FORAETE EPINISI JIONE v STATE (AAU0094 of 2005S)

COURT OF APPEAL — CRIMINAL JURISDICTION

WARD P, WOOD and MCPHERSON JJA

22, 24 November 2006

Evidence — admissibility — witness evidence — fraudulent falsification of accounts and larceny as servant — concurrent term of 3 years' imprisonment — trial fairness — admission of bank interviews — photocopy documents — evidence of Peter Capell — disclosures served during trial — delay — adjournment — immaterial material referred to — biased summing-up — failure to make full disclosure — Constitution of the Republic of Fiji ss 28, 28(1)(d) — Bankers' Books Evidence Act (Cap 45) s 5 — Criminal Procedure Code (Cap 45) ss 192, 346 — Penal Code (Cap 17) ss 284, 307(1).

The Appellant, while employed at the Westpac Banking Corporation (bank), made four false credit entries in accounts which had been opened in the names of South Pacific Applied Geosciences Commission Account, Manohan Aluminium Ltd and Fred Tivou. He also destroyed a deposit slip for an amount which he received on behalf of the bank. The offences were alleged to have been committed variously and they involved a total sum of $172,318.08. The count of larceny as a servant involved an amount of $179,153.27 which was alleged to have been stolen by him. The purpose of the falsification or destruction of the banking records, which was the subject of the other five counts, was the concealment of the theft.

The bank's investigation manager (Lemme) interviewed the Appellant and he confessed the theft and falsification of the records. They were followed by letters purportedly under the Appellant's hand. He admitted to the misappropriation of the funds and offered to make restitution. The Appellant gave one of the letters to Peter Capell (Capell) and he deposed, along with a bank cheque for $500. The Appellant was tried and he was convicted in the High Court on five counts of fraudulent falsification of accounts and one count of larceny as a servant. He was sentenced on each count to concurrent terms of imprisonment of 3 years. The Appellant appealed against his conviction and sentence. The issues were the: (1) trial fairness; (2) admission of the bank interviews; (3) photocopy documents; (4) evidence of Capell; (5) disclosures served during trial; (6) delay; (7) immaterial material referred to; (8) biased summing-up; and (9) validity of the sentence.

Held — (1) The trial judge conducted the trial with impeccable fairness. The Appellant had legal representation at various times. He terminated the services of Raza because he was dissatisfied with the adjournment and then decided to conduct the defence himself. The Appellant was given specific advice by Winter and Gates JJ to obtain a lawyer and was given ample opportunity to do so. The extent of his active participation in the trial did not suggest that he was at a disadvantage. He was given assistance from time to time by the trial judge in relation to the trial procedures and his options. The Appellant was able to call on his specialised banking experience and knowledge of the banking documents and procedures when testing the evidence, knowledge which may not have been readily picked up by counsel.

(2) The court record showed that the options available to the Appellant were explained to him. After the prosecution evidence was led on the voir dire, he then proceeded to make an unsworn statement. The Appellant did not seek to call any other witnesses and he did not indicate who he could have called, or what they may have said, which could have affected the judge's ruling.

Lemme's evidence was accepted as truthful by the trial judge and he was not under arrest at the time of the interviews, nor was he subject to detention. The record showed that:

(a) he was properly cautioned;
(b) he was not obliged to answer any of the questions;
(c) breaks were given; and
(d) he was asked whether he was still prepared to be interviewed after each breach.

Lemme was asked from time to time, whether he was prepared to assist with the bank inquiries and he agreed. Not only that he was prepared to do that, but he also confirmed, during the adoption process, that his answers had been given of his own free will, and that he had no complaints. Lemme was allowed to read the interview records.

(3) Shameem J accepted the evidence led by the prosecution that:

(a) the originals of the bank interviews was lost;
(b) diligent searches was made; and
(c) the copies tendered were accurate copies, and that had the originals been available, they would have been admissible.

These were the relevant requirements for their admission and they were met. No sufficient basis was shown, despite the Appellant's submissions to the contrary, to conclude that these factual findings were incorrect, or that the judge's discretion was wrongly exercised.

(4) There was no unfairness by reason of the late disclosure or by the calling of the witness. The letters spoke for themselves. There was independent evidence of their being on the bank file, and the assessors were properly instructed as to the way in which they should be approached. In this regard, the trial judge indicated that it was for them to decide whether or not they were the letters of the Appellant and to draw their own conclusions, bearing in mind that there had been no expert handwriting evidence.

(5) In the present case, the makers of the last two statements, Capell and Rakesh Lal were called as witnesses and were available for cross-examination. The other evidence related solely to the bank's appraisals of the performance of the Appellant, which had been made before any suspicion arose as to the defalcations. The documents which were tendered showed the history of his employment and were not regarded as prejudicial to the defence case.

(6) It was noted that not all of the delays were attributable to the fault of the prosecution. Some were due to the Appellant's lawyers, the others were due to his decision to represent himself and the others were due to congestion in the court lists. The delay can affect the reliability of the evidence due to the possible loss of documents or witnesses, or lead to uncertainty in the memory of those who give evidence.

There was no possible prejudice that arose from the loss of the original bank interviews and police interview. As a result of the Appellant's objection, they were not placed before the assessors, and he does not now suggest that there was anything in them which could have assisted his case. The evidence of the witnesses regarding the relevant questions and answers related to immaterial matters or details which did not affect or weaken their evidence on the critical issues was satisfied. Save for the front office cash account (FOCA) statement, the Appellant did not identify how any of the allegedly missing documents could have assisted his case. The bank interviews already made out the prosecution case.

(7) The prosecution was allowed to cross-examine the Appellant in relation to whether, contrary to his evidence in chief that he had never admitted the offence to the police, he had in fact made such admissions. The prosecution made it clear that it was not pursuing this line so as to prove the fact of any admissions to the police, but rather to show the existence of a prior inconsistent statement going to his credibility. The cross-examination was very brief. It was met by the response that the signature on the police interview statement shown to him was not his and was false, and he maintained his position that had he made no admissions to the police. That was the end of the matter. None of the contents of the interview were placed before the assessors and no prejudice arose.

(8) The summing-up was entirely fair in relation to the interviews and letters. It was true that there was no reference in the summing-up to the FOCA account. It was, however,

referred to in the closing address of the Appellant. There was no necessity for a trial judge to repeat or even to identify every factual argument advanced by an Appellant, or for that matter by the prosecution. The critical question was whether the essential features of the defence case and the essential issues were placed before the jury. The court was satisfied that this was done.

(9) The offences of the Appellant were very serious and involved a breach of the trust that had been reposed in him. Such benefit as he may have obtained from providing assistance and displaying remorse when first interviewed, entirely disappeared once he chose to defend the case and to deny virtually everything which he had previously admitted.

Appeals dismissed.

Case referred to

Balelala v State [2004] FJCA 49, cited.

Appellant in person

A. Prasad for the Respondent

[1] Ward P, Wood and McPherson JJA. On 31 October 2005, the Appellant was convicted, after trial in the High Court, on five counts of fraudulent falsification of accounts and on one count of larceny as a servant. He was sentenced, on each count, to concurrent terms of imprisonment of 3 years. He has been given leave to appeal on all of the grounds contained in his three petitions of appeal.

Facts

[2] The offences of which he was convicted concerned allegations, that, while a servant of the Westpac Banking Corporation, he made four false credit entries in accounts with the bank which had been opened in the names of South Pacific Applied Geosciences Commission Account, Manohan Aluminium Ltd and Fred Tivou, and destroyed a deposit slip for an amount which he had received on behalf of the bank. These offences were alleged to have been committed variously on 12 and 13 March 1997, and together they involved a total sum of $172,318.08.

[3] The count of larceny as a servant involved an amount of $179,153.27 which was alleged to have been stolen by him. The purpose of the falsification or destruction of the banking records the subject of the other five counts was the concealment of the theft of the last mentioned sum, which it was alleged was committed by the Appellant while he was employed at the Nabua branch of the bank.

[4] After concerns arose in relation to these transactions, the Appellant was interviewed by Gregory Lemme, the bank's investigations manager, in August 1997. There were five interviews conducted over 8 days.

[5] These interviews were placed before the court and their admission into evidence is the subject of one ground of appeal. The Appellant was also interviewed by police but, in the circumstances later mentioned, that interview did not find its way into evidence.

[6] The interviews, on their face, constituted a complete confession of the theft and falsification of records. They were followed by letters purportedly under the Appellant's hand, admitting to the misappropriation of the funds and offering to make restitution. One of the letters was given by the Appellant to Peter Capell, so that witness deposed, along with a bank cheque for $500.

[7] The admissibility of the bank interviews was the subject of an examination on the *voir dire*. It led to a ruling by the trial judge on 19 October 2005 to the effect that the copies which were tendered in place of the lost originals were accurate copies and that the interviews were obtained voluntarily and without oppression.

[8] It was the defence case that the Appellant did not make the fraudulent entries or destroy the deposit slip or steal any of the bank's money. The bank interviews, he said, were of no weight because they were made as a result of duress and verbal abuse. The post-interview letters, he said, were not written by him, and the signatures were forged. He similarly suggested that the signatures on the interview adoption records were not his and that he had either lied in the interviews or their contents were fabricated. The several witnesses called by the prosecution, he said, were not telling the truth in relation to the relevant records.

[9] The prosecution of this case was anything but expeditious, and that fact also became the subject of several grounds of appeal. For that reason, it is necessary to note the progress of the matter, as disclosed in the official records of the Magistrates Court and of the High Court, in some detail.

Magistrates Court

8 January 2003 — the Appellant made a first appearance, and pleas of not guilty were returned. The Appellant was represented by Mr Tuitoga and that representation continued until 5 March 2003.

27 January 2003 and 19 February 2003 — The matter was adjourned to enable the defence to consider the disclosure documents.

5 March 2003 — Mr Tuitoga was given leave to withdraw.

26 March 2003, 17 April 2003, 1 May 2003, 22 May 2003, 6 June 2003, 12 June 2003, 26 June 2003 — During this period and thereafter until about June 2004 the Appellant was represented by Mr Raza. The matter was adjourned on each occasion by consent.

18 July 2003 — Mr Raza announced that he opted for a paper preliminary enquiry.

15 August 2003, 11 September 2003, 13 October 2003, 7 November 2003 — The proceedings were adjourned with consent.

14 November 2003 — An order was made, with the Appellant's consent, for trial in the High Court.

High Court

5 December 2003 — The Appellant repeated his pleas of not guilty. A hearing date for trial was set for 19 April 2004, by Justice Shameem.

30 January 2004 — Mr Raza applied for and was granted an adjournment of the trial hearing as he needed to go abroad for surgery.

6 February 2004 — Mr Raza was offered a trial date of 17 June 2004, which he rejected as unsuitable.

13 February 2004 — Justice Winter fixed a trial date for 12 July 2004.

15 March 2004 — The date for trial was altered to 4 October 2004. The Appellant asserts that this occurred without his consent or knowledge and caused him to terminate Mr Raza's retainer.

10 June 2004 — The Appellant announced that he had terminated Mr Raza's instructions and leave was given for counsel to withdraw. Justice Winter advised him of his right to a lawyer and of the availability of legal aid, urged him to make a submission to that end, and cautioned that there would be no adjournments for a lack of counsel.

8 July 2004 — The file was transferred to Justice Gates.

27 July 2004 — The matter was adjourned by Justice Gates for mention on 22 October 2004. The Appellant indicated that he had approached Mr Fa with a view to being represented by him.

6 September 2004 — Justice Gates asked the Appellant whether he had representation. The Appellant replied that he had "not approached anyone for the moment"; he indicated that Mr Fa had asked him for a deposit and that he had "not approached him again". It appears that this mention was treated as a pre-trial conference. An order was made for the prosecution to disclose the original handwritten version of the interview. The Appellant indicated that it had not been given voluntarily, as he had been the subject of threats. Justice Gates advised him to "sort out" his representation and to contact any witnesses who he wished to call.

29 October 2004 — The trial was fixed for 5 July 2005, by consent. Mr Solanki for the State informed the court that there had been discussions with the Appellant and that it might be possible for there to be some agreement on the facts. Justice Winter advised the Appellant to try to get some legal advice and said that he would "allow more time to settle these matters".

21 January 2005 — The Appellant advised that he was going to appear for himself, that while he had objections to the Westpac interviews, he had no objections or criticisms of the police interviews, that the Westpac witness who he wanted was being called by the prosecution and that, as a result of the discussions, some witnesses could be eliminated

25 February 2005 — The prosecution advised that the handwritten copies of the police interviews could not be found and that attempts to locate them were continuing. The court was informed that the interviewing officers had each migrated. The trial date of 5 July 2005 was vacated and a new date of 19 July 2005 was fixed.

17 March 2005 — Mr Solanki announced that he was leaving the office of the DPP. The matter was adjourned for continuation of the pre trial conference on 20 May 2005, to enable new prosecution counsel to be briefed and to meet with the accused on the agreed facts.

20 May 2005 — The pre-trial conference was adjourned to 24 June 2005 and the 19 July trial date was vacated.

24 June 2005 — Justice Gates adjourned the pre-trial conferred to 19 August 2005 to determine whether the prosecution would rely on the police interview or on the bank interviews.

15 August 2005 — The matter was transferred for trial before Justice Shameem.

19 August 2005 — Justice Shameem asked whether the matter could be listed for trial on the following Monday. The prosecution indicated that they needed more time, as the case officer was on leave and the main witnesses, who were overseas, needed more notice. The applicant made it clear that he wanted the matter set for trial and that the delays had caused stress to him and to his family. He asked for a date "before October," as he wished to migrate. Justice Shameem fixed a hearing date for 24 July 2006, but listed the matter for mention on 30 September 2005 to see if there could be an earlier hearing date.

30 September 2005 — Justice Shameem, with the consent of both parties, fixed the trial for 11 October, with a final pre trial conference for 5 October 2005.

5 October 2005 — At the pre-trial conference, the Appellant who had remained unrepresented since the date on which he had withdrawn Mr Raza's instructions, indicated that he did not consent to the admission of the caution (police) interview, that he disputed the evidence of Gregory Lemme whom had conducted the bank interview and nominated the prosecution witnesses whom he wished to cross examine, as well as those whose statements could be read without objection. He also contended that "there is no case to answer on the information", which led Justice Shameem to advise that such question would be heard at the end of the trial.

18 October 2005 — The trial started before Justice Shameem and the assessors and it was concluded with a verdict and sentence on 31 October 2005.

The appeal

[10] A large number of grounds of appeal have been filed. Some are repetitious, and we shall deal with them in the way which appears to represent their substance, and where appropriate by amalgamating the overlapping submissions.

Ground 1 — Trial fairness

[11] Under this ground the Appellant asserts that there was error in law in that he was not advised of his right to legal representation, provided with a legal aid lawyer, or allowed to present a no-case submission. Additionally he submits that the trial was unfair by reason of the conduct of the trial judge, and also by reason of the delay.

[12] The argument in relation to legal representation turns upon s 28(1)(d) of the Constitution which provides that every person charged with an offence has the right:

> to defend himself or herself in person or to be represented, at his or her own expense, by a legal practitioner of his or her choice or, if the interests of justice so require to be given the services of a legal practitioner under a scheme of legal aid.

[13] As was held in *Balelala v State* [2004] FJCA 49, the right to legal representation at the expense of the state is not absolute. Each case depends on its own facts and on whether the accused has made attempts to secure legal assistance himself. If he is unable to secure that representation then he may be entitled to legal aid, depending on the nature of the case and the availability of funds, but there is no guarantee in that regard, since s 28 is to be given a practical application, in the context of prevailing conditions and competing claims for assistance.

[14] It is clear from the chronology that the Appellant had legal representation at various times, that he terminated the services of Mr Raza because he was dissatisfied with the adjournment, and that he then decided to conduct the defence himself. There is no evidence to suggest that he lacked the means to instruct counsel or that he sought an adjournment to obtain a lawyer.

[15] It is clear that he was given specific advice by Winter and Gates JJ to obtain a lawyer, and was given ample opportunity to do so. The extent of his active participation in the trial does not suggest that he was at a disadvantage. In

this regard he was given assistance from time to time by the trial judge in relation to the trial procedures and his options. He was able to call on his specialized banking experience and knowledge of the banking documents and procedures when testing the evidence, knowledge which may not have been readily picked up by counsel.

[16] This aspect of the submission fails, since we are not persuaded that the absence of representation affected the fairness of the trial. The submission that he was not given the opportunity of having a no-case submission entertained fares no better. He flagged that application on 5 October 2005, and it was considered by the trial judge, and dismissed at the close of the prosecution case.

[17] The delays in the trial were unfortunate but not all were due to the prosecution as the chronology shows. While the Appellant submits that he opposed bringing the trial forward from July 2006 to October 2005 as that would not give Mr Fa time to prepare the defence, that assertion cannot be accepted in the light of the court record for 19 August 2005, 30 September 2005 and 5 October 2005. It was his application that the trial be brought forward, and the final trial date was set with his consent.

[18] It may be accepted that delay is most undesirable because of the possibility of the loss of documents and of witnesses being unavailable. Additionally, it can have an effect on memory and cause undue stress to an accused, over whose head serious criminal charges hang. The Appellant suggested that the present was a case where the delay was of such an order that it denied him a fair trial. The several respects which were identified are addressed later in these reasons. Neither individually, nor in combination, did they, in our view, have that result.

[19] Apart from alleged defects in the summing-up which are the subject of later grounds of appeal, the Appellant submitted that the trial judge continued to "interject, interrupt and disrupt" the proceedings when he tried to cross-examine the prosecution witnesses, and that she deliberately cross-examined him in order to distract and disturb him "on the pretext of providing assistance".

[20] Additionally he submitted that she displayed bias in "doing the work of one side for the prosecution and failing to assist the Appellant who (was) unrepresented and at a disadvantage".

[21] He has not identified any passages in which this alleged conduct occurred. We have read the trial transcript and the transcript of the pre-trial conference and can find no support for his submission. To the contrary our reading of that transcript shows that the trial judge conducted the trial with impeccable fairness.

Ground 2 — Admission of bank interviews

[22] The Appellant contends that there was error in law in the admission of the bank interviews. He additionally contends that he was not informed of his right to call witnesses on the *voir dire* when the admissibility of these documents was examined.

[23] The second contention can be immediately dismissed. The court record shows that the options available to the Appellant were explained to him, after the prosecution evidence was led on the *voir dire*, and that he then proceeded to make an unsworn statement. He did not seek to call any other witnesses, and he has not indicated to us who he could have called, or what they may have said, which could have affected the judge's ruling.

[24] The Appellant submitted that the ruling on the *voir dire* was in error, and that there were several reasons why the bank interviews should not have been admitted.

[25] Dealing with the interview itself, it was submitted that it was tainted because Mr Lemme did not have a current work visa, did not inform the Appellant of his right to a lawyer, subjected him to threats and humiliation to the point where the admissions made were involuntary, did not give him sufficient breaks or refreshments, and did not provide him with copies of the interview notes. He asserted that there had been a general failure to comply with the judges' rules. Independently, he asserted that he had given a number of untrue answers during the interviews so that they were unreliable.

[26] Shameem J received evidence from Mr Lemme, who denied that the Appellant had been subjected to any form of duress, or refused breaks or access to anyone to whom he wished to speak. Mr Lemme's evidence was accepted as truthful by the trial judge, who correctly directed herself as to the law concerning the manner in which a suspect can be interviewed by a person in authority. She noted that he had been advised of his right to have another person present and that, had he wished, he could have obtained legal advice.

[27] He was not under arrest at the time of the interviews, nor was he subject to detention. The record shows that he was properly cautioned that he was not obliged to answer any of the questions, breaks were given, and after each breach he was asked whether he was still prepared to be interviewed. He was asked, from time to time, whether he was prepared to assist with the bank inquiries and he agreed, not only that he was prepared to do that, but he also confirmed, during the adoption process, that his answers had been given of his own free will, and that he had no complaints. He was allowed to read the interview records.

[28] The rights arising under s 28 of the Constitution were not strictly applicable to an internal bank interview of the kind that was here conducted; however, their spirit, as well as that of the judges' rules, was respected.

[29] No good reason has been advanced to show error by Shameem J in the ruling on the *voir dire*. The remaining point concerning Mr Lemme's immigration status has no possible bearing on the lawfulness or admissibility of the interview. Nor does the fact that Mr Datt's signature did not appear on the interview records establish that Mr Lemme was lying when he gave evidence of his presence as an observer. As a person who was there to witness the interview, it was appropriate that a different person conduct the adoption process and sign the adoption certificate.

[30] Next, a general submission was made that the *voir dire* was conducted in a hasty manner and involved a "window dressing" by the trial judge and a "mere formality for the outcome was clear that the judge knew in advance" because of the lost police interviews and absent police witnesses that the bank interviews had to be admitted. The submission was made that she may have "colluded with the respondent" in allowing the evidence. There is no basis, whatsoever for this submission. The *voir dire* was thorough and properly conducted.

[31] This ground fails, and to a large extent that is determinative of the appeal since the bank interviews established a convincing prosecution case.

Ground 3 — Photocopy documents

[32] The Appellant submitted that the trial judge erred in admitting into evidence photocopies of the bank documents, and of the bank interviews.

[33] Shameem J accepted the evidence led by the prosecution that the originals of the bank interviews had been lost, that diligent searches had made for them, that the copies tendered were accurate copies and that, had the originals been

available, they would have been admissible. These were the relevant requirements for their admission and they were met. No sufficient basis has been shown, despite the Appellant's submissions to the contrary, for us to conclude that these factual findings were incorrect or that the judge's discretion was wrongly exercised.

[34] Moreover the official record shows that during the *voir dire*, the Appellant acknowledge that he had signed the interviews, that the record was accurate, and that he did not object to photocopies being tendered.

[35] The Appellant's submission in relation to the tender of the photocopies of the bank records depends upon the absence of any evidence of the copies having been examined with the originals and having been found to be correct copies, in compliance with s 5 of the Bankers' Books Evidence Act (Cap 45).

[36] The requirements of this section relate to the circumstance where the copies are to be "received in evidence under the provisions" of the Act. It is not an exclusive code for the admission into evidence of photocopy documents. They can always be admitted where objection to their tender is not taken. There was no objection in this case, and in any event, there is no reason to suspect that they were other than true copies.

Ground 4 — Evidence of Peter Capell

[37] Peter Capell was called by the prosecution once it emerged that the Appellant denied having been responsible for the preparation, and signature, of the letters dated 29 August 1997, 3 November 1997 and 24 December 1997, which were tendered and admitted into evidence: Exs 42–44.

[38] It was the Appellant's case that his evidence should not have been received because he had earlier been sitting in court, and because there was late disclosure of his statement. Additionally it was asserted that, upon the face of some immigration records which he tendered, this witness must have perjured himself when deposing that the last of these letters had been given to him in Suva in about December 1997 together with a cheque for $500.

[39] The three letters were significant in that they included express acknowledgments by the Appellant that he had defrauded the bank and its customers, as well as offers to make reparations.

[40] There was no objection to their tender, and the Appellant initially observed, in relation to the first letter, "I want this tendered". Subsequently, however, after they were admitted into evidence, he asserted that the letters were not his and could have been forged by the bank. It was this that led to the calling of Mr Capell.

[41] No possible concern arises in relation to the late disclosure of the statement, or the calling of the witness, since the prosecution had no reason to suppose that the Appellant would challenge the authenticity of the letters. The statement was five lines in length and the evidence of Mr Capell was confined to the single issue concerning the provision of the letter. A suitable direction was given to the assessors concerning his presence in the courtroom before giving evidence.

[42] The status and accuracy of the travel history document which was handed to the court during the appeal is less than certain. The prosecution has had no opportunity to check it, and we have no way of knowing whether it provides a full or accurate record of Mr Capell's travel movements or how it was generated. It appears on its face to relate to a number of people, and in the absence of proper

investigation and proof, we are not prepared to draw any conclusion from it as to whether Mr Capell was in Suva during 1997.

[43] The submission that Mr Capell perjured himself, and that, "in collusion with the Respondent, he hastily drew up or fabricated (the evidence) at the DPP's office … before the hearing commenced", has not been substantiated.

[44] No unfairness arose by reason of the late disclosure or by the calling of this witness. The letters spoke for themselves. There was independent evidence of their being on the bank file, and the assessors were properly instructed as to the way in which they should be approached. In this regard the trial judge indicated that it was for them to decide whether or not they were the letters of the Appellant and to draw their own conclusions, bearing in mind that there had been no expert handwriting evidence.

[45] This ground is not made good.

Ground 5 — Disclosures served during trial

[46] The Appellant asserted that there was late disclosure of witness statements during the early part of October before the trial, and disclosure during the trial of two further statements, and that this resulted in the trial being unfair.

[47] Reliance was placed on s 192 of the Criminal Procedure Code (Cap 45), which is concerned with the admission into evidence of witness statements, and which requires service of such statements at least 14 clear days before the hearing. The purpose is to allow an accused to consider and determine whether to allow such statements to be received in evidence without the need for the maker to be called.

[48] In the present case, the makers of the last two statements, Peter Capell and Rakesh Lal were called as witnesses and were available for cross-examination. We have already considered the question of unfairness in relation to Mr Capell. The other evidence related solely to the bank's appraisals of the performance of the Appellant, which had been made before any suspicion arose as to the defalcations. The documents which were tendered showed the history of his employment and could not, in any conceivable way, have been regarded as prejudicial to the defence case.

[49] While the Appellant asserted that he had only been given the copy of the cover sheet, he was present when the witness read from the documents, and he was able to put them to whatever advantage in his favour that he now believes may have existed.

[50] In relation to the other October disclosures, it may be observed that the Appellant did not seek any adjournment or additional time to consider the statements. It is only now that he complains of having been prejudiced in his defence, although without suggesting precisely why that was the case.

[51] This ground is not made good.

Ground 6 — Bringing the trial date forward

[52] The Appellant contends that the trial date was brought forward from 26 July 2006 to 18 October 2005, without his consent and without giving him the opportunity to engage counsel.

[53] We have earlier dealt with this submission which, must fail because the record shows that the Appellant had asked for an earlier trial date and consented to the new trial date. His response that the record of the court does not properly record his applications and that he was overruled by the trial judge cannot be

accepted. We see no reason to assume that the official record of the court, which was created in compliance with s 346 of the Criminal Procedure Code, was other than accurate.

Ground 7 — Delay

[54] The Appellant submitted that the delay of 8 years between the date of the alleged offences and the trial resulted in an unfair trial. We have earlier recorded the history of the proceedings and noted that not all of the delays were attributable to the fault of the prosecution. Some were due to the Appellant's lawyers, others were due to his decision to represent himself, yet others were due to congestion in the court lists.

[55] However, as we have observed, delay can affect the reliability of evidence due to the possible loss of documents or witnesses, or lead to uncertainty in the memory of those who give evidence. We do not underestimate that consideration, since prompt trial is a desirable object of any system of criminal justice. Of present relevance is the extent to which delay may have impacted on this trial, by reason of any one or more of the specific complaints now made by the Appellant.

[56] First, he claimed prejudice through the loss of the original bank interviews and of the police interview. We have already dealt with the bank interviews, the accuracy of the copies of which were accepted. No possible prejudice could arise from their loss. Nor could any prejudice arise in relation to the loss of the police interviews. As a result of the Appellant's objection, they were not placed before the assessors, and he does not now suggest that there was anything in them which could have assisted his case.

[57] Second, he says that deterioration in the memories of some witnesses is demonstrated by some of the answers given in cross-examination by Mr Lemme, Mere Savu, Inise Cakau, and Utu Glaisa. We have examined the record of the evidence of these witnesses and are satisfied that the relevant questions and answers related to immaterial matters or details which did not affect, or weaken their evidence on the critical issues.

[58] Third, the Appellant asserts that he was prejudiced by the absence of the master log, and the VON account records and by some uncertainty as to whether the front office cash account (FOCA) statement, "effective date" 12 March and "posting date" 13 March, which was in evidence, was the final statement for that day.

[59] Save for the FOCA statement he has not identified how any of the allegedly missing documents could have assisted his case. As we have already observed the bank interviews made out the prosecution case. There was, additionally evidence from bank witnesses, with supporting documentation, that was sufficient to prove each count. We cannot act on speculation that, in some fashion, something might have been drummed up, from the absent documents, to throw doubt on what, otherwise, was a very strong prosecution case, particularly if the assessors accepted, as they were entitled, the three letters acknowledging the Appellant's guilt and offering reparations.

[60] The argument in relation to the FOCA statement seems to be that, if it showed a credit balance at the end of the relevant days, then it was possible that no money had been stolen. We do not see why that necessarily follows. It depends entirely on whether fictitious or false entries had been made, the existence of which the Appellant acknowledges in his interviews.

[61] In any event, the Appellant had the benefit of any uncertainty in this respect since it was a matter that was explored in Mr Lemme's evidence in chief and in cross-examination. The explanation which he gave was that while the FOCA account should result in a nil balance at the end of the day, his investigation showed that the Appellant was capable of maintaining the internal accounts without a zero balance, and did so to cancel his misappropriation.

[62] This ground is not made good.

Ground 8 — Adjournment

[63] The Appellant submitted that favouritism was shown to the prosecution in not allowing him further time to prepare his defence, but in allowing an adjournment sought by the prosecution to allow Mr Lemme to return to Australia. This submission was supplemented by a contention that the adjournment was improperly sought, because Mr Lemme did not in fact return to Australia and that, in fact, the request was a subterfuge in order for the prosecution to have more time to reassess its case.

[64] The record for 20 October 2005 does not bear out this further submission of bad faith. In fact it shows that the prosecution did not seek an adjournment. On the contrary it reveals the following:

> A. Ravindra Singh(prosecution): This witness wishes to depart tomorrow. Are we to sit tomorrow? Can he tender the statements (ie the Bank interviews) without reading them? There are 5 statements altogether.
> Court: They ought to be read but in any event accused should not rush cross-examination. Witness requested to change flight.

[65] The rest of the day was taken up with the tender and reading, by Mr Lemme, of the statements. At the close of the day (Thursday) the proceedings were adjourned to the following Monday.

[66] The only available inference is that the court considered it appropriate not to sit on the Friday, *inter alia*, to give the Appellant a chance to consider his cross-examination without "rushing it".

[67] The allegation of collusion between the prosecution and the trial judge contained in the written submissions has no basis and this ground fails.

Ground 9 — Immaterial material referred to

[68] This submission involved the proposition that prejudicial evidence was allowed in relation to the police interview and that there were sections of the bank interview allowed into evidence that the judge had ruled should be excluded. In this regard he contended that the court record was wrong in that the only mention of any editing related to paras 41–112 of the interview of 28 August 1997. These paragraphs with the exception of 112, which has no significance, were excised from the tendered document.

[69] Again we are not prepared to accept the submission that the record is inaccurate, and that orders were made for the editing of additional paragraphs. To the contrary it shows that on 25 October 2005 the Appellant's application to exclude certain paragraphs of the 26 August interview was refused with the ruling that they were relevant.

[70] The remainder of this submission relates to the reference by counsel for the State, in his cross-examination of the Appellant, to the police record of interview. Objection was properly taken to its tender. The prosecution were allowed to cross-examine the Appellant in relation to whether, contrary to his

evidence-in-chief that he had never admitted the offence to the police, he had in fact made such admissions. The prosecution made it clear that it was not pursuing this line so as to prove the fact of any admissions to police, but rather to show the existence of a prior inconsistent statement going to his credibility.

[71] The cross-examination was very brief. It was met by the response that the signature on the police interview statement shown to him was not his, and was "false" and he maintained his position that had he made no admissions to police. That was the end of the matter. None of the contents of the interview were placed before the assessors. No prejudice arose, and this ground fails.

Ground 10 — Appellant not cautioned

[72] The Appellant submitted that Mr Lemme did not provide a caution in accordance with the law, before proceeding with the interviews. It is evident from a perusal of those interviews that appropriate cautions were given.

Ground 11 — Biased summing-up

[73] The Appellant identified several matters which he asserted displayed bias in the summing-up. They related to the way in which the trial judge dealt with the prosecution onus of proof, the reference to there being no issue as to whether the banking records identified in counts 1–5 were "in the possession" of the bank, the reference to the evidence of Mere Savu in relation to documents signed by the Appellant which were not the subject of charges, and the reference to the bank interviews and the three letters.

[74] None of these challenges has any substance. The onus of proof was properly explained. Although the summing-up made reference to the documents the subject of the first five counts being "in the possession of" the bank, it was made crystal clear that the deposit slip for count 2 had been destroyed, and the observation under challenge could only have been understood, so far as that slip was concerned, as asserting that prior to its destruction it was in the bank's possession. The reference to Mere Savu's evidence was not capable of conveying a message that the Appellant had been responsible for further defalcations. Its only relevance was to show what it was that the Appellant did, in the course of his duties.

[75] The summing-up was entirely fair in relation to the interviews and letters. It is true that there was no reference in the summing-up to the FOCA account. It was, however, referred to in the closing address of the Appellant.

[76] There is no necessity for a trial judge to repeat or even to identify every factual argument advanced by an Appellant or for that matter by the prosecution. The critical question is whether the essential features of the defence case, and the essential issues, are placed before the jury. We are satisfied that this was done.

Ground 12 — Failure to make full disclosure

[77] The Appellant submitted that there was a failure of the prosecution to make full disclosure of all of the available evidence in that he was only provided with the cover page of his appraisal report; and in that he was not provided with the Master Transaction log, the VON account (used for processing overseas transactions), a handwritten letter which was mentioned in the cross-examination of Mr Lemme, or the records for the processing of the ANZ Bank cheque that was also mentioned in evidence.

[78] None of these documents formed part of the prosecution case, which stood or fell on the evidence prevented. We simply do not know whether any of them would have assisted the defence. The submission, in effect, rises no higher than

an assertion that, had the Appellant been given access to them, something of assistance may have emerged. This is pure speculation, and it is insufficient to make this ground good, particularly in the light of the admissions in the bank interview.

Ground 13 — No case to answer

[79] The Appellant submitted that, notwithstanding the admissions in the bank interviews and in the three letters, there was not a sufficient evidentiary basis for his convictions on the five counts.

Count 1

[80] The submission in this instance is that since entries in the bank's records are computer generated there was no basis for a finding that he had falsified the credit entry for the SOPAC account.

Count 2

[81] In relation to this count the Appellant asserted that the charge of destroying a deposit slip with intent to defraud the bank could not come within s 307(l) of the Penal Code (Cap 17), although it might come within s 284.

Counts 3–5

[82] In relation to each of these counts, the submission is that they were not proved because the offence, in each instance, was charged as having occurred on or about 13 March 1997, whereas the evidence led related to matters occurring in May 1997.

Count 6

[83] In relation to this count it is submitted that no evidence was called to show that the Appellant had stolen the sum of $179,153.27.

[84] The submission in relation to *count 2* can be immediately dismissed. Section 307(1) applies not only to the falsification of records, but expressly embraces the destruction, or alteration of records.

[85] The remaining submissions require some greater analysis of the evidence. Mr Lemme gave evidence that the Appellant had admitted his misappropriations of bank funds and had explained the system which he had used.

[86] It was his evidence that the debt arising from the Appellant's misappropriations contained within the cashier's account 12 March, 1997, was $115,000. He said that on that date there was evidence of the Appellant receiving from South Pacific Commission (SPC) a cheque for $137,121.09 for deposit into SPC's account. Instead of doing that the Appellant put it into the FOCA account, as evidenced by the teller transaction log. He then transferred $115,000 of that sum into the cashier's account to acquit the debt in that account, as was shown on the tendered deposit voucher which the Appellant admitted was in his writing: Ex 21.

[87] The balance of $22,121.09 he then deposited into the account of South Pacific Applied Geosciences Commission, (SOPAC) and not into SPC's account (Ex 42) the deposit slip for which (Ex 42) was also in the writing of the Appellant.

[88] Mr Lemme acknowledged that the teller transaction logs were computer generated, but said that, in support of his explanation of the events, the Appellant had made relevant admissions in the bank interviews.

[89] He next said that examination of the deposit book of the customer SPC showed a deposit on 12 March 1997 in the sum of $137,121.09 (Ex 7), the butt for which was initialled by the Appellant. He added that a search of the bank records failed to find the matching slip and that the Appellant had admitted destroying this slip.

[90] These facts clearly established counts 1 and 2 and the Appellants' submissions are without substance.

[91] In relation to count 3, Mr Lemme said the Appellant created a bank cheque for $16,640, on 15 April 2007 (Ex 25) payable to Asco Motors, which bore the Appellant's signature. It was funded by withdrawing this sum from the balance of $22,121.09 which was still wrong in the SOPAC account. From the remaining balance of $5481.09, he credited the sums of $4609 and $1143.84 into the TT account from which he had taken money in order to clear those debits.

[92] On 13 May 1997 he cashed the bank cheque and returned $16,640 to the teller's cash account. Mr Lemme said, on 13 May 1997, the Appellant took part of the $16,640 in the teller's account, and credited $8410.90 into the MANOHAN account, signing the deposit slip (Ex 8), as confirmed by the teller's transaction log and the MANOHAN statement of account.

[93] The same process was repeated in relation to the account of Fred Tivou, on the same date, $2500 being effectively taken from the teller's account and deposited to the Tivou account (Ex 9). It was further repeated that day when $2165 was withdrawn by him and deposited to the Tivou account (Ex 10).

[94] These events gave rise to counts 3–5. There was evidence that Exs 8–10 bear the writing of the Appellant and there were admissions by him that the moneys credited did not belong to MANOHAM or TIVOU.

[95] These matters all related back to the $137,121.09 which had been received on 12 March 2007, and it was, presumably for this reason that counts 3–5 were charged as having occurred on or about the dates mentioned.

[96] The date on which an offence is charged is not an essential particular, and it does not seem to us to matter that the relevant falsified vouchers were made in May.

[97] The evidence in support of the final count of larceny by a servant of $179,027.93 depends upon the admission, which was made by the Appellant in answer to question 39 of his bank interview of 28 August 1997. It provides a complete answer to the Appellant's submission that there was no evidence to support the conviction on this count.

[98] For these reasons this ground is not made good.

[99] Accordingly the appeal against conviction fails.

[100] The appeal against sentence also fails. The offences of the Appellant were very serious and involved a breach of the trust that had been reposed in him. Such benefit as he may have obtained from providing assistance and displaying remorse when first interviewed, entirely disappeared once he chose to defend the case and to deny virtually everything which he had previously admitted.

[101] The fact of the delay was taken into account by Shameem J and the sentence was within the tariff.

[102] The order of the court is as follows:

(1) Appeal against conviction dismissed.

(2) Appeal against sentence dismissed.

Appeals dismissed.