IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCR 2019/0011

REGINA

V

WARREN CASSELL

APPEARANCES

Mr Henry Gordon for the Crown.

Dr David Dorsett for the defendant.

2019: OCTOBER 7, 10, 14, 15

OCTOBER 25

RULING

On retrial

1 **Morley J**: I am asked to rule on the propriety of the defendant Warren Cassell being tried again on allegations of fraud, having heard and read argument on 7, 10, 14 and 15.10.19.

2 Cassell[1] is a member of the Bar of Montserrat and Antigua & Barbuda. In 2012 he was tried on an arguably overloaded initial 26 count indictment, reduced it appears on 10.02.12 to an arguably still overloaded 14 count indictment, alleging dishonest activity in 2007, pleading two counts of 'conspiracy to defraud' contrary to **Common Law**, eleven counts of 'procuring

[1] The parties will be referred to by their names for ease of reading and no disrespect is intended by not writing out the legalese of whether defendants or others.

execution of a valuable security by deception' contrary to **s225(2) of the Penal Code**, and a single count of 'money laundering' contrary to **s118(1)(a) Proceeds of Crime Act 2010**. I understand he was convicted of all offences.

3 The allegation is no more complicated than in 2007 he claimed through dishonest formal paperwork to be the sole director of a dormant company named Providence Estate Limited (PEL), which restored it to the companies register, deceptively sold plots of its land to various folk, and then hid the money. There have been at least 20 consequent civil actions, involving more than 60 parties, where Owen Rooney, a legitimate director of PEL, has fought to recover title to lands sold, many parties have been to the Court of Appeal, and currently there are 16 actions pending on a single point before the Privy Council (broadly concerning what land title passes to *bona fide* purchasers). It is right to say almost everyone on Montserrat knows about the PEL affair, and it has drawn in many government offices and leading personalities, including the offices of the Land, Companies, and High Court Registries, many lawyers, at least one senior police officer, and a former Governor. In part the repercussions turned Montserrat into a litigation circus.

4 On conviction, Cassell was sentenced to two years imprisonment concurrently on counts 1-13, concerning the land sales, which I will call the 'substantive criminal conduct', and five years on the subsequent money laundering which hid the proceeds of the said conduct.

5 On 30.01.13, the Court of Appeal quashed the money laundering as it was laid under the **2010 Act** which post-dated the crimes of 2007, and in effect opined there should be a trial under the correct Act (calling it incorrectly a 'retrial'), namely under the then applicable **Proceeds of Crime Act 1999**. The money laundering being quashed, Cassell no longer had a five year term, but only a two year term, being 24 months, of which he fully served two-thirds before automatic remission for good behaviour, being 16 months. Post-release, on 04.07.16 the Privy Council quashed the other convictions *inter alia* for misdirection to the jury by the trial judge Redhead J. On 28.02.17, the Court of Appeal decided there ought not to be a retrial on the substantive criminal conduct because Cassell had fully served his quashed 2 year sentence, (though inaccurately thought it a sentence of 2.5 years).

6 As to the current action in the High Court, specifically I am asked by the prosecution to find there is a sufficiency of evidence to merit a proposed single-count indictment alleging 'concealing the proceeds of criminal conduct', contrary to **s33(1)(a) Proceeds of Crime Act (1999)** cap 4.04, on which Cassell was freshly charged in May 2019. In opposition, I am asked by the defence to find any further trial concerning Cassell, under the 1999 Act or otherwise, is an abuse of process and should be stayed.

7 His convictions having been quashed, despite his travails Cassell remains a practicing member of the Bar on Montserrat and on Antigua, where he has often appeared before me in criminal and civil matters. I have also occasionally taught him, along with others, advocacy skills. In my experience, he is a lawyer of moderate ability while also a particularly talented jury advocate. He has good instincts for where the heart of a case lies, and does not waste court time with overlong or irrelevant forensic forays. He is also I think quite personable. Though I have raised the question of recusal concerning my adjudication of the present matters, neither prosecution nor defence have asked that I am recused, and so I remain comfortable to adjudicate, particularly as these questions are procedural and preliminary to any trial. If this case was being tried in England, I would not be dealing with it, as there would readily be other judges to step into my place; but on Montserrat, as has been discussed in other cases, where I am the lone designated judge, visiting four times a year for a month, the approach to recusal has been historically more robust, noting that Redhead J tried the case, also long known to Cassell, and his presiding was not the subject of appeal.

8 My analysis has worked through six questions.

9 The first question concerning further trial is whether the doctrine of *autrefois acquit* arises. It does not. Cassell was neither convicted nor acquitted. His convictions were merely quashed. He is a person about whom allegations were made and he remains presently innocent of them unless proven guilty.

10 The second question is whether technically there is a 'sufficiency' of evidence on the proposed count. There is. It suffices to say in its particulars as to its elements 'concealing proceeds of

criminal conduct' under the 1999 Act is almost identical to 'money laundering' under the 2010 Act, of which he was convicted, as can be seen setting out the two counts below:

The original trial count, count 14 – '2010 laundering'

STATEMENT OF OFFENCE

MONEY LAUNDERING contrary to s118(1)(a) of the Proceeds of Crime Act 2010.

PARTICULARS OF OFFENCE

WARREN CASSELL between 1 July 2007 and 30 June 2011 in the overseas territory of Montserrat concealed certain property namely $1530767.25ec being the proceeds of Criminal Conduct.

The proposed new lone count – '1999 concealing'

STATEMENT OF OFFENCE

CONCEALING PROCEEDS OF CRIMINAL CONDUCT, contrary to section 33(1)(a) of the Proceeds of Crime Act (1999) Cap 4.04.

PARTICULARS OF OFFENCE

WARREN CASSELL between 1 January 2007 and 4 November 2008 in the overseas territory of Montserrat did conceal or disguise $855.380.54ec representing the proceeds of criminal conduct, for the purpose of avoiding prosecution for an offence or the making or enforcement of a confiscation order.

11 Both counts require concealment of money as the proceeds of criminal conduct. The differing precise amounts and end dates are not material averments. I have reviewed the evidence submitted in support. What was proved previously in theory can be proved again with the presentation of largely the same evidence as in the original trial, namely that Cassell received some money, from criminal conduct, and then sought to conceal it. I am sure on the provided witness statements and documentary exhibits a reasonable jury properly directed on the new lone count might convict of the prosecution case taken at its highest.

12 However, as a third question, a complication arises as to proving the element of 'criminal conduct'.

13 In the original trial, the criminal conduct was the preceding 13 counts. That trial rightly proceeded on the basis substantive offending had to be established as a precondition to

proving the money laundering. Conviction for one or more of the 13 counts proved there had been 'criminal conduct'; I pass no comment on which or how many counts needed to be proved and much might be criticised in the Crown's then perhaps overcomplicated approach. However if there is to be a second trial, Cassell is entitled to know what precisely is the criminal conduct which lays the foundation for the new '1999 concealing' count, as he needs to be able to mount his defence he has not engaged in such criminal conduct. It cannot be left so vague. The purpose of an indictment is to provide precision as to wrongdoing. To leave the proposed indictment as merely a single count of '1999 concealing' would render it bad for duplicity, as it would amount to alleging any number of possible wrongs as criminal conduct arising from the 2007 activities.

14 Duplicity is a fundamental concept in indictment pleading. In **Blackstones 2017** at para **D11.45**, 'the ordinary rule is that each count in an indictment must allege only one offence. If a count alleges more than one offence it is said to be bad for duplicity and should be quashed before arraignment', and at **D11.50**, 'the rule against duplicity rests ultimately on common sense and pragmatic considerations of what is fair in all the circumstances'.

15 To my mind the proposed count on its own is obviously bad for duplicity as 'criminal conduct', being so vague, might mean many different wrongdoings, as specific offences (like various deceptive land sales and formal filings) or even as mere disapproved actions (like simply telling lies). The Crown must specify precisely what the criminal conduct is, and prove it. This should and can be done by placing on the indictment a foundation count, or counts (though preferably just one). If the Crown proposes to proceed only on the '1999 concealing' count, I will quash the proceedings for the indictment being defective. If the Crown proposes to add a foundation count, or counts, then I will hear the application further.

16 I note however in advance the Crown have earlier thought no foundation count necessary. Indeed there was discussion on I think 10.10.19 as to whether Counsel Dorsett tactically might best defend by not yet raising argument, so that the Crown proceeded alone on the '1999 concealing', meaning Cassell could in theory accept sufficiency, plead not guilty, and then later argue the count bad for duplicity, while then resisting allowance so much later in the teeth of a not guilty plea of a curative foundation count. However the defence ignored this analysis and

have sought to challenge the count at this stage, namely at sufficiency hearing. This being so, I can and do at this stage of the proceedings invite further discussion of foundation.

17 In theory, if adding a foundation count, the Crown might wish to keep matters simple, as discussed in particular on 10.10.19, for example by adding a count of 'obtaining property by deception', namely control over the land owned by PEL, under **s230 Penal Code**, which states:

> Obtaining property by deception
> 230. (1) Any person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall be guilty of an offence and liable to imprisonment for ten years.
> (2) For the purposes of this section a person shall be treated as obtaining property if he obtains ownership, possession or control of it, and "obtain" includes obtaining for another or enabling another to obtain or retain.

18 Such a count might succeed, without complication, if proposed 'exhibits 36 and 37', being the formal paperwork filed in 2007 securing control over PEL, are proved a dishonest deception by Cassell. In this way, the Crown can lead what is the primary evidence giving rise to the many subsequent land sales, while Cassell at least knows what supposed dishonesty he must answer, namely what is his defence for filing this paperwork. A consequent trial will have focus.

19 Whatever is chosen, the foundation count or counts remain a matter for the Crown, but there must be something more to this indictment than a lone '1999 concealing' count for it to proceed.

20 I turn now as the fourth question to whether there can be any foundation count in light of the 28.02.17 decision of the Court of Appeal. It might be argued a foundation count may amount to retrying the substantive criminal conduct, which at first blush the judgment appears to have estopped. However closer analysis reveals this is not so. The judgment appears to suggest there should here be no retrial where Cassell 'has served the entire term for which he was convicted'. However, the entire term pertained only to the substantive criminal conduct, which

was two years, not to the term for the concealment of monies, which was five years: Cassell has not served an entire five year term, and in this context the desire to try the seeming more serious allegation of '1999 concealing' is not caught by the 28.02.17 judgment. Moreover, in its earlier judgment of 30.01.13, quashing the '2010 laundering' the Court of Appeal expressed the view there should be a trial under the 1999 Act, about which the Privy Council in its decision on 04.07.16, notwithstanding to quash the substantive counts 1-13, expressed no dissenting view. In short, a fresh trial on the '1999 concealing' has been contemplated since January 2013, and inherent in this long anticipated fresh trial, not estopped, is proving the element of 'criminal conduct'. Moreover, a suggested single count to show the criminal conduct as contrary to **s230 Penal Code** is not a count for which Cassell was tried before, so that strictly this would not be a 'retrial' under either count, whether or not the original counts are estopped from retrial by the 28.02.17 judgment.

21 There is next a fifth question, namely is a prosecution inappropriate under a repealed Act, being the 1999 Act. It is not. The defence had argued that the effect of repeal of the **1999 Act** by **s180 2010 Act** renders it inherently wrong to resurrect the 1999 Act by bringing a prosecution under it. This is misconceived as on Montserrat **s71(d) Interpretation Act 2011** states, '*Where an enactment is repealed in whole…the repeal does not…(d) affect an offence committed against…the provisions of the enactment so repealed or a punishment…under the enactment so repealed'*. It was further argued a proceeding under the 1999 Act was a 'new' proceeding, which being new, could not be under the 1999 Act as it was repealed, which is a circular *non sequitur*, and plainly flatly contradicted by s71(d).

22 I turn now to the sixth question, whether any further trial is an abuse of process by reason the delay brings the administration of justice into disrepute. This is where I have wrestled most with how to proceed.

a. On the one hand, as of today 25.10.19, the offending behaviour is as long ago as 2007, with a trial as long ago as 2012, including count 14 bizarrely and negligently under the obviously incorrect 2010 Act, with a suggested fresh trial for '1999 concealing' mooted as long ago as January 2013, with the quashing of the substantives as long ago as July 2016,

and then a decision not to allow a retrial on the substantives alone as long ago as February 2017, with a delay of 27 months in charging Cassell under the 1999 Act until as late as May 2019.

b. On the other hand Cassell is a member of the Bar, accused of dishonesty, about which there is rightly an acute public interest in such persons being in so trusted a position within so small a society being held to account if they digress, with the added woeful feature the activities in 2007 have given rise to so much painful litigation involving so many in a community of not more than 5000, all of this calling out for there to be a decision as to whether his behaviour was crime as distinct from misunderstanding, negligence or mistake.

c. To my mind the delay is acute, to agitate against further trial, but so too is the public interest, with so many affected, to agitate in favour of it.

23 In weighing the tension between the delay and the public interest, I begin with the following thoughts.

a. If this case were in England, where among so much bigger a population judges abound and the Court of Appeal deals with one jurisdiction, while this allegation would be routine and its impact of minor notoriety, I would stay the indictment for delay, as causing to the mind of an informed observer the administration of justice to fall into disrepute. I know from experience there the matter would have come on sooner, and to come on so late as now would be inexcusable. However, the proceedings are not in England, but on Montserrat, where the designated judge sits only four months a year, the allegation is locally wholly unusual and is therefore unfamiliar to the routine work of the ODPP[2], the event caused great notoriety, and the appeal courts are not local, but reside off-island and deal with multiple jurisdictions. To my mind, it does not help to think on how things would be done in England, and adjustment needs to be made for the local circumstance, which means delay in bringing a fresh trial would always be greater.

[2] Office of the Director of Public Prosecutions.

b. I put out of mind if I stay proceedings there would be then likely be suit against the government for wrongful conviction and incarceration, demanding a considerable sum, which may raise scandal and gossip. I say this so it is understood by the reader I am alive in this small community to how others may think I may be motivated to protect the authorities from a suit, when I am not, and it is only right I should declare this so.

c. In principle, it is not uncommon for there to be a second trial where there is a hung jury or a conviction quashed; this is as a matter of policy often acceptable, though a third or fourth trial may not be.

d. Given the delay, and how these proceedings have hung over Cassell for at least ten years, with a fresh trial being mooted as long ago as January 2013, I would be surprised if a fresh conviction should result in a sentence by any other judge at this stage which would mean he serve more time, even if I accept hiding the money is more serious than the deceptive sale of land. What this means is that to my mind the issue of a further trial is a point of principle, namely whether there should be a fresh and final opportunity for the Crown to mark this alleged behaviour, by no less a barrister, which has caused so much local scandal.

24 Turning my mind to the law on staying an indictment for delay, I have been helped by potent and succinct arguments in writing offered by Crown Counsel Gordon, and then handed by Counsel Dorsett 238 pages of authorities he says in support of Cassell, and who has referred me in particular briefly to the headnote in **Warren v AG for Jersey 2012** 1AC24, quoting:

> Propriety in the conduct of prosecutions is a matter of constitutional importance. It is for the court to take responsibility for ensuring that that process is not abused: see **Connelly v Director of Public Prosecutions [1964]** AC 1254. The judiciary's acceptance of responsibility for maintaining the rule of law requires them to oversee executive action and to refuse to permit conduct which threatens it. The court cannot turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction, and where it finds such lawlessness its proper and necessary response is to decline to exercise jurisdiction on the ground of abuse of process. Unlike a civil trial between parties who seek to establish private rights but may waive them, a criminal trial, and the

administration of the criminal law are matters which concern the state. If proceedings are stayed where wrongful criminal conduct is proved, that will discourage similar conduct in other cases…In the second category of case the court's concern in protecting the integrity of the criminal justice system requires it to strike a balance between the competing public interests to ensure that (1) executive misconduct does not undermine public confidence in the system, and (2) those charged with serious crimes are brought to trial: see **R v Latif [1996]** 1 WLR 104 and **R v Beckford (Anthony) [1995**] RTR 251. In that discretionary exercise, fairness has little weight in the balance, great weight is attached to the nature of the offence and to the need, as a matter of public policy, to discourage prosecutorial misconduct.

25 The difficulty with reliance on *Warren supra* is there is here, on the facts of the delay, no 'executive lawlessness' or 'prosecutorial misconduct'. Instead, there is systemic inefficiency, well known, and which ought to improve, but this desire for improvement does not automatically render a fresh trial an abuse. The system is the best we have. In a sense, everyone has always known that with the case bound for the Privy Council there was always going to be many years before any further trial would be brought on. The question is, the system being the best we have, do the circumstances of this case take it over the abuse threshold?

26 I have also been referred to my earlier decision on Antigua in **R v Larrydow Jacobs et al 2019** ANUCHR 2015/0090 et seq. There, I stayed five cases for wholly unreasonable delay in typing, printing and signing simple indictments, alleging relatively minor offending, concerning committals received at the High Court from the Magistrates Court, being delays of 42 months, 42 months, 36 months, 25 months and 19 months, said to have arisen for no more reason than 'admin backlog'. At paras 13-17 it was said:

13 The power to stay proceedings as an abuse of process is explored from **D3.66** in **Blackstones 2017**, where *inter alia* it says:

At **D3.67**::….the constitutional principle which underlies the jurisdiction to stay proceedings is that the courts have the power and the duty to protect the law by protecting its own purposes and function…the courts have an inescapable duty to secure fair treatment for those who come or are brought before them…It is well established that the court has power to stay proceedings in two categories of

cases, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety.

At **D3.70**: Two key questions run through many of the authorities: (1) to what extent is the accused prejudiced? (2) To what degree are the rule of law and the administration of justice undermined by the behaviour of the…prosecution?

At **D3.72**: …the defence bear the burden of establishing abuse on the balance of probabilities.

At **D3.74**: …the defence may ….apply for the proceedings to be stayed on the ground of abuse of process if (a) there has been inordinate and unconscionable delay due to prosecution inefficiency…

14 Addressing these fundamentals, and borrowing their words, I am of the view that 'on balance' 'the administration of justice is undermined' by the prosecution taking so very long to file these simple indictments, being matters of lesser seriousness, so that the delay is 'inordinate and unconscionable due to prosecution inefficiency', prolonging exposure of witnesses to proceedings, during which the liberty of defendants has been infringed, so much so that this inefficiency 'offends the courts sense of justice and propriety', 'having an inescapable duty to secure fair treatment for those brought before' the court.

15 Put in another way, in my judgment the reasonable third party observer would be aghast at such delay and inefficiency, so that she or he would likely think to tolerate it brings the administration of justice into disrepute.

16 Further, if there is no sanction on the prosecution for such inefficiency, such as a stay, there will likely be no improvement.

17 The power to stay sits alongside, as above, the duty to protect the law by protecting its own purposes and function, remembering the courts have an inescapable duty to secure fair treatment for those who come or are brought before them. In this context, there is no need for an application to be made by defence counsel, where of the court's own motion, alive to its inherent powers to guard its procedures, it pursues this duty. Moreover, it may reasonably be said the Latin maxim *res ipsa loquitur* is of application (that a thing speaks for itself), spurring the court to act *proprio motu* (of its own motion), namely, that the administration of justice is here palpably falling into disrepute speaks for itself in the teeth of such indictment delays with explanation being no more detailed than questionably to assert 'backlog'.

25 On the one hand, Counsel Dorsett says Cassell's case is indistinguishable from *Jacobs supra* as there has been a delay of 27 months between the 28.02.17 Court of Appeal decision and charging Cassell with '1999 concealing' in May 2019. However, on the other hand, the fresh charge required the gathering of further complicated evidence, in particular from the new Lands Registrar about records of the sales of land plots, which will have taken time, plus some careful consideration has had to be given to whether a further trial on '1999 concealing' will be permissible in light of the quashing of the substantive criminal conduct by the 04.07.16 Privy Council decision, with it being said by the 28.02.17 decision that conduct ought not to be retried. The *Jacobs* case was about administrative laziness, this is not.

26 As to prejudice, if argued, possibly created by the delay, such that Cassell cannot get a fair trial owing to loss of documents or fading memory from an eyewitness, neither applies as the case is almost entirely documentary, with all the relevant documents preserved. Realistically, it probably requires merely 'agree and avoid', as trial lawyers might say, namely that the paperwork is agreed and admitted before the jury, with some questions to witnesses, and Cassell then if he considers it needed offers his explanation, or comments on the paperwork through his counsel on whether any dishonestly has been proved. Delay will not inhibit such an approach.

27 Balancing matters, reminding myself of the authorities, dealing with the realities of proceedings taking long on Montserrat, there being no evident prejudice, the delay being no surprise, and also explicable by reason of further inquiry and cautious analysis of appeal judgments, and there being no prosecutorial misconduct, it cannot be said there has been 'inordinate and unconscionable delay due to prosecution inefficiency', as required by abuse of process, such that it is probable an observer would not conclude the administration of justice has been brought into disrepute.

28 I would agree the question is finely balanced. However, what ultimately tips it toward further trial is the notoriety of the case. Montserrat needs to make a decision about what happened with PEL. This is a simple allegation of deception, that Cassell dishonestly pretended to be the

lone director of PEL, then selling its land, to which there is I sense a clear defence, and for the community to heal this contest must be resolved.

29 As to a possible suggestion the PEL affair has become so notorious Cassell cannot get a fair trial, which has not been raised, this would likely be an unattractive argument, as it is the experience of this court in three years juries are well known on Montserrat to make balanced decisions on the evidence, not on gossip. A good example was the trial **Orin Evans** in 2016[3], twice before convicted of murder, then quashed, and yet on his third trial acquitted. Should jury selection prove difficult we can address this if it arises on empanelment.

30 In sum, it is with some regret I must say to Cassell, known to this court and where in fairness he has done some good work, he must be further tried, though I doubt he will face further custody; however, the proposed indictment must have an appropriate foundation count for it to proceed or it shall be quashed as bad for duplicity.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

25 October 2019

[3] See CASE MNIHCR2013/0008.