

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

*In the matter of an appeal against an
order of the High Court under Sec. 331
of the Code of Criminal Procedure Act
No. 15 of 1979.*

HC N/E : 36/2010

D.M. DASANAYAKE

No : 215, Meepilimana, Nuwaraeliya.

Ca No : 95/2012

Accused – Appellant

Vs.

The Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondent

Before : P.R. Walgama, J

: K.K. Wickremasinghe, J

Counsel : Dilan Rathnayake DSG for the Respondent.

: I. Mallawarachchi for the Appellant.

Argued on : 14.02.2017

Decided on : 06.06.2017

P.R. Walgama, J

The instant order concerns the preliminary objection raised by the counsel for the Accused – Appellant as to the maintainability of the appeal by the Hon. Attorney General as to the sentence imposed by the Learned High Court Judge, on the premis that it is grossly inadequate in the back drop of the circumstances stated therein.

The Accused – Appellant too has impugned the conviction and the sentence dated 05.07.2012. These two appeals are amalgamated under the present case number CA 95/2012.

The Accused – Appellant was charged and was indicted for having caused the death of one Don Pathamasiri Samarajeewa on or about 17/10/2002, punishable under Section 296 of the Penal Code.

At the conclusion of the trial the Learned High Court Judge acquitted the Accused – Appellant of the charge of murder and convicted him culpable homicide not amounting to murder and imposed a sentence of 12 years of Rigorous Imprisonment, and a fine of Rs. 10,000/- carrying a default term of 6 months of imprisonment accordingly.

It is the contention of the counsel for the Accused – Appellant that the Attorney – General cannot prefer the instant appeal in terms of Section 15 of the Judicature Act without filing an application for leave to appeal.

The above Section 15 is reproduced for easy reference here under;

“The Attorney – General may appeal to the Court of Appeal in the following cases;

- (a) From an order of acquittal by a High Court,
 - (i) on a question of law alone or on a trial with or without a jury,
 - (ii) on a question of fact alone or on a question of mixed law and fact with leave of the Court of Appeal first had and obtained in a trial without a jury.
- (b) In all cases on the ground of inadequacy or illegality of the sentence imposed or illegality of any other order of the High Court.

Therefore it is the categorical position of the Counsel for the Accused – Appellant as the Learned High Court Judge has acquitted the Accused -Appellant from the charge of murder and convicted him for culpable homicide not amounting to murder, the Attorney – General should come by way of leave to appeal, and not by way of a direct appeal.

To fortify the above position the counsel for the Accused – Appellant has adverted this court to the case of AG .vs. D.S.J.A. Jayamaha, (decided on 10.06.2009, bearing No: CALA- 321/2006) wherein it opined by Their Lordships that an acquittal of the charge of murder and convict for a lesser offence vit. culpable homicide not amounting

to murder, is for all purposes is an acquittal wherein the Attorney – General is entitled to get leave of court tendering an appeal.

The said principle was encompassed in the case of KISHAN SINGH .VS. EMPERIOR- AIR 1928 Privy Council page- 254.

As per contra the Learned DSG has urged in confutation that the present application by the Attorney – General is made under Section 15 (b) of the Judicature Act. The above subsection deals with a situation where the sentence imposed is inadequate or illegal.

It was the contention of the Learned DSG, that the Attorney – General has lodged the instant appeal for an enhancement of the sentence of culpable homicide not amounting murder by replacing the sentence for murder, and not against an acquittal as contemplated in Section 15 (a) of the Judicature Act, but on the basis of the said sentence is grossly inadequate in the circumstances.

But it is apparent that the Accused – Appellant was charged for murder, and after the conclusion of the trial he was found guilty for culpable homicide not amounting to murder. It was the observation of Their Lordships in the Royal Park case that in such situation that the trial Judge has to acquit the accused of the charge of murder and convict him for a lesser offence of culpable homicide not amounting to murder, which is an acquittal

within the interpretation of Section 15(1) of the Judicature Act.

Thus in the said back drop it is abundantly clear that the Attorney – General should have appealed against the acquittal of the former charge by first having obtained leave from court.

For the afore said reasons this court is persuaded to uphold the preliminary objection, and dismiss the appeal of the Attorney – General.

JUDGE OF THE COURT OF APPEAL

K.K. Wickremasinghe, J

I agree,

JUDGE OF THE COURT OF APPEAL