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

In the matter of a Petition Appeal in terms of Section 331(1) of the Code of Criminal Procedure Act No.15/1979 of the Democratic Socialist Republic of Sri Lanka.

C.A.No.180/2016

H.C. Avissawella No.155/2005

Nanayakkarawasama
Delgahawaththage Chandrapala
Nanayakkara

Accused-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12

Complainant-Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI, J.

COUNSEL : Gayan Perera with Prabha Perera for the Accused-Appellant.

Varunica Hettige D.S.G. for the respondent

ARGUED ON : 13th February, 2019

DECIDED ON : 17th June, 2019

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ACHALA WENGAPPULI, J.

The appellant was indicted before the High Court of *Avissavella* along with another accused for committing robbery of a three wheeler and for the murder of *Magammanage Niroshan* on or about 05.05.2002 at *Avissavella.*

On 10.09.2010, after an inquiry under Section 241 of the Code of Criminal Procedure Act No. 15 of 1979 the trial Court made order to proceed with the trial against the appellant *in absentia.*

At the conclusion of the prosecution's case, the judgment of the trial Court was pronounced on 24.01.2013 and the appellant was convicted on both counts. He was sentenced to 7 years R.I. in respect of the first count while death sentence was pronounced on account of the second count. Thereafter an open warrant was issued on the appellant by the trial Court.

The appellant was arrested and produced before the trial Court on 17.06.2013. Upon an application made under Section 241(3) by the appellant, an inquiry was conducted by the trial Court. During this inquiry, the appellant, his brother-in-law and his son gave evidence in support of his position that he did not receive any communication from Court. The prosecution called a former neighbour of the appellant, sister of his 2nd wife and *Grama Niladhari* of the area and the police officer who served process in support of their position that the appellant was absconding, having left his last known address nine years ago.

The trial Court, having considered the evidence that had been placed before it by the contesting parties, made its order on 25.05.2016, refusing the appellant's application to set aside his conviction that had been entered in his absence and to hold his trial *de novo.*

The appellant, by his petition of appeal on 31.05.2016 had invoked appellate jurisdiction of this Court seeking to have his conviction set aside.

In support of the said appeal, learned Counsel for the appellant however submitted to this Court that;

a. the order of the trial Court dated 10.09.2010 to proceed *in absentia* against the appellant is bad in law since the trial Court relied on hearsay material during the inquiry under Section 241(1),

b. the order of the trial Court dated 25.05.2016 is clearly erroneous as it failed to note that the prosecution has failed to tender the *"... summons report through the police officer who delivered summons to the accused by calling him to give evidence."*

The relief prayed by the appellant upon invoking the appellate jurisdiction of this Court could be roughly translated to read as alter the verdict of guilty to a verdict of not guilty ("තමා වැරදි කරුයැයි දී ඇති තීරණය වෙනස් කොට නිවැරදිකරු යැයි තීරණය කරන ලෙස"). Clearly the appellant seeks to challenge the conviction that had been entered against him by the High Court of *Avissavella* with his petition of appeal.

The said conviction was entered against the appellant on 24.01.2013 and the petition of appeal of the appellant is dated 31.05.2016. It was endorsed by the Prison Authorities on 01.06.2016. The said petition of appeal was received by the Registry of the High Court on 08.06.2016 as per the journal entry of that day.

Section 331 of the Code of Criminal Procedure Act, whilst conferring a right of appeal upon an aggrieved person to lodge an 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, ..."*. In this instance, the appellant, although seeks to appeal against his "verdict of guilty", did not lodge an appeal within the stipulated fourteen-day period. His appeal has been filed after a lapse of more than forty months since his conviction. Therefore, the petition of appeal of the appellant is clearly filed out of time as per ***Rajapakse v The State*** (2001) 2 Sri L.R. 161 and owing to this reason, it ought to be dismissed.

There is no appeal (if there is such a right) lodged by the appellant against the order made by the High Court on his application under Section 241(3) of the Code of Criminal Procedure Act. The appellant failed to move in revision of the said order either. In these circumstances, the submissions made by the learned Counsel on his behalf could not be considered since there is no basis for its consideration.

Learned Deputy Solicitor General, in her reply, relied on the judgment of this Court in CA Appeal No. 155/00 - decided on 17.09.2007 where *Ranjith Silva* J has considered the scope of Sections 241(3) and 331(1) of the Code of Criminal Procedure Act No. 15 of 1979 in view of a preliminary objection taken on behalf of the Attorney General.

In the said judgment, it was held that;

> *"... the High Court judge has rejected the explanation of the appellant and refused to vacate the conviction and the sentence. There had been no application for revision and the appellant had the opportunity of moving in revision. On the other hand, if we are to allow this application it would amount to condescending or the Court lending its hand, to a person guilty of contumacious conduct and thereby assisting him. We are of the opinion that the discretionary power of this Court invoking the revisionary jurisdiction should not be used in a situation of this sort. Therefore, we hold that the petition of appeal is not properly constituted and is out of time. There is no right of appeal against the against the order made on the 06.01.2002 under Section 241(3) because Section 331 gives only the forum jurisdiction. We have*

perused chapter XVIII(F) under the Heading of The trial in the High Court in the absence of the accused and we find that there is no provision made for appeals against the orders made under Section 241(3)"vide ***Martin v Wijewardene****(1989) 2 Sri L.R. 409."*

In any event, the record bears the fact that the appellant was committed by the Magistrate's Court on 24.09.2006. He was not successful in obtaining bail from the High Court and therefore the learned Magistrate, while making order remanding him after the committal, has also ordered him to appear before the High Court when noticed, if he was granted bail at a subsequent stage. The relevant part of the very descriptive order made by the learned Magistrate is reproduced below;

"(1) වන වුදිතට මහාධිකරණයේ නඩු විභාගය සඳහා කැඳවීම් ලැබෙන තෙක්, හෝ නඩු විභාගය පවත්වනු ලබන තෙක් හෝ නීතිපතිවරයා විසින් අන්‍යාකාරයෙන් විධාන කරන තෙක් කුරුවිට බන්ධනාගාර අධිකරීවරයා භාරයට පත් කරමි.

මහාධිකරණයෙන් නොපිසියක් ලද හොත් (1) වන වුදිත මහාධිකරණයට ඉදිරිපත් කිරීමට එම බන්ධනාගාර අධිකාරීට නියම කරමි.

ඊට පෙර (1) වන වුදිත ඇප ලබා ගතහොත්, (මහාධිකරණයෙන්), නැවත මහාධිකරණයෙන්, නොපිසි ලද විට පෙනී සිටීමට නියම කරමි.

ඉහත (1) වන වුදිත සම්බන්ධයෙන් වූ බන්ධනාගාර අධිකාරී භාරයට පත් කිරීම.

(1) වන වුදිත සම්බන්ධයෙන් ඇප ලබා ගතහොත් එම ඇප සම්බන්ධ විධිවිධාන වලට යටත්ව ක්‍රියාත්මක විය යුතුය."

Mysteriously the appellant claims that he was "released" by the Prison Authorities from this prosecution and he thought that his release was due to his matter reaching its conclusion as indicative by his release

from remand without even applying for bail. He stated to High Court during the inquiry that he regularly visited his last known address but never served with any notice to appear before the High Court.

The appellant had a series of cases pending against him at that time and it is evident that he was quite familiar with the criminal justice process due to his exposure to Court procedure with these several prosecutions. He knew what to do when a warrant was issued and has obtained bail in some other cases. The "release" from the prosecution and that too by the Prison Authorities and not by any Court of law makes his explanation far from being one made in *bona fide*.

Even if there was an application for revision against the said order, powers of revision being a discretionary remedy, the appellant is unlikely to obtain relief as the Supreme Court in ***Sudharman de Silva v The Attorney General*** (1986) 1 Sri L.R. 9, distinguished the entitlement under a right and entitlement under a discretionary remedy with its statement of law that ;

> *"... Contumacious conduct on the part of the applicant is a relevant consideration when the exercise of a discretion in his favour is involved, but not when he asserts his statutory right to appeal and is not asking for the favour of any permission".*

The trial Court was mindful of the applicable law under Section 241(3) when it considered the applicant's explanation in support of his application, in order to determine whether it is a *bona fide* one and had correctly decided that it is not.

In view of the above considerations, the appeal of the appellant is dismissed as it is filed out of time.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL