# IN THE CAYMAN ISLANDS COURT OF APPEAL

**CRIMINAL APPEAL 9/2016**
IND 5/2014
C04346/2013

BETWEEN:

**HER MAJESTY THE QUEEN**

Respondent

- and

Michelle Bouchard

**Appellant**

**BEFORE:**

**The Rt Hon Bernard Rix, Justice of Appeal**
**The Hon Sir George Newman, Justice of Appeal**
**The Rt Hon Sir Alan Moses, Justice of Appeal**

Appearances: Simon Russell Flint QC instructed by Greg Walcolm for the DPP.
Peter Carter QC instructed by Lee Halliday-Davis of Brady Law for the Appellant.

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**JUDGMENT**

Revised from transcript of oral judgment given on 7 November, 2016 and Approved
Released 16 December, 2016

## Justice Sir Bernard Rix

1. This is the appeal against sentence of Michelle Bouchard, who, on 21 April 2016, following her conviction on that day by a jury, after a trial before HH Judge Worsley QC sitting as a Justice of the Grand Court of Cayman, on 25 out of 26 counts of an indictment charging her with multiple offences of theft and money laundering, as well as single counts of forgery and obtaining by deception, was sentenced by Judge Worsley to a total of 12 years imprisonment.

2. The sentence of 12 years imprisonment was made up as follows:

Count 1 (theft of CI$ 118,887.46): 3 years

Counts 2, 3, 4, 5, 6, 7, 10, 15, 16 and 26 (10 thefts amounting to CI$148,300 and US$ 81,901.08): 1 year concurrent

Counts 8, 11 and 12 (3 thefts totalling CI$ 1,863,281.40): 7 years

Count 13 (forgery, relating to a theft of US$ 50,000): 1 year consecutive

Count 14 (obtaining by deception a diamond ring valued at over $200,000): 4 years

Count 17, 18, and 19 (transferring criminal property in the sums of US$350,000, Can$ 350,000 and CI$ 310,000): 4 years consecutive (but concurrent inter se)

Counts 20, 21, 22, 23, 24, and 25 (attempting to transfer criminal property amounting to US$ 150,000, Can$ 100,000 and CI$ 50,000): 3 years consecutive to the theft and forgery counts (but concurrent inter se and to counts 17-19).

3. All these sentences were concurrent, save for the consecutive sentences for forgery and for transferring criminal property (which we will refer to as money laundering) amounting to an additional 5 years. Thus the total length of sentence of 12 years was determined by the 7 years (concurrent inter se) for the three major thefts plus 1 year for the forgery count and 4 years for the money laundering counts.

4. On one count only the appellant was acquitted, namely count 9 on which she had been charged with theft of a further CI$ 184,869.01 used to pay off her credit card accounts.

5. The essential facts of the appellant's offences were these. Between June 2010 and September 2012, over a period of about 27 months, the appellant took advantage of her relationship with Mr James Handford, a wealthy but elderly and vulnerable Australian, in order to steal from him. When, in September 2012, she feared that her thefts were on the point of discovery due to the suspicions of Mr Handford's daughter, she sought to secure her nest-egg by transferring, or attempting to transfer, the stolen money from her personal accounts in the Cayman Islands to other accounts in Canada or the Cayman Islands. She succeeded in transferring to Canada more than $1 million (a mixture of US, Canadian and Cayman Island dollars). Her unsuccessful transfers were anticipated by her arrest in October 2012. She had already attempted to hide hundreds of thousands of dollars worth of jewellery in a new deposit box at her bank. At the time of her arrest she was about to flee the jurisdiction: she had all her bags packed.

6. Mr Handford is now about 88 years old and at the time of the offending was some 82 to 84 years old. By the time of trial his dementia was such that he was incapable of travelling or giving evidence. His condition was not as bad (as it

was to become) at the beginning of the period of offending, when he was able to conduct some business and to communicate with his bank manager. The judge ruled that his statements dated October and November 2012 were those of a man who was still competent to give evidence, and they were read at trial. Nevertheless, his condition progressively deteriorated, and the judge, who had presided over the whole of the trial, ruled that already at the time of the first offence in June 2010 he was vulnerable in that he suffered from the onset of dementia, was beset with memory problems, was sometimes confused, and did not check his bank statements or the appellant's spending.

7. The appellant and Mr Handford met in the context of her work for him as an interior designer commissioned to work on one of his properties in the Cayman Islands. So the origin of their relationship was a legitimate business one. By June 2010, however, when he had offered her a home in his Waters Edge apartment, she set out to take advantage of moneys which were in accounts over which she was given authority for the purpose of legitimate outgoings on his properties, but which she used illegitimately for the purpose of feathering her own nest. There were two accounts which Mr Handford opened in their joint names, one in Cayman Island dollars opened in May 2010 and the other in US dollars opened in April 2012.

8. The details of her offending are referred to in the judge's sentencing remarks, details which include remarkably forthright but also damning entries from her own journal. The judge regarded these details as all going to the aggravation of her offence. Thus he observed that while Mr Handford was vulnerable, she was in a position of trust, which she abused. Her conduct was persistent over the period of her offending, and extended, as observed above, to the money laundering offences at a late stage. In the meantime she had employed different means to persuade Mr Handford and the banks to allow her unfettered access to the accounts: and on one occasion when he decided to close a joint account without telling her, she took him straightway to the bank and persuaded him to reinstate it. Her comment in her journal was that otherwise "*I am without a regular income stream which means that from now on I will have to go cap in hand to get some money which really turns my stomach literally.*" Her comment on the valuable jewellery he bought for her was: "*Thank heavens he doesn't remember how much he paid for it because he would have a fit*". She spent stolen monies on an extravagant lifestyle including holidays and properties. In order to keep up her deceit, she lied to Mr Handford's family by persuading them that she was looking after him and his affairs in his best interests; and she lied to bank officials. The forgery concerned a credit card authorisation which helped to purchase the diamond ring (count 14), which she said was an

engagement ring, but the judge found, on the basis of the jury's verdict, that no engagement ever took place.

9. If these were the aggravating features highlighted by the judge, he also took account of personal mitigation. Thus, the appellant was a woman of previous good character, an intelligent and able business woman. There were what the judge described as glowing testimonials from her past in Canada. The relationship had started legitimately. She suffered, for no fault of her own, a long delay in the taking place of her trial. Because many of her assets had been frozen, there were prospects of recovery to be set against the losses suffered by Mr Handford. Prison would be a difficult experience.

10. However, as the judge also remarked, there was no remorse. There had of course been no guilty plea.

11. Upon the basis of these facts and features relating to her conduct, the judge turned to consider the appropriate sentence. He said:

> "*11. I have been referred in detail to the maximum in this jurisdiction by way of sentences for these offences. I have read and heard submissions on the appropriate approach to sentencing such offences as set out in the Sentencing Guidelines in this jurisdiction and I have read those set out for the UK. In my judgment your offending is high culpability and high level of harm for the reasons I have set out. I reflect the stated mitigating factors in this case.*
>
> *12. I have in mind the principle of totality in determining the appropriate sentences and I distinguish the different Counts by the amounts on each occasion, but I sentence you for a prolonged course of conduct involving just over $2 million as follows…"*

12. On this appeal, Mr Peter Carter QC accepted (i) that an overall sentence of 7 years for the thefts was an appropriate sentence, bearing in mind that culpability and harm were both at a high level; (ii) that a consecutive sentence of 1 year was appropriate for the forgery; and (iii) that in theory and in principle a consecutive sentence was appropriate for the money laundering counts given that the gravamen of that offending in this case was a true addition to the offending involved in the thefts and forgery. However, his essential ground of appeal was one of totality. He submitted that a total of 12 years was just too long, and that the judge ought to have reflected this by either reducing the total of the theft sentences and/or by limiting the consecutive sentences for the

money-laundering or even making them entirely concurrent. In sum, he submitted that the total sentence should not have exceeded 7-8 years.

13. In connection with and in support of this overarching submission, Mr Carter made the following points. (1) The appellant had already reached the age of 49 with a previous good character before she embarked on her course of offending. (2) Mr Handford may have been vulnerable to a degree, but the judge had failed to mention that he had remained competent to give evidence by way of witness statements in October and November 2012, that he had been regarded as competent to change his will in October 2012, and that there was evidence of his business and personal activity into 2012. (3) The harm caused was mitigated by Mr Handford's very considerable surviving wealth, his current inability to appreciate the offending against him, and the readiness and ability of the appellant to provide compensation to Mr Handford of some CI$1.6 million (in the form of frozen funds plus the value of a condo which she had bought with the stolen monies). (4) The acquittal on count 14 demonstrated that the jury considered that not all the sums she received from Mr Handford were the proceeds of theft or deceit. (5) To some extent the money-laundering offences duplicated aggravating features of the thefts, such as that of "attempts to conceal/dispose of the evidence" recognised in the UK's (strictly speaking the England and Wales) SGC theft guidelines. (6) In *Glasgow*, sentence ruling indictment no 21/13, Quin J in the Grand Court imposed a sentence of only 4 years on a defendant who for her late plea had obtained only a 20% reduction of sentence for the theft of US$437,000.

14. On behalf of the Crown, Mr Russell-Flint QC on the other hand submitted that 12 years was not manifestly excessive in the light of the very large sums stolen, the prolonged period of offending, the serious breach and exploitation of trust, the vulnerability of the victim, and the persistence of the offending extending even to the significantly successful attempts to remove stolen funds out of the jurisdiction and to conceal them. In this connection Mr Russell-Flint also relied on *Glasgow*, at para 65 where Quin J said:

> "*As has often been said: this type of offence has the potential to affect public confidence in Cayman Islands companies and our financial regulations which form an essential part of the financial services industry. In other words, the reputation of our financial services industry on which our economy depends is damaged every time this breach of trust criminal offence is committed. Should others contemplate embarking on this kind of dishonest behaviour they must realise that, if they are*

*apprehended and subsequently convicted, a long term of imprisonment will be imposed."*

15. Before giving our judgment on these submissions, we refer to some of the legal ingredients of the sentencing exercise which the judge took into account in reaching his 12 year sentence.

16. First, it needs to be said that the maximum sentence for theft in the Cayman Islands is 10 years, not the 7 year maximum which applies in the United Kingdom to which the SGC Theft Guidelines apply. The maximum sentence under the Proceeds of Crime Law (2008) under which the money-laundering counts were charged is 14 years.

17. Secondly, the Cayman Islands Sentencing Guidelines of October 2015 contains no guidelines as yet relating to theft, but otherwise states the following uncontroversial principles relating to totality and concurrent/consecutive sentences:

"**5 The Totality Principle**

The Court, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and at the same time, is a sentence which is just and proportionate. This is so whether the sentences are concurrent or consecutive (see 6 below). Thus, concurrent sentences will ordinarily be longer than a single sentence for a single offence.

It is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole…

**6 Concurrent/Consecutive sentences**

When an offender has committed more than one offence for which he is to be sentenced, the Court may structure the sentences to be either consecutive or concurrent. In accordance with the totality principle, the overriding principle is that the overall sentence must be just and proportionate. This can be achieved whether the sentences are structured as concurrent or consecutive, as to which there is no inflexible rule, simply guideline principles…

**6.1** …Concurrent sentences will ordinarily be appropriate where:

(a) Offences arise out of a related incident or facts

(b) There is a series of offences of the same or a similar kind especially when committed against the same victim

Where concurrent sentences are passed, the sentence should reflect the overall criminality involved. The sentence should be appropriately aggravated by the presence of the associated offences and thus the court may increase sentence for the principal offence to reflect the gravity of conduct.

**6.2 Consecutive Sentences**

Consecutive sentences will ordinarily be appropriate where:

(a) Offences arise out of unrelated facts or incidents
(b) Offences are of the same of similar kind but where the overall criminality will not sufficiently be reflected by concurrent sentences…

18. The Guidelines also lists the following among other aggravating factors and factors indicating a higher culpability (section 8):

- An attempt to conceal or dispose of evidence
- Deliberate targeting of vulnerable victim(s)
- Abuse of a position of trust

And the following factors are listed as indicating a more than usual degree of harm:

- Victim is particularly vulnerable
- Offence is committed against a tourist or is likely to negatively impact confidence in the tourist industry
- Offence is likely to negatively impact confidence in the finance industry
- In property offences, high value…

Among mitigating factors, indicating significantly lower culpability are listed (section 9) –

- A show of contrition, remorse and a willingness to compensate

19. The UK's SGC Definitive Guideline of Theft Offences, effective from 1 February 2016, is not statutorily applicable in the Cayman Islands, but such guidelines are regularly recognised and applied, with any necessary local modifications, in these courts. This Guideline suggests that the offence should be categorised for the purposes of assessing both culpability and harm. In assessing culpability, the following three factors (one alone is sufficient) demonstrate *high* culpability (category A) in this case: breach of a high degree of trust or responsibility; sophisticated nature of offence/significant planning; deliberately targeting victim on basis of vulnerability. In assessing harm, although other factors may operate, the essential reference is to value: so that where the theft(s) are of greater than £100,000 value, the harm falls into category 1 (the highest).

20. It is not in dispute in this case that the appellant's offending falls into the categories of high culpability and high harm (category A culpability and category 1 harm). In such a case, the guideline suggests a starting point of 3½ years and a range of 2½ up to 6 years. Such a starting point and range are premised on single offences. Significantly, the Guideline states:

> "Where multiple offences are committed in circumstances which justify consecutive sentences, and the total amount stolen is in excess of £1 million, then an aggregate sentence in excess of 7 years may be appropriate."

The significance of 7 years is both that the range of up to 6 years may be exceeded, and the maximum UK sentence for theft of 7 years may be exceeded. Moreover, it is important to emphasise that the SGC Guideline's starting points and ranges are premised on the maximum penalty for theft in the UK of only 7 years, whereas the Cayman Islands statutory maximum is significantly higher at10 years (see *Aspinall*, an appeal by the Crown which this court heard at the same time as this appeal).

21. We consider that no jurisprudence cited to us is helpful in the context of this case. *Glasgow* concerned a manager in a corporate services firm who stole a (much smaller) total of CI$ 437,300 over some three years from her employer (not a vulnerable elderly man), and entered a (late) plea of guilty. We do not consider that her sentence of 4 years throws any light on the correct sentence in this appeal. Nor do we consider that Quin J's observations concerning potential damage to these islands' financial services industry apply here (although the aggravating factor mentioned in the Cayman Islands Guidelines of potential damage to the tourist industry may be more relevant, and could perhaps have been invoked, albeit in the event it was not and we do not take it into account).

22. We have, however, taken into account the observations of Lord Toulson in *R v GH* [2015] UKSC 24, [2015] 4 All ER 274 at paras [48]-[49] to the effect that in many situations it would be bad practice to add money-laundering counts to counts of theft where the money-laundering was simply the inevitable result of possessing, using or moving stolen money. It would be otherwise, however, where –

> "the thief's conduct involved some added criminality not just as a matter of legal definition but sufficiently distinct from the offence that the public interest would merit it being charged separately: *Brink's-Mat Ltd v Noye* [1991] 1 Bank LR 68 provides a notorious example of the laundering of the proceeds of the theft of gold bars from a warehouse, but the conduct of thieves in laundering property stolen by them would not have to be on such a grand scale to merit them being prosecuted for it."

23. In the present case, however, the appellant sought to retain and hide her spoliations even in the face of imminent discovery and to a certain extent succeeded, not only in removing money from the jurisdiction, but in concealing Can $ 377,000 which were removed from her Canadian account to which she had transferred them by someone claiming to be her father (although her father was no longer alive). Mr Carter accepted that in principle the money-laundering counts were appropriately added and demonstrated additional criminality, but rested on his ultimate submission that the final sentence be limited by the doctrine of totality.

24. In these circumstances, the conclusions to which we have come are these. First, the sentence of 7 years for theft, particularly as it may be regarded as standing not only for the three most serious thefts but as representing a composite sentence for the whole of the appellant's campaign of theft, was well justified. That indeed is not even disputed. The 7 year sentence goes beyond the SGC guideline for category A culpability and category 1 harm, although not by much: but that is entirely justified by the guideline itself, where it refers to the commission of more than one offence of theft, and in particular by the fact that the Cayman Islands maximum for theft is significantly above that for the UK. The elements of breach of trust, of the exploitation of an elderly and vulnerable man, and of the persistence and duration and increasing sizes of the thefts, were deeply unpleasant. The totality of the thefts, at just about $2 million, was well above the £100,000 threshold of the SGC's category 1 harm. Even though in respects other than the size of the thefts the harm done is mitigated by the great wealth of the victim and by the success of the authorities in freezing a large

amount of the appellant's purloined assets, nevertheless, as has been accepted by Mr Carter, the sentence of 7 years was justified. In our opinion, a sentence even higher would have been justified, had not the judge wanted to make room for consecutive sentences totalling 5 years for forgery and money-laundering.

25. Secondly, it is also accepted that the additional use of forgery merited a consecutive sentence of 1 year.

26. Thirdly, there remains the significant factor of the money-laundering counts. We consider that in the circumstances which we have narrated a consecutive sentence was in principle called for, and we see nothing wrong with the judge's quantification of that sentence at four years. However, there remains the ultimate question of totality and in our judgment it was here that the judge erred to a degree which we think calls for correction.

27. In our view the appellant's total sentence should not have exceeded 10 years. Albeit as a total sentence, that already represents the maximum sentence for theft: and still worse thefts, of greater amounts and affecting a multiplicity of victims, and victims of small means, can readily be imagined: as can occur in thefts arising out of an investment scan such as a Ponzi scheme. Moreover, vulnerable as the victim in this case was, we refer again to the facts that the harm in this case has been mitigated by his great wealth and by the availability of substantial sums in the form of compensation. We therefore consider that the consecutive sentence for the money-laundering counts should have been limited to 2 years only, so that the total sentence becomes one of 10 rather than 12 years.

28. In sum, we quash the total sentence of 12 years, and in its place we impose a total sentence of 10 years. We achieve that by replacing the consecutive sentences on counts 17-25 with sentences of 2 years, concurrent to each other, but consecutive to counts 1-8 and 10-19. To that extent this appeal is allowed.