

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

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CICA # 36/2006
(Indictment 24/05 C#4035/04)

7/8/08

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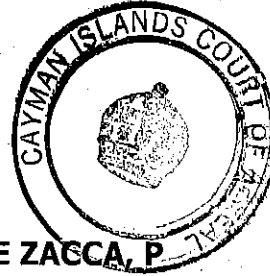
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PAUL ANTHONY EBANKS

-AND-

HER MAJESTY THE QUEEN



BEFORE: THE RT. HON. MR. JUSTICE ZACCA, P.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE MOTTLEY, J.A.

Appearances: Ms. Ailsa Williamson (Stuarts Walker Hersant) for the appellant and Mr. John Masters for the Crown.

Heard and Judgment given: 7th August 2008
Reasons released: 10th December 2008

FORTE, J.A.

On the 19th October 2006, the appellant was convicted [by a jury] of thirteen counts of obtaining property by deception contrary to Section 235 of the Penal Code (1995 Revision). He was sentenced to 6 years imprisonment on each count. It was ordered that the sentences should run concurrently with each other, with time served to be taken into consideration. The sentences were also to run concurrently with a sentence of four years imprisonment which was already being served by the appellant.

This is an appeal from those convictions. On the 7th August 2008, having heard the arguments of counsel we dismissed the appeal and affirmed the

convictions and sentences. In keeping with our promise we now set down our reasons for doing so.

The facts in relation to each count followed the same pattern, with each count relating to a different complainant. In summary the prosecution alleged that the appellant during the period between January and October 2004 at various times by deception, dishonestly obtained varying sums of money from each complainant with the intention of permanently depriving them of those sums of money, by falsely representing to each complainant that he would use the money to secure Caymanian status for them. As there was no complaint in this appeal in relation to the findings of facts by the jury, or the treatment of the evidence in the directions of the Learned Judge to the jury, there is no necessity to set out in detail, the facts as they related to each count of the indictment.

In summary, the allegation at trial was that the appellant, approached the complainants either directly, or through reference by one or other of them inviting them to apply for Caymanian status in the Cayman Islands. In each case he assured them that he had connections with "a very important person in Government," through whom he could obtain "status" for them. The "agreement" entailed the payment of \$1300.00 made up of \$800 to "buy drinks" for the members of the "Board" charged with the granting of status, and \$500.00 to have it stamped in the applicant's passport. The complainants' testimony related a similar system and pattern of approach by the appellant e.g. a declaration to each that there was a list of persons to be granted status with

places vacant, and encouraging the complainant to make the application so that he/she could be put on the list. In many cases, the appellant purported to talk on the telephone in the presence of some complainants to his contact whom he sometimes referred to by name. In at least one instant, he described his contact as the god-father of his son. These references led the prosecution to Mr. Cline Glidden, a member of the Legislative Assembly of the Cayman Islands, who admitted in evidence that he was in fact the god-father of the appellant's son. He had known the appellant from "an early age when they went to school together." The relationship, he said spanned thirty years. The relationship is adequately set out in the summing-up of the learned trial judge (page 95-96) as follows:

"... because of the relationship with him and his wife, at the birth of their son, they asked him if he would become a god-father to the child, and he said he gladly accepted it. The relationship he said, spanned 30 years. He's now 40 years old. And he went on to tell you that initially from high school he knew him, graduated high school, played sports, have had casual encounters till – he doesn't remember when he began working for him. But when he became the god-father of his son up until the time he came to work with him, his relationship was more like a school acquaintance.

But after he became a god parent of the child there was more of binding relationship. ..."

Mr. Glidden in his testimony however, denied any agreement between the appellant and himself to get Caymanian status for any of the complainants. His only connection with the granting of status was in relation to the Government's decision sometime before, to grant status to worthwhile and deserving persons. As a member of the Legislature Assembly he was entitled to provide names of persons from his constituency whom in his opinion were so qualified. This he did, none of whom were any of the complainants. He denied, having any conversation with the appellant re a quota of persons to be given status and having any telephone conversation with the appellant in this regard. This contradicted the conversations, the appellant purported to have had with him in the presence of some of the complainants.

He testified that at the beginning of 2004 he remembered the appellant having an issue with Immigration that caused some difficulties relating to his (the appellant's) status. The appellant's child was ill and it is in this regard that the appellant allegedly had difficulties with Immigration. This forms a part of the appellant's complaint in the appeal, and will consequently be dealt with later.

Mr. Glidden therefore, if believed would establish the lie that the appellant had an agreement with him (Mr. Glidden) to acquire "status," at a cost, for these complainants.

At the end of the Crown's case, the appellant elected not to give any evidence. He, however had given a "question and answer" statement to the investigators. In that statement, the appellant admitted to receiving the sums of money from the appellants but maintained that this was in furtherance of an agreement he had with "a big government official" (without naming the official). In the absence of the statement, and for greater clarity of all the evidence, the learned judge's treatment of the statement in her summing-up is set out hereunder: (page 187)

"Now, in the statement given to the police, and you are at liberty to look at it, Mr. Glidden's name was not called. It is said that during the course of the question and answer, the gentleman I was dealing with, the gentleman I refused to call his name, and it is referred to as the gentleman who was to benefit from the arrangement. And he says he was just helping people. Then I'm going to talk, he says, in one of the answers. It was no trouble, I was just helping people. The only trouble is that I will have the (sic) pay back the money and I don't get the money back from him, then I will have the (sic) it out of my pocket and then I am going to talk ... And in one of the answers it says trust me, its a big

government official. So he has not called any name on the document. And inasmuch as on the Crown's case Mr. Glidden's name was called by the Crown witnesses who gave evidence, and he is alleged to have been using the phone and talking to some-one and called Mr. Glidden's name, the Crown has put forward Mr. Glidden, whose evidence has not been challenged by evidence in court. ..."

The appellant filed and argued one ground of appeal as follows:

"The learned judge erred in law in refusing the two applications that were made for the jury to be discharged following the admission of inadmissible and prejudicial evidence relating to the appellant's bad character. Further the learned judge failed to direct the jury in a manner which removed the prejudice caused by the evidence.

It is respectfully submitted that the resulting trial was unfair and the conviction is unsafe and unsatisfactory and the verdicts of the jury should be set aside under section 9 Court of Appeal Law (2006 Revision)"

This ground relates to pieces of evidence which the appellant through his counsel correctly alleged is prejudicial evidence. In keeping with the arguments advanced by the appellant these pieces of evidence are categorized as follows:

1. Evidence given by Rupert Scotchman

This witness gave the following evidence during examination-in-chief:

- (a) "Paul Ebanks that I heard he - - He involved in problem with immigration before."

The appellant contends that this evidence was "inadmissible hearsay, prejudicial evidence suggesting bad character and irrelevant to the issues the jury had to decide.

- (b) Later in his examination-in-chief Rupert Scotchman stated that the appellant had said to him:

"He said yes, he was locked up"

Counsel contended that this evidence was extremely prejudicial to the appellant's case as the obvious interpretation of this statement was that the appellant had spent time in prison.

On these bases, counsel, at trial, applied to the learned judge to discharge the jury. The application was refused, the learned Judge ruling as follows:

"Firstly, may I say that the question of the judicial time being wasted or the expense or difficulty in locating witnesses, those are not consideration for the court if,

in fact, the court is of the opinion that the evidence elicited – that because of that evidence the defendant could not receive a fair trial.

The weight of the evidence already elicited or evidence to be given is also not a consideration.

Now, having said that, the court must now consider whether in the circumstances the court should accede to the request of defence counsel. Now, this evidence has been elicited. It is in respect of a conversation between the witness and the defendant, and there has as yet been no cross-examination of this witness by the defence, and in fact, the defence will have an opportunity to challenge the evidence.

In addition, I look at the words used, the words 'locked up' and to my mind that does not necessarily connote that this accused man is of bad character or that he has been convicted of any offences, and it is my view that in the circumstances on proper directions from the court this accused could still receive a fair trial. At the end of the day, it would, if necessary, be the court's duty to instruct the jury in respect of these matters."

2. Evidence given by Cline Glidden

Later in the trial, during Mr. Glidden's examination-in-chief, he was asked by Crown Counsel if he knew the appellant by any other name. The answer was that he called him "Pinocchio" The appellant again made application for the discharge of the jury based on the fact that the name "Pinocchio" was a fictional name which had "clear associations with lying and dishonesty which it is submitted would have been apparent to all members of the jury."

In addition Mr. Glidden also referred to difficulties that the appellant had with immigration and that the appellant had said to him that he "wouldn't want to jeopardize his position. The appellant contends that this evidence would have suggested to the jury that the appellant was under scrutiny by the Immigration Department.

Counsel's second application to discharge the jury was not based solely on the evidence of the name "Pinocchio" by which the appellant was known or the evidence of the appellant's difficulties with immigration but on the cumulative effect of all "the prejudicial" evidence adduced, though for the most part, inadvertently. The learned judge ruled as follows:

"Well, I have considered the application made by counsel, and I have considered the context in which the evidence was elicited. And in the circumstance, I

do not feel that this court ought to accede to the application made.

In considering counsel's application, I also had reference to a previous application made by him and I do not agree with counsel that the nature of the directions that the court will be obliged to give in respect of these matters would be such as to eclipse the issues before the jury for their consideration."

The Law

In *R v Michael Docherty* [1999] 1 Cr. App. R 274 it was held that "where a jury had heard evidence which they should not have heard and that evidence was such that the jury might no longer be able to give an impartial verdict based on the admissible evidence in the case they were trying, the trial judge had a discretionary power to discharge the jury. In exercising that discretion the judge had to decide whether there was real danger of injustice occurring because the jury, having heard the prejudicial matter, might be biased. That is a principle which we accept and which ought to be applied to the instant case.

The learned judge purported to exercise her discretion when she refused to discharge the jury. The exercise of a discretion is not one with which a Court of Appeal should lightly interfere. The approach by a Court of Appeal is

appropriately set out by the Court of Appeal of England in the case of **R v Lawson** [2007]1 Cr. App. R. 20 as follows:

“Whether it is necessary for the trial judge to discharge the jury where he inadvertently disclosed inadmissible evidence prejudicial to the defendant was a matter of evaluation for him and the Court of Appeal will not lightly interfere with his decision. Every case depends on its own facts and circumstances, including: the important issue or issues in the case; the nature and impact of improperly admitted material on that issue or issues having regard inter alia, to the respective strengths of the prosecution and defence cases; the manner and circumstances of its admission and whether and to what extent it was potentially unfairly prejudicial to the defendant; the extent to and manner in which it was remediable by prejudicial direction or otherwise so as to permit the trial to proceed ... the test is always the same, whether to continue with the trial could or could, by reason of the admission of the unfairly prejudicial material result in an unsafe conviction.”

Of assistance also is the finding of Her Majesty's Privy Council in the case of ***Arthurton v The Queen*** [2005] 1 WLR 949 which is as follows:

"The decision to discharge a jury was a matter of discretion for the trial judge, that such a discretion fell to be exercised in the context of the trial, the flavour of which might not readily be recaptured on appeal, and the judge's decision was one an appellate court would not interfere with lightly; that, where the judge had not fallen into error of principle, it was necessary for the appellate court to form the view that there had been unfairness which, if not corrected, would amount to a miscarriage of justice ..."

In the instant case, as we have seen, on each application to discharge the jury, the learned judge exercised her discretion in refusing the applications and coming to the finding that directions to the jury to disregard the unfairly prejudicial evidence would result in the appellant receiving a fair hearing in all the circumstances. The question raised in this appeal is whether the exercise of the learned judge's discretion was correctly exercised. The appellant answers that question in the negative, and contends that the directions to the jury in this regard was not sufficient to avoid a substantial miscarriage of justice which the

unfairly prejudicial evidence caused to the appellant. In those circumstances, it is important that we examine the evidence complained of.

(i) Appellant's Difficulties with Immigration

This complaint arises from the evidence of Mr. Cline Glidden as is rehearsed in the learned judge's summing-up (p. 96) as follows:

"Then sometime, he said, at the beginning of 2004, he remembered Mr. Ebanks having an issue with immigration that caused some difficulties relating to his status."

However in her summing-up the learned judge put this evidence in context. At page 97 she states:

"Now, you remember when the defendant's mother gave evidence, she spoke of the child being ill, and I will remind you of her evidence because her evidence also is that this child was sick on occasions.

Now, he said this caused significant difficulties for him because of the immigration problems he couldn't visit or give support to the child. And for that period he says the friendship was quite close because he saw him go through a difficult time, and from what he was told by him, the wife and the child were overseas, child

critically ill, and whatever support he could give him he was willing to give him. And for a while he was working with him to get some sort of a temporary passport for him to travel because he didn't have Caymanian status. He said it was assistance in the form of a passport that he could travel."

In our view this evidence makes it clear that the "problem" the appellant had with Immigration concerned his inability to travel given the fact that he did not have "Caymanian status" and also the fact that he did not possess a passport. In those circumstances there was no allegation of bad character in the appellant in that he was engaged in any illegality which concerned the Immigration Department. This is in keeping with the following words with which the learned judge addressed the jury:

"Now, I don't think ... it has been said by defence counsel, I believe, that many people from time to time have difficulties with status."

Here, the learned judge refers to an agreement by defence counsel, that this evidence was evidence which could not justifiably be said to be unfairly prejudicial to the appellant. In any event we agree and find that this evidence by itself given the totality of the evidence in the case, and the context in which it was said, was not such that would be unfairly prejudicial to the appellant to the extent that it would create a substantial miscarriage of justice.

Mr. Scott also gave evidence that he told the appellant that he had heard that he had difficulties with Immigration in the past. This was explained in the evidence of Mr. Glidden which as we have concluded was not in the circumstances of the case unfairly prejudicial to the appellant.

(ii) Pinocchio

This evidence also came from Mr. Glidden when he was asked by counsel for the Crown if he knew the appellant by any other name and he answered that he called him Pinocchio. There is no indication that this evidence was developed in respect of the implication of the name Pinocchio. Counsel for the defence, Mr. Dixey however in his submission to the learned judge at trial, in the absence of the jury put it this way:

"Pinocchio a fictional character synonymous with lying, in the dock for obtaining by deception charges. Completely avoidable elicitation of that evidence. ... Because in my respectful submission, this trial which has cost this jurisdiction a great deal and inconvenience to many have been torpedoed in a manner which was totally avoidable."

There is nothing to suggest that the members of the jury were aware of the implications of the name Pinocchio, and the fact there was no evidence in that respect, lead us to the conclusion that in all the circumstances, the learned

judge was correct in exercising her discretion not to discharge the jury on that account.

Further, the learned judge was also correct in not making any mention of that evidence in her summing-up to the jury. If she had done so, she would not only be reminding the jury of evidence to which they may not have given any significance, but she would have had to explain to them the meaning given to the name by defence counsel, which in itself would be unfair to the appellant.

(iii) Evidence that the appellant said he was locked up

The appellant contends that the major issue in the case concerned the credibility of the appellant vis-à-vis that of the witness Mr. Glidden. The appellant's defence denied any deception on his part, as the representation he made to the complainants were in fact true because he had an agreement with Mr. Glidden to get "Status" for the complainants. On the contrary Mr. Glidden denied having any such agreement with the appellant, and testified that he had no knowledge of the appellant's transaction with these complaints, except on one occasion when one of the complainants called him and complained about not getting "Status" as was arranged. Mr. Glidden testified that having advised that person to report the matter to the Police, he spoke to the appellant, who denied any such transaction, saying that it must have been some-one else with his name, or that some-one was trying to "mess" him up. This defence of the appellant was indeed a "risky" one admitting as it did, that he was engaged in an

illegal transaction to get the complainants the required status by paying officials to approve same. This was compounded by the fact that he gave no evidence in the case and was content to rely on the questions and answers statement he gave to the police. The appellant however, contended that the reference to his being "locked up" was extremely prejudicial to his case as the obvious interpretation of the statement was that the appellant had spent time in prison. In the event, counsel at trial, contended that was evidence of bad character, and there was no basis for the appellant's "previous conviction or character" to be before the jury at all.

The learned judge in the exercise of her discretion refusing to discharge the jury said inter alia the following:

"... In addition, I look to the words used, the words 'locked up' and to my mind that does not necessarily connote that this accused man is of bad character or that he has been convicted of any offences, and it is my view that in the circumstances on proper directions from the court, this accused could still receive a fair trial. At the end of the day, it would, if necessary, be the Court's duty to instruct the jury in respect of these matters."

Counsel for the appellant contends that the learned judge fell into error when she gave the most favourable interpretation to the prejudicial evidence rather than the most prejudicial effect it could have, as is required by the

authorities. He relies on the *per curiam* dicta as reported in the case of ***Docherty*** (supra) in which the Court said:

“Where there was more than one interpretation of the inadmissible evidence, the judge, in exercising his discretion whether or not to discharge the jury, should approach the issue on the basis of the more prejudicial meaning that could reasonably be placed on it rather than on some lesser prejudicial interpretation.”

We cannot agree that it would be reasonable to put any “more prejudicial” meaning to the statement in the instant case, than that enumerated by the learned judge. In any event the directions given to the jury on this matter remained consistent with the learned judge’s interpretation of the evidence. She directed them thus:

“And you remember that there was some talk of him saying that Mr. Ebanks had been locked up, but we don’t know whether that was in relation to this matter or not, Madam Foreman and members of the jury, so you need not be concerned to allow that to influence you in any way (emphasis mine)

We see no reason for concluding that the learned judge, in all the circumstances was wrong in the manner in which she exercised her discretion, and agree that it

was a matter which could be properly dealt with in the summing-up. Her words to the jury made it clear that they should not speculate as to what circumstances caused the appellant to be locked up and consequently it should not enter into their deliberations. We cannot therefore conclude that this piece of prejudicial evidence resulted in an unfair trial or caused any substantial miscarriage of justice, nor do we agree that the cumulative effect of the prejudicial evidence caused a substantial miscarriage of justice.

We return however, to the question of credibility of the appellant as against that of Mr. Glidden. The appellant had told the complainants that he had given the passports to the authorities, so that they could be stamped indicating that "Status" had been granted. Passports were found in possession of the appellant – none of which were so stamped. None of the complainants had been granted "Status" as promised by the appellant. The consistency and similarity of the evidence of each complainant as against each other demonstrates circumstances which lead to the credibility of the allegations. We conclude that there was a strong case of overwhelming evidence against the appellant, and found that the appellant would have been convicted even in the absence of the unfair prejudicial evidence. We are encouraged in our view by the following words of Viscount Simon, L.C. in the case of *Stirland v DPP* [1945] 30 Cr. App. R. 40 at pp 46 – 47, which we find to be appropriate to the circumstances of this case:

"Apart altogether from the impeached questions (which the Common Sergeant in his summing-up advised the jury entirely to disregard), there was an overwhelming case proved against the accused. ... When the transcript is examined, it is evident that no reasonable jury, after a proper summing-up could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice and this is the proper test to determine whether the proviso to section 4(1) of the Criminal Appeal Act 1907 should be applied."

We conclude, that nothing has been shown to convince us that we ought to interfere with the exercise of the learned judge's discretion to refuse the applications to discharge the jury. On the contrary we find that the discretion in all the circumstances of this case was properly exercised. Further, we also conclude that the learned judge's directions to the jury were sufficient to ensure that no miscarriage of justice occurred. In any event it is our opinion that the evidence, quite apart from the unfair prejudicial evidence, was overwhelming, and could not have reasonably resulted in any other verdict but that of guilty as returned by the jury.

In those circumstances if it were necessary, we would be prepared to apply the proviso to Section 9 of the Court of Appeal Law (2006 Revision). We cannot therefore agree that the convictions were unsafe and unsatisfactory. For these reasons, we dismissed the appeal and affirmed the convictions and sentences.

Zacca, P.

Forte, J.A.

Mottley, J.A.

