

1948

Present: Jayetilleke S.P.J. and Windham J.

SABAPATHY, Appellant, and SINNIAH *et al.*, Respondents.

S. C. 635—M. C. Chavakachcheri, 26,206.

Criminal Procedure Code—Order for payment of compensation to accused—Does appeal lie?—Section 253 B, sub-sections 1 and 4.

An appeal lies from an order for the payment of compensation made under Section 253 B (1) of the Criminal Procedure Code.

Kandiah v. Ramalingam (1948) 49 N. L. R. 304, overruled.

THIS was a question referred to a Bench of two Judges by Wijeyewardene A.C.J. in the following terms :—

“ Acting under section 253B of the Criminal Procedure Code, the Magistrate ordered the complainant in this case to pay Rs. 5 as Crown costs and Rs. 10 as compensation to each of the five accused. The complainant filed an appeal against the order to pay compensation but later filed a petition and an affidavit in view of a recent decision of this Court (*Kandiah v. Ramalingam, et al.*¹) and moved this Court by way of revision.

“The learned Judge who decided *Kandiah v. Ramalingam et al.* (*supra*) says in the course of his judgment :—

‘ In my opinion when the legislature took away the right of appeal against an order for the payment of Crown costs the right of appeal against all other orders dependent thereon ceased. Any other view would have the effect of nullifying the Statute. If in every case in which an order for the payment of compensation is made an appeal were to lie it would amount to allowing a right of appeal against the order for the payment of Crown costs. For, the order for the payment of compensation cannot be disturbed without at the same time disturbing the order for the payment of Crown costs as they both rest on the same foundation, viz., the acquittal or discharge of the accused and the declaration that the complaint is frivolous or vexatious.’

“ That opinion is in conflict with the view expressed in a series of earlier decisions.

“ I am unable to see why the setting aside of an order for the payment of compensation must necessarily result in the cancellation of the order for Crown costs. As pointed out earlier by the learned Judge himself in his judgment, ‘ an order for the payment of Crown costs can exist without an order for the payment of compensation ’.

“ The parties affected by the order for the Crown costs are the Crown and complainant while the parties affected by the order for payment of compensation are the accused and complainant. It is difficult to

¹ (1948) 49 N. L. R. 304.

understand why a provision which denied a right of appeal against the Crown regarding Crown costs should be taken to have affected the right of appeal given to a complainant by section 338 of the Code against an accused regarding the order for compensation.

“ I think this is a question that should not be left in state of doubt and uncertainty. The considerations which move the court in the exercise of its revisionary powers differ from those which are taken into account in the exercise of its appellate powers and it is therefore necessary to ascertain whether the order in question is an appealable order.

“ I reserve the question for a Bench of two Judges. It is desirable that a Crown Counsel should assist the Court in this matter. I shall give my decision on the order of the Magistrate after the decision on this question reserved by me.”

N. Kumarasingham, with *C. Renganathan*, for the complainant, appellant.

No appearance for the accused, respondents.

R. A. Kannangara, *Crown Counsel*, for the Attorney-General.

Cur. adv. vult.

August 23, 1948. WINDHAM J.—

The sole point reserved for decision in this case is a legal one, namely, whether subsection (4) of section 253B of the Criminal Procedure Code deprives a complainant in a criminal case of the right of appealing against an order for the payment of compensation by him to the accused, made by a magistrate under subsection (1) of the same section, where the complaint has been declared to be frivolous or vexatious. It is undisputed that, but for subsection (4), a complainant would have such a right by virtue of section 338 of the Criminal Procedure Code.

The provisions of subsections (1) and (4) of section 253B (subsections (2) and (3) being irrelevant for the purpose) are as follows :—

“ 253B. (1) If in any case instituted on complaint under section 148 (1) (a) which a Magistrate's Court has power to try, a Magistrate acquits or discharges the accused and declares that the complaint was frivolous or vexatious, it shall be lawful for such Magistrate to order the complainant to pay by way of Crown costs a sum not exceeding five rupees, and he may, in addition, at the same time, order the complainant to pay to the accused, or to each of the accused when there are more than one, such compensation not exceeding ten rupees to each person as the Magistrate shall think fit, which sum if paid or recovered shall be taken into account in any subsequent civil suit relating to the same matter.

(4) No appeal shall lie against any order for payment of Crown costs.”

Now at first sight it would certainly appear that nothing in subsection (4) deprives a complainant of the right to appeal against an order for payment of compensation, as distinct from Crown costs, and it was so

held in *Ratnapala Terunanse v. Marthelis Perera*¹, *De Silva v. Gregoris*² and a number of other decisions, all of which were based on sections 197 and 198 of the Criminal Procedure Code, 1898, which have been re-enacted without alteration as section 253B of the existing criminal Procedure Code (Cap. 16).

In a recent decision, however, *Kandiah v. Ramalingam*³, those judgments have been dissented from, and it has been held that the effect of subsection (4) of section 253B, read together with subsection (1), is to deprive a complainant of the right of appealing, not only against an order for payment of Crown costs, but also against an order for payment of compensation to the accused, on the ground that a deprivation of the former right must carry with it the latter, which is ancillary to it. The reasoning of the learned Judge, Basnayake J., in *Kandiah v. Ramalingam* is contained in the following paragraph of his judgment, at page 306 :—

“ An order for payment of Crown costs can exist without an order for the payment of compensation, but an order for the payment of compensation cannot exist without an order for the payment of Crown costs. If then the Statute forbids an appeal against the order for the payment of Crown costs which is a *sine qua non* for the order for payment of compensation it cannot in my view be claimed that the order for payment of compensation escapes the prohibition in subsection (4). In my opinion when the legislature took away the right of appeal against an order for the payment of Crown costs the right of appeal against all orders dependent thereon ceased. Any other view would have the effect of nullifying the Statute. If in every case in which an order for the payment of compensation is made an appeal were to lie it would amount to allowing a right of appeal against the order for the payment of Crown costs. For, the order for the payment of compensation cannot be disturbed without at the same time disturbing the order for the payment of Crown costs as both rest on the same foundation, viz., the acquittal or discharge of the accused and the declaration that the complaint is frivolous or vexatious. A construction which renders the express provisions of a Statute nugatory and defeats its very object is unacceptable and must be rejected in favour of that which gives effect to the Statute ”.

Now with the greatest respect I am unable to agree with the reasoning in the passage quoted above. It would seem to resolve itself into the following proposition: “ An order for compensation can be made only in a case where an order for Crown costs has first been made ”. (The premises so far are sound.) “ No appeal can lie from an order for Crown costs; therefore no appeal can lie from an order for compensation ”. But I confess I fail to see why it should not lie. The fallacy would seem to rest in the learned Judge's having departed from his original premises, where the order for Crown costs was rightly treated as merely a *sine qua non* to the order for compensation, and basing his conclusion upon the altered and (in my view) false premises that the order for compensation

¹ (1902) 2 *Weerakoon's Reports* 78. ² (1906) 1 *A. C. R.* 29.

³ (1948) 49 *N. L. R.* 304.

is part of, or inseparable from, the order for Crown costs, the conclusion being that when subsection (4) prohibits an appeal from the latter the prohibition must extend to an appeal against any inseparable part of the latter, such as the order for compensation. But this conclusion, as I say, is in my respectful view based upon false premises, because on a perusal of subsection (1) it appears that the order for compensation is not a part of the order for Crown costs or incapable of independent treatment. It is a separate order, made in favour of a different party, the accused, while the order for Crown costs is of course in favour of the Crown; and being a separate order, there is nothing to prevent its being separately appealed from. No doubt it cannot be made unless an order for Crown costs has first been made, and thus it cannot be made save in the circumstances in which the latter can be made, namely, where the accused has been acquitted or discharged and the complaint has been declared to be frivolous or vexatious. But that does not make it a part of the order for Crown costs, or so bind it up with the latter that it cannot be disturbed without the latter being disturbed too.

With regard to the question of disturbance, and to the passage in which the learned Judge concludes that—"the order for the payment of compensation cannot be disturbed without at the same time disturbing the order for the payment of Crown costs as they both rest on the same foundation, viz., the acquittal or discharge of the accused and the declaration that the complaint is frivolous or vexatious"—I would merely observe that, if the metaphor of a common foundation is to be pursued, then it is the order for Crown costs which forms the ground floor of the structure (*i.e.* the necessary pre-requisite to support further storeys) and the order for compensation which forms the upper storey. And it is quite feasible to disturb, and even remove, an upper storey without disturbing the ground floor—though of course not *vice versa*. Therefore, with respect, I am unable to share the apprehensions of the learned Judge that—"if in every case in which an order for the payment of compensation is made an appeal were to lie, it would amount to allowing a right of appeal against the order for the payment of Crown costs".

Finally, subsection (1) of section 253B speaks first of ordering the complainant to pay Crown costs, and then of ordering him to pay compensation. Subsection (4) prohibits an appeal from an order for payment of Crown costs. The language is clear. Had subsection (4) been intended to prohibit an appeal from an order to pay compensation, it might have been expected either expressly to mention an order for payment of compensation, or to provide that no appeal shall lie against "any order made under this section". Phrased as it is, however, subsection (4) can only be construed to mean what it says, and no more.

For these reasons I would respectfully dissent from the judgment in *Kandiah v. Ramalingam*, and adhere to the earlier and contrary decisions which I have cited. I accordingly hold that there is nothing in section 253B which deprives a complainant of the right of appeal from an order for compensation made against him under that section, which right is conferred by section 338 of the Criminal Procedure Code.

JAYETILEKE S.P.J.—I agree.