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*Oct. 15
Nov. 30

JACK GOLDHAR .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Criminal law—Leave to appeal to Supreme Court of Canada—Conspiracy to traffic in drugs—Sentence of 12 years—New Criminal Code coming into force during period of offence—Leave to appeal from sentence sought—Whether jurisdiction to entertain appeal—Criminal Code,

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Ritchie JJ.

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1953-54(Can.), c. 51, ss. 408(1)(d), 597(1)(b)—Criminal Code, R.S.C. 1927, c. 36, ss. 573, 1023—The Supreme Court Act, R.S.C. 1952, c. 259, s. 41.

The appellant was convicted of conspiracy to traffic in drugs and sentenced to 12 years imprisonment, pursuant to s. 408(1)(*d*) of the new *Criminal Code,* which came into force during the period of time within which the offence was committed. His appeal against the conviction was dismissed by the Court of Appeal and leave to appeal to this Court from that judgment was refused. His subsequent appeal against the sentence was also dismissed by the Court of Appeal, and from that judgment he applied to this Court for leave to appeal against the sentence on the question of law as to whether s. 408(1)(*d*) was applicable, since, if it was not, the maximum sentence for a conspiracy not specifically named in the former Code, as found in s. 573, was 7 years. The Crown submitted that this Court was without jurisdiction to grant leave. The appellant alleged an alteration of the prior state of the law.

Held (Cartwright J. dissenting): This Court has no jurisdiction to entertain an appeal against a sentence imposed for the commission of an indictable offence.

Per Taschereau, Fauteux, Abbott and Ritchie JJ.: The question whether this Court had any jurisdiction to entertain such an appeal has always been negatively answered prior to the coming into force of the new Code. *Goldhamer v. The King,* [1924] S.C.R. 290 and *Parthenais v. The King* (1945) (unreported). An intent of Parliament to depart from this state of the law could not be found either under the provisions of the new Code or under s. 41 of the *Supreme Court Act.*

As to the new Code. It is clear that no change has been made as to the appellate provisions related to appeals to the Court of Appeal in indictable offences. The distinction between an appeal against a conviction and an appeal against a sentence still obtains. Both appeals are still separate appeals as to substance and procedure and lead to two distinct judgments. As to appeals to the Supreme Court of Canada, the true meaning of the expression "whose conviction is affirmed by the Court of Appeal" in s. 597(1)(*b*) must be ascertained by reference to the appellate provisions related to an appeal to the Court of Appeal. On these provisions, the "conviction" which the latter Court may affirm is a conviction within the narrow meaning of *Goldhamer v. The King.* "The judgment appealed from", referred to in s. 597(1)(*b*), is the judgment against which an appeal is given under s. 597(1); and, as nowhere but in the opening words of the section is an appeal given, that judgment must be a judgment capable of coming within the language of the opening words. Although the words "in affirmance of the conviction", which were in s. 1024 of the former Code, do not appear in s. 597(1), they are clearly and necessarily implied in s. 597. No significance could be attached to the fact that s. 1024 provided for an appeal at large while under s. 597 the appeal is restricted to pure questions of law. Because it may be said in certain cases that an applicant comes within the description of a person to whom a right of appeal is given in the opening words of s. 597, it does not follow that his application does so or in other words, that the right given is a right to appeal against a conviction in the wider sense.

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As to s. 41 of the *Supreme Court Act*. The inconsistencies flowing from the interpretations put by the appellant on s. 41, clearly indicate that it was never intended by Parliament that the right of appeal given under this section would extend to indictable offences, as distinguished from non indictable offences. This is supported by the fact that, under the Code, the appeals to this Court with respect to indictable offences are dealt with in the appellate provisions related to appeal to this Court under the Code. It is further supported by the clear contradiction which would exist between the special appellate provisions under the Code and the general appellate provisions under s. 41.

Per Cartwright J., *dissenting*: The application falls within the literal meaning of the words in s. 597; and the terms of ss. 583, 592 and 593 do not appear to require the Court to construe s. 597 in the limited sense contended for by the respondent. The case of *Goldhamer v. The King* was distinguishable. One of the primary purposes of Parliament in enacting s. 597 in its present form would be *pro tanto* thwarted if it were held that this Court was without jurisdiction to deal with a pure point of law as to whether a sentence imposed was or was not authorized by statute. No sufficient reason has been advanced for interpreting s. 597 so as to refuse a jurisdiction which appears to be conferred by the words of that section construed in their ordinary and literal meaning.

Another line of reasoning leads to the same conclusion. Reading s. 597 of the Code and s. 41 of the *Supreme Court Act* together and as explanatory of each other, as should be done since they are *in pari materia*, the word "conviction" in both sections should be read "with a signification including the sentence", giving thereby effect to the apparent intention of Parliament that the jurisdiction of this Court in criminal matters should be strictly limited to points of law and yet wide enough to assure uniformity in the interpretation of the criminal law throughout the country.

APPLICATION for leave to appeal from a judgment of the Court of Appeal for Ontario, affirming a sentence. Application refused, Cartwright J. dissenting.

M. Robb, Q.C., for the appellant.

J. D. Hilton, Q.C., for the respondent.

The judgment of Taschereau, Fauteux, Abbott and Ritchie JJ. was delivered by

FAUTEUX J.:—This is a motion for leave to appeal to this Court against a sentence, imposed by the trial judge and subsequently confirmed by a judgment of the Court of Appeal for Ontario, on a conviction for an indictable offence.

Goldhar was indicted for having, in the city of Toronto and elsewhere in the province of Ontario, between the 15th of March and the 6th of August, 1955, conspired with

others to commit the indictable offence of having in their possession a drug for the purposes of trafficking. On this charge, he was found guilty by a jury, on the 4th of May, 1956, and thereupon sentenced to twelve years imprisonment, pursuant to s. 408(1)(*d*) of the *Criminal Code,* 2-3 Elizabeth II, hereafter referred to as the new Code.

During the period of time, within which the offence charged was committed, i.e. on the first day of April 1955, the new Code came into force; and this fact gives rise to the question of law on which leave to appeal is now sought. As formulated, on behalf of the applicant, the question is whether s. 408(1)(*d*) of the new Code is applicable to the conspiracy committed, since, if it is not, the maximum sentence for a conspiracy not specifically named in the *Criminal Code,* R.S.C. 1927, c. 36, is found under s. 573 of the said Statute, namely seven (7) years.

The point of law raised is undoubtedly one of substance and may possibly, depending particularly of the evidence in the record, affect the judgment rendered by the Court of Appeal, if leave is granted. However, the primary and major question to be considered and determined is whether this Court has any jurisdiction to entertain an appeal against a sentence imposed for the commission of an indictable offence.

That such a question has always been negatively answered, prior to the coming into force of the new Code, is not open to question.

In *Goldhamer v. His Majesty the King*[1], the appellant, having been found guilty of a criminal offence, was sentenced to pay a fine of four hundred dollars or to be imprisoned during three months in default of payment. After the fine had been paid, the Attorney-General appealed against the sentence, under s. 1013 Cr. C.; and by a majority judgment, the Court of Appeal, in addition to the fine, condemned the appellant to be imprisoned for a period of six months. On a further appeal to this Court, it was decided that there was no jurisdiction in the Supreme Court of Canada to entertain an appeal in the matter of

[1] [1924] S.C.R. 290, 42 C.C.C. 354, 3 D.L.R. 1009.

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sentence, the right of appeal being restricted to an appeal against the affirmance of a conviction. At the time of the decision of this Court, the relevant part of s. 1024, under which the appeal purported to be based, read as follows:

> 1024.—Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under section ten hundred and thirteen, may appeal to the Supreme Court of Canada against the affirmance of such conviction: Provided that no such appeal can be taken if the Court of Appeal is unanimous in affirming the conviction, nor unless notice of appeal in writing has been served on the Attorney-General within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

It is pointed out, in the reasons for judgment of this Court, that the word "conviction" in s. 1024 cannot perhaps be said to be capable of only one necessarily exclusive meaning, but can be capable of being employed with the signification including the sentence. The majority, however, felt compelled to ascribe to the word the less technical sense which excludes the sentence as distinguished from the conviction. The sole reason for this interpretation and the decision consequential thereto is exclusively founded on the clear distinction made in s. 1013, for the purposes of appeal in indictable matters, between an appeal against a conviction and an appeal against a sentence. The appellant in that case did not question the appropriateness of the measure of the sentence but challenged, as a matter of law, the right of the provincial Court of Appeal to interfere with a sentence which had already been satisfied when the appeal to that Court was taken by the Attorney-General. The nature of the ground, however, is entirely foreign to the *ratio decidendi*. It is the right of appeal itself which was found not to have been given by Parliament, in the matter of sentence.

Some twenty years after this decision, again the question arose in the case of *Parthenais v. The King*[1]. Parthenais had entered an appeal in this Court against a majority judgment of the Court of Appeal which had increased the sentence imposed upon him on a plea of guilty to the charge

[1] Not reported.

of an indictable offence. At that time, the matter was governed by what was then s. 1023 Cr. C., the relevant part of which read as follows:

> 1023. Any person convicted of any indictable offence whose conviction has been affirmed on an appeal taken under section ten hundred and thirteen may appeal to the Supreme Court of Canada against the affirmance of such conviction on any question of law on which there has been dissent in the Court of Appeal.

The point of law, upon which there was a dissent, was whether the Attorney-General,—who took a more serious view of the facts of the case than did the Crown prosecutor, in first instance,—could appeal to the Court of Appeal against a sentence imposed upon a plea of guilty which had been entered by the accused on the condition that the sentence, pre-agreed between his counsel and counsel for the Crown, would be passed by the trial judge. The distinction between an appeal against a conviction and an appeal against a sentence, which had brought about the decision of this Court in *Goldhamer, supra,* was still present in the appellate provisions related to appeals to the provincial Courts. This Court followed the same course and, on the 2nd of October, 1945, quashed the appeal for want of jurisdiction to entertain an appeal against a sentence.

Such was the state of the law when the new Code was enacted in 1954. The question is therefore whether an intent of Parliament to make such a substantial departure from this state of the law, as would represent the creation of a new right of appeal to this Court, can be found, as is suggested, either under the relevant provisions of the new Code or under s. 41 of the *Supreme Court Act.* In approaching the question, one must be mindful that a legislature is not presumed to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication. This presumption against the implicit alteration of the law is not, I think, of lesser moment where the new law, under which the alteration is claimed, is of a nature such as that of the one here considered, to wit, a revision of a Code.

The new Code. With respect to the appellate provisions related to appeals to the Court of Appeal in indictable offences, it is clear that no change has been made, in that,

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the distinction between an appeal against a conviction and an appeal against a sentence still obtains. Both appeals are still separate appeals as to substance and procedure, and lead to two distinct judgments. With respect to the appellate provisions related to appeals to the Supreme Court of Canada, the section of the new Code, relied on by counsel for the applicant as a basis for his application and under which the alteration of the prior state of the law is claimed, is s. 597(1)(*b*), which reads as follows:

> 597. (1) A person who is convicted of an indictable offence whose conviction is affirmed by the Court of Appeal may appeal to the Supreme Court of Canada
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> (*a*) .....
>
> .....
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> (*b*) on any question of law, if leave to appeal is granted by the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced or within such extended time as the Supreme Court of Canada or a judge thereof may, for special reasons, allow.

The opening words of that section make it equally clear that the right of appeal to this Court is given to one who is (i) a person who is convicted of an indictable offence and (ii) whose conviction is affirmed by the Court of Appeal. The true meaning of the expression, in (ii), "whose conviction is affirmed by the Court of Appeal" must, of necessity, be ascertained by reference to the appellate provisions related to an appeal to the Court of Appeal. And again, on these provisions, the "conviction", which the latter Court may affirm, is a conviction within the narrow meaning ascribed by this Court in *Goldhamer, supra.* If, contrary to that decision, the word was here given the wider sense which includes the sentence, it would follow that one "whose sentence is *affirmed* by the Court of Appeal" would have a right of appeal to this Court, while one, whose sentence is not affirmed but increased by the Court of Appeal, would not.

Adverting now to the provisions of (*a*) and (*b*) of s. 597(1). These provisions are related to the right of appeal given under the opening words. In (*a*), they restrict the right of appeal to questions of law. And, in (*b*), they condition the exercise of the right to the obtention of a leave and prescribe the delay within which, after "the judgment appealed from is pronounced", such leave must be granted.

"The judgment appealed from", referred to in (*b*), is the judgment against which an appeal is given under s. 597(1); and, as nowhere, but in the opening words thereof, is an appeal given, "the judgment appealed from" must be a judgment capable of coming within the language of the opening words. On this language and for the reasons just mentioned, such a judgment can only be a judgment in affirmance of a conviction and not related to the matter of sentence.

Having considered the following points advanced in support of the application, I must say, with deference, that I am unable to find that they are valid.

Reference is made and significance is attached to two points of difference emerging from a comparison of s. 1024, under which *Goldhamer* was decided, with s. 597(1) of the new Code. The first is that the words "in affirmance of the conviction", which were in the former section, do not appear in the latter. In my view and for the reasons just mentioned, these words are clearly and necessarily implied in s. 597. The second point is that s. 1024 provided for an appeal at large while under s. 597, the appeal is restricted to pure questions of law. The range or nature of the questions raised in support of an appeal is foreign to the *ratio decidendi* in *Goldhamer*. Furthermore, when the decision in that case was, twenty years later, followed in *Parthenais*, the appeal to this Court was then, under the relevant section, s. 1023, as it is to-day under s. 597(1), restricted to questions of law.

It is then sought to ascribe to the word "judgment" in the phrase "the judgment appealed from is pronounced", the usual meaning given to the word in a law dictionary. This, I think, one is precluded to do for, in the context of s. 597, and in the light of the other sections of the Code to which this particular section is inextricably related, a judgment as to conviction and a judgment as to sentence are, for the purposes of appeal, two separate judgments, each having a distinct technical meaning under the Code.

It is also suggested that the applicant having been convicted of an indictable offence and his conviction having been affirmed by the Court of Appeal,—as, in fact, it was finally, prior to the launching of his appeal to that Court, against the sentence,—his application falls within the literal

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meaning of s. 597(1)(*b*). While, because of these circumstances, it may be said that the *applicant* comes within the description of a person to whom a right of appeal is given in the opening words of the section, it does not follow that the *application* he makes does so, or that, in other words, the right given to such a person is a right of appeal against a conviction in the wider sense, as distinguished from a conviction in the narrow technical sense given in *Goldhamer*. The premise upon which this suggestion is predicated has no relevancy to the nature of the right of appeal which is given under the section. It may also be added that, if the interpretation contended for were accepted, in the result, Parliament would have given a right of appeal against sentence to a person coming within the language of the opening words of the section but would have refused a similar right to a person who, having appealed to the Court of Appeal only against his sentence, and not against his conviction, could never possibly come within that language; for the Court of Appeal cannot affirm an unappealed conviction.

Finally, it is said that in enacting s. 597, in its present form, one must find an apparent intention of Parliament to ensure uniformity in the interpretation of criminal law throughout Canada and that such a purpose would be, *pro tanto,* thwarted, if we were to hold that we are without jurisdiction to deal with a pure point of law as to whether a sentence imposed is or is not authorized by a statute. With respect to sentence, as distinguished from conviction, I am quite unable, for the reasons above indicated, to find such an intention of Parliament in s. 597. It also appears that such an intent is negatived by the other appellate provisions related to appeals to this Court. Under these appellate provisions, the right of appeal, given to the Attorney-General, namely in s. 598, does not include the right to appeal in the matter of sentence. For the implementation of this alleged intent and purpose of Parliament, it is no less essential that a right, similar to the one contended for on behalf of the applicant, be given to the Attorney-General; but it has not been given.

For these reasons, I am clearly of the view that nowhere in the relevant provisions of the new Code, did Parliament indicate, either in express terms or by clear implication, any intent to alter the prior state of the law, under which there is no appeal to this Court in the matter of sentence.

Section 41 of the *Supreme Court Act*. The relevant parts of that section read as follows:

41. (1) Subject to subsection (3), an appeal lies to the Supreme Court with leave of that Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court.

(2) Leave to appeal under this section may be granted during the period fixed by section 64 or within thirty days thereafter or within such further extended time as the Supreme Court or a judge may either before or after the expiry of the said thirty days fix or allow.

(3) No appeal to the Supreme Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

To support applicant's contention that s. 41 confers jurisdiction to this Court to entertain appeals in matters of sentence, imposed in respect of indictable offences, the provisions of subsection (3) are assumed to be subordinated to those of subsection (1)—in that, the latter states the principle and the former, the exception—; and, on that assumption, the following interpretation is given.

If matters of sentence are held to come within the language of subsection (3), then, by force of the latter, they are excepted from the operation of subsection (1); and, for this reason alone, this Court has no jurisdiction.

If, on the contrary, matters of sentence are held not to come within the language of subsection (3), then, not being excepted from the operation of subsection (1), there is jurisdiction in this Court.

In both alternatives, however, this interpretation leads to inconsistencies.

In the first alternative, while a judgment *affirming a sentence* would be excepted from the operation of subsection (1) by force of subsection (3), there are no words in the latter capable of excepting a judgment *increasing the*

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sentence. And, in the result, this Court would have jurisdiction to entertain an appeal when the sentence has been increased, but would be without jurisdiction when it has been affirmed; and this, even if in either case the question raised in support of the appeal be whether the sentence is authorized or not by statute.

In the second alternative where, on the interpretation of subsection (3), this Court would have jurisdiction in the matter of sentence, the following inconsistencies would ensue. Contrary to what is the situation with respect to every authorized appeal to this Court in criminal matters, the appeal against sentence under s. 41 would not be restricted to pure questions of law but would extend to questions of mixed law and facts and to pure questions of fact. In addition, the delay within which leave to appeal must be granted, being determined by subsection (2), would be, in the matter, far in excess of the delay prescribed for the proper administration of justice in criminal matters, for the obtention of leave to appeal to this Court against a conviction or an acquittal.

I cannot think that Parliament ever intended or even contemplated these inconsistencies flowing from either one of these interpretations. And this, in my view, clearly indicates that it was never intended by Parliament that the right of appeal given under s. 41 would extend to indictable offences, as distinguished from non indictable offences.

This view is supported by the fact that, under the *Criminal Code*, the appeals to this Court with respect to indictable offences are, contrary to what is the case with respect to non indictable offences, dealt with in the appellate provisions related to appeals to this Court under the Code.

It is further supported by the clear contradiction which would exist, on the view that Parliament intended to include indictable offences in s. 41, between the special appellate provisions under the Code and the general appellate provisions under s. 41 of the *Supreme Court Act*.

Parliament is presumed to be consistent with itself and the language of every Act must be construed as far as possible in accordance with the terms of every other statute

which it does not in express terms modify in a way avoiding contradictions. It has been indicated above that, if s. 597 was interpreted as giving a right of appeal as to sentences, inconsistencies would result and that, on the contrary interpretation, there would not be any, the state of the law remaining what it was prior to the enactment of the new Code. And it has also been pointed out that inconsistencies would flow from the suggested interpretation of s. 41. In these views, one cannot find, either under the Code or under s. 41 of the *Supreme Court Act,* the explicit language required to indicate an intent of Parliament to alter the prior state of the law as to appeals to this Court in the matter of sentence imposed in respect of indictable offences.

With great deference, I find it impossible to reconcile the two Acts by interpreting the word "conviction" in both subsections 41(3) and 597(1)(*b*) as including sentence in indictable offences, for each one of the subsections cannot be so interpreted without leading to inconsistencies.

Under the former Code, appeals against sentence have always been left to the final determination of the provincial Courts and there is nothing, under the new Code or s. 41 of the *Supreme Court Act,* indicating a change of policy in the matter, with respect to indictable offences.

This Court is without jurisdiction to entertain the present application which I would dismiss.

This being a matter of jurisdiction, all the Members of the Court have been consulted and I am requested by the Court to say that all, excepting our brother Cartwright, are in agreement with these reasons.

CARTWRIGHT J. (*dissenting*):—This is an application for leave to appeal to this Court from a judgment of the Court of Appeal for Ontario, pronounced on May 29, 1959, dismissing the applicant's appeal against the sentence imposed upon him by His Honour Judge Macdonell on May 4, 1956. The appeal to the Court of Appeal was brought pursuant to an order of that Court made on April 29, 1959, extending the time for applying for leave to appeal and granting leave to appeal against the sentence mentioned.

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On April 27, 1956, the accused was convicted before His Honour Judge Macdonell at the sittings of the Court of General Sessions of the Peace for the County of York on the charge that:

> Jacob Rosenblat, Jack Goldhar (the applicant), Leonuell Joseph Craig and Hannelore Rosenblum, at the City of Toronto, in the County of York, and elsewhere in the Province of Ontario, between the 15th day of March and the 6th day of August, in the year 1955, unlawfully did conspire together, the one with the other or others of them and persons unknown, to commit the indictable offence of having in their possession a drug, to wit, diacetylmorphine, for the purpose of trafficking, an indictable offence under the Opium and Narcotic Drug Act, contrary to the Criminal Code.

On May 4, 1956, His Honour Judge Macdonell sentenced the applicant to twelve years' imprisonment in Kingston Penitentiary.

An appeal against this conviction (but not against the sentence imposed) was taken to the Court of Appeal for Ontario[1] and was dismissed on February 13, 1957; leave to appeal to this Court from that judgment was refused[2] on May 1, 1957.

The sentence of twelve years was imposed pursuant to s. 408(1)(*d*) of the *Criminal Code,* as enacted by 2-3 Elizabeth II, c. 51, which came into force on April 1, 1955, and is referred to in these reasons as "the new code". Section 408 reads in part as follows:

> 408(1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy, namely,
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> * * *
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> (*d*) every one who conspires with any one to commit an indictable offence not provided for in paragraph (*a*), (*b*) or (*c*) is guilty of an indictable offence and is liable to the same punishment as that to which an accused who is guilty of that offence would, upon conviction, be liable.

The maximum term of imprisonment for the indictable offence of having possession of a drug for the purpose of trafficking is fourteen years, as provided by s. 4(3) of the *Opium and Narcotic Drug Act* which section came into force on June 10, 1954.

Under the *Criminal Code,* R.S.C. 1927, c. 36, hereinafter referred to as "the old code", the maximum term of imprisonment which could have been imposed upon the

[1] [1957] O.W.N. 138, 117 C.C.C. 404.
[2] [1957] S.C.R. IX.

applicant for the offence of which he was convicted would have been seven years, as provided by s. 573 of the old Code which reads as follows:

> 573. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence.

The question of law on which leave to appeal to this Court is sought is stated in the notice of motion as follows:

> Whether Section 408(1)(*d*) of The Criminal Code 1953-1954, Ch. 51 is applicable to the conspiracy committed, since if it is not the maximum sentence for a conspiracy not specifically named in The Criminal Code, R.S.C. 1927, Ch. 36, is found under Section 573 of the said Statute, namely seven (7) years.

On the merits, it is sufficient, for purposes of this motion, to say that the ground of appeal sought to be raised is, in my opinion, one of substance and difficulty; its importance is obvious; if the applicant's contention is upheld he will have been sentenced to five years' imprisonment in excess of the maximum term permitted by law.

Counsel for the respondent submits that we are without jurisdiction to grant leave to appeal from a judgment of the Court of Appeal dismissing an appeal against the sentence passed by the trial Court.

Counsel for the applicant bases his application on s. 597(1)(*b*) of the new Code which reads:

> 597. (1) A person who is convicted of an indictable offence whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada
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> * * *
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> (*b*) on any question of law, if leave to appeal is granted by the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced or within such extended time as the Supreme Court of Canada or a judge thereof may, for special reasons, allow.

It will be observed that this application falls within the literal meaning of the words quoted. The applicant is a person who has been convicted of an indictable offence whose conviction has been affirmed by the Court of Appeal and he seeks leave to appeal to this Court on a question of law. It is important to observe that the present section does not say "may appeal *against the affirmance of such conviction*" as did its predecessor. It is contended for the

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respondent, however, that other provisions of the Code, the history of the legislation and the jurisprudence dealing with it require us to construe s. 597 as giving a convicted person a conditional right of appeal against his conviction only and not against his sentence. It is pointed out that s. 583 which confers upon a person convicted of an indictable offence the right of appeal to the Court of Appeal distinguishes between (a) an appeal against conviction and (b) an appeal against sentence, and that this distinction is maintained in sections 592 and 593 the former of which sets out the powers of the Court of Appeal on an appeal against conviction and the latter the powers on an appeal against sentence.

The respondent also relies on the decision of this Court in *Goldhamer v. The King*[1]. In that case the appellant had been found guilty of an indictable offence and sentenced by the trial court to pay a fine of $400 and in default of payment thereof to be imprisoned for six months; he immediately paid the fine; the Attorney-General of Quebec appealed to the Court of King's Bench under s. 1013 of the *Criminal Code* and that Court increased the sentence by adding thereto a term of imprisonment for six months; Bernier J. dissented but gave no reasons for his dissent. The appellant thereupon appealed to this Court. The question of jurisdiction was raised by the Court in the course of the argument. Judgment was reserved and the appeal was in due course dismissed. Duff J., as he then was, Mignault J. and Malouin J. were all of opinion that there was no right of appeal and dismissed the appeal on that ground. Idington J. was doubtful as to the Court's jurisdiction but thought that, in any event, the appeal should be dismissed on the merits. He said in part at p. 292:

> I cannot therefore confidently assert and hold that there is no appeal possible under such circumstances as involved herein.

Maclean J. simply concurred in the dismissal of the appeal. The ratio of the majority is found in the reasons of Duff J. at p. 293:

> As my brother Idington points out, the word "conviction" cannot, perhaps, be said to be capable of only one necessarily exclusive meaning, and it may be capable of being employed with a signification including

[1] [1924] S.C.R. 290, 42 C.C.C. 354, 3 D.L.R. 1009.

the sentence. Section 1013 does, however, I think, distinguish very clearly between the conviction and the sentence for the purposes of appeal, and the Act of 13-14 Geo. V., by which the present section was brought into force, made no change in section 1024. Accordingly, I think the word "conviction' in the last mentioned section should be read in its less technical sense, and consequently that there is no right of appeal to the Supreme Court of Canada from the judgment given by a court of appeal on an appeal under subsection (2) of section 1013.

and in the reasons of Mignault J. (with whom Malouin J. agreed) at pages 293 and 294:

Our jurisdiction is governed by article 1024 of the Criminal Code, which states, with a proviso which need not be mentioned here, that any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under article 1013, may appeal to the Supreme Court of Canada against the affirmance of such conviction.

As now amended, article 1013 gives a right of appeal against a conviction, and against a sentence pronounced by the trial court against a person convicted on indictment. Article 1024 was not amended by the 1923 statute and under it the right of appeal is restricted to an appeal against the affirmance of the conviction. Reading it with article 1013, as amended, the appeal from the sentence under paragraph 2 of article 1013 cannot be brought before this Court.

When *Goldhamer* was decided the sections referred to in the passages quoted, so far as relevant, read as follows:

1013 (1) A person convicted on indictment may appeal to the court of appeal against his conviction—

(*a*) on any ground of appeal which involves a question of law alone; and

(*b*) with leave of the court of appeal, or upon the certificate of the trial court that it is a fit case for appeal, on any ground of appeal which involves a question of fact alone or a question of mixed law and fact; and

(*c*) with leave of the court of appeal, on any other ground which appears to the court of appeal to be a sufficient ground of appeal.

(2) A person convicted on indictment, or the Attorney General, or the counsel for the Crown at the trial, may with leave of a judge of the court of appeal, appeal to that court against the sentence passed by the trial court, unless that sentence is one fixed by law.

* * *

1024. Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under section ten hundred and thirteen may appeal to the Supreme Court of Canada against the affirmance of such conviction: Provided that no such appeal can be taken if the court of appeal is unanimous in affirming the conviction, nor unless

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notice of appeal in writing has been served on the Attorney General within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

(2) The Supreme Court of Canada shall make such rule or order thereon, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect.

The section now in force which corresponds with s. 1013 quoted above is s. 583 of the new Code reading as follows:

583. A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal

(*a*) against his conviction

(i) on any ground of appeal that involves a question of law alone,

(ii) on any ground of appeal that involves a question of fact alone or a question of mixed law and fact, with leave of the court of appeal or upon the certificate of the trial judge that the case is a proper case for appeal, or

(iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or

(*b*) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.

For the purposes of the problem before us the differences in wording between this section and s. 1013 are not significant.

When, however, s. 597 of the new Code is compared with s. 1024 under which *Goldhamer* was decided it will be observed that there are the following points of difference; (i) as pointed out above, the words in s. 1024 "against the affirmance of such conviction" have disappeared; (ii) while under s. 1024 the appeal to this Court was at large, provided there was a dissent in the Court below, the rights of appeal given by s. 597 are restricted to questions of law; (iii) under s. 1024 the time for appealing ran from "such affirmance" but under s. 597 it runs from the day when "the judgment appealed from is pronounced"; the usual meaning of the word "judgment" in criminal matters is, in my opinion, correctly stated in the Dictionary of English Law by Earl Jowitt (1959) at p. 1025:

In criminal proceedings, the judgment is the sentence of the court on the verdict of the jury, or on the prisoner pleading guilty to the indictment. Where the jury acquits the prisoner, the judgment is that

he be discharged; if he pleads guilty or is convicted, the judgment declares the punishment which he has to suffer, e.g., death, imprisonment, fine, etc.

These three differences appear to me to be sufficiently substantial to prevent the decision in *Goldhamer* being regarded as decisive of the question before us.

I have already indicated my view that this application falls within the literal wording of s. 597; and the terms of ss. 583, 592 and 593 do not appear to me to require us to construe s. 597 in the limited sense contended for on behalf of the respondent.

If the meaning of the words used were ambiguous it would be proper to consider the apparent intention of Parliament in enacting s. 597 in its present form, as appearing from the history of the legislation. One of the primary purposes appears to me to have been to confer upon this Court a jurisdiction, to determine points of law arising in cases of indictable offences, wide enough to ensure uniformity in the interpretation of the criminal law throughout Canada. That purpose would be *pro tanto* thwarted if we were to hold we are without jurisdiction to deal with a pure point of law as to whether a sentence imposed is or is not authorized by statute.

In my opinion no sufficient reason has been advanced for interpreting s. 597 so as to refuse a jurisdiction which appears to me to be conferred upon the Court by the words of that section construed in their ordinary and literal meaning.

There is another line of reasoning which leads me to the same conclusion. Section 41 of the *Supreme Court Act* is *in pari materia* with s. 597 of the new Code. Both sections deal with the jurisdiction of this Court to grant leave to appeal from decisions of provincial Courts.

In *Rex v. Loxdale*[1], Lord Mansfield said:

> Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and *construed together*, as one system, and as explanatory of each other.

[1] (1758), 1 Burr. 445 at 448, 97 E.R. 394.

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Section 597 of the Code has already been quoted. Subsections (1) and (3) of s. 41 of the *Supreme Court Act* read as follows:

41 (1) Subject to subsection (3), an appeal lies to the Supreme Court with leave of that Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court.

* * *

(3) No appeal to the Supreme Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

The words of subs. (1) unless they are cut down by the opening phrase, "Subject to subsection (3)", are obviously wide enough to confer jurisdiction to grant leave to appeal from the judgment of the Court of Appeal affirming the sentence of 12 years' imprisonment passed upon the applicant; it is a judgment, and indeed a final judgment, of the highest court of final resort in the province in which judgment can be had in the particular case, for "judgment" is defined in s. 2(*d*) as follows:

(*d*) "judgment", when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof;

If the words in subs. (3) "the judgment of any court . . . affirming a conviction . . . of an indictable offence" are to be interpreted as having the limited meaning "affirming a verdict or finding of guilt excluding the sentence imposed" and not, to use the words of Duff J., quoted above, "with a signification including the sentence", it would follow that the jurisdiction to grant leave to appeal from sentence is not excluded by the words of subs. (3) from the wide power given by subs. (1). From this in turn it would follow that under subs. (1) this Court would have jurisdiction to give leave to appeal from a sentence and such an appeal would not be restricted to questions of law. It appears to me extremely unlikely that Parliament intended this result; it

can be avoided by construing the words "the judgment of any court . . . affirming a conviction . . . of an indictable offence" so as to include the affirmation of the sentence.

When s. 597 of the Code and s. 41 of the *Supreme Court Act* are read together it is my opinion that the word "conviction" in both sections should be read "with a signification including the sentence" which construction gives effect to the apparent intention of Parliament that our jurisdiction in criminal matters should be strictly limited to points of law and yet wide enough to assure uniformity in the interpretation of the criminal law throughout Canada.

It may be observed in passing that cases in which a sentence can be questioned on a pure point of law are likely to be few and far between.

Having concluded that we have jurisdiction, I would, for the reasons mentioned earlier, grant leave to appeal on the ground set out in the notice of motion.

Application dismissed, CARTWRIGHT J. *dissenting.*

Solicitor for the appellant: M. Robb, Toronto.

Solicitor for the respondent: J. D. Hilton, Toronto.