

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

In the matter of an appeal made in terms
of Section 331 of the Code of Criminal
Procedure Code Act No: 15 of 1979.

The Democratic Socialist Republic of Sri
Lanka

Vs

CA Appeal No: CA 30/2007

HC Negambo

Case No: 262/2002

Ranawake Arachchige Nishantha Alwis

Accused.

And Now Between

Ranawake Arachchige Nishantha Alwis

Accused Appellant

Vs.

Hon. The Attorney General,
Attorney General Department

Respondents

Before : M.M.A Gaffoor, J &
K.K. Wickremasinghe, J.

Counsel : Ranjith Fernando A.A.L. for the Accused-Appellant.
Mrs. Haripriya Jayasundara for the Attorney-General.

Argued on : 7TH June 2016

Written Submissions by the Appellant filed on: 30th June 2016

Written Submissions by the Respondent filed on: 14th July 2016

Judgment on: 9th September 2016

K.K.Wickremasinghe J.

The accused appellant (hereinafter referred to as the appellant) was charged under section 296 of the penal code for committing murder of Wela Tantrige Tissa Boteju. Thereafter, the accused appellant was convicted on the said count and the learned trial judge imposed the death penalty on him on 23.02.2007.

Section 296 of the penal code states:

"Whoever commits murder shall be punished with death"

Counsel for the appellant informs court that he wishes to withdraw the appeal under section 359 of the Code of Criminal Procedure Act No. 15 of 1979 as quoted below:

"Any appellant or applicant as the case may be who has lodged an appeal or application to the Court of Appeal under this code may at any time apply to the Court of Appeal to withdraw his appeal or application and such court may after such inquiry as it considers necessary, permit the withdrawal of such appeal or application on such terms as it may think fit to impose and thereupon the appeal or application shall stand dismissed."

Further Counsel for the appellant has made an application to backdate the sentence of the accused appellant under section 323(5) of the Code of Criminal Procedure Act as quoted below:

“The court of appeal may order that the time so spent by such appellant in custody or any part thereof shall be reckoned as part of the term of his sentence”

The counsel for the respondent has no objection to the withdrawal of the appeal but objects to the backdating of the sentence.

Section 323(5) of the Code of Criminal Procedure is applicable to “such appellant” as stated in the said section. However, the definition as to who “such appellant” may be is stated in section 323(4) as quoted below:

“When a person sentenced to a term of rigorous imprisonment has preferred an appeal, but is unable to give the required recognizance or other security he shall be detained in custody without hard labour until the judgment of the court of appeal is made known to the superintendent of the prison.”

The appellant in this case has been imposed with a death penalty which has no fixed term of imprisonment as he is merely kept in custody awaiting his execution. The sections 285(1) states that the day and the place for the execution of a death sentence will be decided by the president. Therefore, the Court of Appeal shall not disregard the words of the section and attempt to backdate the sentence.

The Cases submitted by the counsel for the appellant namely S.C.Spl.L.A. No.14/2002, CA No. 135/96, CA No.40/98 and CA No. 106/92 shall not be considered as the accused appellants in the above mentioned cases have been imposed with life imprisonment and thus does not support the submission of the defense.

Further in cases of CA 114-117/2000, 127/2001 and 27-29/2001, learned judges of the Court of Appeal have allowed the withdrawal of the appeal in terms of sec. 359 of the Code of Criminal Procedure Act, but not acted under Sec.323(5) of the said act. There is no basis to act under section 323(5) of the said act in a death sentence case since a sentence of death cannot be backdated.

After considering the submissions made on behalf of the accused appellant, we allow the application of the counsel for the accused appellant to withdraw the appeal and disallow the application made under section 323(5) Code of Criminal Procedure Act to backdate the death penalty.

The appeal stands dismissed.

Judge of the Court of Appeal

M.M.A. Gaffoor J

I agree

Judge of the Court of Appeal