1963

*Apr. 29
May 6

HER MAJESTY THE QUEEN.. .....APPLICANT;

AND

ADRIENNE LAROCHE .....RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Appeals—Practice and Procedure—Jurisdiction—Criminal law—Application for leave to appeal by Crown—Whether on a question of law alone.

The accused was convicted of unlawfully converting to her own use a sum of money, the property of a municipal corporation of which she was an employee, and thereby stealing the same. The Court of Appeal quashed the conviction and directed a new trial. The Crown sought leave to appeal to this Court on the following question of law: "Whether the Court of Appeal erred in law in holding that the learned

*PRESENT: Cartwright, Martland and Ritchie JJ.

[1] (1880), L.R. 5 Ex. D. 96 at 105.

trial judge misdirected the jury as to the theory of the defence". The accused opposed the motion on the ground, inter alia, that the judgment of the Court of Appeal was based on two separate and distinct grounds, the first of which did not raise a question of law alone and that, therefore, this Court was without jurisdiction to entertain the appeal upon it.

Held: The application for leave to appeal should be granted.

Where a Court of Appeal has quashed a conviction on two grounds of which one is, and the other is not, appealable to this Court, the appeal to this Court must be dismissed. But in view of the state of the authorities as to whether this Court will entertain appeals based on the ground of the failure of the trial judge to deal adequately with the evidence in his charge to the jury, the point raised here should be dealt with by the Court constituted to hear an appeal rather than on an application for leave. Assuming therefore, for the purposes of this application, that both of the grounds on which the Court of Appeal proceeded raised points of law as to which this Court has jurisdiction, leave to appeal should be granted. However, this will not prevent the accused from urging her objection at the hearing of the appeal.

APPLICATION by the Crown for leave to appeal from a judgment of the Court of Appeal for Ontario quashing the conviction of the accused and ordering a new trial. Application granted.

P. Milligan, Q.C., for the applicant.

G. A. Martin, Q.C., for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—Adrienne Laroche was convicted before His Honour Judge Macdonald and a jury on February 16, 1962, on an indictment charging that she did between the 17th day of September, 1956 and the 17th day of May, 1960, at the Town of Eastview, in the County of Carleton, unlawfully convert to her own use money to the amount of $10,790.52, the property of the Municipal Corporation of the Town of Eastview and did thereby steal the same, contrary to the Criminal Code of Canada.

She appealed to the Court of Appeal on a number of grounds, some of which that Court found it unnecessary to discuss. The Court of Appeal by a unanimous judgment delivered by McLennan J.A. allowed the appeal, quashed the conviction and directed a new trial.

The Crown seeks leave to appeal to this Court on the following question of law:

Whether the Court of Appeal erred in law in holding that the learned trial judge misdirected the jury as to the theory of the defence.

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THE QUEEN v. LAROCHE

Cartwright J.

The question as stated appears to be one of law but counsel for the respondent opposes the motion on the ground, inter alia, that the judgment of the Court of Appeal was based upon two separate and distinct grounds which he summarizes as follows:

> (i) That the trial was unsatisfactory because the trial judge, while he put the theory of the defence to the jury, did not discuss the evidence relating to that theory in a sufficiently comprehensive way.
>
> (ii) That the trial judge erred in directing the jury that they ought to acquit if the accused honestly thought she was 'obliged' to give the money to the Mayor and thereby conveyed to the jury the impression that they should acquit only if they found the accused believed she was under a legal compulsion to obey the Mayor's orders.

He submits that the first of these does not raise a question of law alone and that this Court is without jurisdiction to entertain an appeal upon it.

It is clear from the judgment of this Court in *The Queen v. Warner*[1], that where a Court of Appeal has quashed a conviction on two grounds of which one is, and the other is not, appealable to this Court, the appeal to this Court must be dismissed.

In support of his submission that the first of the two grounds summarized above does not raise a question of law alone, Mr. Martin relies on *R. v. Bateman*[2], particularly at 207 and *R. v. Curlett*[3]. Both of these judgments appear to lend considerable support to Mr. Martin's argument but neither of them is binding on us. The first is that of the Court of Criminal Appeal in England composed of Channell, Jelf and Bray, JJ. The second is a majority decision of the Court of Appeal for Alberta, Harvey C.J.A., Ewing and McGillivray JJ.A. being the majority and Clarke and Lunney JJ.A. dissenting. Both cases appear to hold that whether there has been nondirection or misdirection by the trial judge in dealing with the evidence is not a question of law alone. In the latter case Harvey C.J.A. points out that while this Court appears to have decided *Brooks v. R.*[4] as if the failure to make adequate reference to an item of importance in the evidence raised a question of law appealable to this Court, the point was not raised or discussed.

[1] [1961] S.C.R. 144, 128 C.C.C. 366, 34 C.R. 246.
[2] (1909), 2 Cr. App. R 197.
[3] (1936), 66 C.C.C. 256, 3 D.L.R. 199, 2 W.W.R. 528.
[4] [1927] S.C.R. 633, [1928] 1 D.L.R. 268.

There are, however, a number of cases in which this Court has entertained appeals based on the ground of the failure of the trial judge to deal adequately with the evidence in his charge to the jury. As examples, Mr. Milligan referred us not only to the *Brooks* case but also to *Azoulay v. The Queen*[1] and *Kelsey v. The Queen*[2].

The importance of the point raised by Mr. Martin is obvious; if he were clearly right it would, of course, be our duty to refuse leave, but in view of the state of the authorities we think the point should be dealt with by the Court constituted to hear an appeal rather than on an application for leave.

Assuming for the purposes of this application that both of the grounds on which the Court of Appeal proceeded raise points of law as to which this Court has jurisdiction we are all of opinion that leave ought to be granted. It is clear from the decision in *Warner's* case that the fact of our having granted leave will not prevent Mr. Martin urging his objection before the Court on the hearing of the appeal.

Leave to appeal on the question set out in the notice of motion is granted.

Application granted.

Solicitor for the applicant: W. C. Bowman, Toronto.

Solicitors for the respondent: Hughes, Laishley, Mullen & Kelly, Ottawa.