

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

Dissanayaka Mudiyansele
Upatissa Ralahami

APPELLANT

CA Appeal No: CA 76/2015

HC Anuradhapura Case

No: 16/2011

Vs.

Attorney General,
Attorney General's Department,
Colombo - 12.

RESPONDENT

**Before : P.R. Walgama, J
: K.K. Wickramasinghe, J**

**Counsel : Weerasena Ranaheva with Inoka Senavirathne for
Accused – Appellant.
: Sudharshana de Silva SSC for A.G.**

Argued on : 31.10.2016

Decided on : 24.03.2017

Order

P.R. Walgama, J

The instant order concerns an application made by the SSC appearing for the Attorney General to decide the matter in limine, as the petition of the Accused – Appellant is barred by positive rule of law, vi z. – as it is time barred.

The Accused – Appellant was indicted by the Attorney General for the charge of Grave Sexual Abuse under Section 365 (B) (2) (B) of the Penal code as amended by Acts No: 22 of 1995, 29 of 1998 and 16 of 2006.

As the Accused – Appellant was absconding at the commencement of the trial at the High Court, the trial proceeded in absentia, and was convicted of the above charge and sentenced to 7 years Regorious Imprisonment with a fine of Rs. 20,000/- carrying a default sentence of 6 months of Simple imprisonment and Rs. 50,000/- as compensation to the victim, carrying a default sentence of 6 months of Simple Imprisonment. The said verdict and

the sentence was pronounced on 15.10.2013. pursuant to the afore said an open warrant was issued on the afore said date.

The Accused – Appellant surrendered to court on 24.04.2014. An application was made to court in terms of Section 241 (3) and an inquiry was held and the trial Judge by his order dated 28.05.2014 refused the application and made order for the sentence be effective from 24.04.2014.

It is being noted that the Accused – Appellant had filed the Petition of Appeal on 15.06.2015. Therefore at a cursory glance it is obvious that at the time of preferring this appeal it was out of time.

Hence it is the contention of the counsel for the Respondent, that the Accused – Appellant has failed to file the appeal within 14 days from the date of conviction, which is a mandatory requirement in section 331(1) of the Criminal Procedure code Act No: 15 of 1979.

For convenience and brevity the above section is reproduced here under

“An appeal under this chapter may be lodged by presenting a petition of appeal or application for have to appeal to the Registrar of the High Court within fourteen days from the date when the conviction, sentence or order sought to be appealed against was pronounced”.

Therefor it is seen from the above, the instant petition of appeal has been preferred even after the expiration one year.

The above legal position was confirmed and established by host of decided cases. It was recognized in the case of Rajapaksa .VS- the State (2001) 2 SLR – 161 which has been stated thus.

“The period of time within which an appeal should be preferred must be calculated from the date on which the reasons are given.....”.

“ An application in Revision should not be entertained save in exceptional circumstances. When considering this issue court must necessary have regard to the contumacious conduct of the accused in jumping bail and thereafter his conduct in a manner to circumvent and subvert the process of land and judicial institution. In addition, the party should come before Court without a delay ”. Even to consider the Petitioner’s application in revision the court well follow the pronouncement in the said above cases. (emphasis added)

The above principle was recognized in the case of Padmasiri -VS. Attorney General (2012) 2 SLR - 24 - and was held thus.

“ therefore we hold that the petition of appeal is not properly constituted and it is out of time. There is no right of appeal against the order made on the 06.01.2002, under Section 241 (3) because section 331 gives only the forum jurisdiction. We have in the absence of the accused

and we find that there is no provision made for the appeals against the orders made under section 241 (3).

Therefore it is ostensible that the Court of Appeal is empowered to exercise its discretion to have recourse to the revisionary jurisdiction to review an order made under the above mentioned section.

Before delving on the merits of the petition of appeal, the Appellate court should deal with the undue delay and contumacious conduct of the Accused – Appellant.

It was thus held in the case of Opatha Mudiyanseelage Perera – Vs- Attorney General CA – Revision 532/97.

“ 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 matters before he is heard on the merits of the application ”. (emphasis added)

In perusing the proceeding relating to the inquiry held in terms of section 241 (3) it is abundantly clear from the testimony of the Accused – Appellant that he had appeared in the Magistrate Court in the Non summary inquiry, and he was on bail. He was aware of the matter in hand. Due to some reason he and his family has sold the property at Anuradhapura and moved to Colombo. But he has admitted that he knew that there was no conclusion of the proceedings. It is also being noted that he has never informed court of changing his place of abode.

In the said backdrop the Learned Trial Judge was of the view that the reasons adduced by the Accused – Appellant do not merit any variation of the sentence, by allowing the application made under Section 241 (3) the Criminal procedure code.

At this juncture it is worthy to be mentioned that the case law referred to by the counsel for the Accused – Appellant do not fall within the facts of this case.

The case in hand varies from above. The Accused – Appellant appeared in the Magistrate Court. He was enlarged

on bail. He decided to leave the place where he was residing even without informing the change of residence to the police. In the result he was arrested. The cumulative effect of these factors will only establish his contumacious behavior, of the Accused – Appellant.

The Learned Trial Judge has considered the facts stated above and arrived at the inescapable conclusion that the reasons given by the Accused – Appellant do not warrant to set aside the judgment and conviction entered on 15.10.2013.

Hence, Preliminary objection up held.

For the foregoing reasons we dismiss the Appeal.

Accordingly appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. Wickramasinghe, J
I agree.

JUDGE OF THE COURT OF APPEAL