

RUBERT APPUHAMY
v
KESBEWA PRADESHIYA SABAWA AND OTHERS

COURT OF APPEAL
SALAM, J.
CA 1396/06
DC PANADURA 853/P
APRIL, 24, 2007

Civil Procedure Code – S797, S798, Contempt of Court – Accused acquitted – Complainant appeals – Is the written sanction of the Attorney-General required? – Criminal Procedure Code – 15 of 1979 – S318, S355 Administration of Justice Law – Act 44 of 1973, No. 22 of 1975 – S316, S356, S664, S667 – Compared – Should S318 of the Criminal Procedure Code be isolated from S798?

The respondent-respondent-accused was charged in the District Court for Contempt of Court under S797 of the Civil Procedure Code. The respondents 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.

Held:

- (1) The substantive law and procedure relating to appeals against acquittals and convictions on charges of Contempt of Court was identical to the law presently in force, at least from 1898 and was remarkably uniform and significantly consistent, for a period of over a century.
- (2) It has to be borne in mind that the procedure applicable at any given period, regulating the appeals arising out of contempt of District Court was constantly the Criminal Procedure of the point of time.
- (3) The question for determination, whether the entire chapter dealing with 'appeals' from Magistrates Court would apply in this case or

whether it applies in the exclusion of S318, that deals with the requirement of having to obtain the written sanction of the Attorney-General - S318 of the Code is incapable of being isolated from S798 of the Civil Procedure Code and should be strictly followed *mutatis mutandis* in respect of appeals against acquittals recorded by a District Judge.

APPEAL from an order of acquittal from the District Court of Panadura exercising civil jurisdiction, on a preliminary objection raised.

Cases referred to:

- (1) *Thuraisingham v Karthikesu* – 50 NLR 570
- (2) *King v Chandradasa* – 1923 – TLR 166
- (3) *K.D. Abilin v K.D. Davith Singho* – 58 NLR 566

Rohan Sahabandu with Ms. Amal Weerasinghe de Silva for 3rd defendant-appellant.

Athula Bandara with *S. Godagama* for accused-respondent.

Cur. adv. vult.

May 21, 2007

ABDUL SALAM, J.

Order on the preliminary objection

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The respondent-respondents accused (hereinafter sometimes called as the accused) who stood charged in the District Court for Contempt of Court under section 797 of the Civil Procedure Code, were acquitted, after inquiry. The appellant,, who is the 3rd defendant and the party who set the contempt proceedings in motion, in the original Court, has preferred this appeal to have the order of acquittal set aside.

The accused, *inter alia*, raised the objection that no appeal shall lie against such an acquittal, except with the written sanction of the Attorney-General. The appellant took up the stand, that no written sanction of the Attorney-General is required, to exercise the right of appeal, to challenge the propriety of the order of acquittal. Admittedly, the appellant has not obtained any such written sanction, prior to the filing of the petition of appeal or at any time

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thereafter. The question that arises for determination is the maintainability of an appeal, filed without obtaining sanction.

The law regulating the appeal against an order under section 797 is contained in section 798 of the Civil Procedure Code. The relevant part of it, reads as follows.

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"798 and the procedure on any such appeal shall follow the procedure laid down in the Code of Criminal Procedure Act No. 15 of 1979, regulating appeals from orders made in the ordinary criminal jurisdiction of the District and Magistrate Court."

The learned Counsel of the accused claims that the phrase "procedure laid down in the Code of Criminal Procedure Act", as used in section 798, attracts the whole of Part VII and in particular section 318 of the Code. 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. Based on this, it was argued on behalf of the accused, that the petition of appeal should be dismissed in *limine*. In other words, the learned Counsel has emphasized, that the written sanction of the Attorney-General is a condition precedent, to prefer an appeal against an acquittal, under section 798 of the Civil Procedure Code. Indeed, it is so, if the appeal is preferred against an acquittal of the Magistrate. In short, therefore, the *crux* of the matter is the applicability of section 318 of the Code, to an order of acquittal, made by a District Judge.

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On behalf of the appellant, learned Counsel maintained that prior to the introduction of the Code of Criminal Procedure Act No. 15 of 1979 it was the Code of Criminal Procedure Ordinance, No. 15 of 1898, which regulated the procedure, in respect of appeals against acquittals, both in the POLICE COURT and DISTRICT COURT.

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He placed much reliance on the omission of the words "District Court", in section 318 of the Code, to drive home his point, that the law, as is presently applicable, requires no written sanction of the Attorney-General, in contrast to the procedure that was prevalent prior to 1973. The point that needs to be clarified here is what in fact necessitated the deletion of the words "District Court", from section 318, of the present Code. The precise answer to this

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question is that the District Court, which exercised original criminal jurisdiction under the old Criminal Procedure Code, with its concurrent exclusive civil jurisdiction, emerged as Court exercising, no more than civil jurisdiction, from the year 1973. The words "District Court", therefore, came to be omitted from Section 318, to keep pace with this development of the jurisdictional change, as the use of the words "District Court", in section 318 of the Code of Criminal Procedure Act, then became redundant.

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It has to be borne in mind that the procedure applicable at any given period, regulating the appeals arising out of contempt of District Court was constantly the criminal procedure of the point in time. To restate the issue arising for determination in this judgment, the question for determination here is whether the entire chapter dealing with "appeals" from Magistrate's Court would apply in this case or whether it applies with the exclusion of section 318 of the Code that deals with the requirement of having to obtain the written sanction of the Attorney-General.

The Administration of Justice Law No. 44 of 1973 replaced the Code of Criminal Procedure Ordinance, No. 15 of 1898. Incidentally, Chapter IV of the said law regulated the right of, and procedure for appeals to the Supreme Court from Judgments, and orders of all original Courts. In dealing with right of appeal, Section 315 of the Administration of Justice Law provided that any person who shall be dissatisfied with any Judgment pronounced by an original Court in any criminal case or matter to which he is a party, may prefer an appeal to the Supreme Court for any error in law. In reality, appeals by which acquittal orders can be challenged were restricted only to those, which are filed by the Attorney-General or with his written sanction.

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Section 356 of the Administration of Justice Law, No. 44 of 1973, on the other hand, defined the phrase "Original Court" as "District Court and Magistrates Court." In fact, the general provisions relating to contempt of Court during the period, when the Administration of Justice Law remained in force, contained in Section 664 to 667, which provided for matters connected with contempt of Court and authority to punish as for contempt. As there were no specific provisions in the chapter dealing with contempt of Court, to appeal against an acquittal on such a charge, an

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aggrieved party had to have recourse to section 316 of that law, to prefer any appeal against an acquittal. As such, under the Administration of Justice Law, it is reasonably clear that an appeal against an acquittal on a charge of contempt of Court had to be preferred with the sanction of the Attorney-General.

However, the Administration of Justice Law, 44 of 1973 and 25 of 1975, remained in the statute book relatively for a negligible length of time, before the Code of Criminal Procedure Act No. 15 of 1979 and Civil Procedure Code Act No. 20 of 1977, respectively replaced them.

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It must be emphasized, that the substantive law and procedure relating to appeals against acquittals and convictions, on charges of contempt of Court was identical to the law presently in force, at least from 1898, and was remarkably uniform and significantly consistent, for a period of well over a century.

The authorities *Thuraisingham v Karthikesu*⁽¹⁾, *King v Chandradasa*⁽²⁾, *K.D. Abilin v K.D. Davith Singh*⁽³⁾ cited on behalf of the appellant, undoubtedly strengthen the proposition of law that an appeal against a conviction for contempt of Court by the District Judge, is subject to no limitation. As has been expressed in the decided cases, the legislature cannot be said to have conferred the right of appeal under 798 and withdrawn it at the stroke of a pen by introducing the phrase, "*procedure laid down in the Code of Criminal Procedure Act*", as being the procedural provisions applicable for appeals under 798.

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Quite unfortunately, the question as to whether the written sanction, of the Attorney-General, is a prerequisite to an appeal, against an order of acquittal entered by a District Judge, in a contempt proceeding, has not been authoritatively considered by our Courts. In passing, I would like take the liberty to observe that the reason, for such a state of affair is the abundantly plain and simple language used in section 798 of the CPC and the corresponding provisions in the statues relating to criminal procedure.

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According to the decided authorities, section 335 of the Code of Criminal Procedure Ordinance No. 15 of 1898, does not permit an appeal, where a male offender under the age of 16 years is

sentenced to whipping only and where he has pleaded guilty and been convicted by a District Court on such plea. It is also laid down that where an accused has been sentenced to by District Court to a term of imprisonment not exceeding three months without any other punishment and to a fine not exceeding one hundred rupees without any other punishment, no appeal is permitted except with the leave of the District Judge. The authorities cited by the appellant, elucidate whether, limitations spelt out in section 335 of Ordinance No. 15 of 1898, considered as procedural law or substantive law in nature. As has been, constantly pointed out in the judgements cited by the appellant, the prohibitions imposed by section 335 (*supra*) against the right of appeal are substantive law, than matters of procedure. Further, it is beyond any stretch or imagination to think that by enacting section 798 of CPC the legislature would have intended to reintroduce the substantive law of limitation of appeals, from the Code, in to the CPC.

Conversely, section 336 of Ordinance No. 15 of 1898, section 316(c) of 33 of 1973 and Section 318 of Act No. 15 of 1979, which deal with the qualification to lodge an appeal against an acquittal by a Magistrate, except with the written sanction of the Attorney-General, is undoubtedly a restriction affecting the procedural law. In my opinion, under no circumstances it can constitute an integral part of the substantive law.

In the circumstances, it would be seen that the judicial precedents, relied upon by the appellant are unrelated to the question that arises for determination in this case. Based on the underlying principles, I am inclined to endorse the view that the requirement laid down in section 318 of the Court of Criminal Procedure Act, No. 15 of 1979, is a procedural step. Hence, it is my view that section 318 of the Code, is incapable of being isolated from section 798 of the CPC and should strictly be followed *mutatis mutandis*, in respect of appeals against acquittals recorded by a District Judge.

As the appellant has admittedly failed to conform to the requirement of section 318 of the Code, the preliminary objection, raised by the accused is upheld. In the result, the petition of appeal, filed by the appellant stands dismissed, subject to costs.

Appeal dismissed.