

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST  
REPUBLIC OF SRI LANKA**

In the matter of an action instituted in terms of section 64 (a) of the Sri Lanka Bureau of Foreign Employment Act No.21 of 1985 amended by Act No. 04 of 1994 and Act No.56 of 2009.

SC. Appeal No.201/2014  
High Court Colombo case  
No. HC/MCA/135/13  
Magistrate's Court Colombo  
Case No.58332/5

H. K. Sumanasena,  
Manager (Acting),  
Special Investigations Unit,  
Sri Lanka Bureau of Foreign  
Employment  
234, Denzel Kobbekaduwa Mawatha,  
Battaramulla.

**Plaintiff**

-Vs-

Mallawarachchige Kanishka  
Gunawardhana  
Licensee,  
Samasa Foreign Employment Agency,  
89, 3<sup>rd</sup> Floor, Super Market,  
Borella, Colombo 08.

**Accused.**

**And**

In the matter of an appeal in terms of Article 154 (3) (b) of the Constitution read with section 4 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 and section 320 (1) of the Code of Criminal Procedure Act No.15 of 1979.

Mallawarachchig Kanishka  
Gunawardhana,  
Licensee,  
Samasa Foreign Employment Agency,  
89, 3<sup>rd</sup> Floor, Super Market,  
Borella, Colombo 08.

**Accused Appellant**

-Vs-

- 1 H.K.Sumanasena,  
Manager (Acting),  
Special Investigations Unit,  
Sri Lanka Bureau of Foreign  
Employment  
234, Denzel Kobbekaduwa  
Mawatha,  
Battaramulla.
2. Hon. The Attorney General,  
Attorney General's Department  
Colombo 12.

**Respondents**

**And now**

In the matter of an application for Special Leave to Appeal in terms of Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with sections 9 and 10 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990.

Mallawarachchige Kanishka  
Gunawardhana,  
Licensee,  
Samasa Foreign Employment  
Agency,  
89, 3<sup>rd</sup> Floor, Super Market,  
Borella, Colombo 08.

**Accused Appellant Petitioner**

-Vs-

- 1 H.K.Sumanasena,  
Manager (Acting),  
Special Investigations Unit,  
Sri Lanka Bureau of Foreign  
Employment  
234, Denzel Kobbekaduwa  
Mawatha,  
Battaramulla.
2. Hon. The Attorney General,  
Attorney General's  
Department,  
Colombo 12.

**Respondent respondents**

**BEFORE:** BUWANEKA ALUWIHARE, P.C., J  
NALIN PERERA, J, &  
PRASANNA S. JAYAWARDENA, PC, J.

**COUNSEL:** Sumedha Mahawanniarachchi with Champika Rodrigo and Amila Vithana instructed by Jayantha Senanayake for the Accused-Appellant-Appellant.  
Madhawa Tennakoon, SSC for the Respondent-Respondent.

**ARGUED ON:** 14<sup>th</sup> September, 2016

**DECIDED ON:** 15<sup>th</sup> March, 2018

ALUWIHARE, PC, J:

Special leave to appeal was granted in this matter on the questions:

- (1) Whether the Accused-Appellant-Petitioner-Appellant (hereinafter referred to as the Accused-Appellant) was entitled to file an appeal against the conviction, and
- (2) In instances where there is no right of appeal from a conviction, whether the court is required to consider the existence of exceptional circumstance as a threshold issue in reviewing a judgment of an original court.

The facts relating to this matter are straight forward in that, the Accused-Appellant was charged before the magistrate's court under Sections 64 (a) of the Sri Lanka Bureau of Foreign Employment Act No.21 of 1985, as amended.

The basis of the charge was that, the Accused-Appellant demanded and received a sum of Rs.450, 000 from one Illeperumage Dilhani Pradeepa for the purpose of securing her employment in Cyprus. I do not wish to delve into the facts of the case as they would be of no relevance in deciding the questions of law referred to. Suffice it to state that, at the conclusion of the trial, the learned Magistrate, by

his judgment dated 19<sup>th</sup> March, 2013 found the Accused-Appellant guilty and proceeded to convict the Accused-Appellant as charged.

Aggrieved by the judgment aforesaid, the Accused-Appellant challenged the conviction by lodging an appeal in the High Court. When the matter was taken up before the High Court, an objection was raised on behalf of the Attorney-General, the 2nd Respondent-Respondent to the present application.

The learned State Counsel contended that the Accused-Appellant has no right of appeal against a conviction in terms of the provisions of the Sri Lanka Bureau of Foreign Employment Act No.21 of 1985 (hereinafter referred to as the Act).

The basis of the objection appears to be, that the right of appeal is a substantive right and not a matter of procedure. The learned judge of the High Court having upheld the objection raised on behalf of the state, dismissed the appeal without considering the merits of the case.

The present appeal is from the said order of the learned High Court Judge.

At the hearing of the appeal the learned counsel for the Accused-Appellant referred to Section 31 of the Judicature Act as well as to the Article 154 (P) (3) (a) of the Constitution. Both these are, provisions conferring appellate powers on the Court of Appeal and the High Court. While these provisions confer appellate powers, in *Martin Vs Wijewardene 1989 2 S.L R 409* His Lordship Justice Jameel rejected the argument that these provisions impliedly confer substantive right of appeal.

The learned counsel for the Accused-Appellant also relied on Section 317 of the Code of Criminal Procedure Act No.15 of 1979. The State, based their argument on the principle that the right of appeal is neither a fundamental nor an inherent

right, but a creation of a statute. It was contended on behalf of the Attorney-General that there can be no inherent right of appeal from any judgment for determination unless an appeal is expressly provided for, by the law itself.

The issue at hand, however, can be resolved by application of the provisions of the International Covenant on Civil and Political Rights Act No.56 of 2007 (hereinafter referred to as the ICCPR Act).

Sri Lanka is a state party to the International Covenant on Civil and Political Rights (ICCPR) where an inherent right of appeal is recognized against any conviction. The Covenant, which was adopted by the General Assembly of the United Nations on 16<sup>th</sup> of December, 1966, entered into force on 23<sup>rd</sup> March, 1976. Sri Lanka acceded to the aforesaid covenant in the year 1980.

Sri Lanka being a dualist state, implementation of the ICCPR requires that it be incorporated into domestic law which was accomplished in 2007 with the passage of ICCPR Act. The goal of the covenant is to define international human rights standards and to require signatory states to adopt measures to enforce those rights. The rights provided by the ICCPR are regarded as the basic human rights that should be viewed as restrictions (against derogation) on the governments of signatory states. The ICCPR is valid for its signatory states and every signatory government is obligated to observe its provisions.

Paragraph 5 of Article 14 of the Covenant lays down that “Everyone convicted of a crime shall have the right of his conviction and sentence being reviewed by a higher tribunal according to law.

Jixi Zhang in his article Fair Trial Rights in ICCPR (Journal of Politics and Law - Vol 2 No.4 2009) states that “*Article 14, paragraph 5 provides that everyone*

*convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to law. The right to appeal is also known as the right to be reviewed. The Human Rights Committee considers that the right to appeal is absolute. The absolute nature of the right to appeal is reflected in the following three aspects: the right to appeal applies to all types of crimes, that is, not only applies to serious crimes..... ”*

The preamble to the Covenant exemplifies the objectives and states:

*“Considering that in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”*

*Recognizing that these rights derive from the inherent dignity of the human person,*

*Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,*

*Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,.....*

The ICCPR Act was enacted in the discharge of Sri Lanka's obligation as a signatory to the Covenant and the main objective of the Act is to give effect to the Covenant and in my view the provisions of the Act must be referable to a jurisdiction both to that confers validity to the objectives of the ICCPR and to facilitate enforceability of the Articles of the Covenant.

Section 4 (2) of the ICCPR Act stipulates that every person convicted of a criminal offence under any matter shall have the right of appeal to a higher court against such conviction and any sentence imposed.

In instances where no right of appeal is conferred by a statute, a party aggrieved, could invoke the revisionary jurisdiction to have a decision of an original court reviewed and our courts have always recognized revisionary jurisdiction in such instances. The provision embodied in Section 4 (2) of the ICCPR Act has now expanded the scope (of jurisdiction) to appeals in the case of all criminal offences. While the expansion of the appellate jurisdiction by virtue of section 4 (2) of the ICCPR Act relates exclusively to criminal cases, concomitantly, it must be stated, that Section 4 (2) of the ICCPR Act has no application whatsoever to civil cases.

Violation of Section 64 (a) of the Sri Lanka Bureau of Foreign Employment Act No.21 of 1985 can be visited with penal sanctions and thus falls within the scope of "criminal offences under any written law" referred to in Section 4 (2) of the ICCPR Act and further the Act (SLBFE) does not carry a specific provision ousting the right of appeal against a conviction and a sentence imposed for a violation under the Act. Thus, I hold that the Accused-Appellant has a right of appeal against the impugned conviction.

I am also of the view that with the enactment of the ICCPR Act, Sections 317 and 320 of the Code of Criminal Procedure Act must necessarily be read with Section 4 (2) of the ICCPR Act.

I answer the first question of law in the affirmative and hold that the Accused-Appellant has a right of appeal against the conviction and sentence, to the High Court.

In view of the above findings, the necessity to answer the second question of law on which leave was granted, does not arise.

Accordingly, I set aside the order made by the learned High Court Judge on 28<sup>th</sup> July, 2014 in this matter and direct the learned High Court Judge to entertain the appeal of the Accused -Appellant and to consider the same, on its merits.

**JUDGE OF THE SUPREME COURT**

JUSTICE NALIN PERERA

I agree

**JUDGE OF THE SUPREME COURT**

JUSTICE PRASSANNE JAYAWARDENA P.C

I agree

**JUDGE OF THE SUPREME COURT**