

CRIMINAL APPEALS

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Is an appeal the insignitia of a democratic assets integrally entwined with the machinery provided for dispensation of justice? Does it mean that Judges like ordinary people are fallible or prone to error is an appeal a valuable right conferred under the criminal jurisprudence to protect an individual against the latent or patent errors of law or facts. A criminal appeal is a statutory creation and the right of such an appeal is not inherent but manifestly restricted one. As aptly remarked by Hon'ble Iqbal Ahmad, C.J. 'The commission of an offence does not give a right of appeal to the offender.' Thus, it is not a fundamental right nor merely a matter of procedure but is substantive right and cannot be presumed or assumed.

2. The Code of Criminal Procedure 1973 provides when an appeal can be filed and specifically prohibits that no appeal shall lie from any judgment or order of a Criminal Court except as provided by this Code or by any other law. There are large varieties of cases providing criminal appeals. On the other hand an appeal does not lie when the accused pleads guilty and has been convicted on such a plea if the conviction is by a High Court but if the conviction is by a Court of Sessions or Magistrate of the Ist and ii class, then an appeal lies with regard to the extent or legality of the sentence. In some cases when the accused pleads guilty owing to misconception of his right in property or owing to misconception of law or where there was no fair trial in obtaining the plea or where the plea of guilt was obtained improperly, appeal is not barred and accused can come up in appeal at large. The reason is that his pleading guilty merely amounts to admission of facts which even if true may not be enough to constitute the offence.

Likewise an appeal does not lie in petty cases where the sentence of imprisonment and fine are less than six months and 1000 rupees or both, where the order is passed by the High Court and where imprisonment and fine are less than three months and 200 rupees respectively or both, if ordered by Court of Sessions or Metropolitan Magistrate of the Ist class. However, cases covered under the First Offenders Probation Act or conviction followed by admonition under Section 3 of U.P. First Offenders Probation Act are not covered. In cases tried summarily if the Magistrate passes only a sentence of fine not exceeding 200 rupees, an appeal does not lie. However, where several persons are

* Elevated to Hon'ble High Court subsequent to publication of this Article.

convicted in one trial, all of them have a right of appeal if appealable sentence has been passed on any one of accused persons.

3. Appeals may spring from an order of conviction passed under the Indian Penal Code or under any other law for the time being in force as well as against the orders passed at various stages under the Code of Criminal procedure. In legal parlance the first may be termed as appeal against substantive offences and the others as appeal against procedural lapse. Generally speaking any person convicted on a trial held by any Criminal Court or by a High Court in its original criminal jurisdiction or any person whose application under Section 85 of Cr.P.C. has been rejected or any person who has been ordered under Section 117 Cr.P.C. to give security for keeping the peace or any person whose surety has been refused or rejected under Section 121 Cr.P.C. or a complainant or informant who has been ordered to pay compensation under Section 250 Cr.P.C. or any person whose application to file complaint has been rejected or against whom such complaint has been made by any court other than the High Court under Section 341 Cr.P.C. may prefer an appeal under the Code of Criminal Procedure. Simultaneously, a Public Prosecutor on the direction of the State or Central Government, or a private complainant by special leave to appeal can also prefer an appeal from an order of acquittal by any Criminal Court. The Public Prosecutor can also file an appeal against the sentence alone on the ground of its inadequacy. Conversely, any person aggrieved by an order under Section 452 or 453 Cr.P.C. may file an appeal against it.

4. After the introduction of section 411 A in Cr.P.C. by the Amendment Act 26 of 1943 appeals against the orders from High Court were directed to be filed before the Federal Court instead of Privy Council which used to exercise the appellate jurisdiction 'in the exercise of prerogative right to review the course of justice in criminal cases in the free fashion of fully constituted court of criminal appeals' where ever injustice of serious and substantial character occurred. After the abolition of Privy Council's jurisdiction, the Federal Court was invested and conferred with the jurisdiction to dispose of Indian appeals and petitions as the Privy Council held immediately before it, but after the establishment of the Supreme Court by virtue of Article 124 of the Constitution of India the Supreme Court now stands at the head of judicial system in India, like the House of Lords in England and it is the final appellate tribunal and the fountain head of the judicial system of the land. Article 132 to 136 of the Constitution of India provide when a criminal appeal can be filed before the Apex Court which include an appeal after the High Court certifies the case to be fit one for appeal before the Supreme Court.

The queer question often posed is as to who can apply for a certificate? Usually an application for a certificates should be made by the convict or by the State and not by a third person. Hence the father of the convict or a lawyer not

engaged for the purpose cannot apply for a certificate. Likewise, the State or a complainant cannot ask for certificate against an order of acquittal or against the quashing of proceedings but where substantial question of law decided by High Court requires an authoritative decision by Supreme Court because of conflicting decisions the State may be permitted to ask for a certificate. What are substantial questions of law is often a question of debate and articulation. However, a catena of cases has established the interspersed legal position providing instances of substantial questions of law where a certificate for leave to appeal was granted.

The questions whether the offence of criminal breach of trust can be committed in respect of immovable property there being no decision on it by the Privy Council or the Supreme Court, the question of propriety of sanction, the importance of statement of an accused under Section 30 of the Indian Evidence Act in view of decision of Privy Council in *Pakala Narayan Swami Vs Emperor* (AIR 1939 PC 47); the question of prejudice to the accused by reason of omission to question him: the effect of the lack of jurisdiction of the Magistrate trying case under Essential Commodities Act; the question about the High Court's power to review and alter its judgment once recorded and question whether the accused could be tried for an offence in India which was committed in an area falling in Pakistan after partition have been held to be involving substantial questions of law.

5. In the following cases the leave to Supreme Court was not granted although the question raised was one of law namely the question of interpretation of Section 524 Cr.P.C. (old) (Now Section 458 Cr.P.C.), and Section 110 of the Indian Evidence Act; the question of construction of documents; the question whether delay in submission of charge-sheet should effect the conviction of the accused and the omission to refer section 34 in a charge under Section 302 IPC. Similarly, where there was omission to draw adverse inference from non-production of witnesses or where High Court arrived at a conclusion different from the Court below merely on medical testimony, or if there was difficulty in applying the law, or the point raised is not a point of law, or where one of the two Judges differed in their views but agreed with the order proposed to be made, or where the question was about the propriety of grant or refusal of an adjournment, or where the only ground was delay in delivery of the judgment and that the points urged were lost sight of have been held to be no ground for granting leave to appeal.

6. The difference between a question of law and a substantial question of law lies not in kind but in degree. A mere existence of substantial question of law is not sufficient unless serious injustice of the substantial nature has been occasioned. The sufficient importance of the case, and the question of great public or private importance which may arise again and again the existence of exceptional and special circumstances where substantial and grave injustice has

been done and where the case presents features of sufficient gravity to warrant a review of the decision appealed against are good grounds for permitting leave to appeal. There exists conflict of views whether certificates for leave to file appeal before Supreme Court can be granted in contempt of Court cases, Calcutta & Orissa High Courts differing with Manipur and Madhya Bharat. The power to grant leave is discretionary which is always to be exercised on same judicial principles.

7. Hon'ble Mr. Justice Hegde in the case of R. Reddy & others Vs State of Andhra Pradesh (AIR 1971 SC 460) said that the appellate Court should bear in mind the fact that the trial Court had the benefit of seeing the witnesses. The finding of facts are not to be interfered by the Hon'ble Supreme Court like the practice adopted by the Privy Council nor the Supreme Court would make a re-appraisal of the evidence unless some basic error is brought to notice.

8. Either the appeals are against the acquittals or against the convictions. The quinted-sense of the jurisprudential aspect of criminal justice in an appeal against an order of acquittal is that it has to be firmly indicated and on weighty grounds to discard the reasonings of the trial court in order to reach the contrary conclusion of the guilt of the accused. Unless the trial court's conclusion is palpably wrong or manifestly erroneous and shocking one's sense of justice, no interference is to be made. If two conclusions can be based upon the evidence, then also the acquittal is not to be disturbed. Ram Darshan Shahi V. State, 1994 Cr.L.J. 3681 (All). The reason underlying is that the view of the trial judges as to the credibility of the witnesses and the right of the accused to be benefit of any real and reasonable doubt is always there while disturbing appraisal of evidence on facts arrived upon by the court below Krishna Reddy V. State of Karnataka, 1994 SCC (Cri.) 1667 (SC). The Supreme Court in innumerable cases has held that where the finding of fact was based on a wholesome erroneous approach and the very basis of reasoning was not in right perspective and the intrinsic merit of the evidence of the witnesses was not considered and the trial was summarily or perversely disposed of permitting the manifest errors and glaring infirmities, the appellate court shall interfere.

Then comes the question as to what are the procedural lapses and the matter of their significance in a criminal appeal. The first question is whether there is power to take additional evidence.

There are conflicting views on this question. Our view is that in an appeal under Section 341 Cr.P.C. occurring under chapter 26 of Cr.P.C., the provisions of Section 391 of the Code will not apply and as such the appellate court in an appeal under Section 341 Cr.P.C. has no power to take additional evidence. A reference can be made of the case in Dhanpat Rai Vs. Balak Ram, AIR 1931 Lahore 761 (Full Bench) and Munni Lal Vs. Emperor, AIR 1937 Allahabad 305 (Full Bench). The other view is that the appellate court is empowered to take

additional evidence within the framework of section 391 Cr.P.C. The third view is that such evidence can be taken under inherent power of the court. (Ramachander Vs. Lila Ram, AIR 1931 Sindh 115), while the fourth view is that there is no general power vested in the appellate court to take fresh evidence, but it has got a limited power to examine witnesses if it so likes, under Section 311 Cr.P.C. There is no power in the appellate court to return the case to the Magistrate, with the direction to take evidence and then to dispose of the matter afresh.

The decisions regarding the appellate court's power of remand, while dealing with the appeal under Section 341 Cr.P.C. are also not uniform. One view is that it has got power to remand the case to the lower court for disposal under sub-sections (a) (b) (c) of Sec. 386 Cr.P.C. and the other view is that the appellate court has power to remand the case to the lower court for further enquiry.

The High Court has power to transfer an appeal under Section 341 Cr.P.C. pending before a Sessions Judge to its own file or to another Sessions Judge, under Section 407 Cr.P.C. Likewise the Sessions Judge can also transfer a criminal appeal to any judge, subordinate to him, for its disposal.

Queer question of law arises in some cases, where the appeals are sought to be filed after seeking leave as to who will seek the leave and who can present the petition. Generally speaking, the leave is to be sought by the accused, if convicted; and by the complainant, if there is an order of acquittal; and the appeal can be filed under Section 382 Cr.P.C. by the appellant or his pleader, but it cannot be sent by post. If the appellant is in jail, he may present his petition of appeal alongwith copies to the Officer Incharge of the Jail, who shall forward them to the proper appellate court. Previously there was no provision regarding abatement or substitution of heirs in criminal appeals. However, catena of cases has firmly laid down the track record providing guidelines. When the appeal is against the order of acquittal under Section 378 of Cr.P.C. only it abates on the death of the accused, but it does not abate on the death of the complainant-appellant. However, when complainant died before he could obtain leave of the Court and file an appeal against the acquittal, the appeal would not be maintainable at the instance of his son. (Monmathanath & others Vs. Niranjan, AIR 1967 Cal., 442). In admitting appeal there is no necessity of any substitution but substitution may be made by abundant caution. Under Section 256 Cr.P.C. the accused is to be acquitted, if the complainant fails to appear. Sub-Section 2 of Section 256 Cr.P.C. provides that the acquittal can be resorted to where the complainant failed to appear due to his death. Section 394 Cr.P.C. has been amended envisaging provisions for abatement of appeals. It provides that the criminal appeals under Section 377 of 378 Cr.P.C. shall finally abate on the death of the accused and every other appeal except the appeal from a sentence of fine shall finally abate on the death of the appellant, provided that

if the appellant dies during the pendency of appeal any of his relatives may, within 30 days of the death of the appellant, apply to the appellate court for leave to continue the appeal. Proposition of law on the question of substitution of legal representatives, seeking to appeal against the acquittal in the case of death of the complainant is silent.

However an heir of the convict-accused can file appeal against the sentence of fine as this would clear the realization of fine from the estate left by the deceased accused.

The appeals can be summarily dismissed under Section 384 Cr.P.C. where no arguable point had been raised but the dismissal cannot be made without any speaking order in an appeal, which raised arguable questions. The Hon'ble Supreme Court has the undoubted power to dismiss a criminal appeal in limine. However, there can be no partial summary dismissal and the order dismissing the appeals summarily is final and no review lies against it. Appeals can be admitted on the question of sentence only but a criminal appeal can never be dismissed for default of appearance of appellant or his pleader because the appellate court is not relieved of the duty of hearing the appeal on merits and deciding it.

The appellate court can suspend the sentence and the imposition of fine, it can convict or acquit an accused in appeal or can convert the imprisonment into compensation and in suitable cases consider the grant of compensation to the victim instead of punishing the accused to undergo imprisonment.

The judgment once pronounced cannot be altered or reviewed, except to correct a clerical or arithmetical mistake and the judgments are to be delivered after hearing the appellant or his pleader and the complainant as the case may be.

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