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

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979.

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

CA/10/2011

H/C Badulla case No. 65/1997

1. Selembaram Saunderaraj
2. Peraman Jeganathan

ACCUSED

And,

1. Selembaram Saunderaraj
2. Peraman Jeganathan

ACCUSED-APPELLANTS

Vs,

Attorney General

Attorney General's Department

Colombo 12.

RESPONDENT

Before: **Vijith K. Malalgoda PC J (P/CA) &**

S. Devika De L. Tennakoon J

Counsel: Tenny Fernando for the Accused-Appellant

A. Jinasena SDSG, for the AG

Argued on: 03.02.2016

Written Submissions on: 10.03.2016

Decided on: 05.08.2016

Order

Vijith K. Malalgoda PC J

The two accused-appellants were indicted before the High Court of Badulla under section 296 of the Penal Code for committing the murder of Ammawasi Chandrasekara on or about 20th September 1993.

When the indictments were served on them, both accused-appellants opted to be tried before the High Court Judge without a jury. When the trial commenced in the High Court of Badulla after several years, the prosecution had placed before the Learned Trial Judge a judicial confession of the 1st accused.

The defence challenged the voluntariness of the said confession and a voir dire inquiry was commenced in order to ascertain the voluntariness of the said judicial confession.

As observed by this court, after the evidence of the Learned Magistrate who recorded the above confessionary statement, the evidence of interpreter and the typist who took part in recording the statement was called as witnesses. After the oral and written submissions of both parties the Learned Trial Judge delivered the order on 07.02.2011 admitting the voluntariness of the judicial confession made by the 1st accused.

Being aggrieved by the said order the accused-appellants have preferred the present appeal before this court. When this appeal was taken up for argument on 03.02.2016 before this court, the Leaned Senior Deputy Solicitor General who represented the Honourable Attorney General, raised a preliminary objection for the maintainability of this application, on the ground that the appellants do not have a right of appeal against the impugned order.

Section 316 of the Code of Criminal Procedure Act No 15 of 1979 sets out the limitations of an appeal from a criminal proceeding as follows;

> 316 (1) an appeal shall not lie from any judgment or order of a Criminal Court except as provided for by this code or by any other law for the time being in force.

In the absence of any other law which sets out the appellate procedures from a Criminal Court, what this court will have to consider in this proceeding will therefore limited to the provisions of the Code of Criminal Procedure Act No 15 of 1979.

As identified above, an appeal will only lie against a judgment or an order of a Criminal Court only.

In the said circumstances the Learned Counsel for the Respondents submitted that the impugned order is neither a judgment nor an order, comes within the meaning of section 316 of the Code of Criminal Procedure Act No 15 of 1979, and therefore no appeal is available against the said impugned order.

This court now proceeds to analyze the arguments raised by the Leaned Counsel in support of her contention. The said argument was mainly forcussed on identifying what is a judgment and an order under the meaning of the Code of Criminal Procedure Act No 15 of 1979.

As submitted by the Learned Senior Deputy Solicitor General, the term "judgment" had not been defined by the Code of Criminal Procedure Act but section 283 of the said Act refers to the features of the "judgment" as follows;

> 283 (1) The judgment shall be written by the Judge who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in case where appeal lies shall contain the point or points for determination, the decision there on, and reasons for the decision.
>
> (2) It shall specify the offence if any of which and the section of the law under which the accused is convicted and the punishment to which he is sentenced.
>
> (3) If it be a judgment of acquittal it shall state the offence of which the accused is acquitted.

As identified above, the main ingredients of the judgment are the decision of the court either conviction or acquittal with reasons for the said decision along with a punishment if the decision is a conviction. However, as observed by this court the impugned decision before this court neither gives reasons for conviction nor has acquitted the accused-appellants from the said case.

The term "Judgment" in the context of the Indian Criminal Procedure Code was discussed in the case of ***Surendra Singh V. State of U.P.AIR 1954 SC 194,196,197*** as follows;

> The final operative act is that which is formally declare in open court with the intention of making in the operative decision of the court. That is what constitutes the "Judgment".

A Judgment is the final decision of the court intimated to the parties and to the world at large by formal pronouncement or delivery in open court..."

We see no reason to deviate from the above finding of the Indian Supreme Court when they interpreted the Judgment as the "final decision of court".

With regard to the term order referred to in section 316 of the Code of Criminal Procedure Act, the Learned Senior Deputy Solicitor General has brought to our notice of section 331 (2) of the same Act, in the absence of specific interpretation to the term order in the Act.

331 (2) "In computing the time within which an appeal may be preferred, the day on which the judgment or final order appealed against was pronounced shall be included,...."

The term "final order" was not determined with regard to the provisions of the Code of Criminal Procedure by our courts as well as the Indian Courts but in the case of ***Tarapore & Co Madras V. V/O Tractors Export Moscow AIR 1970 SC 1168, 1169, 1170*** it was determined under the provisions of the Constitution of India [Art 133 (1)] as follows;

"The expression final order" means a final decision on the rights of the parties in dispute in suit or proceeding; if the rights of the parties in dispute in the suit or proceeding remain to be tried, after the order, the order is not final.

So if after the order is made the suit or proceedings still remain to be tried, and the rights in disputes have to be determined, the order is interlocutory."

The Supreme Court in the case of ***Siriwardena V. Air Ceylon (2003) 2 Sri LR 39*** whilst discussing the definition in section 754 (5) of the Civil Procedure Code, observed that the Procedure of direct appeal is available to a party dissatisfied not only with a judgment entered in terms of section 184 of the code, but also with an order having the effect of a final judgment that is, a final order.

Even though the above observation was made with regard to the provisions of the Civil Procedure Code, this court sees no reason to disassociate with the above finding, since the issue to be considered in the present case is almost the same.

As observed by this court, the impugned order does not have the effect of a final judgment. By the said decision of the High Court Judge, he had decided to accept the voluntariness of the judicial confession made before the Magistrate, but the evidence in the main trial, for the court to deliver a decision of conviction or acquittal, yet to be submitted before the Learned High Court Judge.

In the above circumstances this court is of the view that it is safe to follow the above decisions in determining the effect of the final order and under what circumstances an order of a Criminal Court becomes a 'Final Order' in terms of section 331 (2) of the Code of Criminal Procedure Act No 15 of 1979.

As observed above, the impugned order does not have the effect of a final judgment and therefore it is safe to conclude that the said impugned order does not come within the meaning of a "Final Order" under section 331 (2) of the Code of Criminal Procedure Act.

The Learned Counsel for the 1st and the 2nd accused-appellants did not challenge the above preliminary objection raised by the Respondents but submitted that the accused-appellants could have invoke the revisionary jurisdiction of this court under Article 138 of the Constitution.

We agree that the powers of revision of Court of Appeal are wide enough to embrace a case when the law does not permit a statutory appeal to proceed. This position was discussed in the case of ***Soysa V. Silva and Others [2000] 2 Sri LR 235*** as follows;

> "The power given to a Superior Court by way of revision is wide enough to give it the right to revise any order made by an original court. Its object is the due administration of justice and the correction of errors sometimes committed by the court itself in order to avoid miscarriage of justice."

However the revisionary power of this court is a discretionary power and its exercise cannot be demanded as of right unlike the statutory remedy. The tests those are applicable when using the discretion of this court in a revision application was discussed in the case of ***T. Varapragasam and another V. S.A. Emmanuel [CA Revision Application 931/84 CA minute dated 27.07.1991]*** as follows;

a) Aggrieved party should have no other remedy.
b) If there was another remedy available to the aggrieved party then revision would be available if special circumstances could be shown to warrant it
c) The aggrieved party must come to court with clean hands and should not have contributed to the current situation
d) The aggrieved party should have complied with the law at that time
e) The acts complained of should have prejudiced his substantial rights
f) The acts or circumstances complained of should have occasioned a failure of justice

As observed by this court, the prosecution case is not yet concluded. The accused-appellants have a statutory right of appeal once the final order in the High Court Trial is delivered and during the main appeal they have opportunity to canvass against the impugned order before this court. In these circumstances it is clear that the accused-appellants have a statutory appeal and without waiting to make use the said right they have come before this court. The Petitioners have failed to show any special circumstances which compel them to come before this court. In the said circumstances we are not inclined to invoke our revisionary powers in the present case.

For the reasons set out above we uphold the preliminary objection raised by the Respondents and the appeal is accordingly dismissed.

PRESIDENT OF THE COURT OF APPEAL

S. Devika De L. Tennakoon J

I agree,

JUDGE OF THE COURT OF APPEL