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

In the matter of an appeal against the Order of the High Court under section 331 of the Code of Criminal Procedure Act No.15 of 1979 as amended.

Samarasekera Mudiyanselage

Priyantha Peiris

Accused-Appellant

C.A.Case No.52/2012

H.C.Anuradhpura Case No. 241/2002

V.

The Attorney General

Attorney General's Department,

Colombo 12.

Respondent

Before:- H.N.J.Perera, J. &

K.K.Wickremasinghe, J.

Counsel:-Dr. Ranjith Fernando for the Accused-Appellant

Sanjeewa Dissanayake S.S.C. for the Respondent

Argued On:-08.06.2015

Written Submissions:-24.06.2015/06.07.2015

Decided On:-28.07.2015

H.N.J.Perera, J.

The accused-appellant was indicted before the High Court of Anuradhapura for being in possession of an automatic Gun on 18.06.1997 punishable under section 22(3) read with section 22(1) of the Firearms Ordinance as amended by Act No. 22 of 1996.

The accused-appellant was tried in absentia, found guilty and convicted and sentenced on 7th June 2005 to life imprisonment and to a fine of Rs. 2500/-.

An application for retrial was made on behalf of the accused-appellant in terms of section 241(3) of the Code of Criminal Procedure Act when he was produced from remand custody before the High Court Judge on 23.02.2012.

After inquiry the court made order refusing the application for trial de novo, on 18.05.2012. Aggrieved by the said order, conviction and sentence the accused-appellant had preferred this appeal to this court.

If an accused person wishes to make an application for a trial de novo he should follow the criteria laid down in section 241(3)(b) of the Code of Criminal Procedure Act.

Section 241(3) states:-

241(3) Where in the course of or after the conclusion of the trial of an accused person under sub-paragraph (1) 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-

(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.

The main contention of the Counsel for the accused-appellant in this case was that only evidence led before the learned High Court Judge was that of the Sub Constable Punchihewa who has stated that he received a warrant which he could not execute. He had further stated that he went to the residence of the accused and spoke to the father of the accused but he received no information about the whereabouts of the accused-appellant. He had further testified that he recorded the statement of the Grama Sevaka and got to know that the accused had left the area about 3-4 years ago. He had also stated that he inquired from the Justice of the Peace of the area but could not get any information about the accused-appellant. It was the contention of the Counsel for the accused-appellant that the order of the learned High Court Judge to have a trial in absentia was based on hear-say testimony of the Police Officer Punchhewa who had stated to court that the father of the accused-appellant, the Grama Sevaka, and the J.P. of the area had told him with no statements produced or anyone of them called to testify to that effect.

The proceedings of 18.05.2004 very clearly shows that only the evidence of the said police officer Punchihewa had been led by the prosecution in this case to satisfy court that the accused-appellant was absconding. No other witness had given evidence. The prosecution had failed to lead the evidence of the father of the accused-appellant, the Gramasevaka, or the

Justice of the Peace , the witnesses to whom the police officer had referred to in his evidence to corroborate the same. In this instance, the court heard the evidence of the process server of the Madirigiriya Police Station, police constable Punchihewa and was satisfied with his evidence that the accused-appellant was absconding .

In the order of the Learned High Court Judge dated 18.05.2012 it is stated that the evidence of the father of the accused-appellant, the Grama Sevaka and the police officer had been led and that there was evidence to indicate that the accused-appellant was absconding at the time the order was made.

According to section 241 (3) of the Code of Criminal Procedure Act, after the conclusion of the trial if an accused person in his absence if he appears before court and satisfies the court that his absence at the trial was bona fide the court shall set aside the conviction and sentence and order that the accused be tried de novo.

The learned trial Judge had proceeded with the trial in the absence of the accused-appellant and had pronounced judgment on 07.06.2005. The accused-appellant was produced from remand custody before the High Court on 23.02.2012. The accused-appellant had been produced before the High Court after a lapse of six and a half years from the date of the pronouncement of the judgment and sentence by the trial Judge. An application for re-trial had been made on behalf of the accused-appellant in terms of section 242(3) of the Code of Criminal Procedure Act.

It was the position of the accused-appellant that the indictment against him had been filed in High Court after five years and that he did not receive any summons or knew that there was a warrant issued to arrest him in this case. The main contention of the Counsel for the accused-appellant was that although the High Court Judge had proceeded to hear

the case against the accused-appellant in his absentia there was no sufficient evidence led under section 241 (1) of the Criminal Procedure Act, before the learned trial Judge to come to a conclusion that the accused-appellant knew about this case and that he was absconding from court.

In Rajapaksa V. The State 2001 1 SLR 2V 161 it was held that the period of time within which an appeal should be preferred must be calculated from the date on which the reasons are given. In this case the conviction and sentence was given on 07.06.2005. The petition of appeal was lodged on 01.06.2012. The appeal is therefore clearly out of time.

It was the contention of the Counsel for the Respondent that the accused-appellant cannot prefer an appeal against the order made under section 241 (3) of the Code of Criminal Procedure Act , since an order refusing to vacate the judgment and sentence made under section 241 (3) of the C.P.C. is not covered by section 331(1) as section 241 (3) does not confer a right of appeal.

In C.A. Appeal No. 155/2000 the Court of Appeal held that there is no provision made for appeals against the orders made under section 241 (3).

The learned Counsel for the accused-appellant invited this court to exercise the revisionary powers in terms of section 364 of the Code of Criminal Procedure Act.

In Sudage Gamini Rajapakse V. The State (2001) 1 SLR161 it was further held that an application in revision should not be entertained, save in exceptional circumstances. In addition to that the party must come to court without unreasonable delay.

In the instant case there is a delay of nearly five years. In my view delay alone should not prevent a party from seeking redress under revisionary

jurisdiction from this court. If the party can satisfy that there are exceptional circumstances to exercise the revisionary jurisdiction of the appellate court like in this case the court would be in a position to exercise its revisionary powers and grant redress to a party concerned.

In the instant case it is clearly seen that the only evidence the prosecution had led before the learned High Court Judge to satisfy the court that the accused-appellant was absconding is of the police officer Punchihewa's evidence. His evidence had been led by the prosecution on 18.05,2004. He had stated that he received a warrant to be executed from the High Court of Anuradhapura against the accused-appellant in this case but he was not able to execute it. He has stated that he had gone to the given address and questioned the father of the accused-appellant but could not get any information about the whereabouts of the accused-appellant. He had also stated that he met the Grama Niladari and inquired about the whereabouts of the accused-appellant and came to know that the accused-appellant had not been seen for about 3 to 4 years in that area. The police officer Punchihewa had further stated that he inquired about the accused from a Justice of Peace but could not get any information about the accused-appellant. The said witness Punchihewa had even failed to give the name of the J.P. from whom he had inquired about the accused-appellant. He had not stated in his evidence how many times he had attempted to execute the warrant against the accused. . The evidence of this officer only indicate that the accused-appellant was not to be found in the said area.

As submitted by the Counsel for the accused-appellant the prosecution had failed to lead the evidence of the father of the accused-appellant, the Grama Sevake Niladari of the area or of the J.P from whom the witness Puncihewa had inquired about the accused-appellant. Only the evidence of the police officer Punchi hewa had been led before the court

to satisfy the trial Judge that the accused-appellant was in fact absconding.

The learned High Court Judge had refused the application of the accused-appellant made under section 241 (3) of the C.P.C on the basis that a trial in abstentia had been done correctly after hearing evidence of the father of the accused-appellant, Grama Sevaka Niladari and the Police officer.

In the case of Rajapaksa V. The State the evidence of the father of the accused and of the Grama Niladari had been led before court. In that case there was concrete and cogent evidence before the learned trial Judge to justify the order he made to commence the trial and proceed in the absence of the accused-appellant. But in the instant case no such evidence had been led and the learned trial Judge had acted on the basis that all these witnesses had given evidence before court.

Therefore it is manifestly clear that the learned High Court Judge when he made the order refusing the application made by the accused-appellant under section 241 (3) of the C.P.C had mistakenly believed and acted on the basis that the evidence of the parties whom the police officer had referred to in his evidence had been recoded prior to making the order under section 241 (1) of the C.P.C to proceed to trial in the absence of the accused-appellant. Therefore this court cannot agree with the conclusion arrived by the learned trial Judge that his predecessor had made a correct order after considering the evidence led under section 241 of the father of the accused, the Grama Niladari , and the Police officers evidence.

The accused-appellant was tried in abstentia and convicted and sentenced to life imprisonment together with a fine. In our opinion there was no concrete and cogent evidence before the learned trial Judge to justify the order he made on18.05.2004 to commence the trial and proceed in the absence of the accused-appellant. Although the accused-

appellant has no right of appeal from the order made by the learned High Court Judge on 18.05.2012 refusing his application made under section 241 (3) of the C.P.Code, we find that this is a fit and proper case to exercise our revisionary powers of this court. Accordingly we set aside the judgment and the order dated 18.05.2012 made by the learned High Court Judge and order trial de novo.

Application allowed. Trial de novo ordered.

JUDGE OF THE COURT OF APPEAL

k.k.Wickremasinghe, J

I agree.

JUDGE OF THE COURT OF APPEAL