

ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA487/2016
[2016] NZCA 587**

BETWEEN LOUISE WITANA
 Appellant

AND THE QUEEN
 Respondent

Hearing: 29 November 2016

Court: Wild, French and Simon France JJ

Counsel: A M Simperingham and H B Vaughn for Appellant
 I R Murray for Respondent

Judgment: 7 December 2016 at 3.30 pm

JUDGMENT OF THE COURT

- A The application for leave to appeal is granted.**
- B The appeal is dismissed.**
- C Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.**
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REASONS OF THE COURT

(Given by French J)

Introduction

[1] Ms Witana is to stand trial in the District Court on a charge of theft by a person in a special relationship.¹

[2] She wishes to appeal a decision of Judge Cathcart in the Gisborne District Court admitting the following evidence:²

- (a) two written statements made by the complainant, now deceased; and
- (b) propensity evidence of Ms Witana's previous conviction in 2007 for using a document.

[3] Leave to appeal is required pursuant to s 217 of the Criminal Procedure Act 2011.

The Crown case

[4] The complainant was Ms Witana's mother-in-law. The complainant became seriously ill and in November 2013 signed an enduring power of attorney authorising Ms Witana to act on her behalf in relation to all her property affairs.

[5] It is alleged that between 17 December 2013 and 30 January 2014 Ms Witana used the power of attorney to access the complainant's bank accounts and without authority withdrew monies totalling \$17,271.55 for her own benefit.

[6] According to the Crown, the complainant discovered the unauthorised withdrawals in late January 2014. She immediately revoked the authority in favour of

¹ Crimes Act 1961, s 220.

² *Police v Witana* [2016] NZDC 13853.

Ms Witana and made a complaint to the police. The complainant died on 5 March 2014.

[7] Ms Witana's defence is claim of right. She contends that during the complainant's lifetime the complainant gifted a large sum of money to her and that she was authorised to collect that money from the complainant's bank accounts.³

The evidence at issue

The complainant's written statements

[8] The first statement at issue was drafted by an employee of solicitors acting for the complainant. The statement was based on the discussions the employee (a legal executive) says she had with the complainant on 29 January 2014 when the latter visited the law firm to revoke the authority. The complainant signed the statement on 10 February 2014.

[9] In the statement the complainant says she gave Ms Witana authority to use the power of attorney to pay certain bills on her behalf and that Ms Witana had made unauthorised withdrawals from her bank accounts. The statement attached copies of bank statements highlighting withdrawals made by Ms Witana.

[10] The evidence is that on the same day the complainant signed this statement she also went to the police station to make a complaint. There she made a formal witness statement to a police constable. It was signed and witnessed in the usual way. The second statement is more detailed than the first. It addresses the background to the giving of the power of attorney and the discovery of unauthorised withdrawals.

[11] It was common ground the statements are hearsay evidence and that their admissibility is governed by ss 18 and 8 of the Evidence Act 2006.

[12] On appeal Mr Simperingham did not take issue with the Judge's finding that the requirements of s 18 were satisfied, namely that the maker of the statement was

³ In her police interview Ms Witana contends that, while in hospital, the complainant gifted \$12,000 to her and that she believes she went over that amount by about \$2,000. She was unsure of the remaining \$3,000.

unavailable and that the circumstances relating to the statements provided reasonable assurance the statements were reliable. However, he submitted the Judge should have excluded the evidence under s 8 on the grounds the probative value of the statements was outweighed by the risk they would have an unfairly prejudicial effect on the trial.

[13] In support of that central contention, Mr Simperingham said it was unfair the key prosecution witness would be giving evidence through written statements without the defence being able to cross-examine her on the credibility of the allegations made in those statements. In particular, he submitted the inability to cross-examine the complainant about the circumstances in which she gave Ms Witana a bank card and about the changing nature of their relationship meant Ms Witana would be denied the right to offer an effective defence.

[14] We do not accept those submissions. At trial, Ms Witana will be able to rely on her evidential police interview in which she provided a detailed account of the arrangements made between her and the complainant. That account supports her defence of claim of right. The interview also provides an account of a souring relationship with the complainant and hence an explanation as to why the complainant might have been motivated to make a false complaint. Compared with the detail of Ms Witana's police interview, the complainant's statements are relatively sparse.

[15] In those circumstances, as Judge Cathcart pointed out, the unavailability of the complainant may in fact be an advantage for Ms Witana because there will be no one at trial directly able to contradict her version of events.⁴ There is the further consideration that any risk the jury might place disproportionate weight on the hearsay statements will be mitigated by the standard hearsay direction.

[16] We are satisfied the Judge was right to admit the evidence.

Propensity evidence

[17] Ms Witana has two previous convictions for dishonesty. The first is a conviction for theft as a servant in 2002 when she stole \$100 from her employer's till.

⁴ *Police v Witana*, above n 2, at [59].

Judge Cathcart held the conviction was too remote in time and excluded it.⁵ The Crown does not appeal that ruling.

[18] The second conviction, which Judge Cathcart held is admissible, was for using a document. That offending took place over a period of months straddling 2006 and 2007. It involved Ms Witana in the course of her employment fraudulently processing 17 invoices to a total of \$94,000.

[19] Mr Simperingham submitted there were significant differences between the 2007 offending and the index charge, in particular the fact the index charge was “far more simple” and not thorough and planned like the 2007 offending. In Mr Simperingham’s submissions, those differences combined with the six-year gap rendered the propensity evidence of little probative value and any probative value it did have was outweighed by the risk of unfair prejudice.

[20] We disagree. What differences there are do not detract from the central point that both involve allegations of misappropriation and breach of trust. The 2007 offending shows a propensity towards dishonesty by Ms Witana when entrusted with someone else’s money. It thus bears directly on the central issue of Ms Witana’s intentions in withdrawing the complainant’s money and her defence of claim of right. Like Judge Cathcart, we consider any risk of unfair prejudice can be adequately mitigated by an appropriately worded jury direction.⁶

Outcome

[21] We grant the application for leave to appeal, but dismiss the appeal.

[22] The Judge’s decision was comprehensive, well-reasoned and in our view indisputably correct. We consider the challenges to the decision lack merit.

[23] For fair trial reasons we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet

⁵ *Police v Witana*, above n 2, at [76]–[77].

⁶ At [93].

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Solicitors:
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