

UPUL DE SILVA
v.
ATTORNEY-GENERAL

SUPREME COURT
G. P. S. DE SILVA, CJ.,
PERERA, J. AND
WEERASEKERA, J.
S.C. APPEAL NO. 4/99
COURT OF APPEAL NO. 182/95
HIGH COURT NEGOMBO NO. 07/94
MAY 27, 1999.

Appeal – Power of the Court of Appeal on appeal from a conviction – Order for retrial – Scope of section 335 (2) (a) of the Code of Criminal Procedure Act.

The appellant was indicted with the offence of criminal breach of trust (section 391 of the Penal Code) and the offence of using a forged document as genuine (section 459 read with section 454). After trial, the High Court Judge acquitted the appellant on both charges but convicted him of criminal misappropriation and imposed a sentence of twelve months rigorous imprisonment suspended for five years. On an appeal by the appellant, the Court of Appeal acting under section 335 (2) (a) of the Code of Criminal Procedure Act, took the view that upon the evidence adduced at the trial the offence of criminal breach of trust had been made out; set aside the conviction and sentence and ordered a retrial of the appellant upon an appropriate indictment (viz for the offence of criminal breach of trust).

Held:

Where the Court of Appeal acting under section 335 (2) (a) of the Code of Criminal Procedure Act orders a retrial upon a determination of an appeal against a conviction, such retrial must necessarily be limited to the offence or offences upon which the accused had been convicted by the trial Court, and against which he had preferred an appeal and none other.

Cases referred to:

1. *Andhra Pradesh v. Thadi Narayanan* – 1962 AIR SC 240.
2. *Gopalan v. The State of Kerala* – 1962 Criminal Law Journal 427.
3. *King v. Kumaraswamy* – 3 CWR 184.
4. *Attorney-General v. Ratwatte* – 72 CLW 93, 95.

APPEAL from the Judgment of the High Court of Negombo.

Padmasiri Nanayakkara with *Tilakasiri Alahakoon* and *Ms. Swarna Perera* for the accused-appellant.

B. *Aluvihare*, SSC for the respondent.

Cur. adv. vult.

June 24, 1999.

PERERA, J.

The accused-appellant (hereinafter referred to as the appellant) together with another was indicted before the High Court of Negombo with having committed offences punishable under section 391 of the Penal Code (Criminal Breach of Trust) and section 459 read with section 454 of the Penal Code. (The offence of using as genuine a forged document.)

At the conclusion of the trial, the learned High Court Judge held that the charges preferred against the accused had not been proved and proceeded to acquit both the accused of all the counts on the indictment. The trial Judge, however, observed that the evidence adduced at the trial established the commission of the offence of criminal misappropriation and acting under the provisions of section 177 of the Code of Criminal Procedure Act, No. 15 of 1979, convicted the appellant of the aforesaid offence and imposed a sentence of twelve months rigorous imprisonment and suspended the operation of the said term of imprisonment for a period of five years.

The appellant being aggrieved with the said conviction and sentence, lodged an appeal to the Court of Appeal.

The Court of Appeal at the conclusion of the argument held that it was not permissible for the trial Judge to convict the appellant on a charge of criminal misappropriation for the following reasons :

- (a) Criminal Misappropriation and Criminal Breach of Trust are not cognate offences;
- (b) That the provisions of section 177 of the Code of Criminal Procedure Act were not applicable to the facts of the instant case for the reason that this section was applicable only if the evidence discloses that either a single act or a series of acts is of such a nature that it is doubtful which of the several offences the facts proved will constitute;
- (c) The charge of misappropriation was not read out to the accused-petitioner either before or in the course of the trial.

For the aforesaid reasons; the Court of Appeal proceeded to discharge the appellant on the charge of criminal misappropriation which was an offence punishable under section 386 of the Penal Code.

However, the Court of Appeal proceeded to hold further that the learned High Court Judge had misdirected himself in regard to the ingredients of the charge of Criminal Breach of Trust. It was the view of the Court of Appeal that entrustment was not absolutely necessary in all situations to establish a charge of Criminal Breach of Trust. The Court of Appeal held that where a person is appointed to an office, and if by reason of such office such person has dominion over any property that would constitute sufficient entrustment for the purpose of establishing the commission of the offence of Criminal Breach of Trust as defined in section 388 of the Penal Code. The Court of Appeal expressed the view that upon the evidence adduced at the trial, the offence of Criminal Breach of Trust had been made out and that the

learned trial Judge had misdirected himself on this matter when he proceeded to acquit the appellant of the said charge.

The Court of Appeal, accordingly, set aside the findings, the conviction and the sentence imposed on the appellant by the learned trial Judge and ordered a retrial of the appellant upon an appropriate indictment. On a perusal of the judgment of the Court of Appeal, it would appear that the appropriate offence referred to is the offence of Criminal Breach of Trust. (section 388 of the Penal Code.)

The Court of Appeal had made the aforesaid Order acting under the provisions of section 335 (2) (a) of the Code of Criminal Procedure Act, No. 15 of 1979. In the present case, this Court is called upon to determine whether this order made by the Court of Appeal falls within the scope of the provisions of section 335 (2) of the Code of Criminal Procedure Act, No. 15 of 1979. Section 335 (2) reads thus :

"In an appeal from a conviction by a Judge of the High Court at a trial without a Jury, the Court of Appeal may –

- (a) reverse the verdict and sentence and acquit or discharge the accused or order him to be retried; or
- (b) alter the verdict maintain the sentence, or without altering the verdict increase or reduce the amount of the sentence or the nature thereof, or substitute a conviction for a different offence of which the accused person could have been found guilty on the indictment and pass such sentence as may be warranted by law in substitution for the sentence passed."

In this connection it would also be relevant to consider the provision of section 337 of the Code of Criminal Procedure Act, No. 15 of 1979 which specifically provides for appeals against acquittals.

Section 337 reads thus :

- (1) In an appeal from an order of acquittal, the Court of Appeal may reverse such order and direct the accused to be retried or find him guilty of the same or a different offence of which the accused person could have been found guilty on the indictment and pass sentence on him according to law.
- (2) In an appeal from any other order, the Court of Appeal may alter or reverse or set aside such order or make such order in substitution for the order of the High Court as may be warranted by law.

I must observe that in the present case there was no appeal filed against the order of acquittal made by the High Court in respect of the appellant on the charge of Criminal Breach of Trust.

In considering this matter, I have examined the corresponding provisions of the Indian Code of Criminal Procedure Act. Section 386 (b) of the Indian Criminal Procedure Act provides as follows :

In an appeal from a conviction the Appellate Court may –

- (i) reverse the finding and sentence and acquit or discharge the accused or order him to be retried."

The Indian Supreme Court in *Andhra Pradesh v. Thadi Narayanam*⁽¹⁾, considered the scope of this section which is on identical terms as section 335 (2) (a) of our Code.

The question that arose for determination by the Indian Supreme Court in the aforesaid case was whether the High Court was empowered to reverse the finding of acquittal recorded by the trial Court in favour of an appellant in respect of an offence which was directly not the subject-matter of the appeal, in the course of an appeal preferred by a person convicted of an offence against the order of

conviction and sentence imposed on him by the trial Court in the exercise of its appellate powers under section 423 (i) (b) of the old Criminal Code of Procedure Act of India (reproduced in the present Indian Criminal Procedure Code as section 386 (b) (i) which is identical to the provisions contained in section 335 (2) (a) of the Code of Criminal Procedure Act, No. 15 of 1979.

In this case, the Indian Supreme Court held as follows :

"If an order of conviction is challenged by the convicted person, but the order of acquittal was not challenged by the State, it is only the order of conviction that was to be considered by the Appellate Court and not the order of acquittal." (vide *State of Andhra Pradesh v. Thadi Narayanan*⁽¹⁾.)

Further, in *Gopalan v. the State of Kerala*,⁽²⁾ the Supreme Court of India held that the High Court may not set aside the order of acquittal and order a retrial on a charge for that offence, upon which he has been acquitted, unless there is an appeal against the order of acquittal by the State.

Learned Senior State Counsel relying upon the aforesaid decisions, very rightly submitted that where the Court of Appeal acting under section 335 (ii) (a) of the Code of Criminal Procedure Act orders a retrial upon a determination of an appeal against a conviction, such retrial must necessarily be limited to the offence or offences upon which the accused had been convicted by the trial Court, and against which he has preferred an appeal and none other. Senior State Counsel, submitted that he was, therefore, unable to resist the appeal filed by the appellant in this case. I must, indeed, place on record my appreciation of the assistance given to this Court by Mr. Aluvihare, Senior State Counsel in this case.

Having regard to the specific matter which has come up for determination in the present case, it would be appropriate to refer to the observations of Shaw, J. in *King v. Kumaraswamy*,⁽³⁾ which reads thus :

"The provision contained in section 336 of the Criminal Procedure Code (section 337 of the Code of Criminal Procedure Act, No.15 of 1979) authorizing an appeal at the instance of or with the sanction of the Attorney-General in the case of an acquittal, even on a question of fact is one unknown to the English Criminal Law and is somewhat opposed to one of its elementary principles, namely, that no man should be twice placed in jeopardy for the same offence."

This observation of Shaw, J. in *King v. Kumaraswamy* has been cited with approval by T. S. Fernando, J. in the case of the *Attorney-General v. Ratwatte and another*⁽⁴⁾.

I am, therefore, in agreement with the submission of Senior State Counsel which finds ample support in the two decisions of the Supreme Court of India cited by him in support of this proposition. I would, accordingly, allow the appeal of the appellant, set aside the order for retrial of the appellant made by the Court of Appeal and acquit him.

G. P. S. DE SILVA, CJ. – I agree.

WEERASEKERA, J. – I agree.

*Appeal allowed and
Accused acquitted.*