

**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.

The Democratic Socialist Republic of
Sri Lanka.

COMPLAINANT

Vs

Manthaka Gamage Ruwan Ajantha

ACCUSED

Case No. CA 219/2016

HC (Embilipitiya) Case No. 50/2009

AND NOW BETWEEN

Manthaka Gamage Ruwan Ajantha

ACCUSED – APPELLANT

Vs

Hon. Attorney General

Attorney General's Department

Colombo 12.

RESPONDENT

BEFORE

: Deepali Wijesundera J.

: L.U. Jayasuriya J.

COUNSEL

: Amila Palliyage for the

Accused – Appellant.

Anoopa De Silva S.S.C. for the

Respondent.

ARGUED ON

: 26th January, 2018

DECIDED ON

: 02nd February, 2018

Deepali Wijesundera J.

The accused appellant was indicted in the High Court of Embilipitiya for unlawful possession of a fire arm and 28 rounds of ammunition under section 22 (3) of the Fire Arms Ordinance no. 22 of 1996 (as amended) and section 27 (1) (a) of the Explosives Act no. 21 of 1956.

Before the trial when the indictment was served on the appellant he was ordered bail by the High Court on the 17th of December 2009. Thereafter he has not appeared in court and a section 241 inquiry was held and an open warrant has been issued on him.

Trial in absentia was held on 31/10/2011 and the judgment was pronounced on the 08th of March 2012. The appellant was convicted in absentia on both charges and a sentence of life imprisonment was given for the first charge and for the second charge, five years RI was imposed.

Journal entry on 21/10/2015 shows that the appellant was arrested and produced before the High Court after three years to implement the sentence imposed on him. An application was made under section 241

(3) of the Code of Criminal Procedure Act to hold an inquiry to prove his *bona fide*. After inquiry the learned High Court Judge has refused to set aside the judgment dated 08/03/2012. And the learned High Court Judge has proceeded to implement the sentence. Being aggrieved by the said order the appellant has filed the instant application.

The learned Senior State Counsel raised two preliminary objections namely that,

1. There is no right of appeal in respect of a 241 (3) inquiry order.
2. The appeal against the conviction and sentence is out of time.

The learned Senior State Counsel relied on the judgment in **Padmasiri vs Attorney General 2012 (2) SLR 24** to substantiate the first preliminary objection.

The said judgment states;

"Section 241 (3) (b) indicates the existence of a conviction and sentence lawfully passed. Therefore we find that if the accused appellant was successful in his application under section 241, the case would have been re-opened and the trial would have commenced de novo and the accused would have all his rights including the right of appeal, but, as his application under section 241 was rejected, he had no

right of appeal against the conviction and sentence already pronounced because, it was out of time."

It was also held in the said judgment that;

"The High Court has rejected the explanation of the appellant and refused to vacate the conviction and sentence. There had been no application for revision and the appellant had the opportunity of moving in revision. Discretionary power of this Court invoking revisionary jurisdiction as sought as an alternative by the accused should not be used in a situation of this sort."

The learned counsel for the appellant in his argument cited the judgment in **Dona Padma Priyanthi Sennanayake vs H.G. Chamika Jayantha and two others** (Supreme Court appeal no. 41/2015 dated 04/08/2017). And stated that the Supreme Court has discussed as to what are the orders that could be considered as final judgments and interlocutory orders. On perusal of the said judgment we find that leave was granted by the Supreme Court on four questions of law that deals with civil actions. Therefore the case cited by the counsel has no bearing on the instant case.

The learned counsel mentioned **section 11 of Act no. 19 of 1990** which provides,

11 (1).The Court of Appeal shall have and exercise, subject to the provisions of this Act or any other law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any High Court established by Article 154P of the Constitution in the exercise of its jurisdiction under paragraph (3) (a), or (4) of Article 154P of the Constitution and sole and exclusive cognizance by way of appeal, revision and restitutio in integrum of all causes, suits, actions, prosecutions, matters and things of which such High Court may have taken cognizance:

Provided that, no judgment, decree or order of any such High Court, shall be reversed or varied on account of any error, defect, or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

This Act was brought into operation to confer appellate jurisdiction to provincial High Courts. Section 3 of the said Act confers jurisdiction to High Court to hear appeals from Labour Tribunals within the province and orders made under section 5 or 9 of the Agrarian Services Act no. 58 of 1979. Section 4 confers appellate jurisdiction to entertain appeals from the Magistrates Courts and Primary Courts.

Under section 11 of the said Act it does not empower the Court of Appeal to hear appeals filed against the appeal orders given by the High Court. When an indictment is served and a judgment is given after recording evidence such judgment becomes a final order. And whatever the orders given thereafter such as an order made under section 241 are considered as an incidental order unless otherwise the High Court decide to record the evidence de novo.

For the afore stated reasons we find that the appeal is out of time. Further we decide that under section 241 of the Criminal Procedure Code Act the right of appeal has not been specifically granted. We uphold the preliminary objections raised by the respondent and dismiss the appeal.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

L.U. Jayasuriya J.

I agree.

JUDGE OF THE COURT OF APPEAL