

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL

MONTSERRAT

MNIHCRA2022/0003

BETWEEN:

WARREN CASSELL

Applicant

and

THE KING

Respondent

Before:

The Hon. Mr. Paul Webster  
The Hon. Mr. Gerard St. C Farara  
The Hon. Mr. Gerhard Wallbank

Justice of Appeal [Ag.]  
Justice of Appeal [Ag.]  
Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett for the Applicant  
Mr. Richard Jory, KC for the Respondent

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2022: December 9,  
December 20

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*Application for bail pending appeal – Whether exceptional circumstances exist warranting the grant of bail – Whether there is a strong prima facie case that the appeal is likely to succeed.*

**DECISION**

- [1] **WEBSTER JA [AG.]**: On 22<sup>nd</sup> June 2022, Warren Cassell (“the applicant”) was found guilty by a unanimous verdict of the jury of the offence of concealing the proceeds of criminal conduct contrary to section 33(1)(a) of the **Proceeds of**

**Crime Act**<sup>1</sup> (“POCA”). The following day, he was sentenced by the learned trial judge to 3 ½ years’ imprisonment and he has been incarcerated since then. He appealed against his conviction and sentence and on 6<sup>th</sup> July 2022, he applied for an order that he be admitted to bail pending the determination of his appeal.

- [2] The granting of bail pending appeal to a person who has been found guilty by a jury of a criminal offence and has been sentenced to a term of imprisonment is a serious matter. The courts approach such applications cautiously and bail is granted only if there are exceptional circumstances. Dr. David Dorsett who appeared for the applicant did not dispute this basic principle. He referred in his written and oral submissions to **Taylor on Criminal Appeals** by Paul Taylor, KC where the learned author referred to **R v Watton**,<sup>2</sup> the leading case on the requirement to show exceptional circumstances on an application for bail pending appeal, and summarised the basic principles as follows:

“The Court of Appeal is cautious in its approach to deciding whether to grant bail pending appeal. The test, as confirmed in *Watton*, appears to be whether there are “exceptional circumstances which would drive the Court to the conclusion that justice can only be done by the granting of bail...”

Bail is thus likely to be granted where it appears *prima facie* that the appeal is likely to succeed...”<sup>3</sup>

- [3] These principles have been echoed by the courts of the English-speaking Caribbean. In **The State v Lynette Scantlebury**,<sup>4</sup> a decision of the Court of Appeal of Guyana, Haynes C said –

“Undoubtedly, this court has the jurisdiction to admit an appellant to bail pending the determination of an appeal. It is accepted law that this is a matter of discretion. An appellant has no common law or statutory or constitutional right to bail. But like all other discretionary powers it must be exercised judicially. If appellants are admitted to bail freely on appeals from the verdict of juries, a dangerous situation could arise inimical to the public interest.”

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<sup>1</sup> Cap. 4.04 of the Laws of Montserrat.

<sup>2</sup> (1979) 68 Cr App R 293).

<sup>3</sup> *Taylor on Criminal Appeals* at [6.105] to [6.106].

<sup>4</sup> (1976) 27 WIR 103.

- [4] To the same effect is the decision of the Court of Appeal of Trinidad and Tobago in **Krishendath Sinanan and others v The State**<sup>5</sup> where Bernard CJ stated –

“Application for bail by a person after he has been convicted by a jury is a serious matter. It is not to be treated lightly. Anything but a stringent approach to the matter undermines the system of trial by jury and as such is inimical to the public interest. The granting of bail to such persons is a facility that is sparingly resorted to and the discretion of the court is exercised only in very exceptional circumstances.”

- [5] The principles in **Watton** and **Scantlebury** have been applied by this Court in several applications for bail pending appeal including **Joseph Brice v R**.<sup>6</sup> In summary, bail is granted to a person who is serving a sentence, having been convicted, only in exceptional circumstances. The two most common examples of exceptional circumstances are where the convicted person is likely to serve his sentence before the appeal is heard, or where the grounds of appeal are so strong that prima facie the appeal is likely to succeed. There is no suggestion in this case that the applicant will serve his sentence before the appeal is heard. Therefore, the application turns on whether the likelihood of the appeal succeeding is such that it creates an exceptional circumstance that would drive the court to conclude that justice can only be done by granting bail to the applicant.

- [6] Notwithstanding the fact that this application treats with the merits of the appeal, this Court is constrained to say as little as possible about the case and the grounds of appeal so as not to tie the hands of the panel of judges who will hear the appeal. This is consistent with general principles and the view expressed by Geoffrey Lane LJ in **Watton** where he said ‘[o]bviously it is desirable that we should say as little as possible about the circumstances of the offence...’<sup>7</sup>

### **The grounds of appeal**

- [7] This takes me to a consideration of the grounds of appeal.

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<sup>5</sup> (1992) 44 WIR 359.

<sup>6</sup> AXAHCRA2016/0001 (delivered 12<sup>th</sup> December 2016, unreported).

<sup>7</sup> Supra note 2 at page 295.

[8] The original notice of appeal contained five grounds of appeal against conviction which I summarise as follows:

- (i) The trial proceeded on an indictment that was duplicitous (ground 2).
- (ii) The trial judge wrongfully rejected the applicant's no case submission (ground 3).
- (iii) The trial was conducted without due publicity and in contravention of the constitutional principle of open justice as required by the Eastern Caribbean Supreme Court (Sittings of the Court) Rules (ground 1).
- (iv) Misdirections by the trial judge to the jury on various issues resulting in a conviction that was unsafe and should be set aside (ground 4).
- (v) The jury was misdirected on the effect of a judgment of a court in Virginia, USA (ground 5).

Ground 6 relating to the sentence is not material to this appeal.

[9] At the hearing of the application on 9<sup>th</sup> December 2022, the Court granted the applicant leave to amend his notice of appeal and notice of application for bail. On 10<sup>th</sup> December 2022, the applicant submitted an amended notice of appeal and notice of application with the following new ground as ground (7):

"The conviction is unsafe as the trial proceeded on an indictment that was not compliant with section 7(2)(b) of the Constitution of Montserrat ("the Constitution"), in that it failed to specify in detail the nature and cause of the accusation against him by not specifying "an offence to which this Act applies" and thus disabling the Appellant to exercise effectively his rights under section 7(2)(c) of the Constitution and thus contravening the Appellant's constitutional right to the protection of the law."

#### **Grounds 2 and 7 – challenges to the indictment**

[10] Grounds 2 and 7 relate to the validity of the indictment and the effect of its alleged invalidity on the trial.

[11] The relevant portions of the indictment read:

**"Statement of Offence - Concealing the 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 the 1<sup>st</sup> day of January 2007 and the 4<sup>th</sup> day of November 2008, in the British Overseas Territory of Montserrat, concealed or disguised property, namely ... EC\$855,380.54 ... which was, in whole or in part, directly or indirectly, the proceeds of criminal conduct ... [f]or the purpose of avoiding prosecution for an offence or the making or enforcement of a confiscation order.”

[12] Section 33(1)(a) of the **POCA** provides that –

“A person commits an offence if he –

(a) conceals or disguises any property which is, or in whole or in part directly or indirectly represents his proceeds of criminal conduct ...

for the purpose of avoiding prosecution for an offence to which this Act applies or of avoiding the making or enforcement of a confiscation Order.”

[13] Dr. Dorsett submitted that section 33(1)(a) created two offences: concealing the proceeds of criminal conduct and/or disguising such conduct, and the indictment was duplicitous because it charged the applicant with both offences. Mr. Richard Jory, KC, who appeared for the respondent, responded by submitting that section 33(1) creates one offence of concealing or disguising the proceeds of criminal conduct for which the applicant was charged and convicted. It is arguable whether section 33(1)(a) creates one or two offences and whether the indictment is duplicitous. However, I do not think that the ground of appeal alleging that the indictment was duplicitous and that the trial was a nullity reaches the threshold of showing that the appeal is likely to succeed in the sense contemplated by the principles relating to bail pending appeal.

[14] Ground 7 suggests that the indictment is defective because it did not comply with section 33(1)(a) of the **POCA** and the elements of the offence of concealing or disguising the proceeds of criminal conduct. The section states that the concealing or disguising of the proceeds must be for avoiding prosecution for an offence ‘... to

which this Act applies...’ The quoted words are not in the indictment. Dr. Dorsett submitted that the prosecution’s failure to include the missing words resulted in an indictment that was fatally defective in that it did not include an essential element of the crime of concealing or disguising the proceeds of criminal conduct. This, he submitted, was unfair to the applicant and a breach of his constitutional right to protection of the law, and generally his right to be furnished with the full details of the charge against him at the earliest opportunity. Dr. Dorsett submitted that the indictment should have contained the missing words from section 33(1)(a) and/or the specific offence for which the applicant was seeking to avoid prosecution.

[15] Mr. Jory, KC’s response is contained in his supplemental submissions filed on 13<sup>th</sup> December 2022. He referred firstly to section 3(2) of the **POCA** which states that ‘[r]eferences in this Act to an offence to which this Act applies are references to all indictable offences except drug trafficking offences.’ Thus, a person can be convicted under the section, assuming all other elements are proved, of avoiding prosecution for any offence other than the drug trafficking offence. All other indictable offences are covered by the section. Mr. Jory, KC submitted, with reference to two England and Wales Court of Appeal authorities, which are not binding but in principle persuasive,<sup>8</sup> that there is no need for the indictment to specify any offence nor for the trial judge to direct the jury that the defendant is avoiding prosecution for any named offence. Mr. Jory, KC argued that the omission of the missing words did not prejudice the applicant. Mr. Jory, KC also emphasised that what is important is how the trial judge directed the jury. He submitted that the trial judge’s direction to the jury satisfied the requirements of section 33 of the **POCA**.<sup>9</sup>

[16] It is arguable that the prosecution’s failure to include the missing words in the indictment is fatal to the conviction, but it does not attain the threshold of showing that the appeal is likely to succeed in the sense and to the high standard contemplated by the principles relating to granting bail pending appeal.

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<sup>8</sup> R v Powell; R v Powell [2004] EWCA Crim 2244; R v Singh [2003] EWCA Crim 3712.

<sup>9</sup> Page 34 of the judge’s summing up to the jury.

### **Ground 1 – failure to publicise the trial**

- [17] Ground 1 alleges that the trial was conducted without due publicity and in contravention of rule 5(4) of the **Eastern Caribbean Supreme Court (Sittings of the Court) Rules 2014** relating to the publication of notices for criminal sittings of the court. What happened is that the notice of the sitting of the court at which the trial of the applicant was to take place was not published in the Gazette in the time specified in the Rules. The Rules require that the notice be published not less than seven days before the start of the sitting of the court at which a person will be tried. It appears from the notice that is included in the record that the notice was published one day before the start of the sitting of the court for the trial of the applicant.
- [18] There is no evidence that any person was denied access to the courts during the trial or that the applicant was prejudiced in any way by the late publication of the notice. In the circumstances, this is an issue that should be dealt with at the hearing of the appeal and not on an application for bail pending appeal.

### **Grounds 3 – rejection of the applicant’s no case submission**

- [19] Ground 3 complains that the learned trial judge wrongfully rejected the no case submission made by the applicant. I am not satisfied that this ground attains the threshold of making the appeal likely to succeed and the resolution of this issue should be left for the hearing of the appeal.

### **Grounds 4 and 5 – misdirections to the jury**

- [20] Grounds 4 and 5 complain of misdirections to the jury by the learned trial judge. Some of these complaints raise grounds of appeal that are arguable. However, none of them rise to the level that this Court, reviewing the limited record of appeal on the application for bail, can be satisfied that, individually or cumulatively, they are likely to succeed in the sense contemplated on an application for bail pending appeal. These matters will be fully investigated and resolved at the hearing of the appeal.

### **Disposal**

- [21] Having regard to the evidence, the written and oral submissions of counsel and the principles that guide the Court in considering applications for bail pending appeal, I am not satisfied that prima facie the appeal attains the threshold of showing that it likely to succeed in the sense and to the high standard contemplated by the principles relating to granting bail pending appeal. There are no exceptional circumstances that would drive this Court to conclude that justice can only be done by the granting of bail. I would dismiss the application for bail pending appeal.

### **Order**

- [22] The application for bail pending appeal is dismissed.

I concur.

**Gerard St. C Farara**  
Justice of Appeal [Ag.]

I concur.

**Gerhard Wallbank**  
Justice of Appeal [Ag.]



**By the Court**

**Deputy Chief Registrar**