IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL NO: 14 of 2019
IND 93 of 2017
SC#04480 of 2017

BETWEEN:

JUDITH FRANCIA DOUGLAS

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
Appearances:	Mr. Jonathon Hughes of Samson Law for the Appellant Ms. Toyin Salako Office of the DPP for the Respondent
Heard:	11 September 2020
Draft Judgment Circulated:	25 September 2020
Judgment Delivered:	5 October 2020

JUDGMENT

Rt. Hon Sir John Goldring, President

1. On 9 July 2019 the Applicant was convicted of one count of obtaining property by deception, contrary to section 247 of the *Penal Code (2010 Revision).* She was sentenced to imprisonment for 10 years. She seeks leave to appeal against conviction. We grant leave.

2. The indictment alleged that the Applicant "*between the 2nd day of November 2010 and the 30th day of January 2016…dishonestly obtained KYD1,946,437, being property belonging to Nathaniel Robb, with the intention of permanently depriving Nathaniel Robb thereof by deception, namely by falsely representing that the money was required for the purposes of*

payment for a legitimate application for permanent residency status and a Caymanian passport to the Cayman Islands Government."

3. It is implicit in the allegation, and reflects the way the Crown put its case, that Nathaniel Robb paid over the sum alleged believing that sum was legitimately required to obtain permanent residency. The allegation is not made out if he paid the money over believing it was to be used corruptly to obtain permanent status.

The Crown's case

4. Nathaniel Robb was the owner of a company called Indepth Water Sports. Mr Robb, who was American by birth, wanted to obtain Cayman permanent residency and ultimately Caymanian status. A neighbour had told Mr Robb that the Appellant could help him in that pursuit. They met in October 2010. Mr Robb said the Appellant told him that in return for a cash payment of KYD8,000 she could obtain non-revocable Caymanian status. Believing that was so, Mr Robb said he paid that sum to the Appellant. She had told him it would mostly be reimbursed. Thereafter Mr Robb regularly paid the Appellant sums of money. So it was that on 25 November 2010 Mr Robb paid over a further KYD11,000 in cash, in respect of which he was given a receipt, ostensibly signed by someone called Banks. On 15 March 2011, he paid over a further KYD14,000. The receipt he was given stated that the fees had increased. At the Appellant's request, Mr Robb gave her the documents which would be needed for a legitimate application (such as a passport and bank references). Thereafter Mr Robb paid over regular sums in cash. On occasion he was provided with a receipt signed in the name of Banks. On one occasion (in November 2011) Mr Robb provided a cheque for KYD2,000. The Appellant cashed it. It was the only non-cash payment he made. Mr Robb kept a record of the sums he had paid the Appellant. By March 2012 Mr Robb had, he said, paid over KYD141,150 in cash.

5. On 5 April 2012 Mr Robb was granted Permanent Residency. That had nothing to do with anything said or done by the Appellant, although Mr Robb said he believed it had.

6. On or after 9 April 2012 the Appellant provided Mr Robb with a letter of that date, ostensibly from the "Committee Chairperson," informing him of the money to be refunded and that still due. A similar letter, bearing the date 4 July 2012, requested more money. Mr Robb had paid KYD168,000 by then. The letter assured him he would receive a refund. A letter of the 5 July 2012 stated he would be refunded KYD130,000 by 9 July. No money was ever forthcoming.

7. Mr Robb said that he continued to withdraw money from his bank account and/or received loans from his family as and when the Appellant requested further sums to complete the process.

8. By 30 January 2016 Mr Robb said he had paid over cash in the sum of KYD1,911,925 (apart from the one cheque for KYD2000). It was the Crown's case Mr Robb was financially ruined.

9. In April 2016, Mr Robb said the Appellant asked him to be patient: not to contact the police. She said it was a legitimate scheme, the cash paid over was for his grant of Permanent Residency, Caymanian status and a Caymanian passport. At the end, he would receive a refund.

10. Between 10 July 2014 and 26 February 2016, many WhatsApp messages passed between Mr Robb and the Appellant. They were exhibited. In the messages, the Appellant requested further sums of money, referred to money being refunded and provided various explanations as to why more money was required. A number of the cash withdrawals which Mr Robb made corresponded with the amounts requested in the WhatsApp messages. The messages amounted to cogent evidence supporting Mr Robb's account of events.

11. No application for a Cayman passport was ever submitted on behalf of Mr Robb.

The issues

12. Ms Salako, who was counsel for the Crown below, and for the Respondent before us, in helpful, balanced and well put submissions, summarised the issues in the following way.

13. The Appellant accepted Mr Robb paid her KYD2,500 for expenses and KYD8,000 plus other sums of money. She did not accept she received more than KYD1,000,000. She said she passed the money on to someone she called "Mr B." She refused to name Mr B for reasons of "protection." She said she believed Mr B was using the money in order to obtain Cayman status for Mr Robb. She was an innocent go-between.

14. It was also part of her case that the scheme between Mr Robb and Mr B to obtain status was corrupt. It was not conceivable that someone like Mr Robb could honestly have believed that legitimately to obtain Cayman status required a series of substantial cash payments.

15. As Ms Salako put it, the Appellant's case evolved. She said Mr Robb was using the scheme with Mr B to steal money from the business. It was a fraud on Mr Robb's business partners and family.

The grounds of appeal

16. Although Mr Hughes on behalf of the Appellant in substance advanced five grounds of appeal, the nub of the appeal is the first ground. That concerns the judge's conduct of the proceedings. It is said, as Mr Hughes put it, he demonstrated undue hostility and discourtesy towards the Appellant which unduly affected the fairness of the proceedings. As will become apparent when we set out the judge's different interventions, there is substance in Mr Hughes's complaints. If it was, as Ms Salako put it, the judge exhibiting a very specific personal style in his dealings with everyone in which, among other things, he used 'casual language and rich metaphors,' it was unacceptable.

The interventions of the judge

17. We now turn to the specific interventions of the judge.

Page 146/11

18. At page 146/11 there was the following interchange. It occurred during a break. The Appellant had been giving evidence and therefore could not speak to her counsel. The jury was not present.

THE DEFENDANT:	*Excuse me.*
THE COURT:	*What is your problem?*
THE DEFENDANT:	*I can't speak to my counsel but I can speak with you, right? As a defendant, defending my rights, there is a document that has not been presented to this court and I'm very concerned about that.*
THE COURT:	*That's your problem. You will deal with that through your counsel. That is what it is.*
THE DEFENDANT:	*No, it's not what it is Your Honour, it's the fact --*
THE COURT:	*It's what it is, ma'am. That's my decision. Counsel, the break is not because -- it's not your fault. I know you are doing – it's a tedious tough job for you, but I could understand how this -*

	- I feel a little myself. I had to take a break because I lost my concentration a little bit there.
MS. HALLIDAY-DAVIS:	*I do understand that, My Lord.*
THE COURT:	*I feel the pressure on my brain. All right, so we need a little break.*

19. As Mr Hughes submits, the judge was abrupt and discourteous to a defendant who was expressing a perfectly legitimate concern about a document that she wished the jury to see at a time when she is unable to communicate with her own counsel. The Judge should have either permitted counsel to speak to the defendant or allowed the defendant to write down the description of the document she was referring to and provide it to counsel. While the observations at the end of this interchange were better not made, as Ms Salako submitted, the judge may well have been commenting on the interminable series of documents which were laboriously being adduced in evidence.

Page 203/15

20. This was one of a series of interventions made when the Appellant was giving evidence and in the presence of the jury. On this occasion, it was evidence in chief. The jury knew, because it had by agreement been adduced, that on a previous occasion, the Appellant had pleaded guilty to nine offences of dishonesty. She was seeking to explain why. She wanted to say she had been advised to plead guilty and to explain her position. As Mr Hughes rightly said, this was a sensitive issue and no doubt the judge was concerned to avoid her waiving her legal professional privilege. However, instead of asking the jury to leave court to discuss the appropriate approach, the following exchange occurred in their presence:

THE COURT:	*All right, listen, please.*
THE DEFENDANT:	*Judge, I have to explain. I was not --*
THE COURT:	*You are not explaining anything. I run the show around here --*
THE DEFENDANT:	*But it's not true that --*
THE COURT:	*Madam, I run the show, all right? Good.*
THE DEFENDANT:	*Yes, sir.*
THE COURT:	*I'm not trying what you pleaded guilty to. I'm trying what you are charged for, all right? She [defence counsel] said she suggests to you it was the fourth of September 2016.*
THE DEFENDANT:	*No, sir.*

THE COURT: *Sorry, that you pleaded guilty to nine counts.*

THE DEFENDANT: *No, sir.*

THE COURT: *You say no. You pleaded guilty on what date?*

THE DEFENDANT: *It was in 2015 but I cannot remember the date.*

THE COURT: *Okay, you --*

THE DEFENDANT: *I was remanded in custody.*

THE COURT: *Stop, please, ma'am. You said June 2015 that you pleaded guilty?*

THE DEFENDANT: *Yes, sir.*

THE COURT: *All right, let's move on…*

21. Although the judge may have been seeking to help, he was aggressive and unpleasant to the Appellant when she was in the course of giving evidence. The jury could not have failed to notice a lack of respect.

Pages 225-7

22. The Appellant was still giving evidence in chief. There had been a robust exchange (in front of the jury) between the judge and defence counsel about the relevance of a message Mr Robb had sent to a third party concerning fake invoicing. The judge expressed his doubts as to the relevance of that message. He finally said (page 227/2):

> ***THE COURT:*** *So she [the Appellant] can't say anything about it. So we are only taking up a lot of time at this point. Let us get on, get her off the stand.*

23. We agree with Mr Hughes that it was inappropriate to speak of getting her off the stand as if having her there was wasting court time.

Page 236/2

24. This intervention also involved the Appellant's nine previous convictions (to which she had pleaded guilty). On this occasion, she was being cross-examined about them. She did not accept prosecution counsel's suggestion she had been dishonest on nine occasions. The Appellant started to explain that she had paid the money back. The Judge then intervened.

THE COURT: *Listen ma'am, the charges were, you had 9 charges --*

THE DEFENDANT: *Excuse me?*

THE COURT: *-- for dishonestly --*

THE DEFENDANT: *You're being…"*

THE COURT: *-- obtaining money from 9 persons by deception, all right, that was the charge. It was read out to you, right?*

THE DEFENDANT: *(no response)*

THE COURT: *Correct?*

THE DEFENDANT: *I understood, your Honour.*

THE COURT: *And you pleaded guilty to it.*

THE DEFENDANT: *I pleaded guilty but what I'm trying to explain is what I was advised because of those 9 counts.*

THE COURT: *Nobody is asking you what you were advised. Listen, please --*

THE DEFENDANT: *I want to make it clear in the jury minds --*

THE COURT: *Madam, please.*

THE DEFENDANT: *-- 'cause there are no doubts --*

THE COURT: *Madam. Madam --*

THE DEFENDANT: *Yes, your Honour.*

THE COURT: *Don't rub me up funny. Okay, listen to me, all right, see how quiet I have been throughout this trial? Let me stay like that. All right. Good. Listen, you are under cross-examination, all right, this is very different to when your counsel is leading you, all right. The counsel who is cross-examining you, puts a direct question to you to get a direct answer. You can't run all over the place. If there is something else you need to explain, you will get an opportunity to do that when your counsel comes to re-examine you, you understand that?*

THE DEFENDANT: *Yes, your honour.*

THE COURT: *She's asked you a straight question. Answer it. All right? Good.*

QUESTION: *So, Ms. Judith, agreed facts number 2, those are in italics. Those were the details put to you on the 4th of September 2015, agree?*

ANSWER: *Agree.*

THE COURT: *Let me understand that. You have a copy of the agreed facts in your hands now?*

MS. SALAKO: *Yes.*

THE COURT: *You said yes to that? You have a copy of the agreed facts that you pleaded to --*

THE DEFENDANT: *Your honour --*

THE COURT: *-- in your hands?*

THE DEFENDANT: *Your honour, you're--*

THE COURT: *Madam--*

THE DEFENDANT: *You're - you're abs(ph.) -- you're getting me -- I'm scared the way you are talking to me, sir.*

THE COURT: *Well, you can have --*

THE DEFENDANT: *I agree to it, I agree but then you're --*

THE COURT: *Madam, listen to me, listen to me. I have a duty to manage the time and so on in this trial. You understand that? So I'm bringing you in line to where you're supposed to be. Listen to me again --*

THE DEFENDANT: *I understand that, your honour but you're being aggressive to me, sir.*

THE COURT: *Well, you can call it what you like but I'm telling you what it is, you will answer me when I put the questions to you. Understand?*

25. This intervention was at the start of cross examination. As Mr Hughes submits, there was nothing in the conduct of the Appellant to justify it or its manner. The judge was unacceptably rude. The final observation was bullying. It would not be surprising if the Appellant (as she said) found the judge's comments intimidating. However frustrating the judge may have found the situation, the way he dealt with it was unacceptable, particularly in the presence of the jury.

Pages 248-9

26. The Appellant was still being cross examined. She was refusing to identify Mr. B. She said she was protecting him. At page 249/1 the judge intervened again.

THE COURT: *Madam, please, let me say this to you again. Let me say this to you, please. Look, it is my duty to assist you where I can. I have to give you proper directions when I can or when I should, all right. This is cross-examination.*

THE DEFENDANT: *Yes, sir.*

THE COURT: *I'm gonna repeat, she asked you a simple question, you answer her back, simple answer.*

THE DEFENDANT: *Yes, sir.*

THE COURT: *Right. There is an old rule that we like to say that, when under cross-examination you volunteer nothing. If there is need –*

THE DEFENDANT: *But I answered her, your honour.*

THE COURT: *Madam, if I find that I cannot speak to you and you're not prepared to listen to me, I will stop speaking to you. Let the record reflect it, okay?*

THE DEFENDANT:	*My apology, I understand.*
THE COURT:	*I am trying to assist you, all right? If you carry on while your being cross-examined, I am not sure that it will be to your benefit all right.*
THE DEFENDANT:	*Yes.*
THE COURT:	*So the prosecution wish to put questions to you directly to bring you to a particular position, right.*
THE DEFENDANT:	*Okay.*
THE COURT:	*You have a counsel who, if not satisfied with the answer that has come about, will have a second opportunity to clarify those answers.*
THE DEFENDANT:	*Okay.*
THE COURT:	*While we are on that, I must remind you of the caution that I gave you earlier, your refusal to answer any questions without just cause may lead to inferences against you, even if adverse, all right?*
THE DEFENDANT:	*Yes, sir.*
THE COURT:	*Once you are aware of that, it's a matter for you.*
THE DEFENDANT:	*Yes, sir.*

27. While we can understand the judge's frustration at the refusal of the Appellant to identify B, the judge's behaviour was not acceptable. He was rude and aggressive. It was inappropriate to say that he would refuse to speak to the Appellant. While the judge is expressing the view that he is seeking to help the Appellant, the message the jury could well have received was that the judge thought the Appellant was being difficult and evasive.

28. Moreover, the reference to the caution and adverse inference, as well as being prejudicial, should not have been made for another reason. Ms Salako informed us that the judge wrongly, and in the face of submissions by both counsel that he should not, gave an adverse inference warning to the Appellant in terms of section 149(2) of the Police Law (2017 Revision). As both Ms Salako and Mr Hughes agree, such a direction would only have been appropriate had the Appellant not been giving evidence.

Pages 279/21-80

29. The following interchange took place in the presence of the jury. The Appellant was in the witness box being cross-examined. A police officer had moved to stand by her.

THE COURT:	*Excuse me, officer, is that the custom to stand there all the time?*
POLICE OFFICER:	*No, because of her behaviour, that's why I stand here.*
THE DEFENDANT:	*I just only asked her.*
THE COURT:	*Quiet! Who is talking to you? Yes, officer.*
POLICE OFFICER:	*Because of her behaviour, that's why I stand up here.*
THE COURT:	*I didn't hear that.*
POLICE OFFICER:	*Because of how she was behaving that's why I stand up here. Normally I would sit right there.*
THE COURT:	*Oh, okay because I just wondered why you shouldn't take a seat if you wish to.*

30. This again was an unfortunate interchange. By his questioning in the presence of the jury, the judge three times elicited the prejudicial comments of the prison officer. It was unacceptable to address the Appellant in terms of, "Quiet, who is talking to you." Although by then the damage had been done, it would have been possible for the Judge to say something to the jury to try and remove the sting of the officer's remarks. We do note, as the jury might well have, the courteous way in which the judge spoke to the officer as opposed to the Appellant.

Page 280/15

31. The cross-examination continued.

QUESTION:	*So, person B, for his services, how much did he say it's gonna cost?*
ANSWER:	*Well, first Nathaniel gave 2,500 and then it was the 8,000 that he gave after the days -- after -- it was like a day or two after and that's what I gave to person B.*
QUESTION:	*The 8,000?*
ANSWER:	*Yes.*
THE COURT:	*Ms. Douglas, I have no intention to be sitting around here for the long time after this –*
THE DEFENDANT:	*But counsel asked me a question.*
THE COURT:	*-- to hear you talk all you want to talk. That is why I keep telling you it is my duty to ensure that you do exactly what you have to do and no more, no less.*

THE DEFENDANT: *Okay.*

THE COURT: *Good. So listen, the question was a straight, direct question that didn't need all of that long talk.*

THE DEFENDANT: *Understood.*

THE COURT: *Okay, good. So see if you can limit the long talk to the cross-examination and answer the questions, all right? I don't want to keep interfering because I don't want to create the impression that you are doing something so wrong, you know, that the jury might hold it -- I don't want to do that, because that's not my intention all right but I have duties. The operation under cross-examination is very different to the operation under evidence given in-chief. All right.*

32. This was another unacceptable intervention by the judge. As Mr Hughes submitted, there was nothing in the answer provided by the applicant that justified its tone and content. The final comments of the judge suggest he realised he should not have intervened in the way he did.

Page 284/5

33. Ms Salako continued to cross-examine the Appellant. It was not long before there was another intervention by the judge. Ms Salako was asking the Appellant about one of the WhatsApp messages.

QUESTION: *Tab 3 page 50, 11th of December 2014 at 10:32 a.m., middle of the page.*

ANSWER: *Hmm-hmm. Time?*

QUESTION: *10:32 a.m. You see that there?*

ANSWER: *Yes.*

QUESTION: *You to Mr. Robb: "Let me pressure this trust me I'm going to get it done I did before and will do now".*

ANSWER: *Pressure, that's what I meant. I didn't mean –*

THE COURT: *Oh gosh, she hasn't asked you anything. She read the thing. Which word you know she is going to focus on, huh?*

THE DEFENDANT: *She read the question, your honour.*

THE COURT: *How you know she's not gonna focus on "I did it before and will do it now."*

THE DEFENDANT: *Because she read the question to me, your honour.*

THE COURT:	*She read the whole – the thing but now she is going to ask you about it.*

34. If the judge felt he had to intervene, we agree with Mr Hughes that he needed only to say, "*just wait for the question."* Again, the manner of the intervention was unacceptable.

Page 289/4

35. It did not take long for there to be another intervention. Ms Salako was still cross-examining the Appellant. She was asking about a letter ostensibly from Roger Banks.

QUESTION:	*Who is Roger Banks?*
ANSWER:	*I don't know who is Roger Banks. He is the person that gave me the letter.*
QUESTION:	*Person who gave you the letter?*
ANSWER:	*Plan -- number -- my friend.*
QUESTION:	*So your friend is Roger Banks?*
ANSWER:	*I did not -- no.*
QUESTION:	*So, first I asked you who Roger Banks is?*
ANSWER:	*The letter --*
QUESTION:	*Listen. First you said you don't know, then you said he was the person who gave you the letter.*
ANSWER:	*No, no, no, no. Let me re (ph.) – you asked me who is Roger Banks.*
QUESTION:	*Yes.*
ANSWER:	*I said I don't know.*
QUESTION:	*Right.*
ANSWER:	*I said the letter was given to me by my friend -- plan -- the one -- the one that was assisting me so I don't know.*
THE COURT:	*You see, that's the point we were making, you see that's how you get in trouble. She didn't ask you anything about the letter --*
THE DEFENDANT:	*No --*
THE COURT:	*-- she asked you who was Roger Banks, you said, "I don't know", that's the answer.*
THE DEFENDANT:	*Okay.*

THE COURT: *You gone and added to it now, "my friend, he is the person that gave me the letter" and then you added "my friend" so you getting tripped up. So that's why I tell you listen to the question, just answer that and stop. You volunteer things. You volunteer the wrong things, all right."*

36. It was inappropriate for the judge to refer to the defendant getting "in trouble" or "getting tripped up" or saying "you volunteer the wrong things..." It would have been difficult for the jury not to conclude that the judge did not think much of the Appellant's account. This was, as it seems to us, another occasion in which under the guise of seeking to help the Appellant, the judge is indicating he does not believe her.

37. Mr Hughes also draws attention to the use of the word "we" by the judge. Assuming the transcription in that respect is right, that too was unfortunate.

Page 305/1

38. Ms Salako was cross-examining the Appellant about a WhatsApp message from her to Mr Robb. It contained the same spelling error as did a letter which the Appellant said had come from the man B.

MS. SALAKO: *Tab 3, page 10, WhatsApp messages.*
THE COURT: *Page 10--*
MS. SALAKO: *10. The very last message, 6th of August 2014.*
THE DEFENDANT: *This is because this is the message --*
THE COURT: *Hold on ma'am, hold on. You hold on. Yes.*
BY MS. SALAKO:
QUESTION: *Can you -- do you agree that 'chair personnel' is spelt exactly the same in that letter and the WhatsApp message from you?*
ANSWER: *This is the message that was sent by my friend and I sent it to Nathaniel [Robb] with a document.*
THE COURT: *She isn't asking you that.*
THE DEFENDANT: *This -- yes -- this is --*
THE COURT: *Look, Ms. --*
THE DEFENDANT: *Yes, yes, yes.*

THE COURT:	*Yes, you can't get away from this question. Look, 'chair personnel' there, you see it? And 'chair personnel' there, you see them?*
THE DEFENDANT:	*Yes.*
THE COURT:	*She said the two of them spelt the same, what you say about that?*
THE DEFENDANT:	*(no response)*
THE COURT:	*What you say?*
THE DEFENDANT:	*I just answered.*
THE COURT:	*You agree?*
THE DEFENDANT:	*Yes.*
THE COURT:	*Okay.*
QUESTION:	*That's because, Ms. Douglas, you are the author of both?*
ANSWER:	*I disagree.*

39. The questioning on this issue by prosecution counsel had just started. The judge effectively joined in. His manner of doing so suggested he did not believe what the Appellant was saying, something the jury could not have missed.

Page 314/15

40. The background to this interchange, which took place in the absence of the jury, was the Appellant's wish to adduce a document which suggested that Mr Robb was prepared to submit a false invoice. The document had not been disclosed until after Mr Robb had given evidence. The Judge (fairly) indicated the document should be adduced into evidence.

THE COURT:	*I think defence counsel is sincerely trying her best with this difficult task she has. She has an interesting client to deal with. She may have anticipated, I think, reasonably that she wasn't going to bother herself with this. I do not think she should be put at fault because this wasn't admitting, the point is that she says this matter might be relevant to his credibility because what she's saying the prosecution is -- the defence is saying is, given the evidence of her own client, who I think she might not have been able to predict what she was going to say anyhow, she says that this man is lying, he didn't give her all this money he is talking about and one reason why he might be lying is because he is a fraud. He tried to defraud the revenue with a false invoice and if he'd done*

	that then he must have been doing it to her too. So the evidence should be admitted. So we have two choices, you could formally agree it, put it in or you put Mr. Robb on standby for cross-examination --
MS. SALAKO:	*I will put Mr. Robb on standby for cross-examination…*
THE COURT:	*All right.*
THE DEFENDANT:	*Your honour, I'm just saying I didn't understood what you said, sorry.*
THE COURT:	*I don't have anything to say, we've adjourned for the day.*

41. Mr Hughes is rightly critical about the observations of the judge to defence counsel about the Appellant to the effect that she was a difficult client, and about the judge's closing observation. They should not have been made. On this occasion, however, the jury was not present.

Page 375/3

42. Cross-examination resumed the following day. The following interchange took place:

QUESTION:	*If someone said Ms. Douglas you received $1.9 million from Mr. Robb, you would tell them that's a lie?*
ANSWER:	*Exactly.*
QUESTION:	*Right. Stop --*
ANSWER:	*Where would --*
QUESTION:	*Stop.*
ANSWER:	*-- I get $1.9 million. I don't even have a house, a car --*
QUESTION:	*Stop.*
ANSWER:	*-- a land. Nothing. Where is the $1.9 million? Did you prove that I get $1.9 million? He lied. That's my -- that's exactly how it go. He lied. I owns[sic] nothing. Not even family now because of this case.*
THE COURT:	*Do you understand the question clearly?*
THE DEFENDANT:	*Yes.*
THE COURT:	*What did you understand that question to --*
THE DEFENDANT:	*1.9 million --*
THE COURT:	*Listen to me.*
THE DEFENDANT:	*-- dollars –*
THE COURT:	*Listen madam, listen. It's very important because I think I know the next question that's coming. She is saying if anyone*

	said that you received $1.9 million you would say that person lied, right?
THE DEFENDANT:	*I agree.*
THE COURT:	*You agree with that, because you said yes, he lied. Good. Next question.*

43. Mr Hughes submits the Applicant was entitled to answer the question and explain that she had not received $1.9m and that she had no visible assets. The Judge should not have stopped her answer. This does not seem to us an intervention of great significance.

Page 392/8

44. Ms Salako continued to cross-examine the Applicant. In broad terms, she was asking why the Appellant had not given her present account when interviewed by the police; why she had made no comment. The following interchange took place:

QUESTION:	*Why didn't you just tell the police you can --*
ANSWER:	*No, that's your perception.*
QUESTION:	*Why didn't you simply say to the police --*
THE COURT:	*All right, next question.*
MS. SALAKO:	*-- that is incorrect?*
THE COURT:	*She answered that. Next question.*
THE DEFENDANT:	*Counsel --*
THE COURT:	*Next question. Shut up lady, please. Now you go and make me say things like that. I don't want -- don't put that, please, ma'am. Next question. Counsel.*
MS. SALAKO:	*Page 143…tab 3.*
THE DEFENDANT:	*Your Honour, can I just say something in regards to the last question? She said why I did not tell the police --*
THE COURT:	*Ma'am, I've ruled on that.*
THE DEFENDANT*:*	*Okay, sir.*
THE COURT:	*Next question.*

45. As Mr Hughes submits, the Appellant was entitled to explain why she did not answer questions in interview. The judge was gratuitously rude and discourteous. His inappropriate invitation to the court reporter not to record his remarks suggests he was aware he should not have said what he did. This unfortunate exchange took place in the presence of the jury.

Page 403/15

46. Ms Salako was still cross-examining about the failure of the Appellant to answer questions when interviewed by the police. The judge expressed concern about the questions she was asking. The jury was invited to leave. Ms Salako pointed out to the judge that under the law of the Cayman Islands the caution went further than merely informing the suspect had the right to remain silent. It also stated that if the suspect fails to mention something later relied on in court, that may be used against him or her. The judge then said:

THE COURT:	*Just show me the authority. I've read a lot of law in order to take up this position.*
MS. SALAKO:	*I've practiced for 18 years --*
THE COURT:	*Some of it can slip out of my head. Lord Denning said it was not -- that you should walk around with -- even though a judge is expected to know the law --*
THE DEFENDANT:	*Miss Lee, Miss Lee , you have a role to stand up. If you advise your – to give a no comment, then you should stand up and --*
THE COURT:	*Madam, keep quiet. Geez.*
THE DEFENDANT:	*But, Your Honour, I was advised to remain silent.*
THE COURT:	*I'm not -- keep quiet.*
THE DEFENDANT:	*Yes, sir.*
THE COURT:	*Do you want to be the judge, too?*
THE DEFENDANT:	*No, I just -- but they are taking advantage of me, Your Honour.*
THE COURT:	*This is psychological abuse, man. Man, keep quiet, please.*
THE DEFENDANT:	*But the law --*
THE COURT:	*Let me concentrate, Ms. Douglas.*
THE DEFENDANT:	*Yes, sir. (The defendant is having a conversation with the prison officer.)*
THE COURT:	*Madam, stop talking to that prison officer.*
THE DEFENDANT:	*I just -- Your Honour, you got me like a dummy in the court…*
…THE COURT:	*All right. Bring in the jury. I do like that piece of law.*
MS. SALAKO:	*Sorry?*
THE COURT:	*I do like that piece of law. I'd love to have that in Bermuda.*

47. The Appellant seemingly wanted Ms Halliday-Davis - her attorneys at trial, to explain that she answered no questions on Ms Halliday-Davis's advice. As Mr Hughes accepts, the Appellant

should not have interrupted the legal discussion as she did. The judge was entitled to reprimand her. However, the way it was done demonstrated an undue level of hostility towards the Appellant. The final observation was unfortunate.

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48. There was further discussion in the absence of the jury about how Mr Robb's message referring to fake invoices should be dealt with. The Crown wanted to recall Mr Robb for it to be put to him. The judge preferred to deal with the matter by way of an admission. That avoided the Appellant commenting on a document that was not written by or sent to her.

> ***THE COURT:*** *It makes sense, or else she'll be here all tomorrow trying to tell us what this means. She can't tell us what this means. It's not her document. So we want to avoid that. It makes sense. All right. So I support your reading it before the jury. I've been trying cases since, going on 27 years I've been on the bench… I've tried to retire three times. This one will make me retire. I have never worked on a case like this in my life. My brain is hurting.*

49. The Judge should not have referred to the Appellant in these terms.

The summing-up

Page 456/1

50. Mr Hughes refers to one aspect of the summing-up which has a bearing on the first ground of appeal (although he has advanced it as a discrete ground of appeal).

51. The judge gave the conventional adverse inference direction regarding silence in interview (page 456/24). No criticism can be advanced in respect of that. He went on (pages 460-462) to set out the reasons the Appellant gave for not answering questions, namely legal advice and distrust of the police. He concluded with an observation which Ms Salako rightly accepts, he should not have done. He said:

> "*Anyhow, you have to put yourself in her shoes in these circumstances and you've seen her in the witness stand. You might think she's the silent type, having seen her on the witness stand.*"

52. In our judgment, as Mr Hughes submits, the judge's observation was sarcastic and intended to express his sceptical view of the Appellant. The jury will have been all too aware of the Appellant's loquaciousness. The observation also detracted from the directions the judge had previously given.

The law

53. It is axiomatic that if the judge's conduct of the trial results in a conviction which is unsafe and unsatisfactory, the conviction must be quashed. However, it goes further than that, as Lord Brown made clear, when giving the judgment of the Privy Council in *Michel* [2009] UKPC 41, an appeal from the Court of Appeal of Jersey (where the judges of fact were two jurats). At paragraph 27 and following Lord Brown said:

> *"27. There is, however, a wider principle in play in these cases merely than the safety, in terms of the correctness, of the conviction. Put shortly, there comes a point when, however obviously guilty an accused person may appear to be, the Appeal Court reviewing his conviction cannot escape the conclusion that he has simply not been fairly tried: so far from the judge having umpired the contest, rather he has acted effectively as a second prosecutor. This wider principle is not in doubt. Perhaps its clearest enunciation is to be found in the opinion of Lord Bingham of Cornhill speaking for the Board in Randall v R [2002] 2 Crim App R, 267, 284 where, after remarking that "it is not every departure from good practice which renders a trial unfair" and that public confidence in the administration of criminal justice would be undermined "if a standard of perfection were imposed that was incapable of attainment in practice," Lord Bingham continued:*
>
> > *"But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong Page 9 the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial."*
>
> *28. Lord Bingham was, of course, right to recognise that by no means all departures from good practice render a trial unfair. So much, indeed, was plainly implicit in the judgment of the European Court of Human Rights*

in CG v United Kingdom (2002) 34 EHRR 31, 789 which rejected the complaint that the trial proceedings as a whole were unfair notwithstanding the Court's finding that the judicial interventions had been "excessive and undesirable". Ultimately the question is one of degree. Rarely will the impropriety be so extreme as to require a conviction, however safe in other respects, to be quashed for want of a fairly conducted trial process.

29. *In Randall, it may be noted, the conviction was quashed because of persistent misconduct by prosecuting counsel which the judge had failed to control. On occasion, however, it is the conduct of the judge himself which requires that the trial be condemned as unfair. So it was in R v Hulusi [1973] 59 Cr. App. R 378 where, as Lawton LJ summarised it (at p386): "Time and time again the judge intervened, got an answer and then asked questions on that answer. The impression he must have given was that he was cross-examining on the evidence in-chief as it was being given. It really was most unfortunate."*

30. *So too, much more recently, in R v Perren (2009) EWCA Cr. App. 348 where, allowing the appeal, Toulson LJ emphasised yet again (para 34) "that it is for the prosecution to cross-examine, not for the judge", and that "the right time for the prosecution to cross examine is after a witness has given his evidence-in-chief. It would be unthinkable for prosecuting counsel to jump up in the middle of a witness' evidence-in-chief and seek to conduct some hostile cross-examination." The Court continued (paras 35-36):*

> *"The appellant's story may have been highly improbable, but he was entitled to explain it to the jury without being subjected to sniper fire in the course of doing so. The potential for injustice is that if the jury, at the very time when they are listening to the witness giving his narrative account of events, do so to the accompaniment of questions from the Bench indicating to anybody with common sense that the judge does not believe a word of it, this may affect the mind of the jury as they listen to the account. We have been driven in this case to the regretful conclusion that the nature and extent of interventions over the three days in which the appellant gave his evidence deprived him of the Page 10 opportunity of having his evidence considered by the jury in the way that he was entitled. The conclusion from that is that we do not consider that he received the quality of fair trial to which he was entitled."*

31. To that admirable analysis the Board would add that not merely is the accused in such a case deprived of "the opportunity of having his evidence considered by the jury in the way that he was entitled". He is denied too the basic right underlying the adversarial system of trial, whether by jury or Jurats: that of having an impartial judge to see fair play in the conduct of the case against him. Under the common law system one lawyer makes the case against the accused, another his case in response, and a third holds the balance between them, ensuring that the case against the accused is properly and fairly advanced in accordance with the rules of evidence and procedure. All this is elementary and all of it, unsurprisingly, has been stated repeatedly down the years. The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials. All will be familiar with Denning LJ's celebrated judgment in Jones v National Coal Board [1957] 2 QB 55, 64, a personal injury claim ending with each party complaining that he had been unable to put his case properly:

> *"A judge's part . . . is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevances and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal.'"*

32. The need for the judge to steer clear of advocacy is more acute still in criminal cases. It is imperative that a party to litigation, above all a convicted defendant, will leave court feeling that he has had a fair trial, or at least that a reasonable observer having attended the proceedings would so regard it.

33. None of this, of course, is to say that judges presiding over criminal trials by jury cannot attempt to assist the jury to arrive at the truth. On the contrary, they should. That is part of their task. Judges exist to see that

> *justice is done and justice requires that the guilty be convicted as well as that the innocent go free. But for the most part they must do so, not by questioning of the witnesses but rather by way of a carefully crafted summing up…*"

54. For completeness, we should make it clear we have also had drawn to our attention the recent decision of the Supreme Court in *Serafin v Malkiewiz* [2020] UKSC 23. Neither Appellant nor Respondent suggests it in any way calls into question the propositions set out above.

The Respondent's submissions

55. As we have said, Ms Salako submits that the judge exhibited a very specific personal style, whereby he engaged with everyone often using casual language and rich metaphors. The way he dealt with the Appellant was no different from the way he dealt with everyone. It was, submits Ms Salako, not the result of any hostility or discourtesy.

56. Ms Salako submits that when the jury was out, the judge was seeking to ensure that what were difficult and document heavy proceedings ran smoothly. Ms Salako also submits, as it seems to us with some justification, that the Appellant's conduct was not beyond criticism. She repeatedly sought to bypass experienced counsel. She displayed, submits Ms Salako, open hostility towards counsel and the judge in the presence of the jury. That was the background to the prison officer standing by her referred to above. She submits the judge repeatedly tried to assist the Appellant by directing her to listen to the question and answer the question asked.

57. In short, submits Ms Salako, considering the interventions as a whole and the reason for them, although some were unfortunate, they did not render the trial unfair.

Our conclusion

58. There was the plainest evidence implicating the Appellant in receiving the sums of money which Mr Robb said he paid over. Not least of all, was the record of payments which he kept. Her accounts involving Mr B and Mr Banks were unconvincing. There was however a clear issue as to whether someone in Mr Robb's position could really have believed that the Cayman Islands government would legitimately require payments, overwhelmingly in cash, of nearly KYD2 million, albeit with ultimate repayment, for permanent status. Although we have not considered the other grounds of appeal, we shall proceed on the basis that, absent the possibility of an unfair trial process, this is not a conviction which could be said to be unsafe.

59. However, that is not the end of the matter. As Lord Brown said at paragraph 32 of *Michel*, it is "*imperative that a party to litigation, above all a convicted defendant, will leave court feeling that he has had a fair trial, or at least that a reasonable observer having attended the proceedings would so regard it*." It is, as Lord Brown said in paragraph 28, ultimately a question of degree. We bear in mind that the impropriety will rarely be so extreme as to require a conviction, which in other respects is safe, to be quashed for want of a fairly conducted trial process.

60. We have read and re-read the judge's interventions. This is not a case in which it could be said that the judge directly assumed the role of prosecutor in the way described in some of the cases. Rather, the judge displayed persistent rudeness towards the Appellant, laced with aggression, hostility and, on one occasion, sarcasm. When the interventions before the jury are considered as a whole, they could not have failed to pick up the judge's disbelief of the Appellant's case. Moreover, when taken with the judge's comments made in the jury's absence, no defendant could have felt their trial was fair.

61. The fact the judge may (indefensibly) have behaved similarly towards others is not an answer. They were not defendants facing a serious criminal charge. Neither is it an answer that some criticism may justifiably be directed at the Appellant's behaviour. A defendant, however difficult, and however strong the case against him or her, is entitled to be treated fairly and with courtesy by a judge. Unfortunately, that did not happen in this case.

62. Not without regret, we have ultimately been driven to conclude that no reasonable observer would have left court feeling this Appellant had a fair trial. In this exceptional case we are driven to allow the appeal.

63. It is in the circumstances unnecessary to consider the other grounds of appeal.

Hon. C Dennis Morrison, JA

64. I agree.

Hon. Sir Richard Field, JA

65. I also agree.