HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 18

on appeal from:[2004] EWCA Crim 2936

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R *v.* Saik (Appellant) (On Appeal from the Court of Appeal (Criminal Division))

Appellate Committee

Lord Nicholls of Birkenhead
Lord Steyn
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. This appeal raises questions about the ingredients of the statutory offence of conspiracy and their application in the circumstances of this case. Shorn of its complexities the context is a charge of conspiracy to launder money brought against the appellant, Mr Abdulrahman Saik. He operated a bureau de change in London, near Marble Arch. At his trial he pleaded guilty, subject to the qualification that he did not know the money was the proceeds of crime. He only suspected this was so. This qualified plea was accepted. The issue before your Lordships is whether the offence to which the appellant pleaded guilty in this qualified way is an offence known to law. Reasonable grounds for suspicion are enough for the substantive offence of laundering money. But are they enough for a conspiracy to commit that offence?

2. The mental ingredient in the statutory offence of conspiracy has given rise to difficulty. Some of the case law is confusing, and the academic commentators do not always speak with one voice. The best way to tackle this conundrum is to consider first the ingredients of criminal conspiracy, then apply this approach to a conspiracy to commit the substantive offence of laundering, and finally consider the complication introduced by the form of the plea entered by the appellant.

The statutory offence of criminal conspiracy

3. The Criminal Law Act 1977 redefined conspiracy and put it on a statutory footing. The offence-creating provision is section 1(1). So far as material for present purposes section 1(1), as substituted by the Criminal Attempts Act 1981, provides:

> '…if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions … (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement …he is guilty of conspiracy to commit the offence or offences in question.'

The offence therefore lies in making an agreement. Implicitly, the subsection requires also that the parties intend to carry out their agreement. The offence is complete at that stage. The offence is complete even if the parties do not carry out their agreement. The offence is complete even if the substantive offence is not thereafter committed by any of the conspirators or by anyone else.

4. Thus under this subsection the mental element of the offence, apart from the mental element involved in making an agreement, comprises the intention to pursue a course of conduct which will necessarily involve commission of the crime in question by one or more of the conspirators. The conspirators must intend to do the act prohibited by the substantive offence. The conspirators' state of mind must also satisfy the mental ingredients of the substantive offence. If one of the ingredients of the substantive offence is that the act is done with a specific intent, the conspirators must intend to do the prohibited act and must intend to do the prohibited act with the prescribed intent. A conspiracy to wound with intent to do grievous bodily harm contrary to section 18 of the Offences of the Person Act 1861 requires proof of an intention to wound with the intent of doing grievous bodily harm. The position is the same if the prescribed state of mind regarding the consequence of the prohibited act is recklessness. Damaging property, being reckless as to whether life is endangered thereby, is a criminal offence: Criminal Damage Act 1971, section 1(2). Conspiracy to commit this offence requires proof of an intention to damage property, and to do so recklessly indifferent to whether this would endanger life.

5. An intention to do a prohibited act is within the scope of section 1(1) even if the intention is expressed to be conditional on the happening, or non-happening, of some particular event. The question always is whether the agreed course of conduct, if carried out in accordance with the parties' intentions, would necessarily involve an offence. A conspiracy to rob a bank tomorrow if the coast is clear when the conspirators reach the bank is not, by reason of this qualification, any less a conspiracy to rob. In the nature of things, every agreement to do something in the future is hedged about with conditions, implicit if not explicit. In theory if not in practice, the condition could be so far-fetched that it would cast doubt on the genuiness of a conspirator's expressed intention to do an unlawful act. If I agree to commit an offence should I succeed in climbing Mount Everest without the use of oxygen, plainly I have no intention to commit the offence at all. Fanciful cases apart, the conditional nature of the agreement is insufficient to take the conspiracy outside section 1(1).

6. Section 1(2) qualifies the scope of the offence created by section 1(1). This subsection is more difficult. Its essential purpose is to ensure that strict liability and recklessness have no place in the offence of conspiracy. The subsection provides:

> 'Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.'

7. Under this subsection conspiracy involves a third mental element: intention or knowledge that a fact or circumstances necessary for the commission of the substantive offence will exist. Take the offence of handling stolen goods. One of its ingredients is that the goods must have been stolen. That is a fact necessary for the commission of the offence. Section 1(2) requires that the conspirator must intend or know that this fact will exist when the conduct constituting the offence takes place.

8. It follows from this requirement of intention or knowledge that proof of the mental element needed for the commission of a substantive offence will not always suffice on a charge of conspiracy to commit that offence. In respect of a material fact or circumstance conspiracy has its own mental element. In conspiracy this mental element is set as high as 'intend or know'. This subsumes any lesser mental element, such as suspicion, required by the substantive offence in respect of a material fact or circumstances. In this respect the mental element of conspiracy is distinct from and supersedes the mental element in the substantive offence. When this is so, the lesser mental element in the substantive offence becomes otiose on a charge of conspiracy. It is an immaterial averment. To include it in the particulars of the offence of conspiracy is potentially confusing and should be avoided.

9. The phrase 'fact or circumstance necessary for the commission of the offence' is opaque. Difficulties have sometimes arisen in its application. The key seems to lie in the distinction apparent in the subsection between 'intend or know' on the one hand and any particular 'fact or circumstance necessary for the commission of the offence' on the other hand. The latter is directed at an element of the actus reus of the offence. A mental element of the offence is not itself a 'fact or circumstance' for the purposes of the subsection.

10. This contrast can be illustrated by the offence of entering into an arrangement whereby the retention by another person (A) of A's proceeds of crime is facilitated, knowing or suspecting A has been engaged in crime: section 93A of the Criminal Justice Act 1988, now repealed. The requirement that the defendant must know or suspect A's criminal history is an element of the offence, but it is a mental element. The need for the defendant to have this state of mind is not a fact or circumstance within section 1(2). Another ingredient of the offence is that the property involved must be the proceeds of crime. That is a fact necessary for the commission of the offence and section 1(2) applies to that fact. The contrary analysis in *R* v *Sakavickas* [2005] 1WLR 857, 863, para 17, was erroneous.

11. The genesis of this feature of the legislation lies in the ingredients of the common law offence of conspiracy as enunciated by your Lordships' House in *R v Churchill* [1967] 2 AC 224. There the defendant was charged with the common law offence of conspiracy to commit a statutory offence. The statutory offence was an offence of strict liability. The House held that the conspirator was not guilty of the

offence of conspiracy if on the facts known to him the act he agreed to do was lawful.

12. This principle was accepted by the Law Commission in its subsequent report on Conspiracy and Criminal Law Reform (Law Com no 76) para 1.39:

> 'What the prosecution ought to have to prove is that the defendant agreed with another person that a course of conduct should be pursued which would result, if completed, in the commission of a criminal offence, and further that they both knew any facts they would need to know to make them aware that the agreed course of conduct would result in the commission of the offence.'

This report led to the enactment of the Criminal Law Act 1977.

13. The rationale underlying this approach is that conspiracy imposes criminal liability on the basis of a person's intention. This is a different harm from the commission of the substantive offence. So it is right that the intention which is being criminalised in the offence of conspiracy should itself be blameworthy. This should be so, irrespective of the provisions of the substantive offence in that regard.

14. Against that background I turn to some issues concerning the scope and effect of section 1(2). The starting point is to note that this relieving provision is not confined to substantive offences attracting strict liability. The subsection does not so provide. Nor would such an interpretation of the subsection make sense. It would make no sense for section 1(2) to apply, and require proof of intention or knowledge, where liability for the substantive offence is absolute but not where the substantive offence has built into it a mental ingredient less than knowledge, such as suspicion.

15. So much is clear. A more difficult question arises where an ingredient of the substantive offence is that the defendant must *know* of a material fact or circumstance. On its face section 1(2) does not apply in this case. The opening words of section 1(2), on their face, limit the scope of the subsection to cases where a person may commit an offence *without* knowledge of a material fact or circumstance.

16. Plainly Parliament did not intend that a person would be liable for conspiracy where he lacks the knowledge required to commit the substantive offence. That could not be right. Parliament could not have intended such an absurd result. Rather, the assumption underlying section 1(2) is that, where knowledge of a material fact is an ingredient of a substantive offence, knowledge of that fact is also an ingredient of the crime of conspiring to commit the substantive offence.

17. There are two ways this result might be achieved. One is simply to treat section 1(2) as inapplicable in this type of case. This would mean that the knowledge requirement in the substantive offence would survive as a requirement which must also be satisfied in respect of a conspiracy. In the same way as a conspirator must intend to do the prohibited act with any specific intent required by the substantive offence, so he must intend to do the prohibited act having the knowledge required by the substantive offence. Accordingly, on this analysis, where knowledge of a fact is an ingredient of the substantive offence, section 1(2) is not needed.

18. The other route is to adopt the interpretation of section 1(2) suggested by Sir John Smith. The suggestion is that section 1(2) applies in such a case despite the opening words of the subsection. Section 1(2) is to be read as applicable *even* 'where liability for an offence may be incurred without knowledge [etc]'. It is difficult to see what other function the word 'nevertheless' has in the subsection. This may seem a slender peg on which to hang a conclusion of any substance, but it is enough: see 'Some Answers' [1978] Crim LR 210.

19. The first route accords more easily with the language of section 1(2), but I prefer the second route for the following reason. A conspiracy is looking to the future. It is an agreement about future conduct. When the agreement is made the 'particular fact or circumstance necessary for the commission' of the substantive offence may not have happened. So the conspirator cannot be said to *know* of that fact or circumstance at that time. Nor, if the happening of the fact or circumstance is beyond his control, can it be said that the conspirator *will* know of that fact or circumstance.

20. Section 1(2) expressly caters for this situation. The conspirator must 'intend or know' that this fact or circumstance 'shall or will exist' when the conspiracy is carried into effect. Although not the happiest choice of language, 'intend' is descriptive of a state of mind which is

looking to the future. This is to be contrasted with the language of substantive offences. Generally, references to 'knowingly' or the like in substantive offences are references to a past state of affairs. No doubt this language could be moulded appropriately where the offence charged is conspiracy. But the more direct and satisfactory route is to regard section 1(2) as performing in relation to a conspiracy the function which words such as 'knowingly' perform in relation to the substantive offence. That approach accords better with what must be taken to have been the parliamentary intention on how the phrase 'intend or know' in section 1(2) would operate in this type of case. Thus on a charge of conspiracy to handle stolen property where the property has not been identified when the agreement is made, the prosecution must prove that the conspirator *intended* that the property which was the subject of the conspiracy *would* be stolen property.

21. In my view, therefore, the preferable interpretation of section 1(2) is that the subsection applies to all offences. It applies whenever an ingredient of an offence is the existence of a particular fact or circumstance. The subsection applies to that ingredient.

The Criminal Justice Act 1988, section 93C

22. I must now take this a step further and confront another difficulty. I can do this most readily by reference to the substantive offence relevant in the present case: section 93C of the Criminal Justice Act 1988. This section was inserted into the 1988 Act by section 31 of the Criminal Justice Act 1993. It has now been superseded. Section 93C(2) provided:

> 'A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he-
>
> (a) conceals or disguises that property; or
>
> (b) converts or transfers that property or removes it from the jurisdiction,
>
> for the purpose of assisting any person to avoid prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order.'

23. The acts prohibited by this offence are listed in paragraphs (a) and (b): concealing or disguising the property, or converting or transferring the property or taking it abroad. Thus a conspiracy to commit this offence involves an agreement to do one or more of these acts. Further, the agreement must be an agreement to do one or more of these acts for one or more of the stated purposes. Another ingredient of the substantive offence is that the property in question must emanate from a crime: *R v Montila* [2004] 1 WLR 3141. The criminal provenance of the property is a fact necessary for the commission of the offence. This fact falls within section 1(2). So, applying section 1(2) to that fact, the prosecution must prove the conspirator intended or knew that fact would exist when the conspiracy was carried out. Hence, where the property has *not* been identified when the conspiracy agreement is reached, the prosecution must prove the conspirator *intended* that the property would be the proceeds of criminal conduct.

24. If these ingredients are established the offence of conspiracy is made out. In this type of case, namely, where the conspiracy related to unidentified property, there is no question of having to prove that the property *was* the proceeds of criminal conduct. In this type of case that is not possible. It is not possible because the property which was the subject of the conspiracy had not been identified when the conspiracy was entered into. Despite this, the crime of conspiracy will be committed. It will be committed even if the property never materialises or never exists. The observation in paragraph 147 in the court's judgment in *R v Ali* [2006] 2 WLR 316, 351, should not be read as applying *in this type of case*.

25. What, however, if the property to which the conspiracy relates *was* specifically identified when the conspirators made their agreement? In that event the prosecution must prove the conspirators 'knew' the property was the proceeds of crime. This is the next point of difficulty in the interpretation of section 1(2). Does 'know' in this context have the meaning attributed to it in the *Montila* case when considering the substantive offence? If it does, the identified property to which the conspiracy related must actually be or represent the proceeds of crime, and the conspirator must be aware of this. Or does 'know' in this context mean 'believe', as seems to be suggested in *R v Ali* [2006] 2 WLR 316, 335, para 98? On the ordinary use of language a person cannot 'know' whether property is the proceeds of crime unless he participated in the crime. He can only believe this is so, on the basis of what he has been told. Adopting this approach would mean that, so far as section 93C is concerned, equating knowledge with belief in the case of identified property would achieve a measure of symmetry with the

requirement of intention in the case of unidentified property. It would mean that in both cases what matters is the conspirator's state of mind: the actual provenance of the property would not be material.

26. I do not think the latter approach can be accepted. The phrase under consideration ('intend or know') in section 1(2) is a provision of general application to all conspiracies. In this context the word 'know' should be interpreted strictly and not watered down. In this context knowledge means true belief. Whether it covers wilful blindness is not an issue arising on this appeal. As applied to section 93C(2) it means that, in the case of identified property, a conspirator must be aware the property was in fact the proceeds of crime. The prosecution must prove the conspirator knew the property was the proceeds of criminal conduct.

The appellant's plea

27. The offence with which this appellant was charged was 'conspiracy to convert the proceeds of drug trafficking and/or criminal conduct contrary to section 1(1) of the Criminal Law Act 1977'. The essence of the particulars of the offence was that the appellant and others 'conspired together ... to convert ... banknotes, for the purpose of assisting another to avoid prosecution for ... a criminal offence ..., knowing or having reasonable grounds to suspect that such property… represented another person's proceeds of ... criminal conduct.'

28. These particulars were drafted before the decision of the House in the *Montila* case. Post-*Montila*, these particulars are not happily framed. They are misleading in two respects. They ignore the effect of section 1(2) of the 1977 Act. And by reproducing all the ingredients of the offence created by section 93C(2), in particular by incorporating the phrase 'knowing or having reasonable grounds to suspect', these particulars might be taken to suggest that for the purpose of the conspiracy charge 'having reasonable grounds to suspect' was an alternative to proving knowledge. This is not so. The effect of section 1(2) was that the prosecution had to prove intention or knowledge.

29. This formulation of the particulars may well have contributed to the qualified form in which the appellant entered his plea of guilty. He pleaded guilty 'on the basis of laundering money which he suspected was the proceeds of crime'. One surmises this plea was intended to be a plea in mitigation, not a denial of having committed any offence. Be

that as it may, this plea was accepted by the prosecution, and on this basis the appellant was convicted.

30. From what has been said above, it is evident that this conviction for conspiracy cannot stand. Suspicion is not sufficient in respect of a fact to which section 1(2) applies. Knowledge or intention regarding the provenance of the property must be proved or admitted. I agree with the conclusion expressed by Hooper LJ in *R v Ali* [2006] 2 WLR 316, 351, para 148.

31. Mr Peters QC struggled valiantly but vainly to overcome this difficulty. Suspicion, he said, means that the appellant was aware the banknotes might be the proceeds of crime. The appellant intended to convert the banknotes even if they were the proceeds of crime. Thus his intention was akin to a conditional intention: he would convert banknotes representing criminal proceeds if they were presented to him. That was a sufficient intention to satisfy both section 1(1) and section 1(2) of the 1977 Act.

32. I am unable to accept this submission. Suspicion, as a state of mind, is not properly to be analysed and dissected as counsel sought to do. In ordinary usage, and time and again in statutes, a distinction is drawn between suspicion and knowledge. The former is not to be equated with the latter. Section 1(2) explicitly requires a conspirator to 'intend or know' that the relevant fact 'shall or will' exist. That is not the state of mind of a conspirator who agrees to launder money he only suspects may be criminal proceeds. He does not 'intend' the money will be the proceeds of crime, conditionally or otherwise. He simply suspects this may be so, and goes ahead regardless. A decision to deal with money suspected to be the proceeds of crime is not the same as a conscious decision to deal with the proceeds of crime.

33. The distinction thus drawn is not altogether satisfactory in terms of blameworthiness. But this does not entitle the House to erode the distinction clearly drawn by Parliament in section 1(2) between (a) intending or knowing that a relevant fact shall or will exist, and (b) lesser states of mind, such as recklessness or suspicion, regarding the existence of a relevant fact. Parliament intended that in conspiracy cases proof of recklessness or suspicion would not suffice. In conspiracy cases the prosecution must go further. The unattractive outcome in the present case derives from the impact, post-*Montila*, of the way the particulars of the offence were framed and the acceptance of

the appellant's qualified plea. But the desire to avoid an unattractive outcome in the present case cannot justify a distorted interpretation of section 1(2). It is not for the courts to extend the net of criminal conspiracy beyond the reach set by Parliament.

34. Counsel further submitted that by pleading guilty the appellant accepted he had the requisite purpose. By his plea he accepted all the ingredients of the charged offence with the one exception of knowledge. Thus he accepted that he intended to convert the banknotes for the purpose of assisting another to avoid prosecution for a criminal offence etc. That state of mind, it was submitted, is consistent only with the appellant knowing the money represented the proceeds of crime.

35. Again I cannot agree. I readily accept that, evidentially and inferentially, it is a short step from proof that the defendant's purpose was to assist someone to avoid prosecution to a conclusion that the defendant was aware the property had an illicit provenance. But that is an evidential inference. That step cannot properly be taken on the basis of a qualified plea which expressly proceeds on the footing of suspicion only.

36. In the present case the Court of Appeal, comprising Scott Baker LJ, Dame Heather Steel and Judge Roberts QC, expressed their conclusion as follows ([2004] EWCA Crim 2936, para 67):

> '... if two people ... agree that property shall be converted or transferred, and each of them knows or suspects that the property represents the proceeds of criminal conduct and realises that the purpose of the conversion or transfer is to assist someone to avoid prosecution for the criminal conduct which they know or suspect has been committed, that is sufficient to make each of them guilty of conspiracy to contravene s.93C(2). There is nothing in s.1(2) of the 1977 Act which in any way affects this conclusion.'

37. This decision was given before the decision of your Lordships' House in the *Montila* case. At that time the provenance of the property was not understood to be an ingredient of the substantive offence. It was not a fact necessary for the commission of the offence. That is no longer the law. For the reasons set out above this reasoning of the Court

of Appeal cannot now stand. I would allow the appeal and set aside the appellant's conviction. I would answer 'no' to the first certified question. I would answer the second certified question in the sense set out in the speech of my noble and learned friend Lord Hope of Craighead. In an endeavour to avoid unnecessary complexity I have deliberately refrained from commenting on each of the recent reported authorities in this field. I mean no disrespect thereby to the experienced judges who decided these cases. I cannot conclude without recording my indebtedness to Professor Ormerod's article 'Making Sense of *Mens Rea* in Statutory Conspiracies', Current Legal Problems (2006). I have taken the liberty of drawing freely on this valuable survey of a notoriously difficult subject.

LORD STEYN

My Lords,

38. I have found the legal analysis set out in the opinion of my noble and learned friend Lord Nicholls of Birkenhead compelling. For the reasons Lord Nicholls has given I would also allow the appeal and set aside the appellant's conviction.

LORD HOPE OF CRAIGHEAD

My Lords,

39. This case raises an important and difficult issue about what the prosecution must prove where the defendant is alleged to have been engaged with others in a continuing course of conduct which involves the commission of the offence of money laundering. It has become the practice in cases of this kind, in order to avoid the problem of duplicity which arises where a defendant is charged on one count with having committed two or more separate offences, to charge the defendant on a single count of conspiracy. In 1977, on the recommendation of the Law Commission, the common law offence of conspiracy was abolished, with only a few exceptions. It was replaced by the general statutory offence which is set out in section 1 of the Criminal Law Act 1977. Money laundering has never been a common law offence. Various

statutory offences have been created to deal with it. Some relate to the proceeds of drug trafficking. Others relate to the proceeds of crime generally.

40. A prosecutor who wishes to take criminal proceedings for conspiracy against a defendant who is alleged to have engaged in a continuing course of money laundering has to face up to the consequences of this statutory framework when he is considering whether he has a case that can go to trial. They are to be found in the answers that must be given to two questions. What are the essential elements of the substantive statutory offence of money laundering? And are these elements compatible with the statutory offence of conspiracy?

41. His problems are not made easier by the fact that, while the statutory offence of conspiracy was conceived as an inchoate crime, the essence of what he seeks to prove in these cases is not that the defendant was conspiring with others to commit an offence in the future. What he seeks to prove is that the defendant has got beyond that stage and has acted in pursuance of the conspiracy by actually engaging in money laundering. Dealing with a series of completed criminal acts by charging the defendant with conspiracy is a device. Its aim is to ensure that the entire course of conduct is brought under scrutiny in one count and that, when it comes to sentence, the defendant is punished for the totality of his criminal activity. This is as it should be, of course. But the statutory offence of conspiracy was not designed for use in this way. The prosecutor is trying to fit a square peg into a round hole. That is not always possible.

The case against the defendant

42. The appellant was charged with conspiracy to launder money which was the proceeds of drug trafficking or other criminal activity. He pleaded guilty to this offence in the Crown Court at Kingston-upon-Thames on 18 October 2002. On 22 October 2002 he was sentenced by Judge Binning to seven years imprisonment. On 12 December 2003 the Court of Appeal granted him leave to appeal against his conviction. He also applied for leave to appeal against his sentence, and that application was heard together with his appeal against conviction. On 24 November 2004 the Court of Appeal (Scott Baker LJ, Dame Heather Steel DBE and HHJ Roberts QC) allowed the appeal against sentence. The sentence of seven years was quashed and replaced with one of five and

half years imprisonment. But his appeal against conviction was dismissed. It is his conviction that is the subject of this appeal.

43. The offence with which the appellant was charged was set out in these terms in count 3 of the indictment:

> "Conspiracy to convert the proceeds of drug trafficking and/or criminal conduct contrary to sec 1(1) of the Criminal Law Act 1977."

Several other defendants were charged on the same indictment with drug trafficking and other money laundering conspiracies. The particulars relating to count 3 were designed to give notice of how the conspiracy offence was to be linked to the substantive offence of money laundering. Some of the wording was taken from section 93C(2) of the Criminal Justice Act 1988 in which the elements of the substantive offence were set out. The particulars of the offence were in these terms:

> "[The appellant and two other defendants named German Lemos and John J Ruiz] between the 1st day of May 2001 and the 1st day of March 2002 conspired together and with persons unknown to convert property, namely banknotes, for the purpose of assisting another to avoid prosecution for a drug trafficking offence and/or a criminal offence or avoiding the making of or the enforcement of a confiscation order, knowing or having reasonable grounds to suspect that such property in whole or in part, directly or indirectly, represented another person's proceeds of drug trafficking and/or criminal conduct."

44. The appellant operated a currency exchange office. The prosecution case was that in the course of that business and between the dates referred to he converted a substantial quantity of pounds sterling provided by other defendants in the form of cash into foreign currency, and that the cash was or represented the proceeds of drug trafficking or other criminal activity. As Viscount Simon observed in *Crofter Hand-Woven Harris Tweed Co v Veitch* [1942] AC 435, 439, conspiracy when regarded as a crime is an agreement between two or more persons to effect any criminal purpose and it is complete if there is such agreement, even though nothing is done to give effect to it. In this case however the allegation was that the conspiracy was put into effect by engaging in a

course of criminal conduct between the dates mentioned in the particulars.

45. When the appellant pleaded guilty to count 3 he did so in accordance with a written basis of plea which was drawn on his behalf by leading counsel, signed by him and accepted by the prosecution. So far as material to his appeal against conviction it was in these terms:

> "1. The defendant Saik pleads guilty on the basis of laundering money which he suspected was the proceeds of crime.
>
> 2. He only became suspicious from about December 2001, when the number of transactions became more voluminous."

The defendant Lemos pleaded guilty to count 3 on the basis that he knew that the money was the proceeds of drug trafficking. The defendant Ruiz also pleaded guilty to count 3. He did so on the basis that he was acting under the direction of Lemos.

46. In the Court of Appeal the appeal against conviction was argued on two distinct grounds. The first was that the conviction was unsafe as a matter of law. The second was that the plea of guilty was the result of erroneous advice that the appellant had received from his legal advisers. On 26 May 2005 the Court of Appeal, having rejected both arguments, certified that the following points of law of general public importance were involved in the first ground only. These points were the following:

> "1. Can a defendant be convicted of a statutory conspiracy to contravene section 93C(2) of the Criminal Justice Act 1988 if he enters into an agreement to convert property in respect of which he had reasonable grounds to suspect and did in fact suspect but did not actually know was the proceeds of crime?
>
> 2. Is the objective requirement that a defendant can be convicted of an offence under section 93C(2) of the Criminal Justice Act 1988 if he had reasonable grounds to suspect that the property converted etc was the proceeds of crime (without having actual knowledge or suspicion) incompatible with the subjective requirement that the

activity of the defendant must be for the specified purpose of assisting another to avoid prosecution for a criminal offence or avoiding the making or enforcement of a confiscation order?"

The statutory provisions

47. To put flesh on the bones of what is set out in the preceding paragraphs I must now set out the statutory provisions on which count 3 of the indictment was based. They are to be found in section 1 of the Criminal Law Act 1977 and in section 93C(2) of the Criminal Justice Act 1988. Section 93C(2) was repealed when the Drug Trafficking Act 1994, the Criminal Justice Act 1988 and the corresponding legislation in Scotland and Northern Ireland were replaced by the Proceeds of Crime Act 2002.

48. Section 1 of the 1977 Act creates the statutory offence of conspiracy. The relevant subsections are subsection (1), as substituted by section 5 of the Criminal Attempts Act 1981, and subsection (2), which provide:

"(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either –

(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or

(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

he is guilty of conspiracy to commit the offence or offences in question.

(2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of the conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact

> or circumstance shall or will exist at the time when the conduct constituting the offence is to take place."

49. The conspiracy referred to in count 3 was to engage in a course of conduct contrary to section 93C(2) of the Criminal Justice Act 1988. This was one of a series of money laundering and other offences inserted by sections 29 to 32 of the Criminal Justice Act 1993 into Part VI of the 1988 Act, which introduced the power to make confiscation orders. Section 93C of the 1988 Act, which was inserted by section 31 of the 1993 Act, dealt with concealing or transferring the proceeds of criminal conduct. Subsection (2) of this section provided:

> "A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he –
>
> (a) conceals or disguises that property; or
>
> (b) converts or transfers that property or removes it from the jurisdiction,
>
> for the purpose of assisting any person to avoid prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order."

The offences to which that Part of the Act applied included any indictable offence other than a drug trafficking offence: section 71(9)(c) of the 1988 Act. Sections 29 to 32 of the 1993 Act extended not to England and Wales only but to Great Britain: section 79(3). This is relevant to something that I shall say later about how a continuing course of conduct contrary to section 93C(2) of the 1988 Act would have been prosecuted in Scotland.

50. The issue to which most of the argument in this appeal was directed is that raised by the first of the two certified questions. It raises some difficult questions about the interaction between the offence created by section 93C(2) of the 1988 Act and the offence of conspiracy as defined by section 1 of the 1977 Act. The second question raises a different and more straightforward issue about how a contravention of section 93C(2) can be proved. I should like to deal briefly with the second question first before addressing myself to the problem about section 1 of the 1977 Act which is raised by the first question. I do not

think that application of section 1 to a conspiracy to commit a statutory offence ("the principal offence") can be understood without a clear understanding of the mens rea that is required for the commission of the substantive offence.

Section 93C(2) of the 1988 Act

51. Section 93C(2) requires proof of what the defendant knew or had reasonable grounds to suspect on the one hand, and of the purpose for which he engaged in the activities that the subsection prescribes on the other. The appellant submits that there is an incompatibility between these two requirements. This is because proof that the defendant had reasonable grounds to suspect is an objective requirement – it does not require proof of an actual suspicion on his part – while proof that his purpose was to assist another to avoid prosecution or the making of a confiscation order is a subjective one. How, Mr Krolick asked, can a person who did not know that the property was another person's proceeds of criminal conduct, and of whom all that can be said is that he had reasonable grounds to suspect that this was so, be held to be guilty of engaging in the prescribed activities for the purpose which the subsection describes? He said that the two propositions were incompatible. The prosecution could never establish that the defendant had the required purpose if all that it could establish was that he had reasonable grounds to suspect, but did not actually suspect, that the property was the proceeds of criminal conduct.

52. I think that the apparent mismatch between these two requirements is based on a misunderstanding of what the first proposition involves. The test as to whether a person has reasonable grounds to suspect is familiar in other contexts, such as where a power of arrest or of search is given by statute to a police officer. In those contexts the assumption is that the person has a suspicion, otherwise he would not be thinking of doing what the statute contemplates. The objective test is introduced in the interests of fairness, to ensure that the suspicion has a reasonable basis for it. The subjective test – actual suspicion – is not enough. The objective test – that there were reasonable grounds for it – must be satisfied too. In *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286, where the issue related to the test in section 12(1) of the Prevention of Terrorism (Temporary Provisions) Act 1984 which gave power to a constable to arrest a person without warrant if he had reasonable grounds for suspecting that he was concerned in acts of terrorism, I said at p 298A-C:

> "In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed."

53. The words used in section 93C(2) can, in my opinion, be analysed in the same way. By requiring proof of knowledge or of reasonable grounds to suspect that the property was criminal proceeds, the subsection directs attention in the case of each of these two alternatives to what was in the mind of the defendant when he engaged in the prohibited activity. Proof that he had reasonable grounds to suspect the origin of the property is treated in the same way as proof of knowledge. The subsection assumes that a person who is proved to have had reasonable grounds to suspect that the property had a criminal origin did in fact suspect that this was so when he proceeded to deal with it. A person who has reasonable grounds to suspect is on notice that he is at the same risk of being prosecuted under the subsection as someone who knows. It is not necessary to prove actual knowledge, which is a subjective requirement. The prosecutor can rely instead on suspicion. But if this alternative is adopted, proof of suspicion is not enough. It must be proved that there were reasonable grounds for the suspicion. In other words, the first requirement contains both a subjective part – that the person suspects – and an objective part – that there are reasonable grounds for the suspicion.

54. The second requirement, as to what the purpose was, is where the essence of the mens rea of the offence is to be found. It must be proved that the defendant's purpose was to launder the proceeds of another person's criminal conduct. If he knows the criminal origin of the property, his knowledge is linked to his purpose in engaging in the activity. If he had reasonable grounds to suspect that it had a criminal origin, his suspicion is linked to his purpose in the same way. Proof of what his purpose was will usually have to be found by drawing inferences. Evidence that the defendant knew or had reasonable grounds to suspect will usually be sufficient to show what his purpose was when, knowing or suspecting what the origin of the property was, he actually engaged in the prescribed activity.

55. The appellant tendered his plea of guilty to laundering money on the basis that he suspected that the money was the proceeds of crime. In my opinion this plea was based on a correct understanding of the offence created by section 93C(2). He was entitled to qualify his plea by referring to what the substantive offence requires for its commission. So qualified, the plea implied an acceptance on his part that, when he laundered the money, he suspected that it was the proceeds of crime and that he had reasonable grounds for doing so. It is to be noted that the plea does not mention the word conspiracy. The appellant was seeking to mitigate his part in the affair by making it clear that, when he committed the substantive offences, his role was a subsidiary one. He suspected but did not know. The question to which I now turn is whether what he pleaded guilty to was a contravention of the offence that he was actually charged with, which was conspiracy.

Section 1 of the 1977 Act

56. The statutory offence of conspiracy is committed by a person who agrees with any other person to engage in a course of conduct which will amount to or involve the commission of a crime. The essential elements of the offence are set out in section 1(1). The defendant and at least one other person must have entered into an agreement that a course of conduct will be pursued. And the course of conduct must be one which, if the agreement is carried out in accordance with their intentions, will necessarily amount to or involve the commission of an offence by one or more of the parties to the agreement. If the link between the offence and the intended consequences of the agreement is established, the defendant will be guilty of conspiracy to commit that offence.

57. In *R v Churchill* [1967] 2 AC 224 it was held that if on the facts known to them at the time of their agreement what the parties agreed to was lawful, they were not rendered guilty of conspiracy to commit an offence by the existence of other facts not known to them which gave a different and criminal quality to the act or course of conduct that they had agreed on: Viscount Dilhorne, p 237. The offence that was in issue in that case was an offence of strict liability. Section 1(2) codifies this principle. It does so in language which was designed to make it clear that, while ignorance of the law was no excuse, full knowledge of the consequences of the agreement was required: see the Law Commission's Report, *Conspiracy and Criminal Law Reform* (Law Com No 76), 1976, paras 1.39- 1.41. It was designed also to exclude recklessness as to the consequences. In para 1.41 the Law Commission

recognised that the mental element which their proposals required was a stringent one, adding this explanation:

> "However, we think that the stringency we recommend is fully justified by the fact that conspiracy is essentially an inchoate offence which is committed before any prohibited event has in fact taken place."

58. A provision to give effect to this proposal was included in clause 1(3) of the draft Bill appended to the report. Section 1(2) does not follow its language precisely, but the requirement that the defendant and at least one other party to the agreement must "intend or know" that the fact or circumstance "shall or will exist" at the time when the conduct constituting the offence is to take place was taken directly from the draft Bill. There is no doubt that the requirement was designed to eliminate the risk that someone could be guilty of conspiracy just because he was reckless as to the existence or otherwise of the circumstances that would make the conduct criminal. In his commentary on this subsection in *Current Law Statutes*, Professor Edward Griew of Leicester University, noted that offences that might be committed without knowledge of the facts that gave the act a criminal quality are not confined to offences of strict liability. They include offences where recklessness as to some fact was a minimum but sufficient requirement:

> "There are many offences, for example, which require knowledge or recklessness as to the falsity of some statement. But only knowledge of the falsity will ground liability for conspiracy to commit such an offence. All this is as the Law Commission intended: Law Com Report, paras 1.39 et seq."

A preliminary analysis

59. The concepts on which sections 1(1) and 1(2) were based are easy to state but not nearly so easy to apply in practice. This has been the subject of a vigorous debate ever since. It began with two articles by Professor J C Smith: Conspiracy under the Criminal Law Act 1977 (1) [1977] Crim L R 598; Conspiracy under the Criminal Law Act 1977 (2) [1977] Crim L R 638. In his first article at p 603 Professor Smith said that the purpose of section 1(2) was to ensure that strict liability and recklessness had no place in conspiracy, even if the agreement was to

commit a crime which might be committed recklessly or a crime of strict liability. In his second article at p 641, footnote 32, he observed that most of the difficulties of construction of these two subsections were due to the lengths to which the Law Commission had gone to exclude recklessness, flowing from the use of the words "necessarily" in subsection (1) and "intend or know" in subsection (2). He pointed out that *Churchill v Walton* [1967] 2 AC 224 did not decide whether recklessness was a sufficient mens rea on a charge of conspiracy at common law. In the law of attempts, while there must be an intention to bring about the consequences of the crime alleged to be attempted, it was possible that recklessness as to the circumstances which were the ingredients of the offence would suffice. At p 642 he said:

> "The question remains open: but probably the better view is that intention in the strict sense as to consequences is necessary, whereas recklessness as to circumstances may be enough."

60. These articles were soon followed by an article by Professor Glanville Williams, The New Statutory Offence of Conspiracy- I (1977) 127 New L J 1164, and comments by Professor D W Elliott and Adrian Lynch on Mens Rea in Statutory Conspiracy [1978] Crim L R 202 to which Professor Smith replied in a further comment at p 210 entitled Some Answers. Dealing with recklessness as to circumstances, Professor Glanville Williams disagreed with Professor Smith. At p 1166 he said that it was probable that at common law recklessness as to circumstances was sufficient to found liability for conspiracy where it was enough for the substantive crime. He gave as an example an agreement to make a statement which all the parties to the agreement knew might or might not be true to get money as a result of which, if they got the money, they would be guilty of obtaining property by deception. But he did not accept that recklessness would be enough in the case of the statutory offence:

> "Section 1(2) appears to insist upon knowledge for conspiracy in these circumstances, so that, in the example given, the parties must know that facts exist that are the contradictory of what they say, notwithstanding that this knowledge is not required for the consummated offence. It is difficult to see any solid reason for restricting the offence of conspiracy in this way, and the law may well be different for attempt and incitement.

> *A fortiori*, there can be no conspiracy by recklessness as to *future* circumstances. To be guilty of conspiracy, the plotters must believe that the required future circumstances *will* exist, not *may* exist."

61. The mens rea of the offence which section 93C(2) creates is of a kind that was not discussed, and which may not even have been foreseen, by the Law Commission in 1976. Suspicion was not among the various problems that were mentioned by those who criticised the legislation in 1977. This offence can be committed without knowledge that the property is another person's proceeds of criminal conduct. But it is not an offence of strict liability. Nor is it an offence whose mens rea includes recklessness. The minimum requirement is that, when he entered into the agreement to launder the money that was to be handed over to him, the defendant suspected that the property was criminal proceeds and that he had reasonable grounds for doing so. The problem is that suspicion falls short of knowledge.

62. The margin between knowledge and suspicion is perhaps not all that great where the person has reasonable grounds for his suspicion. Failure to ask or to obtain an answer to the obvious question may be described as wilful blindness. In *R v Griffiths* (1974) 60 Cr App R 14, 18, James LJ said that to direct a jury that, in common sense and in law, they may find that the defendant knew or believed goods to have been stolen because he deliberately closed his eyes to the circumstances was a perfectly proper direction. That no doubt is why, for the purposes of the substantive offence of laundering the proceeds of criminal conduct, knowledge and suspicion for which the person has reasonable grounds are treated by the statute in the same way. It is immaterial, for the purposes of this offence, into which of these two categories the defendant falls. In either case he will have the necessary mens rea if he does any of the acts that the subsection refers to for the purpose of assisting any person to avoid prosecution for an offence or the making or enforcement of a confiscation order.

63. But the appellant in this case was charged with conspiracy. It is not easy to see how a case where the mens rea for the substantive offence is based on suspicion for which there are reasonable grounds can be fitted into the language of sections 1(1) and 1(2). The problem has not been assisted by the practice of prosecuting several acts of money laundering which have taken place over a period under the umbrella of the statutory offence of conspiracy. Concepts which were designed to fit with the idea that conspiracy is an inchoate offence are

being applied to cases where the only proof that there was a conspiracy is provided by evidence of the course of conduct, from which inferences as to the state of mind of the participants are then drawn. The problem is made all the more acute in this case because the appellant pleaded guilty before any evidence was led. All we have is his plea and the statement that explains the basis for it.

The developing case law

64. Your Lordships were referred to a series of cases where the courts have attempted, with varying degrees of success, to make sense of this way of prosecuting offences of money laundering. I do not think that anything is to be gained by examining all of them. The important stages in the development of the law are indicated by the following.

65. In *R v Singh* [2003] EWCA Crim 3712 the appellant was convicted on three counts of conspiracy to launder money. The prosecution case was that he and his co-accused engaged in money laundering between June 1999 and March 2000. The particulars on each count contained an allegation that he and his co-conspirators engaged in transactions which were prohibited by section 49(2)(b) of the Drug Trafficking Act 1994 and section 93C(2)(b) of the 1988 Act, "knowing or having reasonable grounds to suspect that certain property, namely banknotes, was, or in whole or in part directly or indirectly represented, another person's proceeds of drugs trafficking and/or criminal conduct". It was submitted for the appellant that the words "knowing or having reasonable grounds to suspect", whilst apt for an allegation of the principal offences, were not sufficient to describe what had to be proved for guilt of the statutory conspiracy. For the prosecution it was submitted that an averment of intent as an alternative to knowledge was not necessary in a charge of conspiracy. The intent was inherent in the unlawful agreement alleged.

66. Rejecting the appellant's argument, Auld LJ said in para 34:

> "If two or more people intend and agree to commit an act that they know to be unlawful, then knowledge or mistake as to a fact critical to the success of the conspiracy is immaterial to its proof; the intention is proxy for, or more correctly an alternative to, knowledge of such a fact. And,

> it follows, gradations of knowledge, such as 'reasonable grounds to suspect' it, are irrelevant."

He added that the inclusion of words such as "knowing or having reasonable grounds to suspect" taken from the substantive offences was an immaterial averment. Summing up in para 35, he said that there was no point of substance in the appellant's complaint that something short of knowledge was alleged in the indictment when, given the thrust of the prosecution case, knowledge of the precise provenance of the banknotes was not at the heart of the conspiracy but intention to launder illicitly obtained money was.

67. I find it hard to accept that an averment taken from the substantive offences is an immaterial averment where the defendant is charged with conspiracy to commit those offences when it would be an essential averment if the substantive offences themselves were the subject of the charge. Proof of an intention to commit the substantive offence, it seems to me, is an essential part of proving the offence of any conspiracy. It must be proved that the activity that the parties to the conspiracy were intending to engage in would amount to or involve the commission of a crime. As a general rule all the elements that require to be established for the commission of that crime must be explained to the jury, because they cannot find the defendant guilty of conspiracy unless they are sure that the activity that he and the others were proposing to engage in was itself criminal. The solution which the Court of Appeal adopted in *Singh* is no doubt correct, because it is faithful to the wording of the state of mind that requires to be established for a conspiracy. But it is open to the objection that it shifts attention away from the wording of section 93C(2) to the words of section 1(2). It works in favour of the defendant in a way that was not anticipated by Parliament when it enacted section 93C(2). It raises the threshold from that required to establish the state of mind described in section 93C(2) to that required to establish the state of mind described in section 1(2).

68. In *R v Sakavickas* [2004] EWCA Crim 2686; [2005] 1 WLR 857, [2005] Crim LR 293, the appellants were convicted of a conspiracy to assist another to retain the benefit of criminal conduct. The substantive offence was in section 93A of the 1988 Act, which makes this an offence where the accused knew or suspected that the other person had engaged in or benefited from criminal conduct. The issue on appeal was whether a person was guilty of a conspiracy to commit that offence if he had a mere suspicion of the criminal character of the person with whom the arrangement was entered into. It was submitted for the appellants

that section 1(2) of the 1977 Act applied and that, in order to be guilty of conspiracy, the alleged offender and at least one other person had to intend or know that the money to be laundered was or was to be the proceeds of another person's crime when the offence contrary to section 93A was taking place. Dismissing the appeal, the court held that section 1(2) did not apply to an offence contrary to section 93A of the 1988 Act. In its view, the fact or circumstance necessary for the commission of the offence was the suspicion of the defendant. Establishing suspicion also established knowledge of that suspicion. The defendant must inevitably have knowledge of his own state of mind: para 17.

69. Here too the solution adopted by the Court of Appeal is open to the objection that it avoids, rather than solves, the problem. As Professor David Ormerod points out in his commentary on this case [2005] Crim LR 293, 296, no one would suggest that a defendant who was charged with the substantive offence must be shown to have both a reasonable suspicion that the money was criminal proceeds and knowledge of the fact that his own state of mind was that suspicion. As the language of section 93C(2) itself shows, that is not the way it is intended to work. Why should it work in a different way where the defendant is charged with conspiracy? Various examples can be envisaged where it would make no sense for this double test to be an essential part of proving a conspiracy. The Court of Appeal failed to address the real problem that section 1(2) raises when it is read with section 93C(2). The knowledge which section 1(2) requires is knowledge of the facts and circumstances that must be proved as part of the actus reus of the substantive offence.

70. The decisions of the Court of Appeal in *Singh* and *Sakavickas* preceded the decision of this House in *R v Montila* [2004] 1 WLR 3141. In that case the appellants were not charged as parties to a conspiracy. The case against them was directed instead to the substantive offences of money laundering in section 49(2) of the Drug Trafficking Act 1994 and section 93C(2) of the 1988 Act. It was held that the offences described in these sections proceeded on the basis that the property in question in fact had its origins in criminal conduct, and that this was an essential part of the actus reus of the offences. As the Appellate Committee said in its report, para 27,

> "A person cannot know that something is A when in fact it is B. The proposition that a person knows that something is A is based on the premise that it is true that it is A. The fact that the property is A provides the starting point.

> Then there is the question whether the person knows that the property is A."

In para 30 it said that it would make no sense to say that a defendant was guilty of an offence of money laundering simply because he had reasonable grounds to suspect that the property had a criminal origin, when he was in a position to prove that it was not property of that kind at all.

71. In *R* v *Harmer* [2005] EWCA Crim 1, [2005] Crim LR 482, which was decided after *Montila*, the appellant and a co-defendant were charged with conspiracy to launder property which they had reasonable grounds to suspect was the proceeds of drug trafficking or other criminal conduct. The prosecution accepted that they could not establish that the property was the proceeds of crime, and it was not alleged that the defendants knew that it had a criminal origin. The case went to trial before the decision of this House in *Montila*. The trial judge did not direct the jury that it was necessary for the prosecution to prove that the money was in fact the proceeds of drug trafficking or other criminal conduct, and he was convicted.

72. Allowing the appeal, May LJ, giving the judgment of the court, accepted the appellants' interpretation of section 1(1)(a) see para 23:

> "Mr Kane's central submission is that the statutory definition of conspiracy comprising section 1(1)(a) of the 1977 Act embraces an agreement whereby the conspirators intend and agree to commit 'an offence or offences'. *Montila* decides that converting or transferring property which a defendant has reasonable grounds to suspect represents another person's proceeds of crime is not an offence, unless the Crown also prove that the property is the proceeds of crime. The Crown, therefore, did not establish in the present case that the appellant was guilty of conspiracy under section 1(1)(a), since they did not establish that the object of the agreement was an offence. In our judgment, this is clearly a correct construction of the subsection."

In para 25 he said that there was a further answer to the Crown's submission. As he explained in para 26, this was the requirement in

section 1(2) that, where the substantive charge was that the defendant had reasonable grounds to suspect (but did not know) that the money was the proceeds of crime, he was not to be guilty of conspiracy unless he and at least one other party to the agreement intended or knew that the money would be the proceeds of crime when the agreed conduct took place:

> "This intention or knowledge is precisely what the prosecution in the present case accepted they could not prove when the words 'knew or' were omitted from the particulars of count 2. If the prosecution cannot prove that the money was the proceeds of crime, they cannot prove that the appellant knew that it was. So section 1(2) of the 1977 Act applies and is not satisfied."

This decision does, at last, address the real issues that arise in this kind of case, although in his commentary on the following case, *R v Liaquat Ali and others* [2005] EWCA Crim 87, [2005] Crim L R 864, 867, Professor Ormerod said that the court was right to cast doubt on what was said in *Harmer* about section 1(1)(a). Referring to the Court of Appeal's judgment in *Singh*, May LJ said that it did not in the court's view survive *Montila*. I agree.

73. In *R v Liaquat Ali and others* [2005] EWCA Crim 87 the appellants were convicted on two counts of conspiracy to contravene section 49(2) of the Drug Trafficking Act 1994. It was submitted for the appellants that the effect of the decision in *Montila*, taken together with sections 1(1) and 1(2) of the 1997 Act, was that a person could not be guilty of a conspiracy to commit an offence against section 49(2) or section 93C(2) unless he and another person knew at the time of the agreement that the property was the proceeds of drug trafficking or of other criminal conduct. So a count of conspiracy to commit either of these offences which included the words "reasonable grounds to suspect" or even the word "suspect" was bad in law under section 1(1)(a) of the 1977 Act in the light of *Montila*. And a count in these terms fell foul also of section 1(2) of the 1977 Act in the light of *Montila*, as that subsection required the defendant and another co-conspirator to intend or know at the time of the agreement that the property was in fact the proceeds of drug trafficking or other criminal conduct.

74. Allowing the appeal, Hooper LJ, giving the judgment of the court, said in para 111 that, as the jury were directed to convict only if they were sure that at least part of the money was in fact the proceeds of drug trafficking, section 1(1)(a) of the 1977 Act was satisfied. But in para 139 he said that, following *Montila*, the substantive offences under section 49(2) and 93C(2) required proof that the defendant was in fact dealing with the proceeds of drug trafficking or other criminal conduct. Section 1(2) of the 1977 Act came in at this stage, and the jury could only convict of conspiracy if the defendant knew that he was dealing with such proceeds. In para 147 he said that it seemed to the court that *Singh* could not survive *Montila*. An intention to launder illicitly obtained money was not enough. The money must be proved to have been the proceeds of drug trafficking or other criminal conduct and, as he put it, "onto that requirement, section 1(2) of the 1977 Act bites". Hooper LJ recognised that the decision which he felt compelled to reach was unsatisfactory. In para 151 he said that its consequence was that, if it was right, the prosecution had a heavier burden to discharge that it would have in order to prove the substantive offence. But, as he observed in para 150, the prosecution accepted that it would not have been open to it to charge each delivery of money separately, given the rule against duplicity in rule 4(2) of the Indictment Rules 1971. In my opinion the Court of Appeal reached the right decision in *Ali*, and there is much in its reasoning with which I agree.

The meaning of the words used

75. I must now return to the words of the statute. It seems to me that the best way to discover the meaning of the words used in section 1 to define the statutory offence of conspiracy is to assume that one is dealing, as the Law Commission intended, with an allegation of an inchoate crime. A conspiracy is complete when the agreement to enter into is formed, even if nothing is done to implement it. Implementation gives effect to the conspiracy, but it does not alter its essential elements. The statutory language adopts this approach. It assumes that implementation of the agreement lies in the future. The question whether its requirements are fulfilled is directed to the stage when the agreement is formed, not to the stage when it is implemented.

76. First there is section 1(1). It refers to (i) an agreement, (ii) a course of conduct to be pursued under that agreement and (iii) the fact that, if the agreement is carried out as intended, it "will necessarily" amount to or involve the commission of an offence by one or more of the parties to the agreement. Let us assume that there are two parties to

the agreement: parties X and Y. X is in possession of cash which he knows is the proceeds of crime (A). Y does not know the cash is A, which it is. But he suspects that it is A, and he has reasonable grounds for his suspicion. The agreement is that X will hand over the cash to Y, and that Y will immediately convert it into a different currency. If the agreement is carried out as they intend, the cash will be converted. The conversion of cash which is A by someone who knows that it is A is an offence contrary to section 93C(2). X knows that the cash is A. So the carrying out of the agreement between X and Y in accordance with their intentions will necessarily amount to the commission of an offence by X. This is enough to satisfy section 1(1)(a). But the carrying out of the agreement will also necessarily amount to the commission of an offence by Y. The cash will be A, because that is the fact known to X. And the conversion of cash which is in fact A by someone who has reasonable grounds to suspect that it is A is an offence under section 93C(2).

77. In the present case, exiguous though the facts are in the light of the appellant's plea, they must be understood in the light of what is averred in the particulars. We can assume therefore that the conspiracy took the form of an agreement between the appellant and Lemos that the banknotes which Lemos was to hand over to the appellant were to be converted into foreign currency. Lemos pleaded guilty to knowing that the banknotes were the proceeds of crime. That can be taken to be the fact, as he could not know that the banknotes were the proceeds of crime when they were not. I think that it follows that the carrying out of the agreement according to their intentions would necessarily amount to the commission of an offence by Lemos. The same is true of the appellant even though he only suspected, but did not know, that the cash was the proceeds of crime. I would hold that the requirements of section 1(1)(a) are satisfied in this case.

78. But there remains section 1(2). It is necessary to address this question too, because Y can incur liability for an offence under section 93C(2) without knowledge of a fact necessary for the commission of the offence – that the cash is A. Section 1(2) tells us that a person shall not be guilty of the conspiracy to commit that offence by virtue of subsection (1) unless he and at least one other party to the agreement "intend or know" that the fact necessary for the commission of the offence – that the cash is A – "shall or will exist" at the time when the cash is converted into a different currency. There is no problem about X, of course. He knows that the cash which he will hand over to Y is A. He knows that it will be A when the conduct takes place – when it is converted into a different currency. But what about Y? He suspects that the cash is A. But he does not know that it is, or that it will be when it is

handed over to him and he converts it. Can it be said that he intends that it should be A, when he does not know what he will be dealing with? Solving this problem is not easy because the word "intend" in section 1(2) refers to the existence of a fact or a circumstance, not to the consequences of giving effect to the agreement. But the words "shall or will" indicate that nothing short of intention or knowledge as to its existence will do.

79. I think that the answer to this question will depend on the facts. It could be said of Y that he knows enough about the purpose of the transaction because of the grounds for his suspicion for it not to matter whether he will be able to tell by looking at the cash that it is in fact the proceeds of crime. It may be open to the Crown to prove that Y knew very well what the purpose of the agreement was – that he knew that the cash was to be converted to assist someone to avoid prosecution for an offence or the making or enforcement of a confiscation order, which is what section 93C(2) refers to. It might be going too far to say that he knew that the cash would be A when he came to deal with it. But it could be inferred that he intended that the cash would be A, because he knew that that was the only purpose of the transaction.

80. But in this case all we know is that the appellant suspected that the money "was" the proceeds of crime. The appellant must be dealt with according to the terms of his plea. We cannot say that he was wilfully blind as to the purpose of the agreement, because that is not what he admits to. He suspected that he was being asked to convert the proceeds of criminal conduct. But he did not know that this was the origin of the money that was actually being given to him. He was prepared to go ahead and convert the money without knowing that it was in fact the proceeds of crime. It would not be quite right to say that he was reckless. All he was to do was simply to convert money from one currency into another – an everyday transaction which involves no risk to anyone. But he was willing to go ahead with this without troubling to find out whether or not what he was proposing to do was criminal. A person who is in that state of mind cannot be said to intend that the fact or circumstance that makes his act criminal should exist. That being the position I would hold that, although he was suspicious, the appellant cannot be said to have intended that the money should be the proceeds of crime when he came to deal with it.

Conclusion

81. Given the terms of his plea, I see no escape from the conclusion that the appellant's case is caught by section 1(2) of the 1977 Act. He cannot be said to be guilty of the conspiracy to commit the substantive offence under section 93C(2) because he did not know, and therefore did not intend, that the money which he agreed to convert would be the proceeds of crime when at some future date he came to perform his part of the agreement. I would allow the appeal and set aside the conviction.

A postscript

82. As Hooper LJ observed in *R v Liaquat Ali and others* [2005] EWCA Crim 87, para 151, the consequence of the approach to the meaning of section 1(2) of the 1977 Act which I favour is that the prosecution has a heavier burden to discharge in suspicion cases which are charged as a conspiracy than it would have to prove the substantive offence. He made some suggestions, which I would respectfully endorse, as to how this problem might be addressed. I think however that may be worth adding these further comments.

83. In my opinion the position that has now been reached compares unfavourably with the way in which the same course of criminal conduct would have been dealt with by the Crown in Scotland, to which section 93C(2) of the 1988 Act also extends: see section 79(3) of the Criminal Justice Act 1993. Conspiracy is still a common law crime in Scotland. But it is not the practice to resort to a conspiracy charge in cases where the substantive offence is a statutory one. The reason is that the Crown does not need to do this in order to obtain a conviction for engaging in a continuing course of criminal conduct.

84. It is, of course, the law in Scotland too that a person cannot be punished more than once for the same offence. And Lord Bingham of Cornhill CJ's statement in *R v Kidd* [1998] 1 WLR 604, 607B-C that a person cannot be lawfully punished for offences for which he has not been indicted and which he has denied or declined to admit and have not been proved against him is as true for Scotland as it is for England and Wales. But it has always been open to the prosecutor in Scotland to allege by way of a single charge (or count, as it would be called in England) that the accused engaged in a continuing course of criminal conduct which involved the commission of a series of identical criminal

acts. This practice is resorted to in a wide variety of cases, including sexual offences against children and crimes of dishonesty such as fraud or embezzlement, where the acts tend to be repeated many times before they are detected. It may be resorted to also in cases involving the statutory offences of money laundering.

85. If this had been done in *Liaquat Ali's* case, each act of money laundering within the period specified in the indictment would have been treated not as a separate offence but as part of the same continuing course of criminal conduct. If the accused had been found guilty, a single sentence would have been imposed on him, not for each act of money laundering taken separately but for engaging in a course of criminal conduct that was made up of all of the acts that were proved against him. In that way the objection that he was at risk of being charged in one count for two or more separate offences would have been avoided.

86. On 10 March 2006, for example, Zohaib Assad and Mohammad Ahmad were found guilty after trial in the High Court of Justiciary at Glasgow on three charges of money laundering, contrary to sections 327(1)(d) and (e), 329(1)(c) and 330(1) of the Proceeds of Crime Act 2002. The charges of which they were convicted narrated that they had engaged in this conduct "between 23 February 2003 and 26 September 2003, both dates inclusive". Their acts in possessing the money, transferring it overseas and failing to disclose what they were doing were treated as separate activities and hence as separate crimes. In the first charge they were accused of non-disclosure, contrary to section 330(1). In the second charge it was narrated that between these dates they had possession of "criminal property, namely qualities of cash amounting to £2,827,078.75 of money", contrary to section 329(1)(c). In the third charge it was narrated that between these dates they transferred and removed from Scotland "criminal property, namely quantities of cash amounting to £2,256,646.00 of money" by paying the cash into a bank and transferring its value to Pakistan, the United Arab Emirates and China, contrary to section 327(1)(d) and (e). The lesser amount in the third charge reflected the fact that not all of the money referred to in the second charge had been removed from Scotland. The accused were convicted on each of these charges on the terms set out in the indictment, except that the amount in the second charge was amended at the close of the Crown case to £2,442,318.75. Assad was sentenced to three years imprisonment on the first charge, to seven years on the second and to seven years on the third. Ahmad was sentenced to two years imprisonment on the first charge, to six years on the second

and to six years on the third. These sentences were all to be served concurrently.

87. I understand, of course, that the system of prosecuting crime in Scotland differs in many respects from that in England and Wales and that it is not possible simply to export isolated parts of that system from one jurisdiction to another. The narrative form of charge that is used in Scotland is a significant difference. It is competent at any time before the determination of the case, unless the court sees just cause to the contrary, for the prosecutor to amend the indictment by deletion, alteration or addition to cure any variation between it and the evidence: Criminal Procedure (Scotland) Act 1995, section 96(2). This enables an accused who wishes to plead guilty to identify precisely, word by word, the parts of the narrative in any charge that he pleads guilty to and the parts that fall outside the scope of his plea. The narrative can also be amended by the jury when it returns its verdict in the light of the evidence. An attempt was made, following recommendations by the Law Commission (Law Com No 277), in section 17 of the Domestic Violence, Crime and Victims Act 2004 to devise a system which was suitable for use in England and Wales which would overcome the problem caused by the duplicity rule. But strong opposition was expressed to that section as not being in the interests of justice, and it has not yet been brought into force. A further study of how these matters are handled in Scotland might point the way forward. In any event, something must be done soon if offences of the kind enacted by section 93C(2) of the 1988 Act which are now to be found in Part 7 of the Proceeds of Crime Act 2002 are not to be impossible of prosecution, or at least more difficult to prosecute than the wording used to describe those offences contemplates, because of the duplicity rule.

BARONESS HALE OF RICHMOND

My Lords,

88. A and B agree that A will bring money into B's bureau de change and that B will change it into another currency. A knows that the money he intends to bring in is the proceeds of crime. B does not know this but he has thought about it. He suspects that the money will be the proceeds of crime and intends to exchange it even if this is so. Is either of them guilty of the crime of conspiracy?

89. Section 1 of the Criminal Law Act 1977 defines the statutory offence of conspiracy:

> "(1) Subject to the following provisions of this Part if this Act, of a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either –
>
> (a) will necessarily amount to or involve the commission of any offence or offences *by one or more* of the parties to the agreement, or
>
> (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,
>
> he is guilty of conspiracy to commit the offence or offences in question.
>
> (2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless *he and at least one other party* to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place."

90. This offence was created as a result of the Law Commission's recommendations in their Report, *Conspiracy and Criminal Law Reform*, 1976, Law Com No 76. This was part of the Commission's programme of codification of the criminal law. The eventual aim was to abolish all the remaining common law offences and replace them, where appropriate, with offences precisely defined by statute. The common law offences were seen as unacceptably vague and open to development by the courts in ways which might offend the principle of certainty. There was an additional problem that it could be a criminal conspiracy at common law to engage in conduct which was not in itself a criminal offence: see Law Com No 76, para 1.7. This was a major mischief at which the 1977 Act was aimed, although it retained (as a temporary measure) the convenient concept of a common law conspiracy to defraud: see Law Com No 76, paras 1.9 and 1.16. Henceforward it

would only be an offence to agree to engage in a course of conduct which was itself a criminal offence.

91. The substantive criminal offence in issue here is that which used to be contained in section 93C(2) of the Criminal Justice Act 1988 (as amended by the Criminal Justice Act 1993 and now replaced by Part 7 of the Proceeds of Crime Act 2002):

> "A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he –
>
> (a) conceals or disguises that property; or
>
> (b) converts or transfers that property or removes it from the jurisdiction,
>
> for the purpose of assisting any person to avoid prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order."

92. Difficulties have arisen in the application of statutory conspiracy to this offence (among others). The tendency of courts and prosecutors has been to ask themselves, has the substantive offence been committed? If so, was it the result of an agreement or collaboration between two or more people? Did it happen more than once, over a period of time, with different combinations of perpetrators? If so, would it not be a great deal more convenient, and easier to explain to a jury, if we charge it as a single conspiracy rather than as a series of separate substantive offences?

93. Yet it is absolutely plain that the offence of conspiracy consists in the agreement, not its carrying out. The offence can be committed whether or not the plot is ever put into effect or the substantive offence committed. Thus it is *not* an essential ingredient of the crime of conspiracy to launder the proceeds of crime that the money in the conspirators' contemplation actually be such proceeds, whereas this is an essential ingredient of the substantive offence: see *R v Montila* [2004] 1 WLR 3141. This makes conspiracy a harsh and controversial crime. Equally, it is plain that the mere fact that the substantive offence has been committed does not necessarily mean that the individuals guilty of it are also guilty of conspiracy. Perhaps some of the difficulties

have arisen because of an understandable tendency to conclude that if the substantive offence has been committed then those who were "in it together" must be guilty of conspiracy.

94. Thus, in the example given above, it is clear that both A and B are guilty of the section 93C(2) offence. One transfers and one converts. One knows and one suspects (with reasonable cause) that it is the proceeds of crime. One has the prescribed purpose and the other must have it if, as he suspects, the money is the proceeds of crime. The money is, in fact, the proceeds of crime. It is scarcely surprising, therefore, that they pleaded guilty to the conspiracy and the court accepted their plea.

95. But it does not follow that they *are* guilty of conspiracy. As conspiracy is a "thought crime", which may be committed without any overt acts other than those manifesting the agreement, the state of mind required for the conspiracy may be different from, and more exacting than, the state of mind required for the substantive offence. It all depends upon the application of section 1(1) and (2) of the 1977 Act to the facts.

96. In this example, I believe that we are all agreed that the requirements of section 1(1) have been met. A and B agreed to engage in a course of conduct. That course of conduct, if carried out in accordance with their intentions, will necessarily involve the commission of the section 93C(2) offence by A. That is enough to meet section 1(1). B is a conspirator even if what is agreed upon will not involve him in the commission of any substantive offence.

97. I believe that we are also agreed that, at this stage of the inquiry, their intentions may be conditional. There are many different kinds of conditional intent. There may be factual circumstances necessary to the carrying out of the purpose: we will blow up the Palace of Westminster if the King comes to open Parliament. Or there may be pre-conditions which the conspirators have set themselves: we will use our bombs if the IRA cease-fire ends. No substantive crime will be committed unless the condition materialises, but it is now generally accepted that they are guilty of a conspiracy to commit that crime. Or there may be provision for contingencies which could arise in a necessarily uncertain future: we will shoot if we have to in order to accomplish our purpose; or we will assist a suicide if we think it appropriate.

98. In all those examples, both parties are involved in the guilty intention. They need not know that what they intend is a crime, but they know all they need to know in order to discover that it would be a crime were they to ask a lawyer about it. In our example, however, A knows everything but B only suspects. His intention is not to convert the money *only if* it is the proceeds of crime but to convert the money *even if* it is the proceeds of crime. He may be guilty of the substantive offence of converting the money without actually knowing the fact necessary for the commission of the offence, that the money is in fact the proceeds of crime. Thus section 1(2) applies to him. We do not need to consider Professor Elliott's 'scandalous paradox' (though we may share his views) "*Mens Rea* in Statutory Conspiracy, (1) A Comment" [1978] Crim LR 202, 205.

99. Therefore B is not guilty of conspiracy unless both he and A "intend or know" that the money is the proceeds of crime. A knows that it is. B does not. But does he *intend* that it will be? Is a conditional intent of the "even if" kind sufficient for the purpose of section 1(2) as many think that it is for the purpose of section 1(1)? My Lords, I cannot see why it should be sufficient for the one but not for the other. The main objection in both cases is that it could be seen as "a recklessness formula in disguise", a phrase taken from Professor David Ormerod's most helpful Current Legal Problems lecture, "Making Sense of *Mens Rea* in Statutory Conspiracies" (2006) CLP forthcoming, to which I am much indebted. Even the late Professor JC Smith seems to have regretted that the Law Commission, in their determination to exclude recklessness, might have "thrown out the baby, conditional intention, with the bathwater, recklessness" (see "*Mens Rea* in Statutory Conspiracy: Some Answers" [1978] Crim LR 210, at 212). My Lords, I do not think that they did. The dividing line between them may be narrow, but it is discernible. Once again, it is important to distinguish between what happens when the substantive offence is committed – when the men have intercourse with the woman whether or not she consents – and what happens when they agree to do so. When they agree, they have thought about the possibility that she may not consent. They have agreed that they will go ahead *even if at the time when they go ahead they know that she is not consenting*. If so, that will not be recklessness; that will be intent to rape. Hence they are guilty of conspiracy to rape.

100. So if, in our example, the conspirator agrees to launder the money even if at the time he does so he is told that it is in fact the proceeds of crime, then he does indeed intend that fact to be the case when he does the deed. The fact that he is equally happy to convert the money even if it is not the proceeds of crime makes no difference. So

perhaps the real question for the jury is, "what would he have done if, when the money came in, someone had let him know the truth?" Would he have said, "take it away"? Or would he have said "hand it over"?

101. In my view, this provides an entirely principled and sensible way of making sense of the language of section 1(1) and (2) of the 1977 Act. It can also make sense of the appellant's plea. He would have converted the money even if he had known that it was the proceeds of crime. But he did not know, so he hoped for a more lenient sentence as a result of persuading the prosecution to accept a plea on that basis. Much ink has been spilled, in and out of the courts, on this knotty problem, and I could spill some more; but as I understand that your Lordships take a different view from mine, there is little to be gained by my saying any more than that I agree with Professor Ormerod's views on this matter.

102. In common with all of your Lordships, I agree that the substantive offence requires that the accused *actually* suspects that the money is the proceeds of crime. Without that actual suspicion, he cannot act with the purpose required. I would therefore have answered the second certified question accordingly. But in respectful disagreement with your Lordships, I would have answered the first certified question as follows: "yes, provided that he intended to put the agreement into effect even if the property was in fact the proceeds of crime".

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

103. I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Hope of Craighead. I agree with him that the appeal must be allowed and the appellant's conviction set aside. Because of the obvious importance of the case, however, and because for my part I have found it a difficult one, I wish to express my own reasoning. I can do so comparatively briefly: all the relevant facts and law are helpfully set out in Lord Hope's speech and I shall repeat only the most essential matters.

104. The two questions certified by the Court of Appeal for your Lordships' determination are these:

> "(1) Can a defendant be convicted of a statutory conspiracy to contravene section 93C(2) of the Criminal Justice Act 1988 if he enters into an agreement to convert property . . . which he had reasonable grounds to suspect was the proceeds of crime and did in fact suspect but did not actually know was the proceeds of crime?
>
> (2) Is the objective requirement that a defendant can be convicted of an offence under section 93C(2) of the Criminal Law Act 1988 if he had reasonable grounds to suspect that the property converted etc was the proceeds of crime (without having actual knowledge or suspicion) incompatible with the subjective requirement that the activity of the defendant must be for the specified purpose of assisting another to avoid prosecution for a criminal offence or avoiding the making or enforcement of a confiscation order?"

105. It is convenient to start with the second question since this goes directly to the substantive offence under section 93C(2) and arises, therefore, before one comes to consider the crime of conspiracy (the subject of the first question).

106. Section 93C(2) provides:

> "A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he—
>
> (a) conceals or disguises that property; or
>
> (b) converts or transfers that property or removes it from the jurisdiction,
>
> for the purpose of assisting any person to avoid prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order."

107. For simplicity's sake I shall hereafter refer to (i) "property [which] is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct" as "hot property" (the equivalent of Lord Hope's description in paragraph 76 of cash being

"A"); (ii) any treatment of such hot property described in paragraphs (a) and (b) of the subsection as its "laundering"; and (iii) the purpose of assisting someone to avoid prosecution or confiscation as "an illicit purpose".

108. If indeed the section contemplated that the defendant (D) might be guilty of the offence merely because "he had reasonable grounds to suspect" that the property was hot (i.e. merely because objectively grounds existed which would make a reasonable person suspect that the property was hot), then certainly I would regard that as incompatible with the requirement that D also be proved to have laundered the hot property for an illicit purpose. Plainly he could not have that illicit purpose unless subjectively he also either actually knew or at the very least suspected the property to be hot. It is, therefore, I readily accept, necessarily implicit in the section that not only must D have reasonable grounds to suspect that the property is hot but also that he *does* suspect it. That requirement, of course, presents no problem whatever in the present case: the appellant *did* suspect that the money he had laundered was the proceeds of crime and, indeed, he pleaded guilty (to the conspiracy count) on that explicit bass.

109. I should perhaps add that I can see an argument for suggesting that not even actual suspicion that the property is hot is a sufficient basis for inferring that when laundering it D had the necessary illicit purpose: if all D knows is that the property may be hot and he suspects it is, it is not immediately obvious that any dealing with it is then for an illicit purpose. Again, however, it seems to me necessarily implicit in the section that it is. The section would otherwise be unworkable. The illicit purpose requirement must be regarded as satisfied whenever property is laundered by someone suspecting it to be hot. He has at least that contingent purpose.

110. None of these difficulties, it should be noted, arise under the legislation in its present form: Part 7 of the Proceeds of Crime Act 2002. Section 328(1) provides that "A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person," and section 340(3) states that: "Property is criminal property if (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit."

111. I pass to the altogether more difficult question arising on the appeal, the scope for a conspiracy charge in the context of section 93C(2) offences. Section 1 of the Criminal Law Act 1977 as amended provides:

> "(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—
>
> (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
>
> (b) would do so but for the existence of acts which render the commission of the offence or any of the offences impossible,
>
> he is guilty of conspiracy to commit the offence or offences in question.
>
> (2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of the conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place."

112. As Lord Hope observes at paragraph 75, a conspiracy is complete when the agreement to enter into it is formed, even if nothing is done to implement it, and the statutory language itself assumes that implementation of the agreement lies in the future: "The question whether its requirements are fulfilled is directed to the stage when the agreement is formed, not to the stage when it is implemented."

113. True it is, as observed by the Law Commission in their 1976 Report (paragraph 1.22) that not all the parties to the agreement need to have evinced their consent at the same time or on the same occasion, nor indeed need each have been in communication with every other or be aware of each other's identity. But each conspirator must entertain a common purpose in relation to the specific offence or offences which

are its object. As the Court of Appeal said in *R v Ardalan* [1972] 1 WLR 463, 469-470:

> "The essential point in dealing with this type of conspiracy charge [i.e. 'cartwheel' or 'chain' conspiracies], where the prosecution have brought one, and only one, charge against the alleged conspirators, is to bring home to the minds of the jury that before they can convict anybody upon that conspiracy charge, they have got to be convinced in relation to each person charged that that person has conspired with another guilty person in relation to that single conspiracy . . . there must not be wrapped up in one conspiracy charge what is in fact a charge involving two or more conspiracies."

114. I pause at this juncture to wonder how easily the conspiracy count in the present case, set out together with its particulars at paragraph 43 of Lord Hope's opinion, fits with that approach. When precisely, one may ask, did the appellant enter into this conspiracy? The conspiracy is alleged to have taken place over a ten month period between 1 May 2001 and 1 March 2002 during which the appellant for his part "only became suspicious from about December 2001." Put that possible difficulty aside, however, and consider the case on the simple factual basis summarised by Lord Hope at paragraph 77: Lemos, one of the appellant's alleged co-conspirators, knew that the property which he handed over to the appellant for laundering was hot; the appellant himself merely suspected it to be so. Their agreement was simply that Lemos would hand it over to the appellant and the appellant would in turn then launder it.

115. But for *R v Montila* [2004] 1 WLR 3141, the substantive offence under section 93C (2) would be committed by anyone who laundered property (with the illicit purpose) suspecting it to be hot, irrespective of whether in fact it was. (It is in no way to criticise *Montila* to point out that it would be perfectly rational to criminalise such conduct without more—as indeed it now seems to have been criminalised by the 2002 Act.) On that basis, a conspiracy charge under section 1(1) of the 1977 Act would present no difficulty: the laundering of the money (the carrying out of the agreement between Lemos and the appellant in accordance with their intentions) would "necessarily amount to or involve the commission of [an] offence" under section 93C(2). And section 1(2) would simply have no application.

116. If, of course, Lemos had known (or even merely suspected) that the property was hot but the appellant himself had no thought whatever of that, then the appellant would have needed to rely on section 1(2) to escape liability for conspiracy. Lemos himself would still have committed a substantive offence under section 93C(2) but only he would have intended or known that a "particular fact or circumstance necessary for the commission of the offence" would exist, namely knowledge or suspicion on the part of one of those agreeing to its laundering that the property was hot.

117. *Montila*, however, changes the position entirely. For the launderer now to be liable under section 93C(2) it is not sufficient that he suspects the property to be hot; the prosecution must prove it to be so. If, therefore, as here, one of the conspirators, the appellant, does not know but only suspects that the property is hot, section 1(2) becomes all-important. (Section 1(1) still presents no difficulty for the prosecution where, as here, one of the conspirators, Lemos, actually knows that the property is hot). How then does section 1(2) apply on the facts of this case?

118. A "particular fact or circumstance necessary for the commission of [a section 93C(2)] offence" here is that the property to be laundered shall indeed be hot. Where, as here, the appellant, one of the alleged conspirators, merely suspects but does not know that to be so it follows that "liability for [the] offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence" so that he is not after all to be found guilty of a conspiracy "unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place." Does someone in the appellant's position, suspecting the property they are about to launder to be hot, "intend or know" that in fact it *is* hot? Clearly they do not "know" it—at any rate on the facts of this case where the substantive offence expressly differentiates between the two states of mind, knowledge and suspicion, and the guilty plea is tendered and accepted explicitly on the basis of suspicion only. But did the appellant *intend* the property to be hot?

119. I should say at this stage that the problem arising here is not one that arises in the context of handling offences. Handling is committed by those who know or believe that the goods are stolen. True, the offence is not committed if the goods, albeit believed stolen, in fact

prove not to be. But if an agreement is made to handle goods believed to be stolen I for my part would have little difficulty in concluding for the purposes of section 1(2) of the 1977 Act that the conspirators intended or knew that they would be stolen. Section 1(2) looks to the future so that the putative conspirator's state of mind is in any event better described as belief than as knowledge—a point well made by Hooper LJ in *R v Liaquat Ali and others* [2005] EWCA Crim 87, [2005] 2 Cr App R 864 (at para 98). One can never be certain that goods that are to come into one's possession at a future time will be stolen but a firm belief can be held and that is sufficient.

120. The present case, however, is different. To suspect something to be so is by no means to believe it to be so: it is to believe only that it may be so. I repeat, the Crown's principal argument is not that the appellant here *knew* that the property would be hot but rather that, whilst only suspecting it, he nevertheless intended it to be so. The argument is advanced essentially in terms of a conditional intention: the appellant suspected the property would be hot and agreed to launder it irrespective of whether it was or was not. This, it is contended, is a sufficient intent for section 1 (2) purposes: it is an agreement to launder hot property (and thus commit an offence) if it proves to be hot; innocent property (and thus no offence) if the property in fact has a lawful provenance.

121. Your Lordships were shown an abundance of academic writing down the years which treats of the concept of conditional intention in the context of conspiracy law. Many examples have been discussed. If two men agree to burgle a house but only if it is unoccupied or not alarmed they are clearly guilty of conspiracy to burgle notwithstanding that their intention may be thwarted. And if they take a weapon albeit to be used only if strictly necessary they are, the better view suggests, guilty also of conspiracy to wound. Consistently with this approach convictions were upheld (a) of conspiracy to aid and abet suicide where it was agreed that the accused would visit individuals contemplating suicide and either seek to discourage them or actively help them commit suicide depending on his assessment of the appropriate course of action (*R v Reed* [1982] Crim LR 819); (b) of conspiracy to pervert the course of public justice where three men agreed that a fourth man, under trial for burglary, should be shot in the leg so as to provide him with mitigation in the event he were convicted (*R v Jackson* [1985] Crim LR 442); and (c) of conspiracy to cause explosions where members of the IRA during the IRA ceasefire agreed to make bombs for use only if the ceasefire came to an end (*R v O'Hadhmaill* [1996] Crim LR 509).

122. The Crown submits that the same approach supports the legitimacy of the appellant's conviction upon his own plea in the present case. True, there was no certainty that the property he agreed to launder would prove to be hot so that the commission of an offence pursuant to the agreement depended on a contingency which might not occur. But that, on the authorities, provides no defence to a conspiracy charge. Beguiling though for a time I confess to have found this argument, I have finally come to reject it. If someone launders property he suspects to be hot, he takes the risk that it *is* hot (and can be proved to be so) and in that event commits the substantive offence under section 93C(2). But he commits it by actually laundering the property and not merely by agreeing to do so. Assume that A and B one morning agree to launder a bundle of £50 notes which C is to bring in that afternoon, suspecting but not knowing the notes will be hot. They are arrested before the money arrives. Are they guilty of conspiracy to launder notwithstanding that, had they received and laundered the money, they might well have had a defence based on *Montila*? With, I confess, some reluctance, I would hold not.

123. As Lord Hope makes plain, the reality here is that the Crown is using the offence of conspiracy purely as a device to circumvent the problems caused in England (although not, it appears, in Scotland) by the duplicity rule. To avoid the need for each substantive offence to be charged separately, thereby absurdly overloading the indictment, the Crown instead charge conspiracy which allows them to roll together into a single charge the events of a continuing course of conduct. There are other advantages too for prosecutors who rely on a conspiracy charge. Small wonder, therefore, that it is often called the "prosecutor's darling". But there are limits to these advantages and, given that the mere fact of agreement is sufficient to establish liability for this inchoate crime, it is important that these limits are recognised and not artificially stretched. To uphold this conviction would in my judgment be a bridge too far. I too would allow the appeal.