EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

MONTSERRAT

HCRAP 2012/001

BETWEEN:

WARREN CASSELL

Appellant

and

THE QUEEN

Respondent

HCRAP 2012/002

BETWEEN:

CASSELL & LEWIS INC.

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise E. Blenman	Justice of Appeal
The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]

Appearances:

Mr. David S. Brandt for the Appellants
Ms. Anesta Weeks, QC, Oris Sullivan with her, for the Respondent

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2013: January 30.

Criminal appeal – Conspiracy to defraud – Money Laundering – Whether or not indictment on which the accused were tried was a nullity – Whether or not a jury properly directed in relation to mens rea would inevitably have arrived at the same verdict – Whether or not an accused charged under an incorrect Act is deprived of an opportunity to mount a defence

available to him under the correct Act – Proceeds of Crime Act, 1999 – Proceeds of Crime Act, 2010

ORAL JUDGMENT

[1] **BAPTISTE JA**: This is the judgment of the Court. Warren Cassell and Cassell and Lewis Inc. (represented by Warren Cassell) were convicted by a jury in the Territory of Montserrat on several counts of conspiracy to defraud, procuring the execution of valuable securities by deception, and money laundering. Warren Cassell was sentenced to two years on nine counts of procuring the execution of a valuable security, and five years on one count of money laundering. On the two counts of conspiracy to defraud, the firm of Cassell & Lewis Inc. was fined $125,000.00 to be paid in 2 years or 2 years imprisonment. This is an appeal against both the convictions and sentences.

[2] Several grounds of appeal were advanced by the appellants, some of which were abandoned during the hearing. It became apparent that the critical appeal grounds related to (1) the alleged nullity of the indictment, (2) the issue of an omission by the learned trial judge to direct on the *mens rea* needed for a conviction on the conspiracy counts, and (3) being charged under the wrong Act on the money laundering counts.

[3] With respect to the grounds dealing with the nullity of the indictment, Mr. Brandt submitted that the proceedings were a nullity by virtue of the court permitting the Crown to file a second or new indictment substituting in the place of the indictment of 24th January 2012, without having applied for leave to amend, and that this was done after the prosecution had closed its case. As a consequence, he submitted, the indictment on which the accused were indicted was a nullity. Additionally, the amended indictment had not been endorsed as required by section 118(1) of the **Criminal Procedure Code**[1] ("the Code") of Montserrat. Having considered the transcript and what transpired at the trial, and the submissions of learned counsel for both the appellants and the respondent, we are not of the view that the

[1] Act No. 21 of 1982, Revised Laws of Montserrat, 1999.

indictment on which the accused were tried was a nullity as we are satisfied that leave was properly applied for an amendment to the indictment, leave was properly granted, and the amended indictment was filed in accordance with the leave given and in accordance with the Code, and no unfairness has been shown to the defendants. Accordingly, we find no merit in this ground of appeal and it is dismissed.

[4] Concerning the grounds dealing with the intent for conspiracy, this ground alleged that the learned trial judge omitted to direct the jury on the requisite *mens rea* for the offence as charged. While the respondent concedes that there was an omission, it is urged that the Court of Appeal must look at the evidence that was before the jury and determine if a jury properly directed on the necessary *mens rea* would inevitably have come to the verdict of guilt. Learned Queens' Counsel pointed the Court to the transcript in which there are several instances which indicated overwhelming evidence which went to show that the appellants, Warren Cassell and Cassell & Lewis Inc., possessed the necessary *mens rea*, and that a jury properly directed in relation to the *mens rea* would inevitably have arrived at the same verdict. Some of the evidence going to show the required intent include, Cassel and his firm's ignoring the existence of director and shareholder Owen Rooney even after Cassell had spoken to Rooney's lawyer who informed him that Rooney was alive and well and did not want to sell his shares or land. Even after Rooney obtained a judgment in a Virginia Court against Cassell and the firm of Cassell & Lewis Inc. deeming the transfer of the shares to Cassell null and void, and the judgment was served on Cassell, Cassell continued to deal with the land of the company in question in this case. These are but examples of the instances which show the *mens rea* of the accused. We agree with learned Queens Counsel therefore that in view of the overwhelming evidence had the trial judge properly directed the jury on the issue of mens rea, the jury would have inevitably have convicted of the offences as charged. This ground is therefore dismissed.

[5] The other ground concerns the charges of money laundering being brought under the wrong Act. Cassell was convicted of offences of money laundering contrary to

the **Proceeds of Crime Act, 2010** ("the 2010 Act").[2] Given the date of the alleged commission of the offences, the transitional provisions of this Act required that the charges be brought under the **Proceeds of Crime Act, 1999** ("the 1999 Act").[3] The 1999 Act required that the prosecution prove an intent either to evade confiscation hearings or to avoid criminal prosecution. By contrast, the 2010 Act creates an offence which does not require such an intent. The appellant submits that by charging the 2010 Act offences, he was deprived of the opportunity of putting forward defences that would have been available to him under the 1999 Act. The respondent's counsel quite properly conceded that the accused ought to have been charged under the 1999 Act. We are of the view that the bringing of this charge under the incorrect Act deprived the accused of the opportunity of mounting a defence available to him under the 1999 Act, resulted in injustice to the appellant, and rendered his conviction on this count unfair. This is not the sort of matter to which the proviso can be applied. The appeal is therefore allowed, and Cassell's conviction on this count is quashed. The only question which remains is whether, as urged by the prosecution, we should order a retrial on this count. Mr. Brandt strenuously resisted this suggestion on the ground that Montserrat is a small territory and a retrial would not be fair.

[6] We have given deliberate consideration to both submissions and we are of the view that the interests of justice will only be served if a retrial is ordered. There are two good reasons why we should order a retrial. The offence is of a very serious nature, and it is generally in the public interest that those reasonably suspected of committing serious crimes be brought to trial. We are also of the view that the prosecution can be conducted without unfairness to, or oppression of, the defendant. That is not to say that it would not be open to the defendant at the relevant time to make any submissions that appear to be appropriate. Accordingly, we are of the view that it is open to the DPP to institute the proper charges against the accused.

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[2] Act No. 1 of 2010, Laws of Montserrat.

[3] Cap. 4.04, Revised Laws of Montserrat, 2008.

[7] The ground of appeal complaining that some of the counts were duplicitous was misplaced. We are satisfied that the counts as amended were not duplicitous. This ground has no merit and fails.

[8] We have considered the other appeal grounds raised by the appellants, many of which were not pursued during oral argument. We however find no merit in those grounds and they are dismissed.

[9] There was a ground of appeal with respect to sentencing, complaining that the judge had not inquired whether the firm could afford to pay the fine of $125,000.00. But, during the actual hearing of the appeal, Mr. Brandt did not actively pursue this ground, and we find no reason to upset the judge's sentence. This ground of appeal is therefore dismissed.

[10] We should like to put on record our gratitude to all learned counsel for their tremendous assistance in this matter.