



**In the Supreme Court of Bermuda**  
**CRIMINAL JURISDICTION**  
**2017: No. 15**

**B E T W E E N:**

**THE QUEEN**

**v**

**MELISSA BURTON**

**NO CASE RULING (IN COURT)**

**Date of Hearing:** 11 July 2018

**Date of Ruling:** 12 July 2018

Larry Mussenden and Alan Richards, Office of the Director for Public Prosecutions  
Mark Pettingill, Chancery Legal Ltd., for the Defendant

**Introduction**

1. Melisa Burton (“the Defendant”) is charged in an indictment containing 5 counts of theft contrary to section 337(1) of the Criminal Code 1907 and one count of abuse of a senior, contrary to section 3 of the Senior Abuse Register Act 2008.
2. The prosecution has called 4 witnesses in support of its case. The Defendant’s video/audio recorded police interview was introduced into evidence by one of the witnesses.

### **The Defence Application**

3. The defence make an application to the court to stop the case on the basis that there is no case for the Defendant to answer. The defence relies on the 2 limbs of *Galbraith [1981] 2 All ER 1060* to support his application. Mr Pettingill for the Defendant submits that as to limb 1, one of the essential elements in theft “proof of dishonesty” has not been made out by the evidence, or otherwise, that there is no evidence that the defendant has committed the offences charged.
4. In so far as limb 2 is concerned he submits that the evidence led by the prosecution suffers from unreliability and or is of such poor quality that to rely on it would render a conviction unsafe or unsatisfactory.
5. One of Mr Pettingill’s complaints is that there is no evidence from Ms Trimmingham that the defendant acted dishonestly in her dealings with her finances. He relies on the evidence of Mr Alan Dunch that Ms Trimmingham was free to do as she wished with her money. As a consequence he argues that there is no evidence that the account access that Ms Trimmingham gave to the Defendant was restricted. Indeed it is his position that the access to the accounts and credit card was unrestricted, without guidelines or parameters and so therefore any use by the defendant of the financial access could not be said to be dishonest.
6. Mr Pettingill’s submission as to the financial transactions post Mrs Trimmingham’s death is that the Defendant had an honest if mistaken belief that she had the right to control Ms Trimmingham’s finances. He submits that the prosecution has not presented any evidence capable of displacing that state of the defendant’s mind. He submits that the lack of response to the Defendant’s enquires and emails to Mr Dunch and Mrs Collis gave rise to that frame of mind. He argues that to the extent that any communication was made to the Defendant capable of affecting her belief, such communications are full of inherent inconsistencies.
7. He submits in the circumstances that the Defendant’s belief was honest because she had access to the accounts and credit card; she relies on the “letter of wishes”; she relies on the fact that no one countered her belief that she could transact as she willed in the accounts and card, so in the circumstances it was reasonable for her to believe that she had power and control over the above

referred finances. Mr. Pettingill also relies upon What's App chats passing between the Defendant and Jonny DeSilva which he submits supports her case that she had the right to unrestricted use of funds in Mrs Trimingham's account. He contends that her actions were therefore not dishonest and a reasonable jury could not find them to be so.

8. Mr. Pettingill has assailed the prosecution evidence as to count 5 of the indictment, in particular about the transactions made on the credit card, as having failed to show that The Defendant actually conducted those transactions after Mrs. Trimingham's death. In the Court's opinion, the credit card statement speaks for itself and is capable of being assessed where appropriate by a jury to their satisfaction as to whether it identifies on which date the actual transaction took place.

#### **The Prosecution Submissions**

9. The prosecution submits that there is an abundance of evidence that the defendant acted dishonestly in making the money transfers into her accounts from Mrs. Trimingham's account and in making the Amazon purchases via the credit card provided by Miss Trimingham. Mr Richards contends that the defence argument merely indicates that the defendant had the technical ability to make transactions on Mrs Trimingham's account and credit card but that that does not entitle her to transact as she pleased.
10. The prosecution point to the fact that the Defendant had been submitting her invoices to Meritus Trust for payment for at least 26 months. Therefore there could not be an argument that the Defendant was latterly paying herself for work performed for Mrs. Trimingham. The defendant indicated in various places in the interview that she charged the credit card and transferred funds from the HSBC bank account for Mrs. Trimingham at her direction for payment of her monthly bills, and internet purchases at her direction for herself and her dog, prior to death.
11. It is for these reasons that the prosecution argue that a jury properly directed as to the regular transactions could safely conclude the transactions in counts 1 and 2 are not in keeping with the history of transactions performed by the Defendant. That they show a dishonest appropriation of Mrs. Trimingham's funds.

12. They also argue that evidence in this case that Mrs. Trimingham did not want the Defendant to come to Bermuda when she was in hospital, which had been communicated to The Defendant, must have operated on the Defendant's mind and therefore the transactions complained of on the indictment can reasonably be said to have been dishonest.

**Communications by Ms. Burton**

13. The Prosecution's submission is that the Defendant could not have honestly believed that she was the executor and trustee of Mrs. Trimingham's will and estate, because The Defendant in an email to Allan Dunch dated 1<sup>st</sup> December the 2016 (the very day that Mrs. Trimingham met her demise) stated the following:

*"Kathy wanted you and me to handle her estate...*

*You have the power and discretion to appoint, hire and remove trustees, and perhaps, to change the law which governs her will.*

*I have her letter of wishes.*

*I have no idea what the laws are in Bermuda, nor do I know how you feel about Kathy's wishes now that she is gone. It would be my hope that you would preserve Kathy's wishes and allow us (you and me) to settle her estate based on her wishes during the past three healthy years of her life."*

14. The prosecution argue that the above-referenced statements are inconsistent with statements made by the Defendant in her police interview. Mr Richards draws reference to the police interview in which the Defendant spoke of transacting in Mrs. Trimingham's accounts. In that interview the Defendant expressed the view that she and not MJM was the trustee of Mrs. Trimingham's will. She expressed the view that she had the legal authority both prior to Mrs. Trimingham's death and post death to operate her accounts. She stated her reason for her belief was the revocation of the Power of Attorney signed by Mrs. Trimingham and the express wishes of Mrs. Trimingham to have the Defendant as trustee. The court takes this to be a reference to what the Defendant refers to as "the letter of wishes" (dated March 9<sup>th</sup> 2016)

15. The prosecution also suggests that a series of emails written by the Defendant were either sent to Neil Halliday without being copied to Allan Dunch, but which refer to Allan Dunch, or vice versa, emails sent to Allan Dunch which refer to Neil Halliday but not sent to him. This was made clear by Mr. Dunch's evidence that he had not before seen the "letter of wishes" until after Mrs. Trimingham's death, notwithstanding that that document refers to him as being appointed co-trustee with the Defendant of Ms. Trimingham's Will.
16. The prosecution submit that this evidence is capable of showing the Defendant's calculated approach in isolating facts from some lawyers who acted for Mrs. Trimingham, but not from others who so acted, or had a professional relationship with her. By the 5<sup>th</sup> December 2016, when mention was made to Allan Dunch of the "letter of wishes", he replied that he was unsure what Ms. Burton was referring to, and thereafter, he requested a copy from the Defendant on at least two occasions but was never supplied with the same by her.
17. Mr. Richards suggests that the Defendant changed her reference in an email to Mr. Dunch from the "letter of wishes" to coincide with the reference in Mrs. Trimingham's will to a "list or memorandum left at my death" which he submits shows the Defendant's transparent attempt to supply the document not previously seen by Mr. Dunch with a status that it did not have. Mr. Richards submits that the What's app chat messages from early November through to at least the 29<sup>th</sup> November 2016, establishes that the Defendant's state of mind was that she was avoiding providing financial information to Neil Halliday, which proves that she did not believe and had not contended therein that she had lawful authority to control Mrs. Trimingham's accounts.
18. The issue of dishonesty looms large and as an essential element of theft is central to this case.

### **The Law**

19. How does the Court approach the issue of dishonesty? It is common ground that the second leg of the test in *R v Ghosh [1982] 2 All ER 689* does not currently represent the law and directions given by a judge are not to follow it. In the more recent case of *Ivey v Genting Casinos (UK) Ltd (Trading as Crockfords Club) [2017] UKSC 67* the Court held:

*“The proper test...when dishonesty is in question is that, the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief was a matter of evidence (often in practice determinative) going to whether he had held the belief, but it was not an additional requirement that his belief must be reasonable; the question was whether it was genuinely held.”*

...

*When once his actual state of mind as to knowledge or belief as to facts was established, the question whether his conduct had been honest or dishonest was to be determined by the fact-finder by applying the (objective) standards of ordinary decent people.*  
[Emphasis added]

20. The test to be applied by a trial judge in determining if there is a case to answer is found in *Galbraith* in the speech of Lord Lane CJ:

*(1) if there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.*

*(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness of vagueness or because it is inconsistent with other evidence.*

*(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.*

*(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness’s reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury...there will of course, as always in this branch of the law, be*

*borderline cases. They can safely be left to the discretion of the judge.”*

**Conclusion**

21. The Court is satisfied, firstly, that the defence cannot rely on limb 1 of Galbraith. As was pointed out at the beginning of this case, this case is document-heavy. The Court has assessed the Crown’s case based on those documents and on the relevant evidence of the witnesses. The court determines that on one possible view of the facts, those elucidated by the prosecution, there is evidence capable of showing the Defendant’s dishonest state of mind as to who had legal control over Mrs Trimingham’s finances.
  
22. In the circumstances it is quintessentially the province of the jury to determine from the evidence whether or not the Defendant’s belief that she had the legal right was genuinely held. The jury would first have to ascertain the state of the Defendant’s knowledge or belief as to her right to make transactions as an executor or trustee of Mrs. Trimingham’s estate. Once the jury determines the actual state of mind as to the Defendant’s knowledge and belief, the question whether her conduct has been honest or dishonest is a matter for the jury, by applying the standards of ordinary decent people. The jury could thereafter properly come to the conclusion that the defendant was dishonest and so therefore guilty of the charges by applying the standards of ordinary decent people.
  
23. This is not a case of insufficiency of evidence but rather a case with evidence thus far adduced by the prosecution, that a jury properly directed, could convict the Defendant on in respect to all the charges on the indictment. The Court is satisfied that the Defendant has a case to answer.

**DATED** this day of 2018.

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Charles-Etta Simmons  
Puisne Judge