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

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

The Hon. Attorney General
COMPLAINANT

Vs

Thuppahi Indika Namal Kumara De Silva
ACCUSED

Case No. CA 89/2016

HC (Matara) Case No. HC 198/2007

AND NOW BETWEEN

Thuppahi Indika Namal Kumara De Silva
ACCUSED – APPELLANT

Vs

The Hon. Attorney General
Attorney General's Department
Colombo 12.
COMPLAINANT – RESPONDENT

BEFORE	: Deepali Wijesundera J.
	: Achala Wengappuli J.
COUNSEL	: Dimuth Senerath Bandara with Chamara Wannisekera and Thusitha Ranathunga for the Accused – Appellant
	Chethiya Goonesekera D.S.G. for Attoney – General.
ARGUED ON	: 19th July, 2018
DECIDED ON	: 06th August, 2018

Deepali Wijesundera J.

The appellant was indicted in the High Court of Matara for armed robbery punishable under section 380 and 383 of the Penal Code. The appellant has escaped from Galle prisons on the day of tsunami and was not found thereafter. There has been no evidence to say he died at the tsunami. Therefore the learned High Court Judge has held a section 241 inquiry and after recording the evidence of four witnesses has decided to have a trial in absentia. After trial the appellant was convicted and sentenced to life imprisonment. Subsequently the accused appellant was arrested in the Homagama area and produced before the Matara High Court. He has moved for a de-novo trial and a section 241 (3) inquiry was

held. After the inquiry the learned High Court Judge has refused the application of the appellant for trial de-novo and sentenced him. This appeal is against the said judgment of the High Court.

The learned counsel for the appellant submitted that the learned High Court Judge failed to conclude that the reasons given by the appellant under section 241 (3) were *bona fide*. Although in **Samarasekera Mudiyanselage Priyantha Peiris vs AG CA 52/2012** delivered on 28/07/2015 it has been held that there was no concrete and cogent evidence before the trial Judge to justify the order made to commence the trial and proceed in the absence of the accused. Therefore the application made under section 241 (3) of the Criminal Procedure Act should be allowed. In the instant case the facts are different. The prisons have got damaged due to the tsunami and the appellant had got away and later gone to court according to his evidence, and was told that he will be noticed. But according to him no notice was sent and he has changed the address of his identity card twice. Under section 241 (3) the appellant has to satisfy court that his absence was *bona fide*. Journal entry in page 12 of the case record shows that he has been absconding.

The counsel for the appellant argued that there was no concrete or cogent evidence to justify the learned High Court Judge's order made on 24/06/2016 refusing the appellant's application. He argued that an officer of the Matara prison has given evidence to say that the appellant was not found after the tsunami. On perusal of the evidence of this witnesses we find that he has stated many prisoners escaped during the disaster and later surrendered to the prison but the appellant has not surrendered, after he escaped. This evidence shows that he has been deliberately avoiding the trial.

The appellant while giving evidence has stated that he was waiting for summons from court. But he himself has stated that the address in his identity card was changed twice. Why didn't he inform the police about his new address if he had any intention of presenting himself before court?

The learned Deputy Solicitor General has cited the judgments in **Rajapaksha vs The State 2001 (1) SLR 2** and **Werangoda Nandana Ratnasuriya vs The AG CA** 8/2008 decided on 19/12/2008.

In **Rajapaksha vs The State** it was stated that ***"An application in revision should not be entertained save in exceptional circumstances..."***

In **Werangoda Nandana Ratnasuriya vs AG** it was held;

> ***"A discretion is vested in the court whether or not to order a retrial in a fit case which discretion should be exercised judicially to satisfy the ends of justice."***

After considering the submission made by both parties and the judgment of the learned High Court Judge and the inquiry proceedings we find that the appellant has failed to satisfy the High Court that his application under section 241 (3) of the Criminal Procedure Act was bona fide.

Section 241 (3) reads thus;

(3). ***Where in the course of or after the conclusion of the trial of an accused person under sub-paragraph (i) of 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). Where the trial has not been concluded, the evidence led against the accused up to the time of his appearance before court shall be read to him and an opportunity afforded to him to cross examine the witnesses who gave such evidence; and

*(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.***

Allowing the appellant's application who intentionally absconded and evaded facing his trial after committing a serious offence would not satisfy the ends of justice.

For the afore stated reasons we affirm the judgment of the learned High Court Judge dated 24/06/2016 and refuse the application of the appellant.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Achala Wengappuli J.

I agree.

JUDGE OF THE COURT OF APPEAL