IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 12/16
IND 56/12
C02214/2012

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and

Marcia Angella Hamilton

Appellant

CRIMINAL APPEAL 10/16
IND 56/12A
C02235/2012

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and

Judith Franciea Douglas

Appellant

BEFORE:

The Hon John Martin QC, Justice of Appeal
The Hon Sir George Newman, Justice of Appeal
The Rt Hon Sir Alan Moses, Justice of Appeal

Appearances: Margeta Facey-Clarke for Hamilton and Guy Dilliway-Parry of Priestleys for Douglas and Toyin Salako for DPP

JUDGMENT

Revised from transcript of oral judgment given on 3 November, 2016 and Approved
Released 23 November, 2016

MOSES, J.A:

This is an application for permission to appeal on the part of Marcia Hamilton who, following a trial starting on the fifteenth of October 2015 before Justice Quin, was found guilty on the 22nd of December 2015 of six counts of an eight count indictment of obtaining property by deception.

This Court heard her appeal this morning and, after hearing submissions, announced its conclusion that it would grant permission to appeal, allow the appeal and the appellant was discharged.

These are our reasons for allowing the appeal. The case concerned a fraudulent scheme, operated by another defendant who had pleaded guilty, Judith Douglas, and another lady, Kathleen Davis, who had fled the jurisdiction. It was alleged this appellant, Marcia Hamilton, had been part of a 'scam' whereby members of the public on Grand Cayman were told falsely that they could secure Caymanian residency on the island by paying 2,500 Cayman Island dollars.

The allegation, so far as this appellant was concerned, was that she would approach members of the public and represent to them that she was able to secure, by paying the money, handing over police clearance and a completed residency application, Permanent Residency.

One can see the nature of the case in relation to one of the particular counts on the indictment, the first count, as described in the findings of fact made by the judge who was sitting without a jury. The first victim was said to be Miss Avril Johnson who was introduced to this appellant by a friend, Gloria Brown. The appellant told Avril Johnson that there was a link to Immigration for Permanent Residency status. Avril Johnson was here, like other victims, on a permit. She was assured by this appellant that the scheme was straight and that Avril Johnson would obtain residency because she had been in Cayman for a long time. She told Avril Johnson that she would meet a lady called Judith Douglas -- in fact the other defendant -- and give Judith Douglas all the relevant information and the money. Undoubtedly these representations were false. They were, in one form or other, repeated on five other occasions; the subject matter of counts two to six.

Count one, as we have said, concerned the victim Avril Johnson.

Count two concerned a co-worker at the Westin Casuarina Resort and Spa who worked there with this appellant. She was told by the appellant about this scheme; it was explained in a similar way and she handed over the money for which she was given a receipt. Subsequently, as we shall notice later, she was concerned as to the delay and was repaid.

Count three concerned a witness who did not attend the trial but whose statement was read -- Vincent Hall -- who learnt of the scheme and again was told how he would, on payment of 2,500 Cayman Island dollars, obtain Permanent Residency.

Count four concerned two others; Angella Brooks and Judith Turner.

Count five concerned an Otis Whilby.

Count six concerned Judith Turner, who worked in a retirement home and in relation to whom others also paid money through her to this appellant.

The Crown's case -- and it is important that we emphasise this -- was that this appellant had been dishonest throughout, that she knew from the start that this was a scheme that was bound to fail, that there was no basis upon which Permanent Residency could be offered on payment of money and that she had bolstered the truth of the representations by making false claims asserting her connection with the Immigration Department . From time to time she pressured those vulnerable members of the public on this island to hand over the money as a matter of urgency. She was cross-examined on the basis that she was dishonest throughout.

There is no doubt but that the representations the appellant made to all the different members of the public involved in those six counts of the indictment were false. There was no possibility, at any stage, of these members of the public duped into handing over their money, of obtaining Permanent Residency by this means. But the crucial question for the judge was whether the prosecution could prove beyond a reasonable doubt that the defendant knew that those representations were false at the time she made them and at the time she obtained the money on the strength of those representations.

The judge convicted this appellant in his reasoned reserved judgment of the 22nd of December 2015 of the first six counts on the indictment; that is, concerning those victims which we have already identified.

It is important at this stage of this judgment to emphasise that the dates of those deceptions were said to be between ninth September 2009 and the second of November 2009.

The judge acquitted the appellant of two other counts on the indictment concerning events somewhat later, on the basis that this appellant had taken no part in those transactions.

It is essential to this appeal that this Court identifies with clarity the basis upon which the judge convicted the appellant. The central argument advanced by counsel for this appellant, Ms. Facey-Clarke, is that the judge's reasoning did not support the conclusion that he reached that she was guilty and that there was no basis for saying that she had been dishonest *throughout* the period of the events which formed the basis of the indictment.

In analysing this judgment, we must remind ourselves and focus on how this appellant herself learnt of the scheme. The judge deals with that at various places in the course of his judgment.

Firstly, he refers to the nature of her defence which he accurately summarises as being that she believed that the scheme for obtaining residence was real and that is why, and we emphasise this, she herself applied for her daughter, as well as for family and friends, to obtain Permanent Residency. The judge notes that as an important part of her defence and describes her case as follows.

The father of her baby, Leonard Wright, had told her about the new Permanent Residency scheme similar to a previous scheme. It cost 2,500 in cash. The child was a student and therefore

she only needed $1,800 and she and Leonard Wright paid $1,800, Leonard Wright having given the money to Judith Douglas who he himself knew. The judge records that the defendant was saying that she and Leonard Wright paid money for the Permanent Residency for the daughter and she believed that this was a legitimate scheme.

The judge, when he was making his findings of fact, having acquitted for the reasons we have given, the appellant of counts seven and eight, turned to how she had first heard of the scheme and his findings about it.

He notes that it was Leonard Wright who first heard about the Permanent Residency scheme when Judith Douglas, who was a client at the hairdressing salon, had told him about it. He had told his barber and others through his hairdressing business had also subscribed to the scheme. He records that Leonard Wright told the mother of his children, Marcia Hamilton this appellant, about the scheme and he gave the appellant $800 and together they paid money to Judith Douglas and got receipts for them -- a number of receipts. The judge finds this happened in July or August or maybe possibly at the latest early September and that they had been told by Judith Douglas that the residency would come through in two or three weeks, possibly a month and that the appellant had given instructions for the money to be paid over to Judith Douglas.

We stress those findings of fact because they are reinforced in a finding by the judge later in his judgment in these terms:

"If Leonard Wright's evidence is reliable and the Court was impressed by his clear efforts to recall the facts and tell the truth, Leonard Wright and the defendant were asking for the return of their money for Shanika's Permanent Residence before the end of October and possibly in September."

We quote at this stage that part of the judgment, although it is relevant to further issues to which we shall come shortly, because it is a clear finding that this judge believed Leonard Wright and therefore accepted his evidence as to how the appellant found out about this scheme.

This is a crucial question in this appeal. If the Crown's case was correct and the appellant had been dishonest throughout, then either the Crown had to establish there was no truth in the fact that this appellant had paid money to obtain Permanent Residency for her own daughter or, alternatively, grapple with the problem and explain why it was that someone dishonest throughout should have bothered to pay over money to Judith Douglas for the purpose, which she knew to be hopeless, of obtaining Permanent Residency. Indeed, we asked Crown counsel, Miss Salako, about this point and she, with her customary candour, accepted that there was no explanation for her doing that, other than that it was a false story.

But the judge did not accept that it was a false story and in the passages that we have identified concluded that the appellant's knowledge of this scheme started with a belief that there was some point in her paying over money, together with the father of the child, to obtain Permanent Residence for her daughter. In short, the judge plainly did not agree with the prosecution case that this appellant was dishonest throughout.

There came a time, undoubtedly, when anxious as to why her own daughter had not yet obtained Permanent Residence, this appellant asked Judith Douglas for the return of the money and, as we have already recorded in a different context, the judge found that that was before the end of October and possibly in September. That finding, for reasons that will become apparent, is crucial. In other words, by that time the appellant no longer had a belief that it would be effective to hand over money and obtain, in return, Permanent Residence.

The judge's conclusion as to the dishonesty of the scheme turned on what followed after the appellant had asked for the money back. He says in his judgment:

"What is crucial is that the defendant continued to collect money from strangers. She was *still* [our emphasis] taking money to Judith Douglas. She was still working with Kathleen Davis and Judith Douglas. She never told any person looking for Permanent Residency that her daughter had not got Permanent Residency."

He then emphasises that the basis upon which he, the judge, was concluding dishonesty was because the appellant was continuing to ask and collect money from members of the public after she herself had asked for its return.

He says at the conclusion of his judgment:

"The defendant had asked for her money back. Well, the evidence shows that the defendant had asked for her money back sometime in late September or even in October but yet she *kept* [our emphasis] on taking cash from innocent victims who more often than not were people who could ill afford a large sum as 2,500."

It is clear that the judge, therefore, was rejecting the Crown's contention that she had been dishonest throughout but was convicting this appellant because he was sure that after she herself had asked for money back, and therefore did not believe in the scheme, was nevertheless representing it as an effective scheme to other members of the public.

This, in our view, is crucial to the safety of these convictions. As we have said, the dates upon which the first four victims of the scheme pre-dated the findings of fact as to when it was the appellant had asked for the money back. Avril Johnson was approached sometime towards the beginning of September, her co-worker, Maylin Aguila sometime in the middle of September, count three Vincent Hall the 16th of September or the 18th of September and, Angela Brooks on behalf of Gregory Bonner, the subject matter of count four, the end of October.

Bearing in mind that there was no precision in relation to the dates and bearing in mind the judge himself could not be sure precisely when this appellant was asking for her money back, there was no precise or safe basis on which he could be sure that she was collecting money after she herself had tried to get her money back.

In those circumstances, the basis upon which the judge convicted this appellant does not support convictions on the first four counts on the indictment. It is clear, unfortunately, that the judge

misdirected himself as to the facts in relation to the dates of those offences. He says -- after the passage we have just quoted in which he said:

"More often than not where people who could ill forward a large sum as 2,500. This continued from August 2009 up to her arrest in April of 2010".

But the dates, as we have endeavoured to emphasise, are not throughout that period but in the first four counts are at a period before she had asked for her money back. It is true that there was evidence that she had paid back her co-worker, the subject matter of count two, Maylin Aguila, in mid-October and the judge had rejected this appellant's explanation as to why that money had been paid back. Thus there was some evidence by mid-October that she might have been aware that the scheme was not effective but even that was not the basis upon which the judge found her guilty of dishonesty because he ties it back to a period, within a considerable time span, of late September or even October because he could not be sure when it was she herself had asked for the money back.

We turn then, with those conclusions in mind, to the last two counts on which she was convicted; Otis Whilby count five and count six Judith Turner for this reason. There is some evidence that those offences did take place and this appellant collected money from the victims; Otis Whilby and Judith Turner, who had collected money from other victims as well, some time towards the end of October or even in early November. The basis for saying that is that there is a receipt from Otis Whilby dated the second of November of 2009 and some evidence that he had received that receipt, signed by Douglas, either through his uncle the day after he had handed over the money, although the judge makes no specific finding as to precisely when that was.

There is also evidence in relation to count six relating to Judith Turner who had obtained receipts, one of which was dated 2nd November, but we need to note that because the appellant was collecting money through Judith Turner from other members of the public, other receipts were obtained. One appears to be dated the 20th of October and another the 30th of October in relation to the victims Gregory Bonner and Angella Brooks.

We therefore have to consider whether, despite concluding that the convictions are not safe in relation to the first four counts because the timing simply does not tally with the basis of the judge's conviction, whether nevertheless the verdicts in relation to counts five and six were safe. In our judgment they were not, for two reasons: first, the evidence as to those dates and precisely when the appellant obtained the money from those members of the public is too vague. It might or might not have been after she had asked herself for money back in relation to her own daughter but there is no possibility of any precision and that is hardly surprising bearing in mind this trial was taking place nearly six years after the events for which it described.

There is a second reason why it would not be safe to have sustained the conviction in relation to those last two counts. That is because the judge himself did not approach it on that individual basis. As we have recorded, having found that she had collected money after she herself had doubts, he related that back to the whole of the period that he dated from August 2009 up to her arrest in April 2010. In other words, he thought throughout that relevant period she had been dishonest and throughout that period she had in mind that she herself had asked for her money

back. But once one understands that that was the judge's approach, putting all those counts together, so far as the dishonest state of mind was concerned, it is revealed, in our judgment, that the basis is falsified because having reached a wrong conclusion on his basis in relation to the first four counts, it clearly, in our judgment, taints his conclusion as to counts five and six. He had never considered them on a different basis but had simply lumped them together considering them on the same basis throughout that period. That is confirmed in the way that this judge considered the process of sentencing the appellant.

During the course of submissions advanced by counsel appearing on behalf of the appellant, he put to her:

"We are back to August or September 2010 -- sorry 2012 -- no sorry 2009, Miss Hamilton" --

that is the appellant --

"was alerted that things weren't right but the problem is she continued being heavily involved in the scheme even though she had already asked for her money back. She managed to take money from other people even though she herself was asking for her money back. I mean that's the criminality of this, that's the intent, knowing full well that I'm getting my money back she proceeded to take money from other people. That's why she has been found guilty".

Of course one has to be very cautious about what the judge says in the course of argument during submissions but it is confirmed that that was his view in relation to her dishonest state of mind when one turns to his sentencing remarks which draws attention to a feature that he found important in the course of a judgment; namely, that she was found with a large number of documents, not only receipts but also names and contact numbers relating to the scheme both in her house and in her handbag. And so he records that his view was that she was "deeply involved in the scam for a long period of time".

If one is to consider just the two counts Otis Whilby and Judith Turner as live matters of contention, by no means could they be described as revealing that this appellant had been "deeply involved in the scam for a long period of time". That merely confirms that the judge was viewing all these counts together, so far as her criminal state of mind, a basis which, as we have endeavoured to emphasise, cannot stand with the dates of those earlier offences before she was asking for her money back.

The result is that the judge's finding contradicted the basis of the prosecution and cannot be justified on the facts as he had found. It is for those reasons that we allow the appeal.

In the light of that conclusion it is unnecessary, in our judgment, to spend too much time in relation to the absence of witnesses which the appellant wished to be called.

A number of witnesses at the outset of the case were not called. They were Gloria Brown, who was due to give evidence which the prosecution said tended to confirm the evidence of the victim, the subject matter of count one Avril Johnson, Maylin Aguila the co-worker, the subject matter of count two, Vincent Hall the victim, the subject matter of count three, and Gregory

Bonner one of the victims who had handed money over to Judith Turner, the subject matter of count six.

At the start of the trial the respondents made an application to have their statements read. The law as to whether that is permissible is contained within section 33 of the Evidence Law (2011 revision) which provides:

"(1) A statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if...

(a) the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness; or (b) that

(i) the person who made the statement is outside the Islands; and

(ii) it is not reasonably practicable to secure his attendance; or

(c) that all reasonable steps have been taken to find the person who made the statement, but he cannot be found".

There is then a provision section 33 (6) permitting the judge to allow a statement to be read if it is in the interest of justice to admit it.

So far as Gloria Brown is concerned, the basis upon which it was said that her statement could be read rested on a statement by Gloria Brown that she had tragically lost her youngest son in a motor vehicle accident in October of the year before, that they both, understandably again, had been suffering much as a result of that and were still grieving and she said this:

"The 16th of October of this year (that was the day after the trial started) will be the memorial and as a result it has been a challenge for me to cope with work on a daily basis".

She goes on:

"I have no objection in attending Court; however, as a result of the timing of the memorial, I don't think that I'm in a position to be of any assistance to the Court at this time".

That was clearly a basis for not requiring the attendance of the witness on that particular day or possibly on the days surrounding that day but no basis whatever for not having her brought to Court a week or so later. Again, with commendable candour, Crown counsel accepts that she did not further consider the calling of that witness at some later date when the trial took, as she told us, rather longer than she had hoped or expected.

In our judgment it was no basis for allowing the statement to be read, that the witness was unavailable for very good reasons on that date or thereabouts. True it is that the prosecution said that it was merely corroborative evidence and excluded some of her statements but it is for the defence to know how it puts its case and reach a judgment as to the necessity of calling the

witness and the advantage that she might obtain from cross-examination and in our view it was wrong for that witness not to be called.

So far as the other witness is concerned, there was evidence from the immigration officer that the other witnesses were, having regard to their immigration status and records, off the island and we take the view therefore that section 33 in relation to them was satisfied.

Our conclusion in relation to the witness Gloria Brown would have required us to consider whether in fact it made a substantial difference such as to render the verdict unsafe but for the reasons we have given and for the reasons in arriving at the conclusion for allowing that appeal, that quite distinct issue as to whether it really made any difference does not call for a conclusion in this appeal.

For the reasons we have given, the appeal was allowed and the appellant discharged.

We then turn to the appeal against sentence of the appellant Judith Douglas. She had pleaded guilty to nine counts on a 38-count indictment. The pleas were offered not at the first opportunity but sufficiently early to permit the judge to give a discount of 25 percent on the sentence that he would have otherwise have given and we should say at the outset that counsel for this applicant, Mr. Dilliway-Parry, did not dispute the justice of a 25 percent discount.

After a sentencing hearing on the 25th of February of this year, on the 26th of April, the appellant aged 50 was sentenced to two and-a-half years' custody concurrent on each count.

The essential case against her is that, notwithstanding that she was right at the centre of this dishonest scheme, nonetheless the sentence was manifestly excessive and that the starting point should have been something in the region of 18 months. The argument was based on English cases, particularly Barrick 1985, 81 Cr. App. R. 78 and Clarke 1998, 2 Cr. App. R. 137.

Those were cases of where the essence of the offence was a breach of trust which support the starting point identified by this applicant. These echoed submissions made by the counsel to the judge at the sentencing hearing. The judge had rejected any analogy with those cases and indeed rejected any assistance to be derived from sentencing guidelines in the United Kingdom concerning fraud, bribery and money laundering offences, all of which, counsel submitted, justified a much lower starting point. The guidelines might do so and Barrick 1985, 81 Cr. App. R. 78 and Clarke 1998, 2 Cr. App. R. 137 undoubtedly would justify a lower starting point. But, in the judge's view, quite rightly in our view, they were of no assistance at all. He put it this way:

"This is a small jurisdiction. These dishonest offences attack the integrity of our immigration laws and immigration procedure. These offences tarnish the reputation of the Cayman Islands. The victims were all on work permits and subject to the roll over. It is not surprising that they fell for this most cynical of scams as they sought and paid for the security they mistakenly thought purported Permanent Residence would provide for them. The Court must impose a punishment to reflect the gravity of the offence and act as serious deterrent to others who may be contemplating such dishonest conduct".

He repeated later in his judgment that:

"The deception was the most cynical exploitation of vulnerable and unsuspecting victims".

We agree with the judge's approach. On that approach it is quite impossible, in our judgment, to argue that the sentence of two and-a-half years, even after a plea of guilty and allowing for 25 percent, was excessive. Indeed, on some views, it might have been regarded as lenient. The judge, however, did take into account the fact that this appellant had not been in trouble before and was a lady of 50.

For those reasons, in our view, it is not arguable that the sentence was manifestly excessive or the judge misdirected himself as to the correct approach. He did refer to other cases, whether they were relevant or not we need not decide in this case. In our judgment, the sentence was the least he could properly pass in the correct view he took of the facts and we refuse permission to appeal.

MARTIN, J.A.: Anything arising out of that?

MS. SALAKO: No, My Lord, just simply this, the issue that I raised at the start of this hearing.

MOSES, J.A.: We have just been very careful in our judgment not to say anything that might trench upon it.

MS. SALAKO: The Crown of course appreciate that, but it's also the detail.

MARTIN, J.A.: The detail of what?

MS. SALAKO: The detail of the criminality is literally exactly the same that's going on next door. Exactly the same. Without any difference. Same amount of money $2,500, vulnerable people, in return for cash.

MARTIN, J.A.: What we are contemplating doing is to make an order restraining publication of the outcome of the appeal until after the conclusion of the other trial you are concerned with. Do we have jurisdiction to do that?

MS. SALAKO: It's discretion.

MOSES, J.A.: Where does that discretion derive from?

MS. SALAKO: From the Common Law. There is no set statute that allows the Court to do that and that's why it's a discretion. The only reason why we would ask the Court to exercise that discretion is for the interest of justice of the trial next door. If it was judge alone I wouldn't be raising it.

MARTIN, J.A.: Remind me when that trial is likely to end?

MS. SALAKO: Speeches tomorrow and summing up we anticipate will start on Monday. Verdict any time before the 11th.

MARTIN, J.A.: Right. Then we will make an order restraining publication of the outcome of these proceedings --

MOSES, J.A.: Or the judgment.

MARTIN, J.A.: -- particularly of the judgment, the terms of the judgment pending conclusion of the trial which is continuing next door.

MS. SALAKO: Thank you.

MARTIN, J.A.: If any member of the press wishes to challenge that, then they may come and make submissions to us on two days' notice before the end of this session.

MS. SALAKO: Thank you very much. Thank you.

MARTIN, J.A.: Otherwise is that it?

MS. SALAKO: Yes, thank you.

(Proceedings concluded at 4:27 p.m.)

CAYMAN ISLANDS
CRIMINAL FORM 18
RULE 50(1) & 51(1)

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- and

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Appellant

NOTIFICATION TO AUTHORITIES OF RESULT OF APPEAL

To: The Attorney General

This is to give you notice that **Marica Hamilton** having sought leave to appeal against *her* CONVICTION passed upon *her* by the Grand Court on the 22 December 2015 as set out below:

IND 56/12

ON COUNTS 1, 2, 3, 4, 5 & 6 AS FOLLOW:

FOUR (4) YEARS & SIX (6) MONTHS IMPRISONMENT ON EACH COUNTS TO RUN CONCURRENTLY. TIME IN CUSTODY TO BE DEDUCTED.

The Court of Appeal has this **3 November 2016** given judgment therein to the effect following:

1. Application for leave to appeal conviction allowed.
1. Conviction quashed, sentence is set aside and a judgment and verdict of acquittal is entered.
2. Reasons to be released.

Dated this 3 day of November, 2016

Registrar

Margeta Facey-Clarke/Toyin Salako for DPP

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
JAN 17 2017
CAYMAN ISLANDS

CAYMAN ISLANDS COURT OF APPEAL