**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALSIT REPUBLICO OF SRI LANKA**

Nuwara Pakshage Titus Surendra Perera

**ACCUSED-APPELLANT-PETITIONER-PETITIONER**

C.A. 307/2012
C.A (PHC)APN 05/2013
H.C. Colombo 7271/1994

Vs.

Hon. Attorney General
Attorney General's Department
Colombo 12.

**COMPLAINANT-RESPONDNET-RESPONDENT**

**BEFORE:** Anil Gooneratne J. &
Malinie Gunaratne J.

**COUNSEL:** Anura Meddegoda with Asela Muthumudalige
for the Accused-Appellant
Chethiya Gunasekera D.S.G. for the Complainant-Respondent

**ARGUED ON:** 30.06.2014

**DECIDED ON:** 01.08.2014

**GOONERATNE J.**

The Accused-Appellant was indicted in the High Court of Colombo on three counts of cheating of certain sums of money as described in the said charges. Trial in absentia was held on or about 06.03.1996 and the Appellant was found guilty of the charges, and sentenced to three years rigorous imprisonment and a fine of Rs. 600,000/- on all three counts. The sentence to run concurrently. Appellant in this case has filed an appeal against the conviction and also a Revision Application, and according to the prayer to the Revision Application Accused-Appellant seeks to set aside the order of the learned High Court Judge as per sub para 'c' of the prayer to the Petition and for relief as in sub para 'd' of the prayer to the petition. This court decided to take up both the Revision Application and the Appeal together as the challenge of the Appellant emanated from the conviction in the year 1996, and as the Appellant is serving the sentence after being arrested on 17.6.2012, on an open warrant issued by court, and which period of sentence is due to lapse shortly as submitted by both learned counsel.

I would refer to and note the following grounds as urged by learned counsel for the Appellant in his oral submissions, and as pleaded in the Petition of Appeal, as well as in the Revision Application.

(a) Trial against the Accused held in his absence without an inquiry as required by Section 241 of the Code of Criminal Procedure Act.

(b) Accused-Appellant had no knowledge of the indictment and never had been served with summons or Notice pertaining to the above case.

(c) Orders made against the Accused-Appellant are erroneous and result in a miscarriage of justice. Emphasis added as apparent from (a) above based on the following matters.

(1) No report of Process-Server/Fiscal to prove service of summons (High Court record itself establish his fact)

(2) Journal Entry of 12.1.1995, upon receipt of indictment order made that summons be issued pursuant thereto the journal entry of 20.2.1995 confirms that summons had been issued.

(3) To prove (2) above no report available in the High Court record of service of summons of Fiscal/Process Server etc.

(4) The above journal entries do not make any reference whatsoever to return to the summons. No evidence of service or return of summons.

(5) Journal Entry of 05.04.1995 refer to a report and proceeding, the issuance of an open warrant with a report pertaining to execution of the warrants to be submitted to court by P.S. Bandula on 16.11.1995. No such report is contained in the High Court record.

(6) Open warrant issued. Firstly a warrant must be issued, not an open warrant.

(7) ~~Evidence~~ Statements of Police Officers, Grama Sevaka and Process Server not recorded and not available. According to the proceedings of 16.11.1995 only a report had been filed by the Officer-In-Charge of the Fraud Bureau that upon inquiry from the Grama Sevaka it has been revealed that the Petitioner could not be found at the residence and that therefore the warrant for his arrest could not be executed.

(8) Accordingly on the application by State Counsel on the basis of a purported report of OIC Fraud Bureau dated 15.11.1995 the trial against the Petitioner had been fixed to be held in absentia on 13.12.1995 and summons issued on witnesses for the prosecution.

(9) Though it was submitted that the proceedings of 16.11.1995 makes reference to a report filed by Officer-In-Charge, Fraud Bureau, no such report is available in the High Court record. Nor is there any reference to the Grama Sevaka from whom such inquiry had been made or who had given such information to the police.

(d) In the Petition of Appeal of 15.08.2012 the following are urged:

(1) Accused had been arrested on 17.06.2012 by the C.I.D. when he was in his residence and produced in the High Court and remanded thereafter. Appellant had submitted an affidavit to the High Court explaining his absence to appear in court. However the learned High Court Judge had rejected the appeal application and made order accordingly on

06.08.2012. The following matters are raised by the appellant against the order of 06.08.2012 which are somewhat similar to the grounds raised in the revision application.

(i) No proper inquiry held in terms of Section 241 of the Code of Criminal Procedure Act to enable court to be satisfied that trial in absentia could be held.

(ii) Learned High Court Judge has not satisfied himself by a report of the Grama Sevaka or Fiscal that the Appellant was either not residing in the address available or that he was evading arrest.

(iii) Learned High Court Judge failed to act in terms of Section 241(3)(b) of the Code, upon Accused being arrested and produced before the High Court on 17.06.2012.

(iv) As per Section 241(3)(b) learned trial Judge has failed to set aside the conviction and order Trial de Nova, in case where trial in absentia held and sentence passed.

(v) In view of above Judgment of 06.03.1996 and order dated 06.08.2012 entered contrary to legal provisions.

By the Petition of Appeal the Appellant seeks to set aside the above Judgment and order of the learned High Court Judge. In the prayer to the petition it is also prayed for an acquittal or fresh trial as per sub para (d) of the prayer to the petition.

The Complainant-Respondent-Respondent who is the Hon. Attorney-General has filed objections raising four preliminary objections. I will incorporate same since submissions of learned Deputy Solicitor General was presented to this court based on the material contained therein. The gist of it is as follows:

**Preliminary objection (1)**

Petitioner-Appellant has considered himself in a manner which circumvented and subverted the process of the law and of a judicial institution the High Court by avoiding the trial for 16 years.

Journal entry of 30.07.2012 indicates that counsel for Appellant made an application based on Section 241(3) of the Code for a re-trial with an affidavit to establish the application. Learned counsel for Petitioner-Appellant admitted that Petitioner was present throughout in the Gangodawila Magistrate's Court prior to service of indictment in the High Court. As such the Petitioner possess the knowledge of the fact that "facts relating to a grave and serious offence relating to cheating of Rs.600,00 being investigated by the CID". Indictment comprises of statement of Petitioner made to P.S. 1603 Wickremanayake fo C.I.D recorded with permissions of Magistrate and recorded on 29.01.1993. As such Petitioner/Appellant had failed to make any reference to the above annexture in his application for a re-trial in his application to the High Court, his application for bail pending appeal or in the Revision Application. As such Petitioner has failed to:

(a) Submit a certified copy of the Gangodawila Magistrate's Court .... Record in respect of he being produced in the Magistrate's court was subsequent release on bail from the Magistrate's Court.

(b) Silent as to how he was released on bail from the Magistrate's Court.

(c) To avoid disclosing the bail conditions.

Therefore the learned High Court judge based on material of Appellant absconding, is justified in proceeding to make an order in terms of Section 241(1) of the Code.

Attention of this court is drawn to the order of learned High Court Judge dated 06.08.2012 what it was held that the Petitioner-appellant has failed to provide his bona fides and absented himself for a period of 16 years. High Court Judge also taken the view that the Petitioner-Appellant left the residence without notifying the Gongodawila Magistrate's Court and any change of address and the date of leaving the residence not stated in the affidavit.

The learned Deputy Solicitor General has cited certain decided case also to support the position that there is no right of appeal against an order made on 06.01.2002 under Section 241(3) of the Code because Section 331 gives only the forum jurisdiction. As such the appeal filed by the Petitioner-Appellant is not recognized by law.

**Preliminary Objection (2)**

Superior Courts have declined to entertain Revision Applications when exceptional circumstances have not been averred. I have noted all the case laws cited by learned Deputy Solicitor General. Powers of revision could be exercised cautiously in only limited circumstances. It is a discretionary remedy. Facts and circumstances of this case does not show any miscarriage of justice and emphasis on a delay of 16 years.

**Preliminary objection (3)**

Rules of court especially rule 3(1)(a) and (b) of the Court of Appeal (Appellate Procedure) Rules of 1990 requires all copies of documents material to the application be filed along with the petition and affidavit. Petitioner-Appellant has acted contrary to the rules. i.e M.C. Gangodawila record/proceedings, deliberately not annexed (case law cited).

**Preliminary objection (4)**

Petitioner-Appellant failure to make reference what so ever to the annexutre to the indictment which comprises, Appellant's statement to the police. This would indicate his knowledge of the High Court trial.

This court is called upon to rule on an important/interesting issue of law. As the Respondents argue inter alia, there is a delay of 16 years. The question on one hand to be considered is whether such a delay resulted due to

some irregular procedure adopted by court for which the Appellant cannot be held responsible or whether there had been a deliberate attempt by the Accused party to abscond from court and interfere directly or indirectly with the due process of administration of justice. If the later prevails, no doubt the Accused-Appellant need to face all the consequences due to his default. The other important matter that has to be kept in mind is the sentence of imprisonment the Accused is now serving, after being arrested in the year 2012. Is the period of sentence of 3 years imposed by court due to lapse shortly?

The provisions relating to holding a trial in the absence of the Accused is contained in Section 241 of the Code of Criminal Procedure Act. The said section reads thus:

(1) Anything to the contrary in this Code notwithstanding the trial of any person on indictment with or without a jury may commence and proceed or continue in his absence if the court is satisfied –

(a) That the indictment has been served on such person and that-

(i) he is absconding or has left the island; or

(ii) he is unable to attend or remain in court by reason of illness and has consented to the commencement or continuance of the trial in his absence; or

(iii) he is unable to attend or remain in court by reason of illness and in the opinion of the Judge prejudice will not be caused to him by the commencement or continuance of the trail in his absence; or

(iv) by reason of his conduct in court, he is obstructing or impending the progress of the trial; or

(b) that such person is absconding or has left the island and it has not been possible to serve indictment on him.

(2) The commencement or continuance of a trial under this section, shall not be deemed or construed to affect or prejudice the right of such person to be defended by an attorney-at-law at such trial.

(3) Where in the course of or after the conclusion of the trial of an accused person under sub-paragraph (i) of paragraph (a) of subsection (1) or under paragraph (b) of that subsection he appears before court and satisfies the court that his absence from the whole or part of the trial was bona fide then –

(a) Where the trial has not been concluded, the evidence led against the accused up to the time of his appearance before court shall be read to him and an opportunity afforded to him to cross-examine the witnesses who gave such evidence; and

(b) Where the trial has been concluded, the court shall set aside the conviction and sentence, if any, and order that the accused be tried de novo.

(4) The provisions of subsection (3) shall not apply if the accused person had been defended by an attorney-at-law at the trial during his absence.

The trial Judge need to be satisfied of all or any of the matters contained in Section 241(1)(a) and (b) of the said section. As such the trial Judge must ascertain details necessary to establish material required as per Section 241(1)(a) and (b) of the said section. The practice adopted by court is to hold an inquiry and decide. As such it would be necessary to entertain both oral and documentary proof by way of leading evidence. That is the best and most acceptable method to be adopted, to be satisfied of the requirements contained in Section 241 of the Code. Anything short of above would necessarily prejudice the rights of parties notwithstanding the Accused absence since the rights of the Accused party is recognized even in his absence as contemplated under sub sections (2) and (3) of Section 241.

This court having perused the available High Court record wish to observe the following important matters.

(a) The Journal Entry of 20.02.1995 indicates summons served on Accused to the address as shown in letter addressed to Magistrate, but Accused is absent. Issue warrant, returnable on 05.04.1995.

The Journal Entry of 05.04.1995 open warrant to be issued, having perused report of C.I.D. Court directs P.S. Bandula of the C.I.D to be present in court on 16.11.1995. Journal Entry of 16.11.1995 indicates that O.I.C of the Fraud Bureau has submitted a report. Accused has left the given address, and inquired from

Grama Sevaka of the area, and G.S. report he has left the area. As such warrant cannot be executed. Based on report of 15.11.1995 of the Fraud Bureau, Application made by State Counsel to try the accused in absentia. Court makes order accordingly to hold the trial in absentia.

This court observes that no inquiry was held as required by Section 241 of the Coe for court to be satisfied. Letter sent to Registrar by O.I.C of the Fraud Bureau of 05.03.1996 states court execute warrant since Accused had left the place. The Grama Sevaka confirms this position. Grama Sevaka's statement recorded. Further investigations conducted. As such ..... returned unexecuted.

(b) In order to arrive at a decision to have the case against the Accused fixed for trial in absentia, it is essential to have led evidence of the police officer who provided or submitted a report as above. The report and letter referred to above refer to the acts of the Grama Sevaka who assisted the police, and statement of Grama Sevaka recoded. Evidence of Grama Sevaka and statement of Grama Sevaka should have been led as evidence and produced in court. Instead learned High Court Judge has merely relied on a report

(c) Prior to above Journal Entry of 20.02.1995 indicates that summons issued. There is no report available to indicate service of summons by the fiscal or process server. The return to the service of summons not made available to court. Such a report

should be available and filed of record. It is only from that point onwards that warrant could be directed. Firstly a warrant and thereafter a open warrant. Open warrant can be issued only after a proper inquiry where court is satisfied of the absence or absconding of Accused.

(d) Taken Journal Entry of 12.01.1995 and Journal Entry of 20.02.1995 together it is the case of the prosecution that upon receipt of indictment summons issued and the J.E of 20.02.1995 confirm that summons issued. There is no record available in the High Court record ^ confirm service of summons. The relevant Journal Entries do not make any reference to return to the summons. As such there is no service of summons/Notices.

The court observed that trial may be held in the absence of Accused person in compliance with Section 241 of the Code of Criminal Procedure Act. As regards ~~in~~ the case in hand, this court is of the view that order dated 16.11.1996 of the learned High Court Judge directing that trial be held in the absence of the Accused is erroneous and all subsequent steps taken to hold the trial in absentia and the Judgment delivered resulting from above on 06.03.1996 is a nullity for the following reasons.

(a) The Journal Entries of 12.01.1995 and 20.02.1995 indicates that on receipt of indictment, court made order to issue summons on the Accused person

and record shows that summons had been issued. There is no report confirming the service of summons or notices on the Accused person. The High Court record does not show any such report as regards service of summons or a 'return' to summons. Even at the oral hearing this fact was notified to either counsel. In Ittepana Vs. Hemawathie 1981 (1) SLR 476 held 'failure to serve summons is a failure which goes to the root of the jurisdiction of court to hear and determine the action. As such judgment entered would be a nullity".

(b) No proper inquiry held under Section 241 of the Code to enable court arrive at a conclusion to have the case fixed for trial in the absence of the Accused party. The trial Judge need to be satisfied as regards the matter referred to in Section 241(1) & (2) of the Code. The record does not indicate that any evidence had been led to enable the learned High Court Judge to consider the application under Section 241 of the Code. The trial Judge cannot arrive at a conclusion in this regard merely on a perusal of a report where the report itself states that the inquiries had been made from the Grama Sevaka of the area. The police officer who reported such facts to court and the Grama Sevaka should have been summoned by court to give evidence on oath as regards the absence of the Accused person. It has not

been done in this instance. A court of law need to be possessed of all material to prove absence of the Accused.

Therefore the order of 16.11.1996 and the Judgment delivered and dated 06.03.1996 are illegal and unlawful. As such all other subsequent orders made by the High Court, thereafter, is of no effect or avail in law. A strong case of interference by this court is made out as above. I would not hesitate to observe that this court has wide powers to act in revision in instances where a right of appeal has been denied by statute or otherwise. All such powers are derived from the provisions of the Constitution of our country. This court on it's own motion decides to ~~revise~~ exercise revisionary powers in view of an apparent miscarriage of justice. The Court of Appeal is vested with the powers to revise orders, decrees, judgments, sentences etc., passed by counts of the first instance, to correct all errors in fact or in law, and to make orders thereon as the interests of justice may require: (Articles 138(1) and 145 of the Constitution.)

The impugned order amounts to miscarriage of justice or is ex facie wrong is an exceptional circumstances and revision lies even though no appeal lies. Ranasinghe Vs. Henry (1896) 1 NLR 303 or where right of appeal not exercised. Mallika Silva Vs. Gamini Silva (1999) 1 SLR 85; Caroline Nona Vs. Pedrick Singho (2005) 3 SLR 176; 'Exceptional' circumstances would be

(a) Where there has been a miscarriage of justice.

(b) A strong case of interference by this court is made out... A.G. Vs. podisinghe 51 NLR 385, 390.

I would go to the extent to state that in the case in hand both grounds in (a) and (b) above are very well fulfilled as such revisionary powers could be exercised by this court. G.P.S. de Silva J. Bakmeewewa Authorised Officer People's Bank Vs. Konarage Raja (1989) 1 SLR 231, 237-8 at pg. 238 learned Judge also said. "The fact that there is no right of appeal does not mean that an aggrieved party is left without a remedy, for revision is available". In Perera Vs. Muthalib 45 NLR 412 per Soertsz J. could would exercise its "revisionary powers" where there has been a miscarriage of justice owing to a violation of a fundamental rule of judicial procedure.

*Mariam Beebee Vs. Syed Mohamed 68 NLR 36*

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*Potman Vs. I.P Dodangoda 74 NLR 115...*

It has been held that the powers of revision are "so wide that revision is available event after the appeal has been disposed of" ... and that the "petitioner in a revision application only seeks the indulgence of Court to remedy a miscarriage of justice".

*Biso Menika Vs. Cyril de Alwis 1982 SLR 368...*

It has been held by sharvananda J. that "when the Court has examined the record and is satisfied that the order complained of is manifestly erroneous or without jurisdiction, the Court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay unless there are very extraordinary reasons to justify such rejection".

*Sirimavo Bandaranaike Vs. Time of Ceylon 1995 (1) SLR pg. 23 ..*

M.D.H. Fernando J. has held that 'revision should not be restricted by ordinary provisions ... as Article 138 of the Constitution confer wide revisionary powers" and that "jurisdictional provisions should be broadly interpreted in order that errors in the administration of justice can be corrected rather than being narrowly interpreted which will perpetuate errors".

In all the above facts and circumstances of this case, we set aside the order of the learned High Court Judge dated 16.11.1996 and the judgment of 06.03.1996, and all other orders made subsequent to above. We also proceed to make order that the Accused-Appellant-Petitioner be tried de novo. In the event of a possible conviction at the fresh trial, the period already served by

the prisoner in the prisons custody need to be taken into account, at the time of sentencing the Accused-Appellant-Petitioner.

Application allowed.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL