APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 12
HCA/2022/399/XC

Lord Justice General
Lord Matthews
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

NOTE OF APPEAL AGAINST CONVICTION

by

GORDON COUCH

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: CM Mitchell KC; Livingstone Brown, Glasgow
Respondent: Gillespie KC AD; the Crown Agent

26 April 2023

Introduction

[1] On 26 April 2023, we refused this appeal against conviction and undertook to provide our reasons in writing. This we now do.

Background

[2] On 23 June 2022, the appellant was convicted after trial on a charge that, between 2009 and 2015, he embezzled £170,000 from Marjorie Bella Stewart, now deceased, and from her estate. He did so while acting in three different capacities for her over that period, namely as an Independent Financial Adviser, while having Power of Attorney in respect of her affairs and welfare and as her Executor. This was achieved by transferring funds from accounts held by Mrs Stewart through her current account and into accounts held by him. The sheriff sentenced the appellant to three years imprisonment. Unsurprisingly, no appeal was taken against sentence.

The issue

[3] It was submitted that the sheriff misdirected the jury in respect of what was said to be hearsay evidence adduced from Crown witness Dorothy Ferrier (Mrs Stewart's niece), of statements made to her by Mrs Stewart prior to her death. On behalf of the appellant, there had been lodged a Notice under section 259(5) of the Criminal Procedure (Scotland) Act 1995. Appended to it was a police statement by Mrs Ferrier referring to information she had gleaned from conversations with the deceased, which, it was claimed, was of material assistance to the defence. It was said that the jury would have ignored such evidence because of the sheriff's directions about hearsay. The sheriff accepted that, inasmuch as Mrs Ferrier's evidence contained any hearsay from the deceased, he did not direct the jury in relation to it. He had, in his opening directions, told them that hearsay was generally inadmissible and he then mentioned a number of exceptions, without saying anything about things said by the deceased, before telling the jury that, where a witness was unavailable, hearsay evidence of a statement by that witness might be available as evidence. He

undertook to direct the jury on that issue, should it arise and in due course he gave such a direction in respect of the evidence of a witness who was unavailable because of Covid-19 and whose statement was read by a police officer. The Crown conceded that there was a misdirection by omission and that, accordingly, as was submitted in the Note of Appeal, the jury would have disregarded any hearsay evidence of utterances by the deceased. They argued, however, that the misdirection was immaterial and not productive of a miscarriage of justice. In particular, Mrs Ferrier was not in terms asked about any particular statement by the deceased. The extent to which her evidence, on the face of it, contained any hearsay, was limited to one passage and the evidence was of no real assistance to the defence in the face of a powerful Crown case.

The Crown case

[4] Many of the salient facts were agreed in an extensive Joint Minute. The appellant first acted as a financial adviser to Mrs Stewart's husband until his death in 1998, following which he continued to act as her financial adviser. The only client fee agreement located was signed in 2006 between Mrs Stewart and the appellant, working independently but within the framework of a company named "Positive Solutions". Mrs Stewart agreed to pay fees amounting to a maximum of 3% of the value of the investment at implementation plus 1% of the portfolio value on an annual basis.

[5] From 2010, the appellant provided financial advice through his own companies. Following a deterioration in Mrs Stewart's health, on 19 July 2011 she executed a Power of Attorney appointing the appellant as Attorney over her affairs and welfare.

[6] She was admitted to the Royal Infirmary of Edinburgh Hospital on 4 January 2012 following a fall and was transferred to the Astley Ainsley Hospital three weeks later. She

was assessed as lacking capacity on 28 February 2012, from which date she could not legally have made any decisions for herself or acted upon any advice. She remained in hospital for most of 2012 and 2013 until her death on 20 September 2013. The appellant and a solicitor were appointed as joint executors of her estate. At the appellant's request, the solicitor declined to act and the appellant acted as sole executor from 23 October 2013.

[7] The appellant obtained a Grant of Confirmation in respect of Mrs Stewart's estate on 26 September 2014. The parties agreed that the value of assets contained in the appellant's declaration was inaccurate. In fact, the declared value was substantially higher than the true value. In particular, he declared that the value of the deceased's Intelligent Finance account was £7,300, whereas it was in truth 13p; her RBS savings account was declared at £13,072, but was in truth £5.64; her RBS current account was declared at £1,000, but was in truth overdrawn to the extent of £756.56; the value of her Premium Bonds was said to be £30,000, but the true value was £3,526; the value of her National Savings Certificates was said to be £19,524, but was in fact nil; her Centrica shares were said to be worth £5,672.84, but the appellant sold them on 12 May 2015 for £1,593.06 and paid the proceeds into his personal account; and her Lloyds shares were said to be worth £2,389.59, but were sold by the appellant for £331.01 on 12 May 2015 with the proceeds likewise being paid into his personal account. This is an overstatement to the tune of £74,159.15, give or take any discrepancy between the value of the shares and the proceeds of sale. As at the date of trial, no funds had been transferred to any of the named beneficiaries.

[8] The parties also agreed the dates and values of a large number of transfers to the deceased's investment account and current account to accounts controlled by the appellant. It is not necessary to go into the details of the transactions, which involved a considerable amount of money over a period from before Mrs Stewart went into hospital until after her

death, which clearly called for an explanation and which on no view could have been accounted for by reasonable fees or outlays. The Crown case was that the appellant realised underlying investments and embezzled the proceeds through those accounts.

[9] Suspicions about the appellant arose after Dorothy Ferrier obtained a copy of the Confirmation. She considered that there were things missing and noted that none of the named beneficiaries was aware that they had been included in Mrs Stewart's will. The police initially advised her that it was a civil matter, but she returned after obtaining copies of the deceased's bank statements and having been concerned about the transfers which they showed.

[10] The appellant's ex-wife, Kerry Lipton, spoke of communications between her and the appellant. In particular, she referred to a telephone conversation in which she asked the appellant if he had taken the money, the appellant's response to which indicated that he had. He advised Ms Lipton that he had done so out of desperation, that there was nothing left and that he intended to pay the money back.

[11] Ms Lipton gave evidence about the family's financial situation in 2008 to 2009. This was dealt with in the Joint Minute, which set out that in March 2008 the appellant and his wife had entered a Debt Management Plan with debts totalling £117,884. At the close of the Plan in August 2015, the estimated balance owed was £50,440.39.

[12] An analysis of the transfers by Kenneth Murray, the head of forensic accountancy at Police Scotland, suggested that the funds were being embezzled. Mrs Stewart's wealth had diminished substantially since 2009. In that year, her wealth had been approximately £400,000, of which half was attributable to her flat. By the time of her death, her assets, other than the flat, were worth slightly less than £5,000. There were numerous instances before and after her death where funds from realisation of investments were transferred to her

investment account, then to her current account and then to the appellant's accounts in smaller amounts. There was no documented reason for the transfers. According to Mr Murray, the misstatement of the values in the confirmation served to obscure the funds transferred.

The defence case

[13] The appellant denied that the agreement produced was the only one he had entered into with Mrs Stewart. He explained that after 2012 he wanted to move to a model where he had fewer, but wealthier clients. Those on the highest service level, which he called world class service, would pay £5,000, with lower class clients paying a lower fixed rate, plus an hourly rate of £197 per hour, which would be invoiced. In 2008 he had reduced his client numbers from 200 to 80, with those clients on the new arrangements. Marjorie Stewart was one of them. He was "incredibly surprised" that the police had only been able to recover one invoice for fees rendered by him through Positive Solutions to the deceased. He did not keep paper copies as he had tried to go paperless as part of his move to fee based advice. He had known the deceased and her husband since 1996. She confided in him that she regarded him as a surrogate son. She was mentally sharp and was able to engage in conversation about finances, amongst other things. She would discuss the invoices with him, as well as her bank statements. She was well aware that he was charging hourly and what the rate was. He would see her two or three times a week and might be there for as much as four hours at a time. She fully understood the purpose of granting a Power of Attorney. When she was in the Astley Ainsley Hospital, in early 2012, she was still able to hold a conversation and he discussed financial matters with her. She declined over the course of that year and did so horribly in 2013. He made the funeral arrangements, along

with Dorothy Ferrier and Gordon Matthew. He accepted that the figures in the application for Confirmation were inaccurate. He could not recall why. The figures were taken from his on-line system. He denied making an admission to his wife that he had taken Marjorie Stewart's money. What he had said to her had been sarcastic. When he was asked why none of the amounts transferred to his accounts amounted to a multiple of £197 (the hourly rate), he said that bills were sent monthly in arrears and not all was taken at once. He said that he did not take any money from the estate, as such. Any money paid into his accounts was for settlement of fees and expenses due for work undertaken while Mrs Stewart was alive.

Submissions

Appellant

[14] It was incumbent on the sheriff to issue specific directions to the jury on the hearsay evidence adduced from Dorothy Ferrier. Even a direction in general terms would have been sufficient. The sheriff had told the jury that hearsay was generally inadmissible and had highlighted a number of exceptions in respect of other parts of the evidence. It had to be assumed that the jury would follow his directions and disregard the hearsay evidence, since he had not directed them specifically that it was admissible and that an exception applied. This was a material misdirection. The evidence was capable of providing significant support to the appellant's evidence and his defence. His account was that Mrs Stewart trusted him. While there may have been other evidence to that effect, from Mrs Ferrier herself, in particular, the fact that it came from the deceased, a sharp woman in full possession of her facilities, added weight to it. The exclusion of the evidence resulted in a miscarriage of justice.

[15] Counsel drew attention to a number of passages in the evidence which, it was said, contained hearsay from the deceased but accepted that she was on the strongest ground with respect only to one passage, to which we shall return.

Crown

[16] The Crown submissions are summarised above and need not be repeated. The Advocate depute maintained the concession, but only in relation to the passage on which counsel placed the greatest reliance.

Analysis

[17] This appeal failed on a number of levels.

[18] Counsel's submissions and the Crown's concession were based on the premise that, unless the jury were told in terms that they could take account of the evidence which is at the heart of this appeal, they would have assumed that they were not allowed to do so. That is a misconception.

[19] In his opening directions, the sheriff told the jury that hearsay was generally not allowed. He also explained that there were exceptions to that rule, which he would tell them about in his directions at the end of the trial in more detail if they arose. He went on to say that they might include evidence of what a witness heard someone say where that explained the witness's statement of knowledge or why they did something; evidence of what was heard or shouted while an alleged crime was actually being committed; evidence of what an accused said; and prior statements made by a witness which might be used to jog the witness's memory, to allow the witness to adopt an earlier statement or to undermine the credibility or reliability of a witness. He went on to say that, in certain other situations

where a witness was unavailable, hearsay evidence of a previous statement by that witness may be available as evidence of what is in the statement and he undertook to direct the jury on that, should it arise.

[20] As we have said, he gave such a direction in relation to a witness whose statement was read by a police officer.

[21] While a statement by Mrs Ferrier, containing things she was told by the deceased, was the basis of the application under section 259(5), no reference was made in the trial to any particular statement made by the deceased, at least as far as is relevant for the purposes of this appeal.

[22] In his charge, the sheriff reminded the jury of what he said at the start of proceedings. He repeated that hearsay was generally not allowed and went on, as follows:

> "You may recall that the lawyers had to stop witnesses from giving evidence, ehm, some of the witnesses from giving evidence of that kind, and they weren't being impolite, but they were trying to help the witness navigate this important rule of evidence."

[23] He reminded them that hearsay was sometimes necessary to explain why a witness took a particular course of action, but it was not evidence of the truth of what the other person said. He reminded them that he had told them there were exceptions to the hearsay rule, including earlier statements made by witnesses to other people and things said by the appellant. He then gave the specific direction, to which we have referred, about the witness who was unavailable, before going on to deal with the appellant's alleged admission.

[24] One of the purposes of the direction before the trial is to allow the jury to understand in advance why people may be stopped from giving evidence of what they were told. That direction is reinforced in the charge at the end of the trial. It is not a direction to the jury to ignore evidence which has been led, without objection. If it is necessary to tell a jury to

ignore evidence, then that must be done expressly. The jury were told that hearsay is generally inadmissible. Inadmissible evidence should not be heard by a jury and if evidence is heard by them, there is no reason to think that they will treat it as somehow inadmissible when they have not been told to ignore it.

[25] Evidence which is technically inadmissible is led in a great many cases in order that witnesses can be steered to the points which matter. No-one would suggest that juries will ignore that sort of evidence unless they are told the contrary. Far from thinking that they should ignore it, juries will assume that evidence which has been led may be taken into account, unless they are told otherwise.

[26] That being so, we do not consider that there was any misdirection in this case, despite the Crown's concession. That concession was not well founded.

[27] Even assuming that there was a misdirection, it was plainly immaterial.

[28] Other than the one instance, to which reference has already been made, it is not necessary for us to rehearse the various passages in Mrs Ferrier's evidence, which were said to contain hearsay. They do not. They consist, for the most part, of the witness's impressions, which may or may not have been based on things said by the deceased, but no particular statement of any kind by her was contained within these passages. Counsel's submission, that the jury might think that the evidence of the witness was somehow based on things she was told by the deceased, is entirely speculative.

[29] The one passage which the jury could legitimately think contained hearsay was, as follows:

> "Q Did Marjorie say anything else to you about Gordon and what she thought of him?
>
> A She though he was a very (inaudible) man, her perception of him was of an extremely successful business man. She considered herself to be very

> fortunate that he would spend time on her small affairs, because she perceived him as someone whose going from promotion to promotion, his (inaudible), he had moved out of the house and (inaudible) some big office round about the West End I think was on her mind, with staff. However (inaudible) or her perception but she thought he was extremely successful and she was very lucky to have him."

[30] As we have indicated, this was said to be important because it contained the deceased's own impressions of the appellant, rather than what Mrs Ferrier perceived them to be.

[31] We were unable to accept that submission. Mrs Ferrier, in passages which were clearly not hearsay, told the jury that the deceased trusted him absolutely, increasingly and implicitly. She listened to him, understood him, admired him and depended on him. She thought very highly of him. She was dependent on him for her finances and he was doing extra things that were not strictly a financial adviser's job, such as buying a computer and a television for her and giving her a filing cabinet. He negotiated her care package with Edinburgh City Council and had taken her to see nursing homes. None of this was hearsay; none of it was challenged by the Crown; and it came from the same witness who reported what she was told by the deceased. There was no reason to think that the jury would not have accepted it.

[32] However, this is all beside the point. The issue for the jury was not the deceased's opinion of the appellant. On any view of the evidence she had a very good impression of him and thought highly of him. Her actions in appointing him to the various positions he held on her behalf spoke more eloquently than anything she might have said. The only question for the jury was whether the appellant betrayed the trust which undoubtedly reposed in him. What she thought or said about him did not assist in answering that question.

[33] Furthermore, given the strength of the Crown case, the supposed misdirection did not give rise to any miscarriage of justice. There were considerable, and regular, transfers of money to accounts operated by the appellant. There were no vouchers justifying these transfers. There was no evidence of any invoicing or enhanced fee agreement. The liquid assets were all but dissipated under the appellant's watch and found their way into his possession. His suggestion that he could not remember why he undervalued the estate by £74,000 is ludicrous. The evidence was overwhelming, even without that of the admission to his wife, his explanation for which was highly implausible.

[34] For all these reasons we refused the appeal.