

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Whynot, 2000 NSCA 15]

Chipman, Bateman and Flinn, JJ.A.

BETWEEN:

| | | |
|-----------------------|---|---------------------------|
| WALTER STEVEN WHYNOT |) | David R. Hirtle |
| |) | for the appellant |
| Appellant |) | |
| |) | |
| - and - |) | |
| |) | |
| HER MAJESTY THE QUEEN |) | Dana W. Giovannetti, Q.C. |
| |) | for the respondent |
| Respondent |) | |
| |) | |
| |) | |
| |) | Appeal heard: |
| |) | January 19, 2000 |
| |) | |
| |) | Judgment delivered: |
| |) | January 19, 2000 |
| |) | |
| |) | |

THE COURT: Appeal dismissed per oral reasons for judgment of Bateman, J.A.;
Chipman and Flinn, JJ.A. concurring.

BATEMAN J.A.: (Orally)

[1] It is our unanimous view that this appeal must be dismissed. The appellant has not demonstrated that the trial judge erred in permitting the Crown to use a prior inconsistent statement of the co-conspirator witness in cross-examination of that witness. The appellant relies upon the decision of the majority of the Alberta Court of Appeal in **R. v. Montoute** (1991), 62 C.C.C. (3d) 481 (Alta.C.A.). Without expressing an opinion about the correctness of that decision, it is our view that this case is not analogous. There the Crown unsuccessfully sought to tender illegally obtained wiretap evidence from a co-conspirator as affirmative evidence of the conspiracy. Even assuming, for the purposes of argument here, that the appellant could have established that the statement of the co-conspirator witness was obtained in violation of his **Charter** rights, it was not being used as affirmative evidence of the conspiracy, but solely to impeach him as a witness. Accordingly, Justice Hood did not err in permitting the Crown to use the statement in this manner.

[2] Neither did the trial judge err in her instruction to the jury on the weight to be accorded the inconsistent statement used in cross-examination nor in her charge to the jury on the test for determination of the existence of a conspiracy.

[3] The appeal is dismissed.

Bateman, J.A.

Concurred in:

Chipman, J.A.

Flinn, J.A.

