

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA.

CA(PHC)APN 18/2013

High Court of Chilaw-HC 59/2007

In the matter of an application
for Revision under Article 138 of
the constitution of the
democratic socialist republic of
Sri Lanka read with Section 404
of the Code of Criminal
Procedure Act No. 15 of 1979.

Hon. Attorney General.

Colomobo

Vs.

1. Reksi Manoj de Seram
2. N.D.R. Kumara Fernando
3. W.L. Cannycious Fernando
4. T.D. Surath Appuhami

(Accused Persons)

And now Between

Sangarajage Don Cannycious

Joshep Appuhami,

“Sadawasana”,

Dematapitiya Road,

Katuneriya.

Petitioner.

Vs.

1. Hon. Attorney General,
Attorney General's
Department, Colombo 12.
2. Officer-In-Charge, Police
Station, Marawila.

Respondents.

T.D.C. Surath Appuhami

(4th Accused Trial in absentia)

Before : A.W.A. Salam, J. &
Sunil Rajapakshe, J.

Counsel : Tenny Fernando for the Petitioner.
Anoopa de Silva SSC for the Respondent.

Argued on : 05.08.2013

Decided on : 06.09.2013

A.W.A. Salam, J.

The petitioner's grievance in this revision application is that the learned High Court judge directed the confiscation of all his movable and immovable properties by reason of the failure of the 4th accused to appear in court. The impugned order of the learned High Court judge dated 09th October 2012 which is marked as X4 and annexed to the revision application along with certain other documents. The petitioner complains that the 4th accused had never been produced before the court and the correct approach that should have been adopted by the learned High Court judge was to hold an inquiry under Section 241 of

the Criminal Procedure Code before she proceeded to enter an order of confiscation. In the circumstances, he urges that the impugned order of the learned High Court judge has resulted in a serious miscarriage of Justice. For the purpose of ready reference Section 241 of the Criminal Procedure Code is reproduced below.

The 4th accused who was charged with having committed the offence under Section 296 of the Penal Code was absent for sometime and the learned High Court judge made an order on 29th May 2012 to lead evidence with regard to the 1st accused. When the matter was mentioned on 29th June 2012 the learned High Court judge released one of the witnesses on bail and fixed the matter for trial on 9th October 2012. On 9th October 2012 when the matter was mentioned in court it had been brought to the notice of the court that the death of the 1st defendant and thereafter the learned High Court judge without holding any inquiry as contemplated under Section 422 of the Criminal Procedure Code made an order that the movable and immovable properties of the 4th accused be confiscated. This revision application has been made by the father of the 4th accused to have the said order of confiscation set aside.

In the instant case the learned High Court judge has completely ignored the requirements that have to be met under Section 421 of the Code of Criminal Procedure and confiscated the movable and immovable properties of the 4th accused in an arbitrary manner without affording any opportunity to the 4th accused or his sureties to show cause against

an order of confiscation. The learned senior State Counsel has filed no objection against the application and she conceded that the proper procedure has not been followed before entering the order of confiscation.

For purpose of ready reference section 422 (1) Code of Criminal Procedure leaving out the unnecessary words are reproduced below....

Whenever it is proved to the satisfaction of the court by which a bond under this code has been taken or when the bond is for appearance before a court to the satisfaction of such court that such bond has been forfeited, the court shall record the grounds of such proof and may call upon any person bound by such bond, to pay the penalty thereof or to show cause why it should not be paid.

Subsection 2 to section 422 lays down what consequences to be followed in the event of the person making the default in paying the penalty. In terms of this subsection, if the penalty is not paid the court may proceed to recover the same by issuing a warrant for the attachment and sale of movable or immovable property belonging to such person.

In the instant case the learned and High Court judge has failed to call upon the accused or to ascertain by herself as to what made the accused keep away from court. Without first ascertaining as to whether the accused had any reasonable grounds to keep away from court, the High Court Judge was not empowered in law to forfeit the bond and then proceed to confiscate the movable and immovable properties

belonging to the accused. This order of the learned and High Court Judge is contrary to the express provisions of the law and the rules of natural Justice.

In the circumstances, I am of the opinion that the impugned order of the learned High Court judge cannot be allowed to stand and should necessarily be set aside. Hence, the order confiscating the movable and immovable properties of the 4th accused is set aside. This order is no bar to the court entering an order of confiscation or to forfeit the bond resulting from the non-appearance of the 4th accused if proper procedure is followed.

JUDGE OF THE COURT OF APPEAL.

Sunil Rajapakshe, J

I agree.

JUDGE OF THE COURT OF APPEAL.

NR/-