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

In the matter of an Appeal Against an order of the High Court under Sec. 331 of the Code of Criminal Procedure Act No. 15 of 1979.

(01) Abdul Kareem Nazeer
(02) Mohamed Farook Abusally
Bogambara Prison

Accused

C. A. Case No. : 274/2009
H. C. Ampara Case No. : 896/2004

Vs.

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

Complainant

And now

Mohamed Farook Abusally
Bogambara Prison

Accused-Appellant

Vs

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

Complainant Respondent

BEFORE : **M. M. A. Gaffoor, J &**

K. K. Wickramasinghe, J

COUNSEL : AAL Dr.Ranjit Fernando for the Accused-Appellant.

Shanil Kularatne Senior State Counsel for the Attorney General.

ARGUED ON : 2nd September 2016

DECIDED ON : 4th November 2016

K. K. WICKRAMASINGHE, J.

When this matter was taken up for argument, the learned Senior State Counsel Shanil Kularatne took up following preliminary objections:-

(1) the appeal against the conviction and sentence passed on the accused appellant on**31st July 2009** is out of time , as the appeal has been lodged on the **2nd July 2010** (almost one year).

(2)there is no right of appeal against an order made under section 241(3) of the Code of Criminal Procedure Act.

The learned counsel for the appellant submitted to court that the accused appellant was produced to court after 8 months and it was on the 10th March 2010 and thereafter the application was made under section 241(3) explaining the reasons for his absence.

After considering the facts, the learned trial judge had refused the application for Trial De Novo on the **22nd July 2010**.Therefor the counsel for the appellant submitted that this appeal filed only after the above mentioned order and therefor the appeal has been filed **within 14 days**.

It was further argued that the mandatory compliance of section 280 of CPC relating to allocutus was not taken place and therefor the imposing of the death sentence cannot be considered as pronounced. In the absence of the pronouncement of the death sentence, only the conviction remained until 22nd July 2010, which alone would not constitute a judgement. Therefor the Appealable period had commenced from the date of judgement and thereby the appeal has filed within the time period.

It is pertinent to note that in the cases of CA Appeal No.81/2003 and CA Appeal No. 155/2000 Decided by Ranjith Silva J. that the above mentioned contention is untenable due to the following reasons:

"One is that under section 241(3)(b)which is as follows:- 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.

We find that the necessary implication or the corollary of this provision to be that, there must be a conviction and sentence in existence for the High Court Judge to set aside such conviction or sentence. From this we can conclude that in case the conviction and the sentence are not set aside, for all purposes, there is a conviction and sentence on record. Therefore if there is a conviction and sentence, especially a sentence (emphasis added) it would be redundant and superfluous to record an allocutus, because an allocutus is recorded before the sentence of death is passed. Therefore as I have mentioned above section 241(3)(b) by necessary implication indicates the existence of a conviction and sentence".

On the other hand, by referring to section 286(f) of the Criminal Procedure Code it was further held "the *provisions of this section too by necessary implication indicate the existence of a conviction and sentence".*

Therefore it was held, that when an accused was tried in absentia is brought before the High Court and if an application to set aside the judgement is not allowed, it is not necessary to record an allocutus from the accused before the sentence is ordered to be carried out.

After considering section 279 of the Criminal Procedure Code it was affirmatively decided, that when an accused against whom a sentence of death has already been passed, is arrested and brought before the High Court, it is not necessary to pronounce the sentence of death and also to record an allocutus.

The counsel for the appellant also contented the fact that the evidence led under section 241 inquiry was based on hearsay evidence and therefor it is illegal. When considering the proceedings itself, it is very clear that the appellant was deliberately keeping away from court. When perusing the brief we find that the accused appellant was present in open courts and the indictment was served on him and the charge was also read out and thereafter he had pleaded not guilty for the charge against him on the 19th October 2004.Therefor, it is an obvious fact that he was deliberately keeping away from court.

Further learned counsel for the accused appellant contended that the name of the accused appellant mentioned by the police officer was wrong, but when considering the evidence of the police officer as at pages 51/53 it is very clear that the discrepancy of the name of the accused appellant as contented by the counsel, read as 'Abusaid" is only a typing mistake. Accordingly, the second ground of the appellant has no merit.

As I have mentioned above and when considering the testimony of the accused appellant it is evident that he was out of the island during the trial and it was a deliberate action. The learned trial judge has given a well-considered order and further mentioned that if he wanted, he would have even got permission of court before leaving the island.

The next argument of the counsel for the accused appellant was that by referring to page No.442 of the brief and stated that the learned Judge was said to have been stated that *"the accused appellant absconded, because he could not explain the prosecution case against him....."* Thereby the above mention reasoning is not a judicial conclusion tenable in Law. When carefully referring to the said page of the brief, it is noted that there is no such sentence at the sited page.

Anyway, in the judgement of case No CA 81/2003 Hon. Ranjith Silva has held that "pronouncing the sentence for the second time was a redundant exercise on the part of the learned judge. The maxim that one should not be allowed to benefit from his own wrong- doing is applicable without reserve to the facts and circumstances of this case (nulprendra advantage de son tort demesne). To permit the accused to take advantage of his own contumacious conduct and grant him a special right of appeal after the appealable period is not only anachronistic but also absurd.

The other argument put forward by the learned counsel appearing for the accused appellant was that if this appeal is not allowed, the court should invoke its revisionary powers under section 363/365 of the CPC and reverse the ultimate findings of the trial court. As decided in case No. 155/2000, we are also of the view that allowing such an application will tantamount the court lending its hand to a person guilty of contumacious conduct and there by assisting him. Therefor we hold that the Petition of Appeal is not properly constituted and is out of time.

As stated by the Learned Senior State Counsel there is no right of appeal against an order made under section 241(3) of the Code of Criminal Procedure Act. According to section 331 of the Criminal Procedure Code, it gives only the forum jurisdiction (Vide Martin Vs Wijewardene 1939 2 SLR 409)

For the reasons stated above, we uphold the two preliminary objections raised by the Learned Senior State counsel and dismiss the appeal in limine.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I Agree

Judge of the Court of Appeal

Cases Referred to:-

1. case No CA 81/2003 decided on 22/10/2007
2. case No. 155/2000 decided on 17/09/2007
3. Martin Vs Wijewardene (1939 2 SLR 409)