IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 29/2016
IND.39/2015
SC#1814/2015

BETWEEN:

Paul Anthony Hume Ebanks

Appellant

- and –

Her Majesty the Queen

Respondent

BEFORE:	**The Rt. Hon Sir John Goldring, President** **The Hon John Martin, Justice of Appeal** **The Hon Sir Richard Field, Justice of Appeal**
Date of Hearing:	**Thursday, 19th April 2018**
Matter of set-off:	**Thursday, 6th September 2018**
Judgment Delivered:	**Wednesday, 12th September 2018**
Appearances:	Mr. Alex Davis of McGrath Tonner for the Appellant Ms. Toyin Salako of the DPP for the Respondent

JUDGMENT

GOLDRING, PRES.

1. The Applicant, who was some 50 years old was, on the 8th of November 2016, after a trial at the Grand Court lasting nearly 4 weeks, convicted by the jury of 26 counts of

obtaining property by deception and one count of theft. The maximum sentence on an individual for obtaining property by deception is 10 years' imprisonment. On the 10th of November 2016, the trial judge, Acting Justice Wood, sentenced him to a total of 14 years' imprisonment, made up in a way we shall come to. After deduction for time spent on electronic monitoring, the final overall sentence was one of 12 years 9 months.

2. He now seeks leave to appeal against conviction and sentence.

The facts

The Applicant's previous convictions

3. Before the jury were admissions of previous convictions in the following terms:

> "*On the 19th of October 2006, the* [Applicant] *was convicted by a jury of 13 counts of obtaining property by deception between the 1st of January 2004 and the 11th of October 2004. The total sum of property obtained ... by deception was $20,700 representing 14 complainants. He gave a false name to one of the complainants.*
>
> *On the 4th of August 2009, the Applicant was convicted of one offence of obtaining property by deception by...*
>
> *The 14 counts of deception were in respect of the Applicant falsely representing that cash given to him was for the legitimate grant of Caymanian Residency or Status.*
>
> *On the 13th of September 2011, the Applicant was released from prison in relation to offences of obtaining property by deception...*"

4. The facts of the previous convictions were summarised as follows:

> 1. *[The Applicant] approached strangers and requested cash in return for the promise of Permanent Residency or Status;*

2. *The individuals were asked to provide their name and date of birth;*

[the Applicant:]

i. Told the complainants that there was a quota for the grant of Permanent Residency or Status;

ii. Told complainants that his son's godfather was the head of the people granting status;

iii. Complainants gave the Applicant their passports;

iv. The Applicant told complainants that before the status could be granted it had to be "Gazetted";

v. After complainants gave their cash to the Applicant, they saw him walk into the Glass House;

vi. [He said] One of the reasons for the delay in the grant of Permanent Residency or Status was that the Governor was off Island;

vii. When complainants stated they would make a complaint to the police, the Applicant informed them that they themselves would get in trouble..."

5. The allegations in the present case were strikingly similar to those set out above.

6. Permanent Residency, or Caymanian Status, are much prized by those in the Cayman Islands without them. The Applicant knew that. He knew people were prepared to pay substantial sums of money to obtain such status. He promised people that in return for a payment made to him, or those working for him, that he could arrange such Residency or Status with senior politicians or government employees. He told people that there was a bona fide arrangement in which he played an important role. Over a period of 30 months, he represented:

1. That he was working on behalf of the government;
2. That he was in direct contact with the then Premier McKeeva Bush and/or the Deputy Governor Franz Manderson pertaining to the grant of Permanent Residency or Status in the Cayman Islands;

3. That for a fee of between CI $1,000 and CI $3,000, with the submission of their name, they would get granted Permanent Residency or Status.

7. As was put in paragraph 1 of the Agreed Facts under the heading "*The Office of the Premier*":

> "*The Deputy Chief Officer for the relevant period has confirmed that the Office of the Premier did not authorize anyone to collect funds and applications for Permanent Residency or Status from members of the public. In addition, the Office of the Premier did not authorise* ... [the Applicant] *to collect funds for Permanent Residency or a Status programme.*"

8. Counts 1 - 19 on the indictment were each in similar form, each naming an alleged victim. We can take count 1 as an example. It alleged obtaining property by deception. It set out that the Applicant, "*on a date unknown, between the 1st of July 2012 and the 31st of August 2012 ... dishonestly obtained the sum of CI $8,000 from* [in this instance] *Anthony Horace Chin, with the intention of depriving Anthony Horace Chin thereof, by deception, namely by falsely representing that the cash was required as payment for a legitimate grant of Caymanian Status.*"

9. It is to be observed that omitted from that count, in common with each of counts 1 to 19, was the word "*permanently*". It should have read "*with the intention permanently to deprive*". It was ground 6 of the Grounds of Appeal against conviction that the judge's correction of this error before the Summing Up began was flawed. That ground is no longer pursued, and rightly so.

10. Counts 20, 22 - 25 and count 28 were each in similar form, again naming in each case an alleged victim, but with very slightly different wording in respect of the false representation alleged. We take count 20 as an example. The false representation alleged was that the sum was a required payment for a legitimate grant of Permanent Residency

or Status. Nothing arises from that slightly different wording. By that stage, the "*intention permanently to deprive*" had been included.

11. Count 21 alleged that the Applicant falsely represented that the money he obtained was required for a government grant.

12. Count 26 alleged that it was required to obtain Permanent Residency.

13. Count 27 alleged the theft of a Brazilian passport.

14. Counts 19 and following were allegedly committed after the Applicant had been arrested and granted bail.

15. Over the period of the indictment, the Applicant received some CI $164,700 from members of the public. A small amount was repaid. That amount which was repaid was from the proceeds of further offending, alleged the Crown.

More detail of the counts

Counts 1-19

16. In respect of counts 1 - 16, it was the Crown's case that the Applicant recruited three innocent women to work for him to make the false representations on his behalf. They were Ms. Russell, Ms. McLaughlin and Ms. Gordon. The Crown's case was that the Applicant led those women to believe he had a close relationship with Mr. McKeeva Bush and a then Member of the Legislative Assembly, called Cline Glidden. On a number of occasions, he gave those women the impression he was on the telephone talking to various senior government officials.

17. Count 17 alleged a false representation resulting in a member of the public, paying over $800 in response to the claim that the Applicant could obtain Caymanian status.

18. As to count 18, the facts are set out in the following way in the Respondent's skeleton:

"The Applicant whilst driving offered Audley Williams a lift which he accepted. Mr Williams and the Applicant did not know each other previously. The Applicant provided a false name. He informed Mr Williams that Mr Manderson, the Deputy Governor, was godfather to his son.

He informed Mr Williams that Mr Manderson had instructed him to find two well-deserving members of the public to whom permanent residency should be granted for CI $1,500. Mr Williams was asked to recommend someone. He recommended Paul Williams, the alleged victim in that count. Paul Williams handed over $1,500, for which he received a receipt. It was in cash."

19. Count 19 concerned the Applicant and Tabitha Piercy. They had been friends for years. On the 10th of July 2014, she spoke to the Applicant at George Town Hospital. He, in her presence, purported to have a conversation with Mr. Manderson on the telephone concerning the grant of Permanent Residency. Following that conversation, he told Miss Piercy that he had been instructed by Mr. Manderson to identify two well-deserving members of the public for grant of Permanent Residency. He informed her that Mr. Manderson was godfather to his son. He was given CI $1,500, for which again she received a receipt.

Counts 20 – 25

20. On the 30th of July 2014, Mr Brown was at George Town Hospital. The Applicant called out to him. He said that Mr. Manderson had instructed him to find two well-deserving members of the public for Permanent Residency in order to meet a government quota. The Applicant gave a false name and provided contact details. Mr Brown unwittingly became an agent for the Applicant. He recruited members of his church to participate in the scheme. Mr Brown collected money on behalf of church members and/or put them in contact with the Applicant to hand over money to him. Upon the Applicant's request,

some of those complainants handed over their passports, believing that they would receive the Permanent Residency or Status stamp.

21. In respect of Mr Stephenson, one of the victims, the Applicant deceived him into giving him an additional $1,000 in order to remove a letter that had purportedly been written to immigration concerning his application.

22. As time progressed, individuals started to ask for their money back and the return of their passports.

23. The Applicant was identified through his vehicle registration number. Officers attended at his house. He handed over the passports that he had received. He did not deny that he had accepted the money. He said that he was acting on behalf of Mr. McKeeva Bush.

Counts 26 and 27

24. Someone called Mr. Terc saw the Applicant at George Town Hospital. He recognised him as someone who had been at same school with him. They exchanged pleasantries. The Applicant gave the impression he was taking a call from Mr Manderson. Following that purported call, he told Mr Terc that the government was running a lotto scheme for the grant of Caymanian Status. Mr Terc, believing this to be legitimate, suggested one of his employees, namely Miss Santos de Oliveria, should be entered into the lottery. He put her in touch with the Applicant. She subsequently met him and gave him the required fee and her passport, believing she would receive Permanent Residency in return. She handed over, according to the indictment, CI $2,500.

Count 28

25. Mirian Melendez knew the Applicant's girlfriend. She had met the Applicant on numerous occasions. In December 2014, whilst at George Town Hospital, she saw the Applicant. He purported to have a conversation concerning the grant of Permanent Residency or Status. Miss Melendez expressed an interest. She collected cash on behalf of various family members, believing the Applicant had the authority to grant them

Permanent Residency or Status. The family members as requested, handed over their passports to the Applicant. The Applicant represented that he was acting on behalf of Mr Franz Manderson.

26. In short, the Crown submitted there were many similarities in the way the Applicant deceived so many people over such a long period of time. He recruited agents to find and encourage potential victims. He promised Residency or Status in return for cash. Cash was handed over to him or his agents. Individuals were persuaded into handing over their money by the suggestion the scheme was authorised.

The defence case

27. The defence case in respect of counts 1 - 4 and 6 - 18 was broadly similar. The Applicant had deceived no one. He honestly believed there was a government approved scheme by which Residency or Status could be obtained. He took the sums of money in good faith. Others let him down.

28. In respect of the obtaining by deception alleged in counts 1 and 2, the Applicant alleged duress. We need not go into any detail.

29. In respect of those offences allegedly committed on bail, the defence was a denial that what had allegedly happened had indeed happened. In broad terms, the Applicant alleged that many different members of the public who said they had given the Applicant money were lying. Many people had conspired falsely to accuse him.

30. As to his previous convictions, it was the Applicant's case that he was wrongly convicted. He had then been part of a bona fide scheme. He had "*taken the rap for Mr McKeeva Bush.*"

The Grounds of appeal against conviction

Ground 1

The judge's refusal to issue a witness summons for Mr. McKeeva Bush

31. Paragraphs 19 and 20 of the Agreed Facts, state that:

> "*McKeeva Bush was Premier of the Cayman Islands from 27 May 2009 to the 18 December 2012. McKeeva Bush was removed from office following a vote of no confidence following his arrest on the 12 December 2012.*
>
> *The 2013 general elections for the Cayman Islands were held on the 22 May 2013. The People's Progressive Movement won the election and Alden McLaughlin was elected Premier.*"

32. The arrest was nothing to do with the offences alleged against the Applicant.

33. Not all the alleged offences were committed when Mr McKeeva Bush was premier. The Financial Crime Unit of the Cayman Islands police, when investigating counts 1 - 18, approached Mr McKeeva Bush to provide a statement. Through his lawyer, he refused. He refused again shortly before the trial was to begin.

34. Mr McKeeva Bush was mentioned by the first two witnesses who gave evidence. They spoke of going to Mr McKeeva Bush's house. One of the witnesses said she had spoken to him. She said a letter was handed over to 'security' and subsequently received a call, apparently from Mr McKeeva Bush.

35. Mr Ebanks told her that Mr McKeeva Bush and Cline Glidden were getting a loan. She went to both the CNB and Scotia banks with the Applicant. The Applicant spoke to a loan officer. He said the loan had been approved. Nothing happened. By this stage, the witness was using her own money to repay people, borrowing it from where she could.

36. On the 17th of October, *in the face of objections by the defence* (our emphasis), the prosecution sought a witness summons to be served on Mr McKeeva Bush under section 43 of the *Criminal Procedure Code 2014*. That section provides:

"*Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon or call any person as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case*".

37. The prosecution submitted that Mr McKeeva Bush's evidence was essential to the just decision of the case. His absence was described in terms of the "*elephant in the room*". The judge, submitted the Crown, had an obligation to summons or call him. The judge refused the application. In doing so, he said:

> "*It is clear that in respect of at least part of this trial the figure of Mr. McKeeva Bush, who was at that time, Premier, looms large. Looms large in two ways. Mr. Ebanks has previous convictions for very similar, if not identical offences. His case is that he was effectively the fall guy for Mr. McKeeva Bush on that occasion, and as a reward lived his sentence like a king in prison and was looked after.*
>
> *In this current case his case is, I gather, he was again acting on behalf of Mr. McKeeva Bush or alleges that he was. He has also named various other people as being involved in this scheme*".

38. Mr Aiolfi, then representing the Applicant, objected to that proposed course. It was his submission that it was too late.

39. The judge went on to say (13/8):

> "*The fact Mr. McKeeva Bush has declined to come to court, doesn't in fact necessarily or at all provide Paul Ebanks with a defence, because all Mr. McKeeva Bush would have to do is come along and flatly deny the suggestion. As I have already indicated during the course of discussion with the attorneys this afternoon, if there was to be an application for [a] witness summons, I think it should have been made some time ago.*

Looking at the procedure to be followed following sections 43 and 45 of the Criminal Procedure Code, Mr. Bush, if he wasn't at Northward, may...disrupt and delay this trial to such an extent we would have to discharge the jury. I don't want to do that, I want to keep this trial on track the best we can. And as already indicated I think the stance taken by Mr. McKeeva Bush is wholly improper and it ill behoves anybody, let alone a member of the Legislative Assembly."

40. In his Summing Up, the judge referred to Mr McKeeva Bush's absence in the following terms (3/9):

> "*You must not speculate about what other evidence there could have been or might have been. The one name that has loomed large in this case, who you haven't heard from, is that of McKeeva Bush. You mustn't speculate about what he might have said, could have said, or whether he should in fact have come along to court. So, you have to do without McKeeva Bush.*"

41. Mr Davies, on behalf of the Applicant, now seeks to take a wholly different position from that taken by Mr Aiolfi, then the Applicant's counsel. He submits that his instructions are that when objecting to the calling of Mr McKeeva Bush, Mr. Aiolfi was not acting in accordance with the Applicant's instructions. His instructions were that Mr McKeeva Bush should be called. They continued to be such, albeit there was an adjournment overnight for matters to be considered. In the circumstances, therefore, the submission is that, first, Mr McKeeva Bush's evidence was important and, second, that Mr Aiolfi, his counsel, acted contrary to his specific instructions.

42. We deal with the issue in a number of stages.

43. Although not as clearly set out as it might have been, it seems to us that the judge decided that the presence of Mr McKeeva Bush was not essential to a just outcome of the case. The jury could fairly decide it in his absence. Other witnesses could speak as to the existence or not of such a scheme as alleged by the Applicant. It would prejudice the just

process of the trial to have it adjourned for some time or even aborted while attempts were made to obtain Mr McKeeva Bush's presence.

44. It seems to us that the judge was entitled to come to that decision.

45. Moreover, we find it incredible that Mr Aiolfi acted in specific breach of instructions, as is alleged by the Applicant. Be that as it may, the issue is whether the safety of these convictions is affected by Mr McKeeva Bush's absence. In our judgment, it is not. It seems to us (as no doubt it did to Mr Aiolfi) that had Mr McKeeva Bush been called, his evidence, far from assisting the Applicant, would severely have prejudiced his case. It seems to us clear that the safety of the Applicant's convictions could not conceivably have been affected by the absence of Mr McKeeva Bush.

Ground 2

The hearsay evidence ground

46. By section 33(1) of the *Evidence Law (2011 Revision):*

> *"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.... the person who made the statement is outside the Islands; and it is not reasonably practicable to secure his attendance; or that all reasonable steps have been taken to find the person who made the statement but that he cannot be found."*

47. Section 33(6) provides:

> *"Notwithstanding subsection (1), in criminal proceedings a written statement by any person is admissible as evidence to the like extent as oral evidence to the like effect by that person if the court determines that it is in the interest of justice to admit such written statement."*

48. The prosecution applied to have the witness statements of six witnesses read. They were not agreed. They were complainants in relation to various counts.

49. In her skeleton argument, Miss Salako has helpfully set out in chart form the various witnesses concerned and the counts to which they related. They related, without naming them, to counts 2, 10, 11, 12, 13 and 15. In each case that witness had left the island on the different dates set out in the chart.

50. The application to have the statements read was heard on the 21st of October 2017. Mr Aiolfi objected. He accepted that on the face of it the witnesses were outside the jurisdiction and difficult to contact. He complained about the absence of proper evidence regarding the efforts made to keep tabs on them up until the trial. There was no proper chronology, he submitted.

51. He took each of the witnesses in turn, indicating how he would have sought to question that witness. The judge decided to admit the statements. He gave reasons for doing so on the 10th of November 2017 (the date of sentencing). Some criticism was made of that, but plainly it was open to the judge to give his decision, with reasons later to follow.

52. It is axiomatic that if a witness statement which is not agreed is read, the jury should be warned of the dangers of relying upon it. No proposition for that is needed. The statements were to be read by Miss Salako on behalf of the prosecution broadly as a group. Before the first statement was read, the judge said (transcript 25/10/2016):

> *"Members of the jury, remember what I said to you earlier about some statements can be read by agreement, which are not in dispute, these are different. I have to warn you. These are witnesses who the defence don't agree can be read, but I've ruled, because they can't be found, that their statements can be read. So, it's not agreed evidence, so be a little* [*wary*] *of these ones. Okay? And I won't say anymore at this stage because for various reasons."*

53. In the event, not all the statements were read at the same time. On the 26th of October, another statement was read. The judge said (at 1/7):

> *"So Ms. Salako is going to read -- I think it's just one or two -- a couple of statements, and then that's as far as we can go today. ....*
>
> *And again, members of the jury, this is one of the witnesses we can't locate, so it's being read, and this is not agreed evidence. So, remember what I said to you yesterday about weight you should attach to it, et cetera."*

54. On the 28th of October 2016, another statement was read. The judge gave a similar warning. We need not recite it.

55. In his Summing Up, when referring to four of the statements which were read, the judge said (2/15):

> *"Kadion James is Count 2. Kadion James, members of the jury, is one of those witnesses whose statement I ruled could be read to you, although it wasn't being read by agreement. So, you might like to think it fair, bearing in mind Mr Aiolfi hasn't had an opportunity of cross-examining these witnesses, give it a little less weight...*
>
> *...She, in fact, handed over $4,000 for herself and her husband. She was in the process of applying for PR through an attorney but thought this would speed the process up...*
>
> *Pierre Wilkinson, Count 10. Again, read not read by agreement. So, again, perhaps slightly less weight. Matter for you. Pierre Wilkinson heard about it from...[Miss] Margaret...he became involved in late 2012*

and handed over $2,000. And various times was told there were delays and then it would be in the post, but nothing received

Rayan Simms, Count 11. Again, not read by agreement. He paid over his money to Miss Margaret...He paid $2,000, actually handed over in cash. And he told a couple of friends about it and they gave – became involved as well, because the information being rolled over from one person to another.

Sunil Pahalajani became involved in September 2012, handed over $2,500, told it would be in the mail, but then no contact...

Gabbidon...Count 9...Mr Gabbidon heard about this from Margaret, handed over $2,000, and didn't get status, didn't get his money back.

Finally in this little group, Jason McLean, which is Count 15. Again, his statement read not by agreement. He handed over $2,000 to Margaret and became aware of Paul Ebanks' involvement in it..."

56. The submission is that these warnings were not adequate. They render the convictions on the counts to which the witnesses' statements relate unsafe.

57. In our judgment, the judge should have given more fulsome and clearer warnings to the jury when referring to those statements. However, for the reasons we shall shortly give, that failure does not, in our judgment, conceivably affect the safety of these convictions.

58. First, the witnesses in question did not directly have contact with the Applicant. The money they handed over was passed to an agent or agents. They were available to be cross-examined. Although one of the witnesses, namely Jason McLean, did subsequently meet the Applicant, it was in the presence of others who were available to be questioned. Many other witnesses in a similar position to these witnesses were available. Their

statements were read by agreement. The court is bound to question whether, had those witnesses not been available, their presence would have been requested. Moreover, this was not, in the circumstances, a case dependent upon the absent witnesses' evidence. And, finally, albeit in the limited terms to which we have just referred, the judge did warn the jury. Of course, it may be that that warning was in those limited terms because the evidence of those witnesses, as far as any dispute was concerned, was, to some extent, in his judgment peripheral.

59. In the circumstances, Ground 2 fails.

Ground 3

The so-called "dock identification"

60. Count 28 alleged that the Applicant obtained $26,000 by deception from Mirian Melendez. His case was that she didn't hand the money over to him, but to someone else. An identification, it was said, therefore arose.

61. When giving her evidence, the following sequence of events occurred when the witness was being questioned by Ms Salako on behalf of the prosecution.

> "*Did you meet Mr Paul...*[Ebanks] *on any other occasion? No, that's the only time I saw him. Until today.*"

62. Sensibly, the questioning of the witness continued. The examination in-chief came to an end. Mr Aiolfi drew the judge's attention to what he described as the dock identification which had taken place. The judge had not himself noticed that there had been such an identification. Mr Aiolfi, having taken instructions, asked for the jury to be discharged. The judge refused. He said if Mr Aiolfi wished it, he would warn the jury that they must ignore such an identification. No doubt, the judge had in mind this was a passing remark, the significance of which the jury might well, like him, not have appreciated. In the event, the judge did raise the matter with the jury. Mr Davies submits, on the basis of his

client's instructions, that his client had not wished the judge to raise the matter. The judge said this (*80/15*):

> "*Now, [a] matter of law, members of the jury, because you know it's suggested that these dealings between all the family are not with Paul Ebanks. Remember, that's the case, it's somebody else. At the end of her evidence, Gina Hernandez pointed at Mr. Ebanks, said that's him. Matter of law, ignore that. That is not evidence. The American say to 'strike that answer', which is an awful expression. But just ignore that, please. There are proper identification procedures which should have been gone through if they wanted to do an identification. Identifying somebody in the dock went out of fashion about 40 years ago, even before I started. Right, so ignore that, please.*"

63. Mr Davies is critical of what the judge said regarding that identification. First, he submits that the judge shouldn't have mentioned it. It was contrary to his client's expressed wishes. Second, it exaggerated what, in fact, had happened. It gave added weight to something unnecessarily. It was a warning not in accordance with what had been said in the speech of Lord Kerr in *Tido* [2012] 1 WLR 115, a case, as Mr Davies conceded, very different from the present. That was a case in which there had been an express dock identification when there should not have been. Nevertheless, so strong was the evidence against the Appellant in that case, that his conviction for murder was upheld.

64. In our judgment, this is another ground of appeal without merit. The real issue, the jury may have thought, was not whether the witness could recognise the Applicant, but whether she was truthful when she said she had handed over money to him. It was the Applicant's case that she was lying about the money because he owed her money for a gambling debt.

65. Moreover, while we accept that the warning was not as happily expressed as an identification warning should have been, it was made plain to the jury they should ignore it.

66. This is another ground of appeal without merit.

Ground 4

The dismissal of juror number 4

67. A question arose as to whether juror number 4 knew two of the witnesses. A question also arose as to whether she had a criminal conviction for importing cocaine. The issue arose in the first place at the behest of the Applicant, having been raised, as we read the transcript, by the Applicant's wife.

68. The learned judge had the juror separated from her colleagues. He asked her if she did know two of the witnesses. She readily accepted that she did. He asked her whether she had discussed her knowledge of those witnesses with other members of the jury. She said she had not. He thereafter kept her separate from her colleagues. He discharged her from the jury. He made it plain that she should not discuss anything with her erstwhile colleagues.

69. The submission is that the juror could not be relied upon in her assertion that she had not discussed anything with her fellow jury members. She had, it is submitted, ignored warnings given at the outset of the trial to indicate whether she knew any witnesses. She had failed to say she did. That goes to her credibility when she asserts that she had not discussed her knowledge of the witnesses with her colleagues. There is, it is submitted by Mr Davies, "*A palpable risk that she might have influenced other jurors although she denied it.*"

70. Mr Davies also drew to our attention that there had been an interchange with this juror at the outset of the case. The context plainly was a discussion between this juror and the judge as to whether she was available for the period anticipated for the trial. In her responses to the judge, when asked about the witnesses, she had mentioned words to the effect that she had previously said something about the fact that two of the witnesses were her cousins.

71. It seems to us that this matter was dealt with impeccably by the judge. There is no sensible basis for suggesting that this juror in some way influenced her colleagues against this Applicant or in any way at all. There is no sensible basis for the sequence of events concerning her to begin to affect the safety of these convictions.

72. Ground 4 fails.

The remaining grounds

73. There were further grounds; firstly, under Ground 5, to the effect that the judge inadequately directed the jury; and, secondly, under Ground 6, relating to the absence of the assertion in counts 1 - 19 of an intention permanently to deprive. Mr Davies, as we have said, sensibly does not pursue those grounds. It is unnecessary for us further to refer to them. We do observe however, firstly, that it is surprising that no one picked up the error before the Summing Up and, secondly, that it would have been better had an amended indictment been prepared containing the omitted word for the jury to have before them.

74. In the result, therefore, there is no basis to allow this appeal against conviction. The grounds relate to matters of law and fact. We have to consider whether or not we should grant leave. In the circumstances, this appeal, being wholly without merit, we have decided we should refuse leave.

The Application for Leave to Appeal Against Sentence

The Applicant's previous convictions

75. We have, in our papers a list of the Applicant's previous convictions. We have already referred to them and shall therefore put it shortly.

76. On the 26th of June 2006, he was convicted of offences of 39 offences of obtaining property by deception. He was sentenced to 4 years' imprisonment. Those offences were similar to the present.

77. On the 19th of October 2006, again for obtaining property by deception, he was sentenced to 6 years' imprisonment concurrent. That related to some 13 similar offences.

78. On the 4th of August 2009, for obtaining by deception, he was sentenced to 4 years' imprisonment, with 2 years to run concurrent with the sentence he was then serving. That too was a similar offence.

79. Although not as clear from the transcript as it might be, the judge appears to have sentenced the Applicant on counts 1 - 16, 18, 19 and 26, to 8 years' imprisonment concurrent; on count 27, 2 years' imprisonment concurrent; on counts 20 - 25, 2 years' imprisonment concurrent with each other, but consecutive to the 8 years; on count 28, 4 years' imprisonment consecutive. That makes a total of 14 years. Against that, he deducted 1 year 3 months, seemingly for the period during which the Applicant was on curfew.

80. However precisely the sentence is made up, Mr Davies submits that 14 years in total is manifestly excessive. The maximum sentence for this offending was 10 years' imprisonment. The sentence imposed exceeds it by too great a margin. It is too long when compared with the concurrent sentences of 6 years imposed in 2006.

81. What sentence, asked Mr Davies rhetorically, would be imposed if a greater sum of money had been obtained by deception? It was too long, he submits, when compared to the cases of *Douglas* and *Hamilton*, heard by Mr Justice Quin in the Grand Court in which, in respect of the defendant Douglas, he imposed a sentence of 2.5 years' imprisonment, she having pleaded guilty to 9 counts of similar offending involving $20,500; and in respect of the defendant Hamilton, a woman of previous good character, convicted of 8 counts involving $17,500, Mr Justice Quin imposed sentences of 4 years 6 months concurrent.

82. Mr Justice Quin expressed the view that, having considered such authority and guidance as there was in the Cayman Islands, the starting point for these "*immigration offences*" was 4 years, with a range of 18 months to 2 years. In each case, he ordered that any period in custody should be deducted.

83. The learned judge set out in his sentencing remarks at some length the nature of the offending involving Mr Ebanks. He rightly referred to his "*simply appalling record for offences of dishonesty*". He rightly referred to the seriousness of these offences in terms of their attack on the integrity of the immigration laws and procedures, and the subsequent tarnishing of the reputation and the image of the Cayman Islands. He rightly referred to the fact that the Applicant, having previously been released on license, shortly thereafter offended.

84. He referred to the fact that although he was not sentencing the Applicant for pleading not guilty, he had shown:

> "*...absolutely no remorse at all, quite the opposite. Your hypocrisy is breath-taking. On the one hand you were saying it is not fair for these poor hardworking people, they should get their money back, or on the other hand you were taking yet more money from poor hardworking people.*"

85. He referred to the fact that the Applicant accused people of lying and planting property on him and conspiring to frame him. He referred to count 28 in terms of it being "*truly awful*". He set out the facts of that case and the fact that Miss Melendez had handed over not only her own money but all her family's money, a total of $26,000. He referred, again rightly, to the fact that she handed over the money because she trusted the Applicant.

54. Having regard to the many aggravating features, as he set them out, the judge imposed the sentences he did.

86. In our view, it is difficult to conceive of a more serious example of offending of this type. The Applicant is a man who, it seems, will start to offend the moment he is at liberty. He is released from prison. He offends. He is granted bail. He offends. He deliberately played upon what he knew was the desperate wish of people, mostly of moderate means, to obtain Residence or Status. He knew they could ill afford the money they were paying over. Having received some $164,000, very little was returned, and that the product of further offending.

87. The facts of this Applicant's case are of a different order to those cases cited by Mr Justice Quin and referred to by Mr Davies in his submissions. In our judgment, the judge was quite entitled, to impose the overall sentence of 14 years. Whether we might have made up that total sentence in a slightly different way matters not in the circumstances.

88. We agree that time spent on curfew should be transparently calculated and set off against the sentence imposed, as Mr Davies has submitted. As we have indicated in argument, an agreed figure should be calculated by counsel before the present sitting of the court ends. Hopefully we can deal with the matter in writing.

Conclusion

89. In our view, there are no arguable grounds to appeal the overall sentence of 14 years. In that respect, therefore, we refuse leave to appeal. We do grant leave for the period of the set off to be considered by this Court. To that very limited extent leave is granted.

The curfew

90. We add this to the corrected judgment of the court delivered on 19 April 2018.

91. There was a further hearing on 6 September 2018. Although only two members of the Court were available for that hearing, what follows has been approved by all the members of the Court, including JA Martin, the absent member of the Court on 6 September 2018.

92. It proved not to be possible for an agreed figure to be available before the end of the previous sitting of the Court. Mr Ebanks then dispensed with the services of his second counsel, Mr Davies. At the hearing on 6 September, Ms Salako, in the presence of Mr Ebanks, now representing himself, helpfully provided us with the detail. Mr Ebanks did not demur from anything Ms Salako said.

93. In short, the Appellant was subject to electronic monitoring for 1,099 days (a figure previously agreed by Mr Aiolfi on his behalf). He was on 24 hour curfew but was permitted to attend hospital and church. As Ms Salako pointed out, he used some of the time when in hospital to continue offending. The Electronic Monitoring Service calculated the Appellant was 58% compliant, although he was not breached for non-compliance.

94. In October 2015 the Chief Justice of the Cayman Islands issued new Sentencing Guidelines relating to time spent in custody. They state:

> "***Reduction in sentence for time spent on remand subject to conditions curtailing liberty*** 12.1 ***Principle***
>
> *When passing a determinate custodial sentence the court should consider whether credit should be given for time spent on bail where conditions have been imposed which curtail the liberty of the defendant. This is most likely to be relevant where a defendant has been subject to a curfew, especially where compliance with that curfew can be verified through electronic monitoring.*
>
> ***12.2 Factors to be taken into account***
>
> *In deciding what, if any, credit should be given for time spent on curfew, the court will consider the following factors:*
>
> - *The total length of time the defendant has been subject to a curfew*

- *The number of hours each day that curfew was imposed during the curfew period*

- *Whether the curfew included daytime hours or was solely a night time curfew (recognising that being indoors at night during, for example, normal sleeping hours may be less of a curtailment of liberty than being indoors during the day).*

- *Any breach of the conditions of the curfew*

12.3 Caution to avoid double counting

A Court will ensure that there is no double counting of benefit as a result of a curfew or other conditions restricting liberty; where a defendant is sentenced on the same occasion for all the offences to which a curfew or other condition has related, there should be a single deduction from the total sentence. Where a defendant is sentenced on different occasions, care will need to be taken to ensure that credit is only given once.

12.4 Calculation of credit to be given

When exercising its discretion whether to give credit, a Court will require the attorneys to provide it with a calculation of the days when the defendant was subject to curfew (or other condition). The Court will then determine what proportion of those days will count towards the sentence.

In deciding how to exercise its discretion in the absence of statutory provision in the Cayman Islands, the Court will bear in mind the statutory provisions applicable in England & Wales (as set out in CJA 2003 s.240A (as amended by LASPO 2012 s.109) in relation to electronically monitored curfew). A Court giving credit should include in its reason the basis for its calculation.

A Court deciding not to give credit should also give brief reasons for the exercise of its discretion."

95. Applying that guidance, and taking into account the provisions applicable in England and Wales, the judge could have reduced the days to be set off from 1099 to 637 to reflect the Appellant's non-compliance. Dividing that by two (again in accordance with the guidance of England and Wales), would have resulted (rounding it up) to 319 days. In other words, the judge could, substantially, have reduced the period to be set off. We must take it he decided not to, hence the period he set off of 1 year 3 months. It is not open to us now to increase the total sentence imposed by in any way decreasing that. There is however, no basis at all for giving the Appellant more credit than did the judge. His (generous) set off period will stand.

96. In the circumstances, we dismiss the appeal so far as it relates to the period spent in custody.

97. We add: it is important for judges clearly to explain how they have arrived at their figure reflecting the time the defendant has spent on remand and subject to any restriction on his liberty.