

JOSE CRUZ, Defendant-Appellant
v.
TRUST TERRITORY OF THE PACIFIC ISLANDS,
Plaintiff-Appellee
Criminal Appeal No. 28
Appellate Division of the High Court
April 1, 1969

Appeal from order denying motion to dismiss. The Appellate Division of the High Court, H. W. Burnett, Associate Justice, and Robert Clifton, Temporary Judge, held that as an order denying motion to dismiss is not a final order it is not a judgment or order from which an appeal can be taken.

Appeal dismissed.

1. Appeal and Error-Final Judgment or Order

An Order Denying Motion to Dismiss is not a final order and, therefore, is not a judgment or order from which an appeal can be taken.

2. Appeal and Error-Final Judgment or Order

In order to be appealable a judgment or order must be final.

3. Appeal and Error-Final Judgment or Order-Res Judicata

The argument that the "principles of res judicata apply to questions of jurisdiction" has no bearing on the question of the finality of a judgment for the purpose of an appeal.

4. Appeal and Error-Final Judgment or Order-Res Judicata

Counsel's right to prevent the matter of the denial of a motion to dismiss from becoming res judicata is preserved by the fact that an appeal can be had from the final judgment and at that time the court's ruling made at the time of denying the motion is not res judicata; it is like any ruling made at or before trial, subject to examination on the appeal from the final judgment.

Before BURNETT, *Associate Justice*, CLIFTON, *Temporary Judge*

OPINION

[1] The motion to dismiss the appeal in the above entitled case must be granted. The Order Denying Motion to Dismiss is not a final order and, therefore, it is not a judgment or order from which an appeal can be taken.

[2] It is very well settled and the rule is supported by an extremely large number of cases that in order to be appealable a judgment or order must be final. This is the rule both in civil and criminal cases. See 4 Am. Jur. 2d 673, and 4 Am. Jur. 2d 677. The reason given for the application of the general rule that only final orders are appealable to appeals from orders overruling demurrers to an indictment or information or orders denying motions to quash an indictment or information is set forth as follows in the latter citation : —

"The reason underlying the general rule is that such rulings do not constitute final decisions supporting an appeal, and that a contrary practice would result in incalculable delay in the administration of criminal law and the multiplication of appeals."

As to proceedings in the United States federal courts, the rule that only final judgments are appealable is encompassed in 28 U.S.C. Sec. 1291. For citations of a large number of cases supporting the application of the rule to criminal cases, see the cases cited in notes 191 and 194 of the notes annotating said Section 1291.

[3] As to the cases cited by plaintiff's counsel in his motion before the Appellate Division of the High Court in relation to the order of the dismissal of the appeal herein entered December 5, 1968, the arguments and citations of authorities to the effect that the "principles of res judicata apply to questions of jurisdiction" have no bearing on the question of the finality of a judgment for the purpose of an appeal.

[4] Counsel's right to prevent the matter from becoming res judicata is preserved by the fact that an appeal can be had from the final judgment. At that time, of course, the court's ruling made at the time of denying the motion to dismiss is not res judicata; it is like any ruling made at

or before the trial, subject to examination on the appeal from the final judgment.

In view of the above decision in relation to the question of the fact that plaintiff's appeal is premature, it is not necessary to inquire into the contentions' of plaintiff's counsel that several of the judges who acted heretofore in relation to plaintiff's appeal were disqualified to act on this appeal because of their previous positions as Attorney General or Deputy Attorney General, or into related questions as to whether there was a waiver of such alleged disqualifications by a failure to raise such question until an adverse ruling was made on plaintiff's counsel's Motion for Reconsideration. And, inasmuch as their rulings are the same as that made herein, it is unnecessary to vacate previous orders dismissing the appeal.

ORDER

It is ordered that plaintiff's appeal heretofore filed is dismissed for the reason that it is an attempted appeal from a judgment order which is not final and not appealable, and plaintiff's motion to vacate previous orders made in connection with the above appeal is denied.