IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 12/2018
IND. 5/2014
SC#4346/13

BETWEEN:

Michelle Bouchard

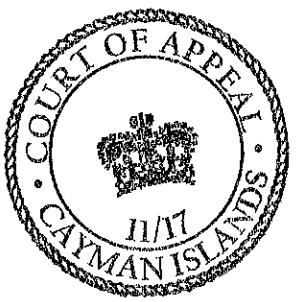
Appellant

- and –

Her Majesty the Queen

Respondent

BEFORE: **The Rt. Hon Sir John Goldring, President**
The Hon. Sir Richard Field, Justice of Appeal
The Hon. C Dennis Morrison, Justice of Appeal



Date of Hearing: Tuesday 9th April 2019

Appearances: Mr. Anthony Akiwumi *amicus* for Appellant
Ms. Toyin Salako for DPP/Respondent

JUDGMENT

Transcript of oral judgment dated 9 April 2019
Approved for Release 15 April 2019

FIELD, J.A.

1. This is an application for leave to appeal conviction out of time. The applicant was convicted unanimously on 21st April 2017 after a trial before Justice Worsley and a jury

on 14 counts of theft, six counts of attempting to transfer criminal property, three counts of transferring criminal property, one count of forgery, and one count of obtaining by deception a diamond ring valued in excess of $200,000. The total amount stolen covered by the theft counts was approximately $2 million.

2. On 21st April 2016, the applicant was sentenced to 12 years' imprisonment by the trial judge. On 7th November 2016, the sentence of 12 years was reduced to 10 years by this Court.

3. Section 13 of the *Court of Appeal Law (2001 Revision)* requires that a notice of appeal against conviction must be filed within 14 days of being sentenced. The applicant filed her notice of application for leave to appeal against conviction out of time on 8th March 2018 — one year and 321 days out of time.

4. The offending covered by the indictment took place whilst the applicant was the companion of Mr James Handford. At the material time, the applicant was in her late forties and Mr Handford was in his early eighties. He was a very wealthy, but lonely and vulnerable Australian who had moved to the Cayman Islands from Australia in order to enjoy a less exacting tax regime. The applicant was an interior designer. The relationship began in June 2010 when the applicant was commissioned by Mr Handford to work on one of his Cayman Island properties. The Crown's case was that in the course of the next 27 months the applicant took advantage of Mr Handford in order to steal large sums of money from him by dishonestly withdrawing money from bank accounts held at Butterfield Bank that Mr Handford had opened in the joint names of himself and the applicant.

5. In September 2012, Mr Handford's daughter, Mrs Van Dijk, received a message from Ms Holland, an employee of Butterfield Bank, who had noticed the transfer of large sums of money from an account in the joint names of the applicant and Mr Handford whilst Mr Handford was away in Australia. Following a meeting between Ms Holland and Mrs Van Dijk at the bank on 9th October 2012, Mr Handford made a complaint to the police alleging that the applicant had stolen large sums of money from him.

6. On 10th October 2016, Mr Handford was interviewed by two officers in the Financial Crimes Unit of the Royal Cayman Islands Police, Detective Constable Sherry Francella and Detective Constable Berry. In the course of the interview, a statement was drawn up in the usual way by the interviewing officers based on Mr Handford's answers to their questions. The resulting statement was read to Mr Handford and he signed it. A second statement was taken from Mr Handford by Detective Constable Francella and Detective Constable Gary Scott on 31st October 2012. This statement was signed by Mr Handford on the 13th of November 2012. At time Mr Handford made these statements, he was 83 years old.

7. Detective Constable Francella's notes taken at both interviews were made available to the defence. At the trial, Justice Worsley observed that the interviews with Mr Handford when these statements were taken really ought to have been videotaped.

8. The day after Mr Handford was seen by the police, the applicant was arrested. When the officers arrived to apprehend her, she was in the process of moving all of her possessions out of the apartment she shared with Mr Handford. A few days before, she had transferred sums from her accounts in the Cayman Islands to accounts in Canada, and had

attempted to transfer further sums. The money in question had come from Mr Handford's accounts.

9. The trial of the applicant was delayed for a number of reasons, including the fact that her first counsel had not been available to appear at one of the earlier dates. In the event, she later dismissed her then legal team and appointed another, including Mr Peter Carter QC from London.

10. By the time the applicant's trial came on in early April 2016, Mr Handford was aged 87 years and unable to give evidence by reason of the dementia from which he was suffering. In these circumstances, the Crown applied, under s.33 (1) of the *Evidence Law* to adduce the hearsay evidence contained in Mr Handford's signed statements. S.33 (1) and (2) of the *Evidence Law* provide (so far as relevant):

> *"(1) A statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if ...*
> *that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;"*

11. The Crown's application was resisted by the applicant on the ground, amongst others, that there was reason to doubt the reliability of the statements in the light of Mr Handford's cognitive state of mind at the time the statements were made. Following submissions from Mr Russell Flint QC, for the prosecution, and Mr Peter Carter QC, for the defence, Justice Worsley ("the judge") gave a full and careful ruling in which he held that Mr

Handford's statements could be adduced by the Crown. The principal reason the judge gave for his ruling was that he was satisfied that the defence had access to evidence which went to Mr Handford's mental state at the material times, including evidence from a Dr Osterloh, who had been treating Mr Handford since the end of January 2012, and his daughter, both of whom were to be called as witnesses. In the judge's clear view, that evidence could be explored in a way that would enable the jury fairly to discharge its duty.

12. In his statements, Mr Handford acknowledged a close and affectionate relationship with the applicant. He added the applicant to his Cayman dollar account at Butterfield Bank to assist in paying the bills and she was added to his US dollar account to facilitate a real estate business venture. He denied that she had his consent to withdraw the money she withdrew to spend on herself.

13. The applicant gave evidence on her own behalf. Her case was that she was in a caring relationship with Mr Handford which involved her having unrestricted access to bank accounts containing Mr Handford's money. He had made generous gifts to her because they were a couple and at all times he had had access to the bank statements showing the movement of money in and out of the accounts.

14. In the ordinary way, an applicant seeking leave to appeal conviction out of time must satisfy the court, on the basis of convincing evidence, that the delay is excusable and that there are good arguable grounds of appeal.

15. We have heard submissions from Mr Akiwumi who has helpfully represented the applicant today. He told us that the reasons for the highly exceptional delay in the filing of the applicant's notice of appeal were these. Immediately after the trial, both of the applicant's counsel departed from the Cayman Islands returning to London. She received advice as to an appeal against her conviction from the firm of solicitors that had represented her and was told that if she did not accept that advice the firm could not represent her. Later, junior trial counsel advised her that there were grounds for challenging the judge's ruling under s.33 (1) of the *Evidence Act* permitting the Crown to adduce Mr Handford's statements. We were also informed by Ms Lee Halliday-Davis, who was present in court during the hearing of the applicant's application, that she was asked to consult with the applicant and to report her (Ms Lee Halliday-Davis') views as to a possible appeal to the Director of Legal Aid.

16. Mr Akiwumi submitted that there is a cogent ground of appeal to be advanced on behalf of the applicant challenging the judge's decision to allow the prosecution to adduce Mr Handford's statements. Mr Akiwumi argued that the first stage of inquiry when dealing with s.33 (1) and (2) of the *Evidence Law* is to consider the admissibility of the proposed evidence. He submitted that the judge did not address that prior question, but instead went straight to the secondary consideration as to whether or not it was fair and just for the hearsay statements to be put before the jury. What the judge ought to have done was to decide at this first stage that the statements were inadmissible by reason of Mr Handford's incompetence.

17. In our judgment, the scheme of s.33 (1) and (2) of the *Evidence Law* is entirely plain. The first question is whether the statement in question constitutes evidence of any fact of

which direct evidence by the maker of the statement would be admissible in criminal proceedings. The next question is whether the requirements of subsections (2), (3) or (4) are satisfied. Finally, the court has to decide in the exercise of its discretion whether in all the circumstances it is appropriate, fair and just for the statement(s) to be before the jury.

18. It is plain to us that it was common ground between the parties at the hearing of the application by the prosecution for these statements to be adduced, that what was contained in Mr Handford's statements would be admissible as part of direct oral evidence given by him had he been fit to give such evidence. It was also common ground that by reason of his bodily or mental condition Mr Handford was unfit to attend as a witness and that therefore the requirement of s. 33 (2) (a) was satisfied. Accordingly, the only real question that the judge had to consider was whether or not it was fair, just and appropriate in the circumstances of the case before the court to allow Mr Handford's hearsay statements to go before the jury.

19. As we have observed, Mr Akiwumi submitted that the statements were not admissible at the first stage because Mr Handford was not competent to have made the statements that he made. He referred us to a medical report from a Dr von Kirchenheim, which is dated 5th December 2014 and which he told us related to an assessment of Mr Handford undertaken sometime in November 2014. In that report, Dr von Kirchenheim observed that Mr Handford was suffering from some significant deficits in his higher learning functions; he was, however, oriented in time, space, place and person. And concrete memory, as measured by vocabulary, was fully intact and considerably above average. However, in respect of a test of his problem-solving skills, auditory memory, and the like,

Mr Handford had performed well below what would have been expected of someone of his age and ordinary cognitive competence.

20. In our judgment, Mr Akiwumi's submission that the judge had failed to address the prior question of admissibility of the statement is wholly misconceived. These statements undoubtedly related to matters of which Mr Handford could have given evidence by way of direct evidence from the witness box. Further, as was common ground, the requirement of s. 33 (2) (a) was satisfied in light of the dementia from which Mr Handford was suffering.

21. The medical condition of Mr Handford, particularly at the time he made the statements, was dealt with in a number of medical reports that were made available to the judge. He was well aware of their contents and the defence, of course, had access to them. But in the circumstances, these reports were relevant only to the exercise of the judge's discretion as to whether it was appropriate, fair and just for the statements to be adduced.

22. Mr Akiwumi next submitted that the judge's decision in the exercise of his discretion to allow the Crown to adduce this hearsay evidence, involved an error of law. It was submitted that the judge gave no or wholly insufficient weight to the medical evidence going to Mr Handford's cognitive ability at the time he made the statements, and, further, that the decision itself was so wholly wrong as to be outside the permissible margin of appreciation that should be allowed to a judge exercising the discretion that he did in the circumstances of this case.

23. We see no merit in this second submission at all. The judge gave a most careful set of reasons for the decision that he came to. He had regard to all the relevant evidence. He carefully addressed the position that the defendant would be in if the evidence was admitted. He recognised that the applicant would not be in a position to cross-examine Mr Handford. That is a situation that is always present when a hearsay statement is admitted into the evidence of a criminal trial. The judge gave careful consideration as to whether, notwithstanding these difficulties confronting the applicant, it was nonetheless fair for the evidence to come before the jury. One of the matters he had in contemplation was that the applicant could identify all those matters upon which they would have wished to cross-examine Mr Handford had he gone into the witness box to give live evidence. The judge also took account of the fact that witnesses who could give evidence as to the cognitive state of Mr Handford at the relevant time were due to give evidence. These included Detective Constable Francella and Mr Handford's daughter, Mrs Van Dijk.

24. In our judgment, the decision of the judge to admit the hearsay evidence, and the reasoning that he deployed in justification of that decision, are entirely beyond criticism. We find there is no merit whatsoever in the applicant's proposed grounds of appeal.

25. It follows, that this application for leave to appeal conviction, made almost two years out of time, must be and is dismissed.

26. We add that the application for Legal Aid in respect of Mr Akiwumi's representation before the Court is denied. We are nonetheless grateful for Mr Akiwumi for representing the applicant at short notice in the fair way that he did.