

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an Appeal in terms of
Article 154P of the Constitution of the
Democratic Socialist Republic of Sri
Lanka read with the Provisions of the
High Court of the Provinces (Special
Provisions) Act No. 19 of 1990.

1. Ramanathan Arumugam
Thondaman M.P.
Nuwara Eliya District
General Secretary C.W.C.

1st Accused – Petitioner

**CA (PHC) 78/09
H.C.R. Case No.165/08
P.C. Nuwara Eliya Case No.22785**

VS.

1. Suppiah Sathasivam,
No. 12/16, Glen Fall Road,
Nuwara Eliya.

Complainant-Respondent

AND NOW BETWEEN

1. Suppiah Sathasivam,
No.12/16 Glen Fall Road,
Nuwara Eliya.

**Complainant-Respondent-
Appellant.**

VS.

1. Ramanathan Arumugam
Thondaman M.P.
Nuwara Eliya District
General Secretary C.W.C.

**1st Accused-Petitioner-
Respondent**

BEFORE : **W.M.M. Malinie Gunaratne, J. and
P.R. Walgama, J.**

COUNSEL : Anil Silva, P.C.
for the Appellant.

Shibly Azeez, P.C. with Avindra Rodrigo
for the Respondent.

Argued on : 27.05.2015

Written submissions
filed on : 22.07.2015

Decided on : 08.06.2016

Malinie Gunaratne, J.

This is an Appeal which has come before this Court, against the Judgment of the High Court of Kandy, which allowed the application made to the said High Court to revise the Order of the Primary Court of Nuwara Eliya, relating to the conviction of the 1st Accused-Petitioner-Respondent (hereinafter referred to as the Respondent).

The facts that have given rise to the present application are briefly as follows:

The Complainant-Respondent-Appellant (hereinafter referred to as the Appellant) instituted proceedings in the Magistrate's Court of Nuwara Eliya against the Respondent and eight others in respect of the commission of an offence under Section 73 of the Primary Court Procedure Act No.44 of 1979.

Upon a preliminary objection raised by the Respondent and the Others the learned Primary Court Judge upheld the Preliminary Objection and dismissed the Appellant's application.

Being aggrieved by the said Order the Appellant sought to move in Revision against the said Order. The learned High Court Judge after hearing the parties, made an order directing the learned Primary Court Judge of Nuwara Eliya to entertain the original application of the Appellant and proceed to hold the inquiry.

At the Primary Court of Nuwara Eliya, the trial was held against the Respondents and after trial the learned Primary Court Judge convicted three Respondents and sentenced them to six (06) months simple imprisonment suspended for three (03) years and a fine of Rupees Ten thousand (Rs.10,000/-) each.

Being aggrieved by the said Judgment the Appellant has invoked the jurisdiction of this Court filing this case and 79/09 and 80/09, to intervene by setting aside the judgment of the learned High Court Judge of Kandy dated 07.07.2009.

Since all three appeals CA (PHC) 78/09), CA (PHC) 79/09 and CA (PHC) 80/09 relate to the same matter and the relief claimed by the Appellant is identical, by consent of parties all three appeals were consolidated and heard together.

When these appeals were taken up for argument on 27.05.2015, the learned President's Counsel for the Respondent raised the following preliminary objections as to the maintainability of this Appeal.

- (i) As an Appeal also had been lodged in the Provincial High Court of Kandy, and since the learned High Court Judge has exercised its Appellate jurisdiction, this Court is precluded from entertaining any application to set aside the impugned judgment.
- (ii) As these are appeals against an acquittal, without the sanction of the Hon. Attorney General the Appellant could not have preferred these appeals.

Upon the said preliminary objections parties agreed to file written submissions.

Firstly, I will consider the first Preliminary Objection namely whether this Court is precluded from entertaining any application to set aside the impugned judgment.

In the Written Submissions filed in this Court by the Respondent, it was contended that, on the Order by the learned High Court Judge dated 07.07.2009, the Appeal (No. 162/2008) and three Revision Applications (PHC 165/2008, 166/2008 and 167/2008) are referred to and the **final order given on the said date is in respect of the aforementioned Appeal and**

three (03) Revision Applications. It was further contended that instant Appeal filed by the Appellant is only in respect of three Revision Applications and had not appealed against the Appeal decision numbered 162/2008. Therefore, it is the stance of the learned President's Counsel for the Respondent since the instant appeal filed by the appellant is only in respect of the three revision applications and had not appealed against the decision of the appeal Case No. 162/2008, this Court cannot overturn a judgment which had not been appealed or revision is sought.

But, in the same written submissions filed in this Court (Para 13) it was contended that, after full hearing of the Appeal and the Revision applications filed by the Respondents and two others in the Provincial High Court of Kandy, the learned High Court Judge made an Order dated 7th July 2009 in respect of all four cases, whereby the learned High Court Judge set aside the conviction of the Respondent and two others and acquitted them of the charge.

Further, it was contended (Para 25) that the Provincial High Court of Kandy was exercising its special jurisdiction, specifically its revisionary jurisdiction in the consideration of the revision application filed by the Respondents along with the Appellate jurisdiction arising out of Provincial High Court of Kandy (MCA) 162/2008.

Hence, it is an undisputed fact that the three Revision Applications (PHC 165/2008, PHC 166/2008, PHC 167/2008) and the Appeal (MCA 162/2008) has been taken up for hearing together at the same time on the agreement of both parties whether it is correct or not. What the Appellant of the case No. 162/2008 would have done was, to withdraw the said Appeal as

the Appellant had no right to appeal since the impugned order being made by the learned Magistrate of Nuwara Eliya under Part VII of the Primary Court Procedure Act. The Petitioner (Appellant of Case No. 162/2008) in his affidavit filed with the Revision Application (H.C.R.A. 165/2008) has admitted that there is no right of Appeal against the Order of the learned Magistrate.

The following Order has been made by the learned High Court Judge when the case No.165/2008 was taken up for hearing.

“ මෙම නඩුවේ අද දින විවාදයට ගනු ලැබුවේ ප්‍රතිශෝධන 165/2008 දරණ නඩුව බවට සියලු පාර්ශ්වයන් එකඟත්වය පළ කර සිටියි. ප්‍රතිශෝධන 166/08, 167/08 දරණ නඩු වලටද ප්‍රතිශෝධන 165/2008 දරණ නඩුවේ කාර්ය සටහන් අදාල විය යුතුය. ඒ අනුව කාබන් පිටපත් ඒ නඩුවලටද ගොනු කරන්න. සම්බන්ධිත අභි: 162/2008 දරණ නඩුවටද සම්බන්ධිත විය යුතු බවට නියෝග කරමි. ඒ අනුව ප්‍රති/165/2008 හි නියෝගය අනෙකුත් නඩුවලටද අදාල වන බවට සියලුම පාර්ශ්වයන් එකඟත්වය පළ කර සිටියි”.

Hence, it is the stance of the learned President’s Counsel for the Appellant that the learned High Court Judge of Kandy exercised his Revisionary Jurisdiction in HCRA 165/2008 and pronounced the judgment. It is to be noted that, the learned High Court Judge in his Judgment dated 11.05.2009 has stated, he took up for argument HCRA 165/2008, and it was an application in Revision.

“ ඉහත සටහන් ප්‍රතිශෝධන ඉල්ලුම් පත්‍ර 3 සහ එකී නියෝගයට එරෙහිව ඉදිරිපත් කර ඇති අභි:162/2008 දරණ අභියාචනය එකම කරුණු සම්බන්ධයෙන් අදාල වන බව පාර්ශ්වකරුවන් විසින් පිළිගෙන මෙම අධිකරණයේ එකඟතාවයක් ඇති කර ගන්නා ලද හෙයින් වර්තමාන නියෝගය මෙකී සියලු නඩු සඳහා අදාල බවට පාර්ශ්වකරුවන්ගේ එකඟත්වය මත වැඩි දුරටත් මෙසේ වාර්තාගත කරමි “

Hence, there is no doubt that the learned High Court Judge has exercised the Revisionary Jurisdiction and pronounced the Judgment dated 07.07.2009.

Now I will turn to consider, what is the remedy available in law when a person is dissatisfied with a judgment of the High Court made, exercising its Revisionary Jurisdiction.

Article 154 P (6) of the Constitution states as follows:

“Subject to the provisions of the Constitution and any law, any person aggrieved by a final order, judgment or sentence of any such Court, in the exercise of its jurisdiction under Paragraphs 3 (b) or 3(c) or 4 may appeal there from to the Court of Appeal in accordance with Article 138”.

In the instant case, although the learned High Court Judge had taken up the Revision Application (No.165/2008) mainly for hearing, parties have agreed to abide by the decision of the said matter in respect of other cases. Hence, I am of the view, since the impugned judgment has been made by the learned High Court Judge, in exercising his Revisionary Jurisdiction, this Court is not precluded from entertaining this Appeal.

It is to be noted, that as all the other cases had been taken up for hearing together, the Appeal case (162/2008) cannot be severed from the other cases. Hence, I am not agreeable with the submissions made by the learned President’s Counsel for the Respondent, that the learned High Court Judge of Kandy was in the exercise of its appellate jurisdiction in giving the Order.

It is not an arguable matter that any appeal against an Order by a Provincial High Court in the exercise of its appellate jurisdiction shall lie in the Supreme Court. However, in the above circumstances this Appeal cannot be considered as an appeal referred to this Court against a judgment given by the learned High Court Judge exercising his appellate jurisdiction. As such I am of the view, this Court has jurisdiction to hear and determine this appeal.

The second preliminary objection is that as this is an appeal against an acquittal, without the sanction of the Attorney General, the Appellant could not have preferred this Appeal.

It is the stance of the learned President's Counsel for the Appellant that, Article 154 P (6) of the Constitution or provisions of the High Court of the Provinces (Special Provisions) Act does not impose any such restriction. The learned President's Counsel has contended that restrictions in respect of appeals to the High Court, are found in Section 318 of the Code of Criminal Procedure Act No.15 of 1979.

The said section reads as follows:

“An Appeal shall not lie from an acquittal by a Magistrate's Court except at the instance or with the written sanction of the Attorney General”.

Accordingly, Section 318 of the Criminal Procedure Code states that an appeal shall not lie from an acquittal by a Magistrate's Court except at the instance or with the written sanction of the Attorney General.

It is the contention of the learned President's Counsel for the Appellant that, restriction does not apply in respect of an Appeal to the Court of Appeal from the High Court.

In the written submissions filed in this Court on behalf of the Respondent, it was contended that, an appeal against the order of the Provincial High Court of Kandy, falls within the ambit of Section 798 of the Civil Procedure Code and in consequence Section 318 of the Criminal Procedure Code.

Section 798 of the Civil Procedure Code reads as follows:

Section 798 "An Appeal shall lie to the Court of Appeal from every order, sentence or conviction made by any Court in the exercise of its special jurisdiction to take cognizance of, and to punish by way of summary procedure the offence of contempt of Court, and of offences by this Ordinance made punishable as contempt of Court, and the procedure on any such appeal shall follow the procedure laid down in the Code of Criminal Procedure Act regulating appeals from orders made in the ordinary criminal jurisdiction of Magistrate's Courts".

The learned President's Counsel, in support of the above submissions referred to case of Rubert Appuhamy vs. Kesbewa Pradeshiya Sabawa and Others (2007) 1 S.L.R. 1. In that case, the accused was charged in the District Court for Contempt of Court under Section 797 of the Civil Procedure Code. The accused were acquitted after inquiry. The Appellant, who is the 3rd defendant and the virtual complainant appealed to have the order of acquittal set aside. The accused raised the objection that no appeal shall be lodged against an acquittal except with the written sanction of the

Attorney General and as the written consent of the Attorney General has not been obtained the appeal should be rejected *in limine*.

The Court held, as the Appellant has failed to conform to the requirement of Section 318 of the Code, the Appellant cannot maintain the appeal.

Section 318 of the Code of Criminal Procedure Act reads as follows:

“An Appeal shall not lie from an acquittal by a Magistrate’s Court except at the instance or with the written sanction of the Attorney General”.

In terms of Section 318 of the Code, an appeal against an acquittal by a Magistrate’s Court can only be preferred by the Attorney General or with his written sanction.

Hence, it is the contention of the learned President’s Counsel for the Respondent that, this Appeal falls within the ambit of Section 798 of the Civil Procedure Code and in consequence Section 318 of the Code of Criminal Procedure Act.

It is to be noted, that the case cited in the written submissions (Rubert Appuhamy vs. Kesbewa Pradeshiya Sabawa and Others) has no relevance to the question of issue in the instant case. I am of the view it is unrelated to the question that arises for determination in this case.

It is relevant to note that, it was an appeal filed in the Court of Appeal, by the Appellant against an order made by the learned District Judge, with regard to a charge for Contempt of Court. In the said case the main question for determination was, whether the entire Chapter dealing with “appeals”

from Magistrate's Court would apply or whether it applies in the exclusion of Section 318, that deals with the requirement of having to obtain the written sanction of the Attorney General. It was held in the said case, Section 318 of the Code is incapable of being isolated from Section 798 of the Civil Procedure Code and should be strictly followed *mutatis mutandis* **in respect of appeals against acquittals recorded by a District Judge.**

Hence, the judicial precedent, relied upon by the Appellant is unrelated to the question that arises for determination in this case.

As such, I am of the view that the restriction in respect of appeals to the High Court found in Section 318 of the Code of Criminal Procedure Act, does not apply in respect of an appeal to the Court of Appeal from the High Court.

In such circumstances, I overrule the preliminary objections raised by the learned President's Counsel.

JUDGE OF THE COURT OF APPEAL

P.R. Walgama, J.

I agree

JUDGE OF THE COURT OF APPEAL