The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 10 of 2011

Between:

ROGER VINCENT COX

Appellant

-v-

THE QUEEN

Respondent

Before: Zacca, E. President
Evans, Anthony, JA
Baker, Scott, JA

Appearances: Mr Charles Richardson for the Appellant
Mr Rory Field, Ms Cindy Clarke for the Respondent

Date of Hearing: **8 March 2012**
Date of Judgment: **8 March 2012**
Date of Reasons: **22 March 2012**

Reasons for Decision

BAKER, JA.

1. On 19 April 2011 following an earlier plea of guilty to three counts of money laundering under sections 44 and 45 of The Proceeds of Crime Act 1997 the appellant was sentenced to five years

imprisonment concurrent on each count. On 8 March 2012, having granted leave to appeal, we dismissed his appeal and said our reasons would be given later. We now give those reasons.

2. The appellant is a thirty-eight year old Bermudian living with his partner and three minor children in St. George's Parish. There was a co-defendant, Michelle Lindsey, who was employed as an accounts assistant at Gibbons Company. She pled guilty to one count of facilitating the retention or control of the appellant's proceeds of crime. The amount involved in her case was $24,950.00 and she was sentenced to four months imprisonment.

3. In the appellant's case, count one involved $338,920.00 in cash in his possession on 2 April 2009, count four $369,640.00 in cash in his possession on 3 April 2009 and count 5, conversion, transfer or removal of $1,579,296.21 from Bermuda between 7 January 2004 and 19 April 2009. So the total was just under 2.3 million dollars.

4. As originally indicted, count 5 (but not counts one and four) alleged that the money removed from Bermuda represented his proceeds of criminal conduct for the purpose of avoiding prosecution for drug trafficking or a relevant offence. However, the appellant tendered and signed a written basis of plea stating that the money in each count represented the proceeds of criminal conduct contrary to section 155 of the Criminal Code 1907 i.e. keeping a gaming house and the proceedings continued on that basis.

5. When the appellant was arrested on 2 April 2009 his house was searched and various amounts of cash were found totalling the sum in count one. Also found were three safe deposit keys in a Bank of Butterfield envelope. The money in count four was recovered from that safe deposit.

6. When the appellant was interviewed he said the cash (or some of it) had been given to him by a Mr Robinson who had since died. A review of the appellant's known finances, lifestyle and expenditure during the relevant period strongly suggested he had not only benefited from his criminal activity but that by the level of his benefit he was very close to the antecedent offending.

7. Leading counsel submitted to the judge on the appellant's behalf that he was engaged in running gambling dens and that this was the source of the money. Before us Mr Richardson submitted that it was one gambling den only and that those were his instructions. It does not, however, seem to us to make any difference to the outcome of this appeal whether the appellant had run one gambling den or several. If it was only one it has generated an astonishing amount of money over a five-year period.

8. Although it is difficult to accept that 2.3 million dollars was the proceeds of running a gambling den or dens, that was the basis of the appellant's plea and the prosecution had no evidence to establish that there was any other source. Understandably, therefore, the plea was accepted.

9. The appellant used a number of different methods of laundering to cover the extent of his proceeds of criminal conduct. These were:

- currency exchanges;
- layering by using the bank accounts of others;
- utilizing the proceeds for apparently legitimate expenditure in particular building a family home with money that left and then returned to Bermuda;
- removal of funds from Bermuda by wire transfer or international money payments;
- removal of funds from Bermuda by cash couriers.

Most of the transactions involved simple currency exchanges and payments into and out of third party accounts.

10. Particular features of the appellant's criminality were:

- the period over which the offences were committed-, namely 5 years;
- the variety of laundering methods employed;
- the amount of funds laundered;
- the infrastructure created by the appellant;
- the involvement of secondary parties as unwilling participants thus subjecting them to criminal investigation;
- the considerable financial gain for the appellant.

11. The thrust of Mr Richardson's submission was that since the maximum penalty for an offence under section 155 of the Criminal Code 1907 is two years imprisonment, this was an important factor in determining the appropriate sentence. He accepted that money laundering was a different offence from running a gambling den but contended that the criminal conduct giving rise to the funds was low on the scale of gravity and that the sentence should not exceed three years imprisonment. This was the same argument Mr Perry QC had run on the appellant's behalf before the Chief Justice in the Supreme Court.

12. We cannot accept this submission. The link between the laundering and running a gambling den or dens is at best tenuous and rests on no more than an assertion by the appellant. Nor do we accept that he could not have been prosecuted for more than one offence under section 155 of the Criminal Code 1907 on his account of events. The ability to launder the proceeds did not in any way assist the commission of the underlying offence. The launderings were standalone offences committed for reasons independent of the gaming. The position is very different from, for example, laundering the proceeds of drug trafficking, where the criminal scheme may well involve transferrig the proceeds of crime outside Bermuda.

13. The appellant has given no detail of his gaming operation or operations, not even where it took place or how the deceased Mr Robinson was involved. Nor has he explained why it was necessary to undertake so many different laundering procedures.

14. The amount and period involved (nearly 2.3 million dollars over 5 years) indicates that the underlying offence, whatever it was, was of an equivalent scale. If that offence was, as the appellant claims, the keeping of a gaming house that was not only an unlawful but also a very substantial operation.

15. There was much debate before us about the link between the money laundering and the underlying offence and its relevance to the length of sentence. The starting point is that money laundering under The Proceeds of Crime Act l097 is an offence in its own right whatever the underlying criminal source of the funds. The scale and period of the laundering by the appellant suggests that the underlying offence (whatever its nature) was of an equivalent scale.

16. In our judgment the correct approach to sentence in a case such as this is that the appellant should be sentenced on the basis of the established features of his criminality as set out in paragraph 10 above. True it is that the appellant's pleas were on the basis that the monies came from a gambling den or dens and this was accepted in the absence of evidence of any other source. But the appellant has provided no detail or evidence that might mitigate the established features. On the other hand the plea eliminates any suggestion that there was some other source of the money such as any trafficking which might have aggravated the offences.

17. In *R v Basra* [2002] EWCA CRIM 541 Cooke J giving the judgment of the Court of Appeal (Criminal Division) said money laundering was a standalone offence where the constituent elements may be many and varied. He added at para 15 that there was not necessarily a direct relationship between the sentence for the laundering offence and the original antecedent offence.

> "T*he criminality in laundering arises from the encouragement and nourishment it gives to crime in general. Without it many crimes would be rendered much less fruitful and perhaps more difficult to perpetrate."*

With that observation we respectfully agree. We would, however, add this. The maximum sentence for money laundering in Bermuda is twenty years imprisonment whereas in the United Kingdom it is fourteen years. There is in our view a reason for this which the Chief Justice touched upon in his sentencing remarks in relation to the co-defendant. There is a strong public interest in upholding the integrity of the financial sector and deterring those who would subvert it and that is particularly important in relation to Bermuda. Integrity of the financial sector is of crucial importance to the Island's well being. Those who jeopardise its reputation, whether in a large or small way, can expect severe punishment.

18. We were referred to a number of English cases but we do not think a great deal of assistance can be gleaned from the level of sentence imposed in those cases. First, because the maximum penalty is different and secondly, because money laundering cases depend very much on their own particular facts.

19. In the present case there is no evidence that the appellant was laundering the proceeds of crime of others; it was all his own. The appellant has not condescended to provide any details of the nature of the gaming operation or operations that formed the basis of his plea. It is not necessary to send money abroad for reasons connected with gaming. One is left, therefore, with the following aggravating features of the offence: A long period, the amount involved, the variety of methods used and the involvement of others. In mitigation there is the late plea of guilty and his cooperation with the authorities in the confiscation proceedings.

20. We cannot accept that the maximum penalty for one offence for keeping a gaming house has any relevance to the sentence in the present case. This was a bad case of money laundering whatever the history of the funds before they were laundered by the appellant. In our view, 5 years imprisonment was an entirely appropriate sentence. Had the source of the funds been drug money, this would have been an additional aggravating feature and a significantly longer sentence would have been appropriate.

Signed

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Baker, JA

Signed

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Zacca, P

Signed

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Evans, JA