

**NOVA SCOTIA COURT OF APPEAL**

**Citation: *R. v. Smith*, 2007 NSCA 19**

**Date: 20070213**

**Docket: CAC 206002**

**CAC 206003**

**Registry: Halifax**

**Between:**

Neil William Smith and Wayne Alexander James

Appellants

v.

Her Majesty the Queen

Respondent

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**Judge:** The Honourable Justice Thomas Cromwell

**Appeal Heard:** September 21 and 22, 2006

**Subject:** **Murder and Conspiracy to Commit Murder; Hearsay Evidence; Fresh Evidence; Disclosure; *Vetrovec* Warning**

**Summary:** The appellants were convicted of first degree murder and conspiracy to commit murder. The theory of the Crown was that the appellant, Smith, had ordered the killing and the appellant, James, counselled or aided in the commission of the murder. The Crown's case rested principally on the evidence of Paul Derry and Tina Potts who had been involved in the killing and attempts to cover it up. Afterwards, they co-operated with the authorities and Derry became a police agent. Both were granted immunity and enrolled in the witness protection program.

**Issues:**

A. Was there a miscarriage of justice?

1. Did a miscarriage of justice occur:
  - (a) because the Crown failed to disclose allegations of wrongdoing before trial by Derry while in the witness protection program?
  - (b) because further evidence of alleged wrongdoing by Derry has

- come to light since the trial?
- (c) because during deliberations, a juror may have seen one of the appellants in handcuffs?
  - (d) because the trial judge interrupted the jury's deliberations to permit the jury to vote at an advanced poll?
  - (e) because the trial was subject to various delays and disruptions?
- B. Jury Directions Re: Potts and Derry:
- 2. Did the judge err by giving an inadequate "*Vetrovec*" warning and in his instructions about potentially confirmatory evidence of the testimony of Derry and Potts?
  - 3. Did the judge err by instructing the jury that suggestions put by counsel during Derry's cross-examination were not evidence?
- C. Kienapple:
- 4. Did the judge err by failing to enter a conditional stay of the conspiracy charge as it was subsumed by the conviction for first degree murder?
- D. First Degree Murder:
- 5. Did the judge err in leaving planned and deliberate murder to the jury?
  - 6. Did the judge err in leaving contract killing to the jury?
- E. Hearsay Evidence:
- 7. Did the judge err in admitting hearsay evidence from Jylene Simmons that Sean Simmons told her he had been beaten because he had been accused of having an affair with the girlfriend of the head of the Halifax chapter of the Hell's Angels?
  - 8. Did the judge err in admitting certain hearsay evidence under the co-conspirator's exception to the hearsay rule and in his instructions to the jury about the permitted use of such evidence?

**Result:**

Appeals dismissed. No failure to make proper disclosure had been shown and the totality of the fresh evidence could not reasonably be expected to have affected the verdict. The points concerning the so-called handcuffs incident, the trial judge's decision to allow the jury to vote in an election during their deliberations and the alleged delays and disruptions of the trial had no merit. The judge appropriately instructed the jury concerning the dangers of relying on the evidence of Potts and Derry and did not err by failing to

enter a conditional stay of the conspiracy charge in light of the convictions for first degree murder. The judge did not err in leaving planned and deliberate murder or contract killing to the jury or in admitting the hearsay evidence of the deceased's widow. The judge did err in instructing the jury that they could use certain out of court assertions by an alleged co-conspirator which were not made in furtherance of the conspiracy as evidence of the conspiracy's existence and in instructing the jury that they could use the same evidence in relation to the allegation of murder by arrangement. However, there was no reasonable possibility that these errors could have affected the result.

**This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 75 pages.**