

1926.

Present : Dalton J.

NONIS v. APPUHAMY.

129—P. C. Kandy, 17,008.

Appeal—Order of acquittal—Solicitor-General's right—Delegation by Attorney-General—Criminal Procedure Code, ss. 336 and 338.

The Attorney-General has no right of appeal under section 338 of the Criminal Procedure Code when he is not a party to the original proceedings. The Solicitor-General has no right of appeal, independently of any delegation by the Attorney-General.

A PPEAL by the Solicitor-General from an order of the Police Magistrate of Kandy, acquitting the accused.

Schokman, for the Crown.

L. A. Rajapakse, for the accused (*Amicus Curiae*).

June 18, 1926. DALTON J.—

The accused was charged in the Police Court, Kandy, with committing an offence under the Excise Ordinance, selling fermented toddy without a licence. He was found not guilty and acquitted. The reasons for his acquittal are set out by the Magistrate in the following terms :—

“The charge is one of illicit sale. There is only a presumption that sale took place. From the above evidence no proof at all. I discharge accused.”

The Solicitor-General now appeals from this acquittal. Mr. Rajapakse appears as *amicus curiae*, the accused not appearing, and states he is unable to resist the appeal on the facts. It is admittedly difficult to understand the reasons given by the Magistrate. Objection is taken however on behalf of the accused that the Solicitor-General has no right of appeal. In support of this contention I am referred to a previous decision given by me in *P. C., Kurunegala, No. 28,130*, on March 31 last. I there held that where the Attorney-General is not a party he has no right of appeal under section 338 of the Criminal Procedure Code, whatever rights he may have flowing from his commission. It is agreed that the Solicitor-General has no right of appeal, except in so far as he can exercise a right given to the Attorney-General by the Code, if that right is delegated to him.

It has been held by this Court that section 336 of the Code gives the Attorney-General a right of appeal against an acquittal. I am unable to agree, however, that the appeal mentioned in that section

is anything but an appeal allowed under the provisions of section 338. The right of appeal is given by section 338, and that right is subject to the provisions of the three foregoing sections, those sections limiting and qualifying the right of appeal given by section 338 in certain particulars. Hutchinson C.J. makes this clear in *Attorney-General v. Samarakoon*.¹ As held by Browne J. in *Abraham Appuhamy v. Peiris*,² the principal section in regard to the question who may appeal is section 338. There is authority to the contrary in *Attorney-General v. Silva*.³ When in dealing with a question that came up for decision in that case, Pereira J. seems to have assumed that a separate and distinct power of appeal is conferred upon the Attorney-General by section 336, and that the Solicitor-General can exercise that power if it is delegated to him. Up to that decision I am informed that no appeal ran in the name of the Solicitor-General, and I am unable to agree that the assumption of the learned Judge was correct. He appears to have appreciated the difficulty following upon that interpretation of section 336, for in *P. C., Colombo, No. 47,711*,⁴ in the course of his judgment he points out that section 336 does not specify who shall be the party appellant in the case of an appeal against an acquittal with the written sanction of the Attorney-General. The party appellant, it seems to me, is the party given the right of appeal by section 338 and no one else.

Mr. Shockman has however now elaborated the argument he put before me in the case decided on March 31 last and argues that although the complainant here is an Excise Inspector the real party other than the accused is the Attorney-General. The Excise Inspector is a public officer bringing the proceedings in the course of carrying out his special duties, and it is urged that he is merely the formal prosecutor who is instituting the proceedings on behalf of the Crown. If that argument is accepted I take it the Excise Inspector has no right of appeal himself, since he merely represents the party bringing the proceedings, I am referred to *Munasinghe v. Sinnappu and others*.⁵ in which a Police Headman instituted proceedings for the theft of plumbago from Crown land. There de Sampayo J. states it must be presumed that the formal prosecutor instituted the proceedings on behalf of the Crown, but that was apparently for the reason that the plumbago was stated to be stolen from Crown land. When considering this and other cases, Bertram C.J. in *Sedris v. Singho*⁶ where a question arose as to who was the real prosecutor in the case which came up on appeal, the Crown, a police officer, or the person at whose instance the police instituted proceedings, appears to express the opinion that it is not the Crown who is the real prosecutor, although he states he leaves the matter open for

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*Nonis v.
Appuhamy*¹ 14 N. L. R. 5.² 1 Broune's Reports, 403.³ 17 N. L. R. 193.⁴ 18 N. L. R. 70.⁵ 4 C. W. R. 263.⁶ 23 N. L. R. 171.

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further elucidation. It is clear from the provisions of section 148 of the Criminal Procedure Code that proceedings can be instituted before Police Courts by private persons as well as public officers and others. In the case of the former there seems no reason to doubt that the section which names such a person the complainant regards him as the party in the proceedings against the accused person. It would appear to be the same also in the case of other classes of persons named whether they be peace officers, Municipal servants, or others. In the Excise Ordinance also the Legislature has in Chapter VIII. of that Ordinance conferred powers upon excise officers in respect of offences and proceedings thereon. Whatever part the Crown may take in theory in criminal prosecutions, it is impossible to disregard what in practice takes place, a practice which is based upon definite statutory enactments. I regret I am unable to give the word "party" as used in section 338 (1), the meaning for which Mr. Schokman contends. The whole trend of the section, having regard to the provisions of section 147 seems to me to be against it.

If his argument is sound, in the case of a prosecution instituted and conducted by a private person, the section contemplates two parties joining as it were against the defendant, the Crown and the complainant to each of whom the right of appeal is given, I am unable to read such a meaning into the section. If on the other hand it only contemplates the Crown, why, it may be asked should the Attorney-General be permitted to give the Crown written sanction to appeal. It seems to me inconceivable that if the Legislature intended it (the section) to include Crown, they would not have clearly stated so. As a matter of fact it was quite unnecessary, for the Crown has power apart from the Code to come in if it wishes (*Queen v. Herat*¹). They were legislating for something outside the prerogative, and had in view the actual prosecutor as being the "party" who may prefer the appeal, and not the person who has been described by Burnside C.J. as the "real" prosecutor. The use of the word "real" is capable of being misunderstood. I take it, he means "theoretical." If the Attorney-General is the actual prosecutor, and the proceedings themselves will clearly show, then under the section it is "a case or matter to which he is a party," to whom a right of appeal is given. In such a case he can delegate his powers under section 393, but not otherwise.

I have therefore come to the conclusion that in this case the Solicitor-General has no right of appeal, and the appeal must, therefore, be dismissed.

Appeal dismissed.