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

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979.

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

CA/06/2011

H/C Kegalle case No. 1384/1999

Thammettayalage Thissa Kumara

ACCUSED

And,

Thammettayalage Thissa Kumara

ACCUSED-APPELLANT

Vs,

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

Before: **Vijith K. Malalgoda PC J (P/CA) &**

H.C.J. Madawala J

Counsel: Nagitha Wijesakara with P.M. Gunasekara for the Accused-Appellant

Sarath Jayamanna PC ASG for the AG

Argued on: 01.10.2015, 23.10.2015

Written Submissions on: 16.03.2016

Judgment on: 08.07. 2016

Order

Vijith K. Malalgoda PC J

The accused-appellant was indicted before the High Court of Kegalle for committing the murder of one S. Nilmini Upul Kumara alias Podi Ralahamy on or around 25.10.1995 an offence punishable under section 296 of the Penal Code.

The accused –appellant who appeared before the High Court on notice on 28.10.1999 opted for a trial before a judge without a jury, when the indictment was served on him. The accused-appellant who was present before the High Court trial until December 2000 had absconded thereafter and the trial had proceeded in the absence of the accused.

The Learned High Court Judge who convicted the accused-appellant on 27.06.2005, after imposing the death penalty had issued an open warrant on him. The accused-appellant who failed to lodge an appeal challenging the conviction and the sentence within the stipulated time was absconding until he was arrested by the police on 20th April 2010.

When the accused-appellant was produced before the High Court after his arrest, the court had proceeded under section 241 (3) of the Code of Criminal Procedure Act No. 15 of 1979 and held an inquiry under the said provision of the Law.

Section 241 (3) of the Code of Criminal Procedure Act No. 15 of 1979 reads thus;

> 241 (3) where in the course of or after the conclusion of the trial of an accused person under sub-paragraph (i) of the 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) .....

(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*.

As observed by this court, the accused-appellant had submitted a petition and affidavit before the Learned High Court Judge giving reasons for his absence during the trial and as observed by the Learned High Court Judge the only reason pleaded by the accused-appellant was the fact that he was once discharged by the Learned Magistrate and therefore he did not attend the High Court. However the Learned High Court Judge had observed that the said position taken up by the accused-appellant before the High Court was incorrect since the accused-appellant had appeared before High Court during the trial dates nearly for one year.

Since that was the only ground under which the accused-appellant had canvassed his *bona-fide*, the High Court Judge after rejecting to act under the said version, refused the application for a *de novo* trial and made order to implement the death sentence already imposed on the accused-appellant on 27.06.2005 after recording the allocutus on 07.02.2011.

Being dissatisfied with the said order made under section 241 (3) of the Code of Criminal Procedure Act No 15 of 1979, the accused-appellant had preferred the present appeal before this court.

As observed by me earlier in this judgment, the accused-appellant had failed to lodge an appeal immediately after the conviction in the year 2005.

Under these circumstances we see no appeal preferred before this court against the conviction and the sentence imposed on the accused-appellant but the only appeal before this court is made against the order of the High Court Judge made under 241 (3) of the Code of Criminal Procedure Act 15 of 1979.

In the said appeal the only grounds under which the accused-appellant had preferred the present appeal is;

9. එකී නියෝගයෙන් අතෘප්තියටපත් අභියාවක මෙම නඩුව පිළිබඳ විවාදයේදී ගරු අභියාවනාධිකරණයේ ගෙනහැර දක්වන කරුණු මත සහ පහත සඳහන් හේතූන්මත ඉවත්කරවා දෙනමෙන් අයැදසිටී,

අ) අභියාවකට ගරු අධිකරණය සෑහීමකට පත්කරන ආකාරයෙන් විමසීමක් පවත්වා කරුණු ඉදිරිපත්කිරීමට අවස්ථාක් නොදීම

ආ) එකී අභියාවක ගරු අධිකරණයේ පෙනී නොසිටීම අදාලව ඉදිරිපත්කල කරුණු නොසලකා එකී නියෝගයදී තිබීම

ඇ) අභියාවකව මෙම වරදට අදාලව මහේස්ත්‍රාත් අධිකරණයේ නිදහස්කර ඇතිබවට වූ හේතු දක්වා තිබියදී නියෝගයදී තිබීම

එසේ හෙයින් අභියාවක අභියාවනාධිකරණයේ විනිශ්වයකාර උතුමන්ලාගෙන් ගෞරවයෙන් අයැදසිටින්නේ,

අ) සබරගමුව පළාත්බඳ කැගල්ල මහාධිකරණයේ විනිශ්වයකාරතුමන්ගේ 2011 පෙබරවාරි මස 7 වැනි දින දරණ නියෝගය ඉවත් කරන ලෙසත්

ආ) අභියාවක මෙම ගරු අධිකරණයට නොපැමිණීම අදාලව නැවත විමසීමක් පවත්වන ලෙසට නියෝග කරන ලෙසත්

However when the present appeal was argued before this court, Learned Counsel who represented the accused- appellant failed to made any submission with regard to the appeal before this court but made submissions on the merits of the case, mainly on the evidence available in the said case,

As observed by this court, the appeal before this court only refers to the decision by the Learned Trial Judge to reject the accused-appellant's application made under 241 (3) of the Code of Criminal Procedure Act and not against the trial proceeded in absentia against the accused-appellant.

The Learned Additional Solicitor General who represented the Attorney General requested the Court to restrict the appeal only to petition of appeal before this court.

In this regard we would like to consider the provisions in section 203 along with section 331 of the Code of Criminal Procedure Act.

Section 203 of the Code of Criminal Procedure Act reads thus;

> "when the cases for the prosecution and defence are concluded, the Judge shall forthwith or within ten days of the conclusion of the trial record a verdict of acquitted or conviction giving his reasons therefore and if the verdict is one of conviction pass sentence on the accused according to law."

Section 331 (1) of the Code of Criminal Procedure Act which refers to filing of appeal reads thus;

> 331 (1) an appeal under this chapter may be lodged by presenting a petition of appeal or application for leave to appeal to the Registrar of High Court within fourteen days from the date when the conviction, sentence or order sought to be appealed against was pronounced.

The extent to which section 331 should adhered to was discussed in the case of ***Haramanis Appuhamy V. Inspector of Police Bandaragama 66 NLR 526*** by Sri Skandarajah J and held that the period of time within which an appeal should be preferred must be calculated from the date on which the reasons for the decision are given.

The High Court had pronounced the Judgment convicting the accused, giving its reasons for the said conviction on 27. 06.2005 and the appeal referred to above was lodged before the High Court on 23rd

February 2011, 5 years and 7 months after the said conviction and sentence and therefore it is clearly out of time.

Therefore it is clear that the only appeal before us is the appeal preferred against the decision of the High Court made on 7th February 2011 refusing the application made under section 241 (3) of the Code of Criminal Procedure Act for a *de novo* trial.

Even though the counsel for the accused-appellant decided not to canvass the said order before this court, we have perused the said order and of the view that the Learned High Court Judge had correctly rejected the application after giving due consideration to the matters placed before him.

As discussed above, the position taken up by the accused-appellant before the High Court was that he did not come before the High Court since he had been already discharged in the Magistrate Court. However the above position taken up the accused-appellant was contrary to his own conduct, since he had come before the High Court, received the Indictment and was present before the High Court for nearly one year.

Since this was the only ground under which the application was supported under section 241 (3), the Learned High Court Judge was correct in refusing the said application and therefore we see no reason to interfere with the findings of the Learned High Court Judge when he refused the application and made order to implement the sentence already imposed on the accused-appellant.

Even though the Learned Counsel for the accused-appellant had failed to canvass the case in hand under section 364 of the Code of Criminal Procedure Act, this court is mindful of the existence of the Revisionary Jurisdiction with this court to revise orders of original court. The revisionary powers of the Court of Appeal was discussed by Jayawickrama J, in the case of ***Soysa V. Silva and Others [2002] 2 Sri LR 235*** as follows;

> "This power of revision is an extraordinary power which is quite independent of and distinct from the Appellate Jurisdiction of the Court of Appeal.
>
> Its object is the due administration to Justice and the correction of error, sometimes committed by the Court itself, in order to avoid miscarriage of justice. ***Merino B.F. Vs. Seyed Mohomad 69 CLW 34.*** The power given to Superior Court by way of revision is wide enough to give it the right to revise any order made by an original court, whether an appeal has been taken against it or not. This right will be exercised in which an appeal is pending only in exceptional circumstances as for example, to ensure that the decision given on appeal is not rendered nugatory ***Athukorala V. Swaminathan 41 NLR 165, Silva V. Silva 44 NLR 494."***

However when the court is exercising this discretionary remedy, the court must necessarily have regard to the unseasonable delay and contumacious conduct of the accused in jumping bail.

In the case of ***Sudarman de Silva and Another V. Attorney General [1986] 1 Sri LR 11*** Sharvananda CJ observed the importance of the contumacious conduct in a revision application as against an appeal as follows;

> "Contumacious conduct on the part of the applicant is relevant consideration when the exercise of a discretion in his favour is involved, but not when he asserts his statutory right to appeal and is not asking for the favour of any permission"

In the case of ***Opatha Mudiyanselage Perera V. Attorney General CA Revision 532/97*** (CA minute dated 21.10.1998)"

F.N.D Jayasuriya J observed the undue delay and contumacious conduct of the accused-appellant as follows;

> "These matters must be considered in limine before the court decides to hear the accused-petitioner on the merits of his application. Before he passes the gateway to relief his aforesaid

contumacious conduct and his unreasonable and undue delay in filing the application must be considered and determination made upon those matter before he is heard on the merits of the application."

In the case in hand the accused-appellant who was present before the High Court when the indictment was served on him had absconded since December 2000. The trial was concluded and the sentence was imposed in his absence on 27.06 2005 and he was apprehended and product before the High Court on 04.05.2010, ten years after he started absconding and five years after the sentence.

The above contumacious conduct of the accused-appellant and his delay in coming before this court does not permit us to entertain this discretionary remedy. In these circumstances we are not inclined to exercise our revisionary powers and interfere with the Judgment of the Learned High Court Judge dated 27.06.2005. For the reasons given above, this court

a) See no reason to interfere with the findings of the Learned High Court Judge dated 07.02.2011 when he refused the application for a *de novo* trial and made order to implement the sentence already imposed on 27.06.2005.
b) Is not inclined to exercise the revisionary power of this court and to interfere with the Judgment of the Learned High Court Judge dated 27.06.2005.

Appeal is accordingly dismissed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL