

SEVANAIA SORONAIVALU

v.

THE STATE

[SUPREME COURT, 1998 (Tuivaga P; Cooke of Thorndon,
Mason JJA) 20 March]

Criminal Jurisdiction

Appeal- whether appeal lies against grant to appellant of extension of time to appeal- whether appropriate subject of grant of special leave by the Supreme Court. Court of Appeal Act (Cap 12) Section 35- Constitution (1990) Section 117 (3).

Constitution- power of Supreme Court to grant special leave to appeal – Constitution (1990) Section 117 (3).

The Supreme Court confirmed that a party aggrieved by a grant of extension of time by a single Justice of Appeal has no right of appeal to the full Court of Appeal. The Supreme Court also interpreted the constitutional special leave provision as conferring on it a “comprehensive jurisdiction in respect of any decision of any other court in the judicial hierarchy.”

No case was cited.

A.H.C.T. Gates for the Appellant
K. Wilkinson for the Respondent

Judgment of the Court:

This is an application for special leave to appeal to the Supreme Court pursuant to section 117(3) of the Constitution and sections 8 and 13 of the Supreme Court Decree 1991.

The applicant (the accused) was charged that he murdered and raped a three-year old child on 4 December 1993. He pleaded not guilty and his trial commenced in the High Court on 1 August 1995 before Kapa J. sitting with three assessors. The evidence against the accused was essentially of alleged confessions.

The Judge summed up to the assessors on 13 September 1995. On the same day the assessors after retirement delivered their unanimous opinion that the accused was not guilty of murder, the third assessor volunteering as well “I would like to say that the accused did not mean to kill the little girl.” The first assessor gave the opinion that the accused was also not guilty of rape, but the other two assessors gave the opinion that he was guilty of rape.

On the same day in a very briefly reasoned judgment the Judge acquitted the accused on both counts. He dismissed the opinions of the second and third

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assessors that the accused was guilty of rape as totally illogical and untenable in the light of the unanimous opinion that he was not guilty of murder, based on the same evidence of statements by the accused.

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On 10 October 1995 the Acting Director of Public Prosecutions filed in the Court of Appeal a petition of appeal (in effect a notice of appeal) and an application for leave to appeal, specifying various alleged errors of law and of mixed law and fact on the trial Judge. Section 21(2) of the Court of Appeal Act (Cap. 12), introduced in 1990, authorises appeals and applications for leave to appeal by the State against an acquittal on grounds there stated. The Director of Public Prosecutions has since filed an amended notice of appeal, dated 12 March 1996; it has not been suggested for the accused that this amendment raises any separate question for determination by this Court.

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By section 26 of the same Act, a person convicted desiring to appeal must give notice in such manner as may be directed by Rules of Court within 30 days of conviction, but the time may be extended at any time by the Court of Appeal. By section 35, a single Judge of the Court of Appeal may exercise the power of the Court to extend time: "but, if the judge refuses an application on the part of the appellant to exercise any such power in his favour, the appellant shall be entitled to have the application determined by the Court as duly constituted for the hearing and determination of appeals under this Act."

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In the history of this case it appears to have been assumed on all hands that the time limit in section 26(1) applies to State appeals against acquittals, although section 26(1) has not been amended to say so. We accept the common assumption as correct, as the new section 21(2) authorises the State to appeal against an acquittal "under this Part" - namely Part IV of the Act, which includes section 26. It is to be noted, however, that section 35 (likewise in Part IV) gives a right of determination by the Court, as duly constituted for the hearing of appeals, only if an application for an extension of time has been refused by a single Judge. No right of review by the Court is conferred when the single Judge has granted an extension. We can see no process of interpretation, however liberal, which could produce a power of review by the Court of Appeal of a grant as distinct from a refusal of an extension.

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What section 26(1) requires of an applicant is that he shall give notice of appeal or of an application for leave to appeal within 30 days of the date of conviction. The wording is different from, for instance, that of rule 4(3) and (4) of the Supreme Court Rules 1991, which treat filing and service separately. Notwithstanding an argument by Mr. Wilkinson to the contrary, we think, in agreement with the Court of Appeal and Sir Moti Tikaram P., that give comprises both filing and service. Rule 35(5) of the Court of Appeal Rules is consistent with this interpretation. It requires a notice of appeal, in addition to being filed with the Registrar, to be served upon all parties to the proceedings in the Court below who are directly affected by the appeal. Similarly rule 38 refers to an application for leave to appeal duly served. The interpretation that service as well as filing is to be within the thirty days gives effect to the

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principle of criminal justice that parties to criminal proceedings should be notified promptly if the case is to be taken further after the verdict at the trial.

In this case, as already mentioned, the State's notice of appeal and notice of application for leave to appeal against the acquittal on 13 September 1995 were filed in the Court of Appeal on 10 October 1995, that is to say within the 30 days. But they were not served on the accused until 15 December 1995, that is to say two months two days out of time. An extension of time was accordingly necessary if the acquittal was to be challenged in the Court of Appeal.

The State applied for an extension and the application was heard by Tikaram P., sitting as a single Judge of the Court of Appeal pursuant to section 35 of the Court of Appeal Act. Having heard counsel on both sides and considered affidavits filed on both sides, the learned President in a Ruling dated 25 March 1996 granted the extension sought and ordered that the service on the accused on 15 December 1995 be deemed to have been effected within the extended time.

By letter dated 9 April 1996 to the Registrar of the Court of Appeal the solicitors for the accused gave notice, in purported pursuance of section 20 of the Court of Appeal Act, that the accused was aggrieved by the single Judge's exercise of the extension power and wished the matter to be determined by the Court as duly constituted for the hearing and determining of appeals under the Act. This application was heard by the Court of Appeal (Sir Mari Kapi, Savage and Hillyer JJ. A.) on 29 May 1996. They ordered that the application be struck out, on the ground that section 35 does not give an accused a right to apply to the Court of Appeal when the State is granted an extension of time by a single Judge. As already stated, we agree with this view.

By petition dated 10 July 1996 the accused seeks special leave from this Court to appeal against the judgment of the Court of Appeal dated 29 May 1996. As we consider the judgment to have been correct in holding that the Court of Appeal lacked jurisdiction, special leave to appeal from it would be obviously inappropriate and is refused.

We note, however, that, as the Constitution stands at present, section 117(3) provides -

“(3) Nothing in this section shall affect the right of the Supreme Court to grant special leave to appeal from the decision of any court in any civil or criminal matter.”

We regard this section as conferring on the Supreme Court, by necessary implication, a comprehensive jurisdiction available in respect of any decision of any other court in the judicial hierarchy. But its very width and the scheme of the various specific provisions in the Constitution for appeal mean that it must be seen as essentially a residual jurisdiction to be exercised sparingly and only in exceptional circumstances where the interests of justice so demand.

A It is a section which enables this Court in a proper case to give special leave to appeal from a decision of a single Judge of the Court of Appeal under section 35 of the Court of Appeal Act extending the time for the State to give notice of appeal or of an application for leave to appeal against an acquittal; and as the liberty of the citizen is ultimately at stake we are prepared to treat the petition as invoking this jurisdiction. The purpose of the petition is essentially to challenge the extension of time granted on behalf of the Court of Appeal by a single Judge. The petitioner's object is to prevent any risk of his acquittal being replaced by a conviction. In these circumstances we think it B
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Nevertheless we are satisfied that this is not one of those exceptional cases where special leave under section 117(3) would be appropriate. Although there was more than minor delay, Tikaram P. accepted the explanation that there was difficulty in locating the accused for service. The affidavit evidence to that effect included considerable hearsay, but we are not willing, especially when dealing with the case under section 117(3), to disturb Sir Moti's acceptance of that particular evidence in his discretion. We have regard also, and importantly, to the gravity of the charges, the course which the case took in the High Court, and the nature of the contentions which the State seeks to make before the Court of Appeal. The interests of justice do not require this Court to exercise its residual jurisdiction. The petition is dismissed. The result is that the State's appeal and application for leave to appeal may now be dealt with by the Court of Appeal on the merits.

(Petition dismissed.)

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