

Reasons for Decision by Rowe J.A.
Concurred in by White and Harrington JJ.A.

Counsel for the Intended Appellants: Donald A. MacBeath Q.C.
Counsel for Her Majesty the Queen in Right of Canada: Shaun O’Leary
Counsel for Her Majesty the Queen in Right of Newfoundland and
Labrador: Lloyd Strickland

Rowe J.A.:

[1] On December 7, the Court heard an application for leave to appeal by Aubrey Crews and Leo Crews. The Court denied leave in an oral decision. These are the reasons for that decision.

[2] The intended appellants sought leave to appeal the decision of a judge of the Trial Division sitting as a Summary Conviction Appeal Court (SCAC) dismissing their appeals against conviction. Their appeals to the SCAC were from convictions in the Provincial Court in Grand Bank for three offences: possession of non-duty paid, packaged alcohol contrary to s. 88(1) of the *Excise Act, 2001*, SC 2002, c. 22; possessing contraband alcohol contrary to s. 124.1 of the *Liquor Control Act*, RSNL 1990, c. L-18; and conspiracy to commit the offence of possessing non-duty paid, packaged alcohol contrary to s. 465(1)(c) of the *Criminal Code*.

[3] The applications for leave to appeal to this Court were made pursuant to s. 839(1) of the *Criminal Code*, which provides that, with leave of this Court, an appeal of an SCAC decision may be heard “on any ground that involves a question of law alone”.

[4] As the Prince Edward Island Court of Appeal noted in *R. v. Rhymes*, 2004 PESCAD 15, 239 Nfld. & P.E.I.R. 89 at para. 21:

The error in law required to vest jurisdiction in [the Court of Appeal] is an error of law on the part of the Summary Conviction Appeal Court judge, not the trial judge. See *R. v. Shrubbsall*, [2000] N.S.J. No. 26 N.S.C.A. at para. 7.

See also *R. v. Croft*, 2003 NSCA 109, 218 N.S.R. (2d) 184 at para. 8.

[5] In *R. v. Newfoundland Recycling Limited*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153 at para. 9, this Court set out the considerations for determining whether or not leave should be granted:

Thus, to obtain leave to appeal pursuant to s. 839(1):

(a) the appeal must “be taken on a ground that involves a question of law alone”, and

(b) the grounds(s) of appeal must be such that:

(i) either the ground of appeal has a “reasonable possibility of success, or

(ii) “the proposed question of law [has significance] to the administration of justice”.

[6] In seeking leave to appeal, counsel for the intended appellants points to errors of law that he submitted were made by the Provincial Court judge:

(a) while the case against the intended appellants was based on circumstantial evidence, the Provincial Court judge did not advert to the Rule in *Hodge’s Case*, nor did the judge apply that rule;

(b) the Provincial Court judge heard evidence from police officers that should not have been admitted as it was hearsay, opinion evidence (for which no *voir dire* was held) or evidence of bad character concerning the intended appellants;

(c) the Provincial Court judge engaged in “circular reasoning” (by “begging the question”) and also misapprehended certain aspects of the evidence.

[7] Counsel for the intended appellants submitted that the SCAC erred in law by failing to set aside the convictions of the intended appellants and by failing to order a new trial for Leo Crews and enter an acquittal for Aubrey Crews, based on errors by the Provincial Court judge (as identified above).

[8] Counsel for the Crown in right of Canada and the Crown in right of Newfoundland and Labrador both opposed the granting of leave to appeal. In their submissions, the SCAC decision dealt with the submissions by counsel for the intended appellant under the curative proviso set out in s. 686(1)(b)(iii) of the *Criminal Code* (without referring expressly to that provision). The SCAC judge did so by determining that no verdict other than the convictions was possible even excluding the evidence submitted by the intended appellants to have been improperly admitted. See *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272 para. 53.

[9] We would note, as well, that the reasons for decision by the Provincial Court judge do not indicate that in arriving at his verdicts he relied on the evidence submitted by the intended appellants to have been inadmissible.

[10] We agree with the submissions of counsel for the intended respondents that the intended appellants have shown no error of law in the decision of the SCAC.

[11] In addition to seeking leave to appeal the convictions, counsel for the intended appellants sought leave of this Court to appeal the sentences imposed on the intended appellants.

[12] Counsel for the intended respondents submitted that this Court's jurisdiction to hear an appeal as set out in s. 839(1) of the *Criminal Code* is limited to hearing appeals on errors of law in the SCAC decision. Given that the SCAC decision did not deal with the sentences (as the sentences were not appealed to the SCAC), the intended respondents submit that this Court has no jurisdiction to grant leave to hear an appeal of the sentences. We agree with the intended respondents that, in the circumstances of the case, this Court has no jurisdiction to grant leave to appeal the sentences.

[13] At the hearing, we gave our decision orally. We set it out below.

[14] We are all of the following view with respect to both intended appellants.

[15] Leave to appeal the decision of the Summary Conviction Appeal Court judge should be denied. We say so for three reasons:

- (1) the appeals do not raise a question of law alone, vis-à-vis the Summary Conviction Appeal Court decision, as is required by s. 839(1);
- (2) the appeals have no reasonable possibility of success, nor do they raise a question of law that has significance to the administration of justice; and
- (3) we are not persuaded that any miscarriage of justice has occurred.

[16] Further, with respect to the request that this Court hear an appeal of the sentences, we decline to do so. An appeal to this Court under s. 839(1) is from the decision of the Summary Conviction Appeal Court; the intended

appellants not having appealed their sentences to the Summary Conviction Appeal Court, this Court has no jurisdiction to hear an appeal of their sentences.

[17] That said, it appears to us that one possible avenue concerning appeal of sentence may remain open. If leave were granted by the Summary Conviction Appeal Court to bring an appeal of sentence, notwithstanding that the appeal is out of time, that Court would have jurisdiction to hear such an appeal, whereas this Court now does not.

M. H. Rowe J.A.

I Concur: _____

C. W. White J.A.

I Concur: _____

M. F. Harrington J.A.