self-contradictory claims as to the cost and value of work done. Konstas could have given evidence. He was available at the time. He did not give evidence.

Konstas attached to his affidavit some exhibits which were said to relate to advertising work. These exhibits indicate that some advertising work was done but that much (worth \$199,000) was still to be done. Another exhibit was an account from Harris' company to Konstas' company. On page 1 of the account appear particulars of air fares and consulting totalling about \$60,000; and on page 2 appear the cost of other fares. Then there appeared an item of \$35,000 said to be for consultations by Konstas with a number of persons in relation to advertising and promotion in the United States. This "work" was said to be useless (if it was done) as there was evidence that Konstas made no worthwhile contacts and soon washed his hands of the whole scheme. All items so far total \$98,000. The account concludes:

"To subsequent media commitments:

News Chronical	\$129,000
Valley News	\$70,000"

These two items for future work (to be done in the financial year July 1 1979 to June 30 1980) total \$199,000. They constitute the bulk of the bill. One of the central questions at the trial was whether expenses (including future promotional and advertising expenses) had been genuinely "incurred" as "expenditure" prior to June 30 1979. If the expenditure was incurred, a genuine application might be made for 70% of that genuine expenditure. If not, the claim to the board was pro tanto dishonest. The claim was that the industry required the money for advertising work to be "put up front" even though it was only to be done (if there was any money forthcoming from the partnerships) between October and December 1979.

The Konstas account was so lacking in particularity as to past expense (especially the \$35,000) and so plainly referred to future expense (as to \$199,000) that its only effect was to tend to undermine the claim that the nine partnerships "incurred" the expenditure prior to June 30 1979. The appellant's account for \$630,000 rested inter alia upon this account. His case was that he was a consultant engaged to set up an exporting business to qualify it for the subsidy. He said that he did his work throughout the 1978/79 financial year. He rendered his account at the appropriate time when he left Semmens and the nine partnerships to continue with their own ongoing export business. Although the appellant assisted the partnerships by giving evidence before the tribunal in their appeal in the 1979/1980 financial year after the board's rejection of the subsidy applications, he said it was no part of his fee or his obligation to do anything in the 1979/80 financial year.

The fact is that the appellant well knew that the nine

partnerships were going to make their applications to the board. Indeed, he had set up the whole scheme and introduced the idea of the scheme to Semmens at a public seminar. The appellant was the export marketing expert, the person with the expertise. The whole scheme was directed, from beginning to end, towards obtaining these large, all-important grants from the board (70% of 9 x \$70,000). As the magistrate said, only two shops were opened in the United States. A Mr McPhee had been sent there to oversee them. Sheepskin products worth \$200,000 had been obtained and forwarded to the United States, obtained on long-term credit. The original intention was to undertake a huge promotional "give away" exercise in the United States to create market interest in these products. In fact, only a few sheep skins were given away, only in their "tens". A trickle of others were sold from the two shops, barely enough to pay the rent and wages. This was well described as a "Mickey Mouse operation" in performance of a grandiose scheme. The magistrate said:

"The evidence discloses that early in 1979 the defendant was employed to act as a consultant to these partnerships by Semmens. The defendant made grandiose plans for the sale and distribution of sheepskin products and opals in America. The plan was to open a number of shops and then, when they were successful, sell them to American purchasers".

(I interpolate that many dozens of American shops were in contemplation)

"However, by the middle of June, 1979, only two shops had been opened; neither having any substantial capital. Apart from the dispatch of sheepskin products to these shops and some opal, little was invested in them. They were managed

by a small group of people who had to pay for advertising - and take their salary - from the proceeds of sale.

The partnerships which Semmens had been instrumental in forming had received capital in the form of loans, several of which appear to have been nominal only. And yet the defendant's invoices, to which I will refer in detail shortly, and the claims which were based on them, would suggest that the defendant Robertson, partly by himself, but largely through his agents, had carried out work in one way or another on a very large scale. The very claim itself, of \$633,000-odd, was calculated to make that impression. And, of course, the payments to the defendant which comprised that amount must have confirmed that impression strongly. When the claims were made on the Grants Board, no disclosure was made that the large amounts which had been paid to Robertson had, to a very great extent, been lent back to the partnerships. Admittedly, the loans themselves were disclosed, but naturally, disclosure of the loans without disclosure that many of them had no substance about them must surely have been misleading (although I realize that "substance" is one of the questions to be decided). What was in reality a small enterprise was, whether by dishonesty or otherwise, given the semblance of a very large export business.

No-one doubts that the enterprise was a legitimate one initially. The question is whether its lawful endeavours were put aside in favour of an unlawful purpose, as alleged. I have no doubt that, on the prosecution case, that is what did occur, as I found in ruling that the defendant had a case to answer. It now comes to be considered, on all of the evidence, whether

the fraudulent purpose has been established and whether the defendant was a party to it, as charged."

I now turn to the inflated advertising accounts of Konstas as to \$35,000 worth of past work to promote this small operation and as to \$199,000 worth of expected future work.

Konstas went to America from New Zealand in about April 1978 to arrange a great amount of advertising, the cost of which should have been incurred prior to June 30 1978 if it was to be included in the subsidy applications. However, when Konstas came back at about the end of May 1979, he had done little or nothing effective about the advertising. Yet his account shows \$35,000 plus air fares for interviewing some people. Konstas saw Harris and the appellant and told them he was going to Europe. He wiped his hands of the scheme. This left the nine partnerships (and the appellant) in the lurch. The program was running behind time even though the appellant had been working throughout the whole of the financial year to get things advanced to the point where the costs had been incurred and he could lawfully render his large account.

If Konstas had anything useful to say, he could have said it during the trial. He was not called. In his affidavit in support of the application for fresh evidence, Konstas concludes:

"The advertising was not commenced because the partnerships never gave me the promissory notes required."

The expenditure was not genuinely incurred in the year ended June 30 1979, as the magistrate found.

The appellant next referred to the possible evidence of one Forgan. At the hearing before the magistrate it must have been

apparent that Forgan incurred some costs in relation to his American trip before he went there, from July 1 to July 20 1979. That is, some money must have been spent for air fares etc. prior to June 30 1979. Forgan could have been called at the trial to prove the pre-June 1979 expenditure. In aid of proof of pre-June 30 1979 employment of Forgan, the appellant wanted to introduce "fresh" evidence of an air ticket which showed that Forgan flew from Adelaide to Sydney and from Sydney to Adelaide on the same day in mid-June 1979. That trip indicated that Forgan was incurring expenditure in June 1979 on behalf of the partnerships. Forgan was one of the parties to the "round robin" of cheques. That might explain his absence from the witness box at the trial. In any event, this head of fresh evidence is peripheral in the extreme.

Mr Kilby argued that large advertising agencies intending to embark on large promotional programmes were entitled to charge fees in advance and require the client to "put the money up front" in the same way, he said, as "a barrister, or like any professional person doing work, seeks to get fees in advance". However, one would expect that a barrister or other professional person would put these large advances against future fees in a trust account. The "up front" argument was an unconvincing and unmeritorious explanation for claiming that the appellant had an honest belief that \$199,000 of expenditure had already been "incurred", when plainly it had not.

The appellant next complained that he had been unable to call Semmens as a witness at his trial because Semmens was still involved in his own litigation. It was open to the appellant to subpoena Semmens to give evidence in his case. I was told that

this was considered by his counsel but Semmens was not called.

There are obvious reasons why Semmens was not called. He figured large in the main "round robin" of cheques. It is not open to the appellant now to complain that Semmens was not called.

On the nature of fresh evidence, Mr Kilby referred to Napper v. Samuels (1972) 4 S.A.S.R. 63. Bray C.J. said that a more liberal attitude was now adopted towards fresh evidence. That was said, however, in the context of sentencing. The correct nature of fresh evidence is described in Hook v. Ralphs, a judgment of von Doussa J., unreported, delivered July 24 1987.

His Honour said (p.10):-

"The main considerations to which a court must have regard are: firstly, whether the evidence relied on could not with reasonable diligence have been produced by the party seeking to rely on it at trial, although this is not a universal requirement, Gallagher v. R. (1986) 65 A.L.R. 207 at 209. Secondly, whether the evidence is relevant to the issues, Craig v. The King (1933) 49 C.L.R. 429 at 439. That the evidence must be relevant "goes without saying", R. v. Parks (1961) 1 W.L.R. 1484 at 1486. Thirdly, whether the evidence is apparently credible in the sense that it is at least capable of belief, Gallagher v. R. (supra) at 209, R. v. Parks (supra) at 1486. Fourthly, whether the cogency of the evidence gives it such a character that it meets the test appropriate to the class of case under appeal (whether civil or criminal) and to the relief sought (whether the appellant seeks to have the verdict reversed, or to obtain an order for a retrial).

The third and fourth considerations may merge as it is not always convenient or helpful to

consider questions of credibility, plausibility and cogency in isolation; Gallagher v. R. (supra) at 210, 213-214, and 233. In the instant case the appellant seeks an order for a retrial. Although the decision under appeal is that of a magistrate who constituted a court of summary jurisdiction, I consider the relevant test by which this court should determine whether the conviction should be quashed and a retrial ordered, is to be formulated in accordance with the judgments in Gallagher v. R. (supra), namely:

'Is there a sufficient possibility that the court of summary jurisdiction, acting reasonably, would have acquitted the appellant of the charge if the new evidence had been before it?'

The requirement stated in the majority judgment in Bean v. Considine (supra) that the fresh evidence "would have been likely to influence the court below" must now be so construed where the appeal is against conviction."

I conclude my discussion of this second stage of the appeal by holding that none of the matters put forward by the appellant could be classed as fresh evidence, either singly or in combination.

The third stage of the appeal related to the real issues.

The charge against the appellant was:

"That between the months of April and July 1979 at Adelaide and other places, he aided and abetted the commission by Robert James Semmens of an offence against section 374c(2) of the Companies Act, 1962, the offence being that between the months of April and July, 1979, the said Robert James Semmens was knowingly a party to the carrying on of a business of Ayala Pty Ltd, a company to which the said section 374c(2) of the Companies Act 1962, applies, for a fraudulent purpose'.

Particulars of Offence:

1. Ayala Pty Ltd, a company incorporated in South Australia, was ordered to be wound up by the Supreme Court of South Australia on the 19th day of January, 1981.
2. In or about the month of April 1979, Ayala Pty Ltd entered into a partnership agreement with John Kalleske, John Hill, Matfor Mining Pty Ltd and Lindsay Smith, trading under the business name of Frewville Exporters No. 8.
3. Ayala Pty Ltd and the other partners trading under the said business name carried on a partnership business of establishing an export market in the United States of America for manufactured sheepskin and opal products.
4. One of the purposes for which the said business referred to in paragraph 3 hereof was carried on was fraudulent in that the said business was carried on for the purpose, inter alia, of making a false claim to the Export Development Grants Board for a grant of \$49,000 in respect of a total expenditure by the partnership of \$70,000 on consultant's fees to J. Robertson Exports Ltd and J.R. Export Pty Ltd when \$70,000 had not been expended as consultant's fees.
5. R.J. Semmens was knowingly a party to the carrying on of the business by the company referred to in paragraph 3 hereof for fraudulent purpose referred to in paragraph 4 hereof."

In order to establish the above charge the prosecution had to establish to the magistrate's satisfaction beyond reasonable doubt, first, that one of the purposes for which a relevant company in a partnership was trading was fraudulent, that is, to perpetrate a fraud upon the board; second, that Semmens acted fraudently by knowingly being party to the carrying on of the

company's business for a fraudulent purpose (assisting the company to achieve that fraudulent purpose); and third, that the appellant himself knowingly and dishonestly assisted Semmens in the achievement of that purpose. See Semmens v. Flavel (Full Ct) unreported, judgment of O'Loughlin J. (Jacobs A.C.J. and Prior J. concurring) delivered August 21 1987.

The essence of the charge was the dishonesty of Semmens and the dishonesty of the appellant in the respective roles they played in relation to the one fraud. It is not to the point, and it did not assist proof of the prosecution case against the appellant, that Semmens admitted his own dishonest role as principal offender in the course of his appeal to the Full Court (ibid p.5). An admission by Semmens is not admissible or relevant in aid of proof in the prosecution case against the appellant. The prosecution had to prove, in the course of its case against this appellant, that Semmens was in fact dishonestly involved in assisting the company to achieve the dishonest purpose. Only then could it be said that this appellant was himself aiding and abetting Semmens dishonestly.

Further, since the prosecution case against the appellant was based upon circumstantial evidence, the prosecution had to prove such dishonesty beyond reasonable doubt to the point of excluding every rational hypothesis consistent with innocence. See Peacock v. The King (1911) 13 CLR 619.

Almost the same huge body of evidence was relevant and admissible and indeed highly probative in establishing, at one and the same time, the guilt of Semmens and the guilt of the appellant. However, their roles were different and different questions had to be asked and answered in determining the guilt

of each of them.

Normally, the absence of an accused person from the witness box in answer to the charge makes it more easy to draw the adverse inference already established as to guilt. In this case, the appellant gave evidence but Semmens did not. The absence of Semmens was of no comfort to the prosecution case because the appellant did give evidence. Although Semmens' guilt had to be proved beyond reasonable doubt, he was not the accused and the usual observation about drawing inferences more readily, provided they are already established, against the party who prefers the well of the court to the witness box, had no application here. It was said that the appellant might have subpoenaed and could have subpoenaed Semmens but Semmens' case was still before the courts. He had been found guilty by a magistrate but his case was under appeal. The outcome of the appeal might have been a re-trial but it is possible that Semmens might have refused to give evidence on the ground that his answers might tend to incriminate him or affect his chance of a fair re-trial.

The magistrate correctly noted the absence of Semmens and certain other witnesses but he did not attach any weight to the absence of Semmens anywhere in his reasons so no error of law was demonstrated on this account.

During the course of considerable argument presented with great assiduity by Mr Kilby, very little attention was paid to the reasons of the magistrate. It was Mr Kilby's contention that the hearing before me was by way of re-hearing and that I stood in the magistrate's shoes, as it were, and could make any findings he could have and should have. That is not correct. In other States such as Victoria the appeal to the Supreme Court

from a magistrate's conviction is by way of complete re-hearing and all the evidence is heard again. In this State, appeals are normal appeals. If the appeal is allowed, the court can make any order which should have been made and may even make amendments which should have been allowed by the magistrate. But that does not mean that the appeal court can reverse findings based on credibility. The magistrate hears and sees the witnesses. He absorbs the atmosphere of the trial. He assesses the credibility or otherwise of the witnesses. On questions of fact on a delicate matter like dishonesty, his assessment is very important. He is acting as the jury. This court can only interfere if the magistrate fails to take into account something he should have taken into account or does take into account something he should not have or if he makes an error of law. Generally, an appeal court defers to the magistrate's views on credibility. And this court will only interfere if the magistrate is otherwise in error. It may be for this reason that Mr Kilby's argument concentrated upon a fresh re-appraisal of the evidence rather than an examination of the magistrate's reasons for judgment in conjunction with the evidence.

Most of the argument on behalf of the appellant was pressed with a view to convincing me that it was reasonably possible that the appellant was not himself involved in a fraud even if Semmens and the company were, because he had done a lot of work over a whole year in an effort to have the export arrangements well established and the advertising well under way before the expiration of the financial year 1977/78, so that he could honestly say that his work was done, his role was over and that his professional charges of \$630,000 had been incurred by the

partnerships and were well and truly payable. Of course his charges were not \$630,000 but less than \$100,000 to \$150,000 of that. The balance of the bill he rendered was made up of huge advertising and other costs including the setting up of shops to sell sheepskins in the United States and the trips backwards and forwards to the United States to assist in the initial promotion and to round up a big campaign of promotion and advertising involving expenditure of huge sums of money. As I said, the prominent figure in the initial arrangements, Konstas, a New Zealander, failed in his efforts to obtain satisfactory advertising and to incur necessary expense prior to June 30 1979. He went to America; and he presented a bill with a large component for trying to get advertising done and contacting advertising personalities for which he charged \$35,000. But Konstas did not give evidence to support that as a reasonable cost and the only evidence was that Konstas had really done nothing but by late May or early June was wiping his hands of involvement in this scheme and was going to Europe. He arranged with a Mr Harris of Harris Robinson & Associates in Sydney to do the work for the partnerships and in support of Robertson's charges, as I said, to be done in New Zealand by his Trans Tasman Co-ordinator company but much of it in Sydney by the Harris company. The bill as ultimately sent by Konstas company to Harris for some reason (which the magistrate found puzzling and so do I), sets out these air fares and costs in relation to visits to America. More significantly, the final item of \$199,000 relates to the potential cost of getting some advertising done in a few months time, in the period late September/October/December, 1979 - well after the June 30 1979.

It was this unincurred component which impressed the magistrate as being part of a fraudulent scheme to pretend that it had been incurred. That pretence was not to be viewed in isolation. It was to be viewed in combination with another pretence arising out of a "round robin" of cheques under which sums were paid in various directions shortly before June 30 1979, as if they were genuine payment of the appellant's professional and advertising and other fees prior to the end of the financial year whereas that same money or its equivalent was returned by devious channels to Semmens and the partnerships in Adelaide on the claimed basis that the returned sums were loans to the partnerships. Virtually all of the money that had been "paid" to the appellant for his fees and expenses "incurred" was now returned to the partnerships on this so-called loan basis. As I said, the magistrate saw and heard the appellant. He simply did not believe him. On the totality of the circumstances, the magistrate was convinced that the appellant and Semmens were using these accounts and round robins as dishonest devices to "pull the wool", as it were, over the eyes of the board. He was convinced that the partnerships had not genuinely incurred these huge expenses. He saw the large hasty payments on inflated and unsupported accounts shortly before the end of the financial year and the surreptitious return of most of the money shortly afterwards in the new financial year as fraudulent methods of attempting to obtain large subsidies from the board.

That was the guilty inference which the magistrate drew as being proved beyond reasonable doubt to the exclusion of all other explanations. There was ample evidence upon which he could draw that inference of guilt. I can see no reason to upset his

verdict.

The appellant's role within the year July 1 1978 to June 30 1979 was quite prominent. He was the person who lodged his account for \$630,000. He was prepared to justify his account in terms of other accounts for inflated expenditure, including future advertising costs. Further, his companies were heavily involved as payees in the "round robin" of cheques. It was thus that his account was paid before June 30 1979. He was also heavily involved in the return of the money by his companies to the nine partnerships soon after July 1 1979. And not long after that date he gave evidence to the Administrative Appeals Tribunal against the board's refusal to grant subsidies. He endeavoured to explain to that tribunal on behalf of the partnerships and the companies why it was that the partnerships were entitled to the subsidies from the board. It was the appellant who had originally introduced the whole scheme to Semmens. And when the scheme was running behind time in June 1979 he became involved, as the magistrate found, in an alternative way of qualifying the partnerships for the subsidy in this fraudulent manner. It was a measure of desperation. It was not his intention from the beginning to be involved in a fraudulent scheme. Rather, he became involved in response to a change of circumstances in late May and in June 1979.

Mr Kelly paid much attention to the argument that costs could genuinely be "incurred" in late June even though performance of the work to be done was not to be incurred until the period September to December 1979. I have already referred to this topic. As I said earlier, the magistrate saw and heard Harris, the advertising expert, and he saw and heard the

appellant, in their respective explanations as to the necessity to put money "up front" well in advance if large and expensive advertising companies were to be persuaded to undertake future large promotions. This is so, it was claimed, the custom in the trade. The magistrate held, in effect, that these future costs were not incurred and that they were largely a 'pretence', and that Semmens and Robertson did not believe they were incurred. He was singularly unimpressed with the way in which the \$630,000 was paid out as if the expenses behind the large total of the appellant's account had actually been incurred.

I propose to deal with the question of the meaning of "expenditure incurred" in this context.

Section 4 of the Export Markets Development Grants Act 1974 (Commonwealth) provided a definition of "eligible expenditure" as being "expenditure incurred" primarily and principally for the purpose of creating or seeking opportunities, or creating or increasing, demand for -

- "(a) the sale for export, or export and sale, of eligible goods that have been manufactured, produced, assembled, processed or packed, or graded or sorted, in Australia
- (b) ... (or) outside Australia ...
- (c) the supply for reward, in the course of carrying on business in Australia, of services (not including know-how, but including technical advice, training or assistance other than know-how) outside Australia; or ..."

Sub-s.(2) of s.4 of the Act provides that "expenditure" includes the expenses of, contributions towards the expenses of, or payments made to, an agent for the purpose of carrying out a

market research or the obtaining of market information: or advertising or other means of securing publicity or soliciting business.

If the nine partnerships were to qualify for subsidies under the Act it was necessary for the partnerships to be in a position to prove that they had "incurred" the claimed "expenditure" by having "made contributions towards the expenses of an agent" or by having "made payments to an agent".

The magistrate considered the questions whether the \$630,000 was "paid" to appellant. He said:

"One of the very important considerations in this case, in relation to the defendant's credit, is this: the defendant, claiming to be an independent consultant at arm's length from the operation, allowed this large sum of money, \$633,000, to pass through his hands and be returned to its source eventually, without deducting any money for himself or any sub-contractor who had done work on his behalf. That is by no means necessarily evidence of fraud itself, but it is important in the overall context. But the defendant says that he was prepared to lend the money to the partnerships, and wait for his own reward, so that they could make a success of their export enterprise which he had done so much to foster as their consultant (the partnerships were, after all, very short of money). That may be true. But it is very surprising that nothing was deducted to cover his own accounts. If he had deducted what he claims he was entitled to for himself as consultancy commissions or fees - some 12-15 per cent of the total amount of all of the invoices - the loans to the partnerships would still have been very substantial.

Of course, the Crown alleges that the truth is that it was not possible for him to do that if the partnerships were to survive, because they had virtually no money to speak of, apart from the money spent on sheepskins. And the fact that the partnerships were not prosperous is really the starting-point when one comes to consider whether or not deceitful means were used. In view of the fact that so many loans were disclosed to the Grants Board, the impression was given that the partnerships did have considerable backing. And so I agree that we have the outlines of a fraudulent scheme. Whether that fraudulent scheme has been proved beyond a reasonable doubt, and whether the defendant was a party to it as an accomplice, are the issues."

Having dealt with inflated accounts for advertising and the argument as to the need to "put money up front", the magistrate described the sending of the account for \$630,000 and the "payment" of the account thus:

"During the months of May and June, 1979, the partnerships paid, or purported to pay, some approximately \$630,000 to the two companies, J.R. Robertson Exports Limited and J.R. Export Pty Ltd., of which the defendant was the principal, to cover his invoices for the work that he and his supposed sub-contractors (I will deal with the sub-contractors shortly) had done, or claimed to have done. The prosecution's case is that the payments were not genuine and that the purpose in making them was not to recompense Robertson for work he claimed to have done, or to have had done, but to provide false evidence of expenditure upon which spurious claims could be made to the Grants Board for subsidies. There were several cheques that comprised the approximate amount of \$630,000. Some were drawn on accounts in the name or names of the partnerships, there being one for each

partnership. Some were drawn on behalf of the partnerships on an account entitled "R.J. Semmens Administration Account". The cheques were drawn either by Semmens himself or by Mr Noolan, to whom I have already referred as the witness who has been granted immunity by the Crown in relation to the transactions which are the subject of these proceedings.

The cheques which were drawn in purported payment of Robertson's invoices did not result in any lasting credit to Robertson (the appellant) or his companies. The amounts for which they were drawn were credited in Robertson's banking records flittingly. Almost immediately these book credits were extinguished and the amounts then found their way back by circuitous, and sometimes mysterious routes to their sources, the partnerships or the "R.J. Semmens Administration Account" (for the partnerships). It is readily understandable, therefore, that the prosecution should submit that the payments were fictitious and were calculated and intended to be no more than a spurious means of creating the appearances of expenses in connexion with the export market.

(I will come shortly to the details of Robertson's invoices: they are very much in question). However, the defendant's answer to this is that, through Noolan, the purpose of the payment back to the partnerships, or the R.J. Semmens Administration Account, of the amounts comprising the approximate sum of \$630,000 was to lend the money, albeit without interest, to the partnerships. In essence, Robertson said in evidence that he was prepared to lend back the money that was paid on his invoices - just as were other parties to the invoices whom I will name in a moment - to enable the venture to continue, the partnerships being short of money.

That is one of the main issues in this case:
were there genuine loans made by the Robertson
companies to the partnerships and the "R.J.
Semmens Administration Account", or were the
"round robins" of cheques a dishonest vehicle to
give the superficial resemblance of true business
expenditure followed by loans? Of course, in
connexion with that, the other major question,
and the one upon which the allegation of
complicity largely depends, is whether the
invoices themselves were genuine. It is the
strong contention of the prosecution that the
invoices were to a very large extent Robertson's
concoctions; that he did very little work himself
- indeed, very little work was done by anyone in
connexion with the export market excepting McPhee
- and that many of the details which are set out
in the invoices were inserted with a fraudulent
purpose in mind, viz, to deceive the Grants
Board.

In other words, the prosecution case is that the
defendant was a party to a sham, evidenced by the
exaggerated claims made in the invoices which the
defendant prepared and submitted. I will now
have to go into more detail and describe the
invoices and the evidence of the various payments
that were made to the Robertson companies and the
fate of those payments. The way is labyrinthine,
but finally a passage can be found through the
complexities. The task has been made more
difficult than it might have been by the absence
of certain persons as witnesses, and I will say
more of that."

No attack was made upon that approach. And the magistrate
did undertake the difficult task of finding his way through the
labyrinth. Again there was no attack on his findings apart from
the inference of dishonesty.

Before considering the effect of the \$630,000 "round robin", the magistrate took a simpler example. He started, as an example, with the fate of one cheque for \$59,000 and showed how it went out of Semmens "administration account" into the account of one of the appellant's companies and then back again to the original account on the same day. The appellant explained this (and other "round robins") on the basis that he was concerned for the survival of the partnerships. They paid his accounts and he "lent" the money back to the partnerships immediately. His Honour was sceptical to the point of disbelief about that explanation. He saw in this type of arrangement the beginnings of a fraudulent scheme.

The magistrate then turned to the much more dramatic "round robin" of many cheques (Exhibit 77) which related to payment of the appellant's account for \$630,000 and which I have already described.

In the absence of some error of approach by the magistrate as to the law or, to the facts or to the onus of proof, his findings and verdict cannot be disturbed. No such error was demonstrated.

On the contrary, there was an error of approach by counsel for the appellant. This error permeated the argument on this long-drawn-out appeal from beginning to end. The error was the underlying assumption that I was the judge of fact, that this appeal was a full re-hearing, that I could substitute my own view of credibility and dishonesty for that of the magistrate. In the absence of established error, I cannot do that.

As a jury man, the magistrate was convinced beyond reasonable doubt that the only explanation for all of these circumstances was the furtherance of the fraudulent purpose of

obtaining from the board money with which the partnerships and Semmens were not entitled. He rejected the explanation put forward by the appellant for all of this.

It was the magistrate's decision, not mine.

The grounds of appeal were:

- "1. That the Learned Special Magistrate erred in law in his construction of Section 374C(2) of the Companies Act 1962.
 2. That the Learned Special Magistrate erred in finding a case to answer that the company in each count was carrying on a business to which Section 374C(2) of the Companies Act 1962 applies for fraudulent purposes.
 3. That the conviction of the appellant was against the evidence and against the weight of evidence.
 4. That the hearing of the charges against the appellant constituted a denial of natural justice in that Section 37 of the Export Development Grants Act prevented the defendant from obtaining necessary evidence for the defence.
 5. That upon the hearing of further evidence the conviction of the appellant should be quashed.
- The appellant will seek to adduce further evidence on the following matters:

- (a) the extent and character of work performed by Trans-Tasman Co-ordinators in relation to which claims were made to the Export Development Grants Board;
- (b) the extent of the contribution of the partners to the partnerships which made claims on the Export Development Grants Board the subject of the charges;
- (c) the amount of work performed by J.R. Robertson Exports Limited and J.R. Exports Pty Ltd in relation to which invoices were rendered to the partnerships;

- (d) the size of the export business embarked upon by the partnerships;
- (e) that the various loans made to the partnerships to fund the expenditure for which claims were made to the Export Development Grants Board were genuine in that work had been performed or was to be performed to justify the raising of the invoices and their payment;
- (f) that work had been performed or was to be performed to justify the raising of the invoices for which payments were made in relation to which invoices claims were later made on the Export Development Grants Board;
- (g) that loans by Trans-Tasman Co-ordinators were genuine loans;
- (h) that the debt incurred by sending a Mr Richard Forgan to the United States of America was incurred on the 29th June 1979 although Mr Richard Forgan did not travel to the United States until the 1st July 1979.
- (i) that the loan by Mr Richard Forgan of the sum of \$11,500 to the partnerships was a genuine loan;
- (j) that invoices rendered by R.J. Semmens to J.R. Exports Pty Ltd were for work actually performed by R.J. Semmens for J.R. Exports Pty Ltd and J. Robertson Export Ltd.
- (k) that evidence heard by the Court of Summary Jurisdiction was obtained as a consequence of a representation to the Administrative Appeals Tribunal that Alan Ralph Raphael, the liquidator of the companies, had approved of or supported the application by the Corporate Affairs Commission for the release of documents by the Administrative Appeals Tribunal;
- (l) that the record of interview (exhibit P246)

received in evidence did not accurately
record the interview between Barbara Anne
Thorpe and the appellant.

6. That the Learned Special Magistrate erred in his finding of facts in relation to the basis of sentencing.
7. That the Learned Special Magistrate erred in failing to suspend any sentence of imprisonment.
8. That the sentence imposed is manifestly excessive."

Grounds 1, 2, 3 and 4 have not been made out. The application in ground 5 to call fresh evidence has been refused. It follows that the magistrate's conviction must stand.

I will hear counsel on grounds 6, 7 and 8 as to the sentence of six months imprisonment against the maximum term of 12 months imprisonment.

.../34A

At the outset of these reasons I said that the appeal was heard in three stages: first, the disqualification challenge; second, the attempt to introduce fresh evidence; and third, the appeal on the merits against conviction. The fourth stage was to be the appeal against penalty. My reasons for not disqualifying myself, for refusing the admission of fresh evidence, and for rejecting the grounds of appeal against conviction, as set out above, were ready for publication in December 1987.

I called the matter on to hear submissions on sentence so that all my reasons could be given at one time. However, counsel for the appellant asked me to defer hearing submissions on sentence as they might not be necessary if the pending appeal in Semmens v. Flavel was successful before the High Court. However, that application for leave to appeal to the High Court was dismissed some months ago; and I fixed a time for hearing submissions as to penalty in the May list of Justices Appeals. The appellant appeared in court without counsel and without a copy of the magistrate's reasons. He took the opportunity to attempt to re-open his application for the admission of fresh evidence in support of a re-trial. He tendered a long written submission. He advanced the ingenious argument that the principles relating to the admission of fresh evidence were more flexible at the sentencing stage; and since we were now at the sentencing stage, he renewed all of his earlier submissions, this time in his own words and not in his counsel's words, against his conviction. He wished to call Mr Semmens to give evidence. A long affidavit from Mr Semmens was on file with numerous and quite bulky exhibits which I had not read. He also wished to

recall the expert accountant expert, Miss Thorpe, of Corporate Affairs Commission, who had prepared the charts showing the "round robins" of cheques. He claimed that there had been new developments in a police inquiry into certain amendments she had made to the statement she had taken from him and that the altered answers or edited answers which are now recorded in her record of interview affected his chances of acquittal because they affected the issue of his credibility.

However, I had invited his counsel, and I invited the appellant himself, to indicate where, in his reasons of judgment, the magistrate was affected as to credibility or as to the facts by anything contained in the record of interview. The magistrate did not rely upon any admission or any thing in the record of interview which could have affected his view of the appellant's credibility, in the totality of the evidence and documentation in this case. It is clear, upon a true understanding of the facts, that the magistrate drew adverse inferences of dishonesty, not by reason of anything appearing in Miss Thorpe's record of interview but by reason of his overall appreciation of the fraudulent nature of the scheme in which the appellant was involved. He was driven to an inference of dishonesty. I allowed the appellant, as he was appearing in person, to range again, in his own words, over his application to introduce fresh evidence, in case there had been a misunderstanding or a miscarriage of justice or in case he wished to amend the grounds of appeal to allege that the finding of guilt was unsafe or unsatisfactory.

The appellant's second attack upon the evidence of Miss Thorpe (whom he wished to have recalled for further cross-examination at this stage to establish either a new ground of appeal or his

right to call fresh evidence) was to the effect that she had dishonestly edited the charts of the round robins of cheques in June 1979, giving them the appearance of being round robins when the appellant alleged that they were not. He said that this inaccurate chart depiction of what had happened with the cheques had deflected the attention of all the parties and counsel and the magistrate, both in his case and in Semmens' case. Everyone was on the wrong track except the appellant. The appellant said that the lawyers were mesmerised by the professional accountant whose misleading chart had hidden the fact that there was real substance and real value behind the cheques which passed out of the Semmens' accounts through the Robertson accounts and back into the Semmens' accounts again. He said that a round of cheques is not a round robin of cheques if they reflect the truth of the matter, or if, in substance, there is value for what has been done. The cheques were in discharge of real liabilities and not just a facade of paper erected for the purpose of the alleged misrepresentation. The appellant said that if account were taken of the liability incurred in the current financial year to pay for about \$200,000 worth of stock of opal and about \$200,000 worth of sheepskins sent to America in that financial year, then the total expenditure by the partnerships was not only the \$630,000 of Robertson's consulting fee accounts (which include advertising etc.) but more than \$930,000. When the sheepskins and opal were brought into account, it did not matter that some of the supporting vouchers for future advertising did not fall due for payment within the current financial year as there was more than sufficient value to support a claim to the Export Development Board for 70% of \$630,000.

Mr Lane indicated to my satisfaction that there was nothing misleading or incorrect about Miss Thorpe's charts which represented a true round robin because there was no truth or substance in much of what was claimed in Mr Robertson's account for consultancy fees. He said that throughout the long case in the Magistrates' Court it was clear that there were two categories of payments or alleged payments which were kept separate. The first category was the payments, or liabilities to pay, for the opal and the sheepskins which were exported to America. The second category was the payment, or alleged payment, of Mr Robertson's account by means of the round robin of cheques. During the trial in the Magistrates' Court there was no challenge that money had been paid, or liability incurred, with respect to the opal and the sheepskins. The whole of the prosecution case concentrated upon the deception arising from the false impression, deliberately created, that the appellant's consultancy charges of \$630,000 (which included large amounts for alleged disbursements including advertising expenses in America) and as evidenced by the round robins of cheques, were "expenditure" genuinely "incurred". I have already dealt with this issue in my reasons above. I would only add to my discussion of s.4 of the Export Markets Development Grants Act 1974 and the meaning of "expenditure incurred" and "contributions made towards the expenses of an agent" on pp.26 and 27, a brief reference to Federal Commissioner of Taxation v. James Flood Pty Ltd (1953) 88 C.L.R. 492. The appellant referred to Flood's case and said that he understood that liabilities can be incurred in a financial year even if there is no obligation to pay. Hence his account for \$630,000 consultancy fees to the nine partnerships

(or \$70,000 each) lawfully included huge amounts for contingent liability to pay "up-front" large advertising fees which had not been paid because he believed as a result of his appearances over many years before the Taxation Board of Review, that such a future contingent liability fell within the meaning of expenditure incurred. Further, he said that he had made inquiries through Mr Flavel's office from the Export Development Board about "expenditure incurred". The Board correctly responded that this was a matter for any applicant to the Board to determine according to law. It is not proper for a body administering an Act to give legal advice to intending applicants, and this Board did not. The appellant said that subsequently the Board's view has fluctuated; it has been ambivalent in its attitude towards the interpretation of "expenditure incurred", I did not permit him to follow this argument up as it related to attitudes in later years, not at the time when he first made inquiry of the Board in 1979. In my opinion, the references to payments to an agent in s.4(2) of the Act mean payments actually made to an agent (such as to this agent for professional expenses) and that contributions made towards expenses actually incurred by an agent means contributions actually made towards the expenses of the agent in that financial year. In any event, I do not think that "expenditure incurred" in s.4 has any weaker connotation than "outgoings incurred" in the sections of the Income Tax Acts considered in Flood's case. The High Court there referred to the tension between accountancy practice and legal concepts of "outgoings incurred" in a financial year. In Flood's case, the High Court held that provision for long-service leave in the accounts of a company for the next income tax period were

not "outgoings incurred". The outgoings were incurred when payments were actually made to the respective employees who individually went on leave.

The High Court in Flood's case distinguished the English approach to tax deductions at p.506:

"For under our law the facts must satisfy the expression 'losses and outgoings incurred'. These words perhaps are but little more precise than the word "established" or the expression used above 'definitively committed' (in England). But they do not admit of the deduction of charges unless, in the course of gaining or producing the assessable income or carrying on the business, the taxpayer has completely subjected himself to them. It may be going too far to say that he must have come under an immediate obligation enforceable at law whether payable presently or at a future time. It is probably going too far to say that the obligation must be indefeasible. But it is certainly true that it is not a matter depending upon 'proper commercial and accountancy practice rather than jurisprudence'. Commercial and accountancy practice may assist in ascertaining the true nature and incidence of the item as a step towards determining whether it answers the test laid down by s.51(1) but it cannot be substituted for the test. ...

To repeat what has been said before in relation to an analogous provision in the Act of 1922-1934:

'To come within that provision there must be a loss or outgoing actually incurred. 'Incurred' does not mean only defrayed, discharged or borne, but rather it includes encountered, run into, or fallen upon. It is unsafe to attempt exhaustive definitions of a conception intended to have such a various or multifarious application. But it

does not include a loss or expenditure which is no more than impending, threatened, or expected.":

New Zealand Flax Investments Ltd v. Federal Commissioner of Taxation (1938) 61 C.L.R. 179, at p.207."

Having then distinguished another case, the High Court went on at p.507 to say:

"But whatever be the rationale of the decision (in Nevill's case) of the point, clearly enough it is not based on a view that no outgoing could be incurred until actual payment was made. It is one thing, however, to say that it is not necessary, for the purposes of s.51(1), that an actual disbursement should have taken place. It is another thing to say that in the present case the taxpayer had incurred a loss or outgoing in the year of income in respect of the pay of its men during the annual leave to be taken in the ensuing accounting period by employees whose service had not as yet qualified them for annual leave. In respect of those employees there was no debitum in praesenti solvendum in futuro. There was not an accrued obligation whether absolute or defeasible. There was at best an inchoate liability in process of accrual but subject to a variety of contingencies. It may be true, that regarding the labour employed as a whole, the accrual of an amount of the order claimed had, by 30th June 1947, become predictable with certainty. But that is not the test. If it be regarded nevertheless as an evidentiary consideration having some weight then it cannot be divorced from the further consideration that the source of the accruing liability, the award, imposes it as an obligation to pay wages for a period of time in the future during which the employee must be given

leave. That means that it is imposed in the form of a liability associated with the operations of the taxpayer for the ensuing year."

Some, but not all, of that passage is applicable to this case. As the High Court was at pains to point out there, each case depends upon its own circumstances and the Act being construed. However, taking a line through that case, it is clear to me that the prosecution case was soundly based and that the magistrate correctly appreciated it and that there was no error in the magistrate's appreciation of the charge or in Miss Thorpe's presentation of the charts. Miss Thorpe's charts were confined to the movement of cheques, that is, to category-two payments, the round robin of cheques relating to the consultancy fees of the appellant. In a last desperate lunge, the appellant said that the Board was not interested in his accounts until quite a late stage but only in the supporting documents behind his accounts. However, it is clear that the fraudulent scheme was to present the accounts of \$630,000 for consultancy fees as the basis for the claim for a grant from the Export Development Board. Naturally, the Board wanted to go behind the accounts and to see the supporting accounts to test what the nature of the "payments made to the agent" were and whether the expenditure was incurred in the relevant sense. It did not take the Board long to discover that they were not. It took the court a lot longer to receive the evidence which established that this was the case beyond reasonable doubt.

The first part of the prosecution case, Mr Lane said, was to establish that it was deliberately represented to the Board by means of the impression given by the accounts that \$630,000 worth

of work was done by way of consulting fees and expenses incurred by that agent, such as in visits to America and payment to various persons and in advertising expenses. In truth, those accounts were falsely swollen. It was beside the point that others had paid for a lot of sheepskins and opal. It was the expenses of the consultant which were relevant to his account, not the expenses of others.

The second part of the prosecution case was to show that the cheques drawn in the round robins in May - June 1979 were not really in payment, but drawn to give the impression that they were really in payment, of genuine invoices. As Mr Lane pointed out, it had to be a round robin because no real money was injected anywhere into the circle. Some of the partners themselves were called to give evidence to say what money had been put in; and it became apparent that very little money was put in. Cheques went around the circle and came back to their source.

A deliberate decision was made by the parties, Semmens in his case and the appellant in his case, as to what evidence was to be called and what evidence not called. Semmens did not give evidence. He took a legal point which failed. Robertson gave evidence. Their roles were different. They had different defences. All the questions that might have been asked of Miss Thorpe were asked. All of the documents, and all of the information which was needed for her cross-examination, were available before the magistrate. The opening commenced on October 7, 1985 and, from that date, all charts and supporting documents were available to the appellant and his counsel. The case was adjourned for three weeks and resumed on 28 October 1985. Miss Thorpe was cross-examined on 30 October 1985. After

the addresses of counsel, by consent of the prosecution, Miss Thorpe was recalled and further cross-examined on November 18, 1985. She was cross-examined about her "editing" of the interview; but she could have been cross-examined upon the alleged editing or misdirection of her charts. That was not done. Nothing has been said by the appellant on this further attempt to call fresh evidence to give me any cause for disquiet that there has been a miscarriage of justice. He explained why he did not speak to Mr Semmens in the course of the Semmens' trial. It was as a result of the advice of the respective counsel. However, after Semmens' case was over, he could have been available to give evidence (or information at least) to the appellant, even though Semmens' case was under appeal. In any event, there is nothing in Semmens' present affidavit which causes me to think that the result would be any different even if he had been called.

The appellant has had two "bites of the cherry" in relation to his appeal against conviction. That appeal is rejected on all grounds.

I pressed the appellant to indicate his complaints about the magistrate's reasons as to penalty. He conceded that he was the initiator of the whole idea. He published the pamphlet. He was "the captain of the ship". He agreed that he was thus taking responsibility for the major role in the scheme during the year ended June 30, 1979. He said, however, that his role as a consultant finished completely on June 30, 1979 and that the application to the Development Board was made by Semmens. At that stage, therefore, he claimed that his was the lesser role. But the application was the end result of his original plan. It

~~was based upon his professional accounts and upon the round robin~~
of cheques in which he participated. It was within the contemplation of all parties that this application was to be made to the Board. He joined in at that stage and was an aider and abettor in the full sense. His role was at least equal to that of Semmens.

The appellant pointed to an error in the magistrate's sentencing remarks where he said:

"In considering whether or not there was equality of criminality, I do not see how it can really be assumed that Semmens and the defendant were on a par. We do not know precisely what they said to each other and I daresay we never will know; but the evidence does smack of a conspiracy between the two of them - although I hesitate to use that word because conspiracy has not been charged. But the point is that there is such a paucity of evidence as to precisely what transpired between them, neither of them having given evidence, that it seems to me to be difficult for me to make any accurate finding."

The magistrate was making ex tempore remarks on penalty. It is unfortunate that, after such a long and difficult case, he did not reserve his remarks. Earlier in his remarks, he had referred to the fact that the defendant had given evidence. The transcript of the appellant's evidence is very long. The magistrate must have remembered the appellant's evidence. This remark could be interpreted as meaning "neither of them gave evidence as to precisely what transpired between them". There was paucity of evidence on that topic. The magistrate was talking about roles. That mistake might have been important if he had misconceived their respective roles. If anything, the

~~magistrate unduly minimised the appellant's role.~~ The appellant himself said that he was captain of the ship during the financial year. He stood to obtain payment of very large consultancy fees if this application was successful. Without money from the Board, he suffered a loss. (I ignore the question of any collateral tax advantages. It was not litigated before the magistrate in this case.)

Semmens was sentenced by another magistrate to six months imprisonment. The maximum is imprisonment for one year. It was relevant that I should know what the other magistrate said in sentencing Semmens. All things being equal, co-offenders should receive equal punishment. That consideration influenced this magistrate, Mr Kelly, to sentence the appellant to the same term of six months' imprisonment as Mr Chivell S.M. had sentenced Semmens. A sentencer must nevertheless be satisfied that the other sentence was an appropriate one to follow. The sentencing discretion must be exercised in each instance in case the second sentencer is of the opinion that the first sentence is manifestly excessive. See, for example The Queen v. Kite (1972) 2 S.A.S.R. 94. In my opinion, the sentence of six months' imprisonment is too close to the maximum of 12 months when regard is had to all of the circumstances of this offence and the appellant's lack of insight into its criminality as well as his good character.

If the maximum penalty of 12 months' imprisonment is too short, that is a matter for the legislature. White collar crime of this kind might in future be visited with heavier penalties. Until the maximum is altered, the penalties must be squeezed into the framework of a low maximum term of imprisonment. It is not difficult to conceive of worse frauds of this type, repeated and

prolonged frauds, frauds which were successful, frauds under which huge losses were suffered by the public revenue or by individual members of the public, frauds by companies and persons with previous convictions.

The appellant is 52 years of age. He has no previous convictions. He has been a stable member of our community from childhood. He is a married man with five children (two of them married). He has been separated from his wife for two years. He became bankrupt in June 1980 no doubt due to the aftermath of the scheme. The events leading up to the prosecution may have contributed to the breakdown of his marriage.

The defendant joined his father's business as a young man and built it up to a successful one. He then became involved in the electrical trade. He was the proprietor of a highly successful business by the time he was 30 years of age. He then became a consultant in the export field. By the time these 1979 crimes of aiding and abetting Semmens were committed, the appellant was a highly qualified professional man in the export field. All in all, he demonstrated, prior to the commission of these offences, great industry and great enterprise. He was respected in the business community.

Imprisonment for a first offence or offences should be avoided if possible. The magistrate appreciated this. Nevertheless, he observed, the offences were serious. That is correct. He noted that Mr Chivell S.M., had sentenced Semmens to six months' imprisonment.

The magistrate then seems to have assumed that six months was the correct sentence. He continued, "... the question is whether a distinction should be made now in relation to the defendant."

~~That was not the only question or, indeed, the first question.~~

The first question was - What is the appropriate sentence for the appellant in all of the circumstances of the offences and the offender? Only then did the question of possible disparity arise. If it did arise, the next question was whether the explanation for the disparity arose from a difference in roles or from a mistake in his own approach or in the approach of Mr Chivell S.M. In my opinion, there were two errors of principle in sentencing the appellant. The first error was that insufficient attention was given to the maximum fixed by the section. The second error was that the magistrate did not give sufficient attention to his own role as sentencer with the result that he did not so much exercise his own discretion as to the appropriate sentence for the appellant but rather assumed the correctness of the sentence imposed upon Semmens by Mr. Chivell SM and confined his attention to the relationship between the offenders and to the question whether any distinction should be made between them.

It is true that Mr Chivell S.M. had adverted to the maximum penalty. He said (and Mr Kelly S.M. read his remarks):

"It is axiomatic that the maximum penalty of twelve months imprisonment is reserved for the worst class of offence against this particular section."

The difficulty for me on this appeal is compounded by the fact that Semmens' penalty of six months' imprisonment has been the subject matter of an unsuccessful appeal to a single Judge of this Court. Semmens has appealed to the Full Court.

Notwithstanding the history of Semmens' sentence and appeals, I must not shrink from my responsibility to sentence this

appellant now that the sentencing discretion is to be exercised afresh. ~~It cannot be the case that I am bound to fix the same~~ penalty as was fixed in Semmens case if I am of the opinion that it is too close to the maximum in this appellant's case.

The scheme was, I think, more fully canvassed in this case and the facts have been analysed more fully in this more prolonged trial and prolonged appeal.

The two men did not set out to create a fraudulent scheme. If swifter progress had been made in the United States, it may well be that the bulk of the expenditure would have been incurred before the end of the financial year which ended on June 30, 1979. The trouble seemed to be that, in spite of the appellant's best efforts, the programme fell behind time. As the end of the financial year was fast approaching, it became "expedient" for them to resort, in the last month or so, to this plan of preparing accounts so as to give the false appearance that all the consultancy fees and disbursements were expenditure incurred by the agent in that financial year. That appearance was to be given plausibility by the round robin of cheques.

The magistrate correctly took the view that this change of mind occurred in late May to late June 1979. The scheme was deliberate and fraudulent from then onwards. The magistrate said:

"So many things must have been on the defendant's mind when he prepared those invoices; so much mental energy must have been expended in working out where things might go wrong and in planning to avoid it. All loopholes had to be closed. I think it is a fair thing to say that it can be inferred from the evidence in this case that the deceitfulness was very great indeed,

~~whatever number of days it may have occupied."~~

Time spent upon the preparation of the accounts was only part of the fraudulent scheme. A lot of time was also spent upon the round robin of cheques and subsequently in attempts to obtain money from the Board.

It is not clear what proportion of the \$630,000 in the accounts had been, or was to be expended, on outgoings, but the personal intended net gain to the appellant would have been considerable - between \$60,000 and \$100,000 - if the Development Board had paid out.

As against that, it must be borne in mind that the public did not suffer. No moneys were obtained. And the appellant has suffered much. The appellant became bankrupt. His marriage is in ruins. The appellant said that he undertook the scheme not only for personal profit but to participate in the export drive which was being actively encouraged by the government. He did not set out to defraud the Board. If everything had gone to plan, the expenditure would have been incurred and then the grant made legitimately.

Indeed, the appellant still refuses to concede that he did anything wrong. He is not remorseful. He would do it again. His view is that he has been denied natural justice; that his prosecutors are his persecutors; that lawyers do not understand sound accounting principles; and that Mr Lane, counsel for the Commission, and Miss Thorpe, its accountant, should be prosecuted and sent to prison.

In The Queen v. Streckert (1985) 38 S.A.S.R. 250, I said (at p.255), with the concurrence of the other members of the Court of Criminal Appeal:

"The sentencing Judge correctly observed that serious white collar crime of this nature is difficult to detect and to prosecute and it can result in substantial illegal and immoral gain to the perpetrators, not to speak of losses to the Commonwealth and its citizens."

That was a very different type of fraudulent scheme. It was ongoing and many members of the public - not all innocent - did suffer as a result. In Streckert's case I referred to other cases where men of good character had been imprisoned for revenue frauds. I referred to The Queen v. Hurley, a sentence of Shepherdson J. in the Queensland Supreme Court delivered on February 14, 1984 and to a sentence affirmed by the New South Wales Court of Criminal Appeal in The Queen v. Moore and Gamble (1982) 82 A.T.C. 4610; (1983) 84 A.T.C. 4174.

I said in Streckert's case (at p.252):

"The penalty in this case should reflect the standard penalties for fraudulent tax evasion schemes set by the courts in other States of Australia. Hurley was sentenced to two years' imprisonment for his role as an accountant and 10 per cent shareholder in companies engaged in 'bottom of the harbour' schemes. It was a much more serious case than this, both in amounts of tax avoided and degree of sophistication but he was allowed substantial discounts for greater co-operation than this respondent is prepared to give. In Moore and Gamble, the owner of a large transport business and his 'paid lieutenant'-accountant, were both sentenced to three months' imprisonment for their roles in a less sophisticated scheme involving lower tax losses. ... That was not such a serious case as this, either as to the amount of revenue lost or to potential for widespread use by other tax-payers. It was a scheme confined to a

particular tax-payer. They could, I think, have expected about 4-6 months imprisonment against the background of a maximum penalty of three years. (What was said in those cases and what is said in this case must be understood in the context of that low maximum of three years, which incidentally was increased recently to five years.)"

Moore and Gamble is much closer to this scheme than Hurley and Strecker. This case and Moore and Gamble concern private schemes. In Moore and Gamble the maximum was three years; here the maximum is one year but here the offence is worse.

Finally in Strecker's case I also said:

"... his previous general good character must be weighed in the scales. ... In Hurley and in Moore and Gamble, the offenders were men of previous good character. Some frauds, and this is one of them, are so serious by reason of their magnitude, sophistication and potential for expansion that other options for punishment have to be put aside. The factor of deterrence is also of the utmost importance. In a case like this, imprisonment is the only appropriate option."

This fraudulent scheme did not have great capacity for expansion. However, it was sophisticated and a relatively large sum was involved. Prima facie it calls for imprisonment.

The appellant is sufficiently misguided to persist in saying that he would do it again. He holds strongly to the view that the expenditure was "incurred". He needs a personal deterrent. It is inevitable that a term of imprisonment must be fixed. In my opinion the appropriate term in all of the circumstances of the offence(s) and the offender having regard to the maximum is three months' imprisonment. A fine is inappropriate.

The only remaining question is whether the sentence should be

suspended. The appellant passes the threshold test for suspension by reason of his good character. However, I am of the opinion that the discretion to suspend should not be exercised in his favour. In his present frame of mind, he is intent upon a course of conduct which can only militate against his own rehabilitation. First, he says that he would act in the same way in the future. He needs a firm deterrent against that indication of intention. And second, he indicates an intention to prosecute without mercy the counsel and a witness who were involved in his prosecution. He handed up a written diatribe about them as part of his personal submissions. He wants them to be imprisoned. I cannot prevent him from carrying out proper investigations in the future if that is his wish, but there are indications that he will concentrate inordinately upon either justice, revenge or counter-persecution for a long time. I was considering the possibility of suspending the sentence, not because suspension is strictly appropriate but as an act of mercy towards him in the interests of the rehabilitation of an otherwise useful citizen. However, I have little or no faith in his rehabilitation while he remains in his present frame of mind; and I am powerless to impose a condition that he desist from future investigation or even harassment of the prosecutor and/or the witness. If I did impose a condition not to investigate the already litigated matter further or not to prosecute the above persons as a condition of a bond and an order to suspend the sentence, the condition could be struck out as restricting his freedom to pursue what he perceives to be the justice of his cause. It is not my intention, nor is it appropriate, that he should have the benefit of a suspended sentence granted as an act of mercy when he is of a frame of mind

~~not to be rehabilitated.~~

I can see no alternative but to order him to serve the sentence of three months' imprisonment.

I order that the appellant serve the term of three months' imprisonment. I grant him leave to appeal to the Full Court. I stay the operation of the order of imprisonment until the appeal to the Full Court has been finally determined. In case the appeal is not instituted and prosecuted with due diligence, I reserve to the respondent leave to vary or remove the stay.

The appellant is to pay the respondent's costs of this appeal against conviction to be taxed. I make no order as to costs of the appeal against sentence as by then the appellant was acting in person. I allow the appellant 18 months to pay the amount of the allocatur or any written agreement as to costs. In default, I order one day's imprisonment for every \$100 of unpaid costs.