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, read with Article138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA - HCC 158/2013

High Court of Kalmunai
Case No: HC 25/2008

Vs.

1) Atham Kandu Fouzer

Accused

And Now Between

1) Atham Kandu Fouzer

Accused-Appellant

Vs.

The Honourable Attorney General,
Attorney General's Department,
Colombo 12

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Dr Ranjit Fernando with

Champika Monarawila

for the Accused-Appellant

Maheshika Silva, SSC

for the Respondent

ARGUED ON : 16/03/2022

DECIDED ON : 07/06/2022

R. Gurusinghe, J.

The Accused Appellant was arrested by the Akaraipattu Police on the 3rd of November 2003, in connection with the complaint made by PW1, on the 26th of September 2003, alleging that PW1 was subjected to grave sexual abuse by the appellant.

The police arrested the appellant on the 3rd of November 2003 and was produced before the Magistrate of Akaraipattu on the 4th of November 2003. The appellant was remanded and later enlarged on surety bail for Rs. 20,000/= with two sureties. The Magistrate Court case was called on several days, but the appellant did not attend the court regularly.

The Attorney General has indicted the appellant in the High Court of Ampara, and later the case was transferred to the newly set up court in Kalmunai. The High Court Judge of Ampara issued summons to the appellant. The summons could not be served to the appellant as he was not in the country. After that, a warrant of arrest was issued. Then the police also reported that the appellant had left the country. The High Court Judge summoned the two sureties and inquired as to why they were not producing the appellant. Their response was that the appellant had moved to Saudi Arabia, and as a result, they could not produce him.

After recording the evidence under section 241 of the Court of Criminal Procedure Code, the learned Judge decided to proceed with the trial in the absence of the appellant for the reason that, the appellant had left the country.

The trial commenced in the High Court of Kalmunai on the 17th of March 2009, and the appellant was absent throughout the trial. The High Court Judge delivered the judgment on the 09th of March 2010, convicting the appellant and imposing him a term of five years imprisonment, which was the minimum punishment for the offence prescribed by the Penal Code at that time (now it is seven years). In addition, a fine of Rs. 15,000/= was imposed, and he was also ordered to pay Rs. 100,000/= as compensation to the complainant.

Thereafter, an open warrant was issued as the appellant was still absconding. The appellant never surrendered to the court. The appellant was arrested by the police and produced before the Magistrate of Akaraipattu on the 25th of June 2013. The appellant was produced before the High Court of Kalmunai on the 27th of June 2013. The learned High Court Judge read over the judgment to the appellant. The appellant was represented on that day by an Attorney-at-law, Mr Abbasi.

Mr N.H.M. Hamsa filed the petition of appeal on behalf of the appellant on the 9th of July 2013.

The appellant is on bail, but the records available do not indicate as to when he was admitted to bail, pending the appeal.

When this came up for hearing, the learned Senior State Counsel for the respondent took up a preliminary objection that the appeal has lapsed, as per the provisions of section 331(1) of the Code of the Criminal Procedure Act. Section 331 and section 331(2)read as follows:

> 331 (1) An appeal under this Chapter may be lodged by presenting a petition of appeal, or application for leave 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: Provided that a person in prison may lodge an appeal by stating within the time aforesaid to the jailer of the prison in which he is for the time being confined his desire to appeal and the grounds therefore and it shall thereupon be the duty of such jailer to prepare a petition of appeal and lodge it with the High Court where the conviction, sentence or order sought to be appealed against was pronounced.
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> (2) In computing the time within which an appeal may be preferred, the day on which the judgment or final order appealed against was pronounced shall be included, but all public holidays shall be excluded.

In terms of the above provisions, the petition of appeal has to be lodged with 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 the case of *Haramanis Appuhamy vs Inspector of Police, Bandaragama, 66 NLR 526,* Sri Skandarajah J. held that "where an accused is convicted and sentenced, the time within which an appeal should be preferred must be

computed from the date on which the reasons for the decisions are given and not from the date of conviction and sentence."

In the case of *Solicitor General vs Nadarajah Muthurajah 79 NLR 63* following the above case, Pathirana J. held that "the period of the time within which an appeal should be referred must be calculated from the date on which the reasons of the decisions are given and not from the date of which the verdict was entered. In the case of *Rajapakse vs The State [2001]2 Sri LR161*, Kulathilake J. followed the above decisions and held that"the period of time within which an appeal should be preferred must be calculated from the date on which the reasons for the decision are given."

In the instant case, the reasons for the conviction and sentence were given on the 9th of March 2010. The petition of appeal was filed at the Registry of Kalmunai High Court on the 9th of July 2013, more than three years after the reasons for the decision were given. The appeal is clearly out of time. Therefore, the preliminary objections should be upheld.

The Learned Counsel for the appellant also submitted that if this court were to hold that the petition of appeal is out of time, it would not preclude the appellant from inviting this Court to exercise the inherent revisionary powers in terms of section 364 of the Code of Criminal Procedure Act. Further, submitted that the powers of the revision of the Court of Appeal are wide enough to embrace a case where an appeal lay was not taken.

In the case of *Rajapakshe vs State (Supra),* Kulathilake J. held as follows: "However an application in revision should be entertained save in exceptional circumstances.."

In the case of *Ossen vs Exercise Officer 34 NLR 50, Dolton J.* held, "the Supreme Court will hear a case in revision, if the appellant makes out a strong

case, amounting to a positive miscarriage of justice, in regard to the law or the judge's appreciation of facts."

In the case of *Attorney General vs Podi Singho,51 NLR 385,* Dias J. held that "the powers of the Supreme Court are wide enough to embrace a case where an appeal lay but was not taken in such a case. However, an application of revision should not entertain save in exceptional circumstances such as there has been a miscarriage of justice."

Unlike in an appeal, the revision is not a statutory right. However, the appellant can invite the attention of the court to the grounds of revision based on law, such that the Trial Judge made an obvious error-in-law. In revision, generally, the facts of the case cannot be re-examined.

In this case, no revision application is filed before this court. An appeal is considered to be a continuation of the original proceedings. The revision is a discretionary remedy. In the case of *Rajapakshe vs The State(supra),* Justice Kulathilake stated thus;

"In Sudarman de Silva & Another vs. Attorney General at 14 and 15 Sharvananda, J observed that the contumacious conduct on the part of an applicant is a relevant consideration in an application in revision. In this regard vide the judgment of F.N.D. Jayasuriya, J in Opatha Mudiyanselage Nimal Perera vs. Attorney-General. In that case, too the trial against the accused was held in absentia and he had filed an application in revision 2 3/4 years since the pronouncement of the judgment and the sentence. His Lordship remarked:

"These matters must be considered in limine before the Court decides to hear the accused-petitioner on the merits of his application. Before he could pass 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."

In these circumstances we are not disposed to exercise our revisionary powers of this Court and interfere with the judgment of the learned High Court Judge made on 22.7.98. Besides, on the facts of this case there is no merit."

In the case of *Wijeratne vs Attorney General 2010 2SriLR 407* Ranjith Silva J. held that;*"According to the Cursus Curiae a person who by his contumacious conduct placed himself beyond the reach of the law treating the original courts and their authority with contempt, should not be allowed the invoke the reversionary jurisdiction of the appellate Courts, particularly the Court of Appeal."*

In this case, the petition of appeal was filed more than three years after the judgment. Even for revision, the petitioner should come before this Court without undue delay. The appellant had not made an application to the High Court under section 241 of the Code of Criminal Procedure Code Act.

The petition of appeal has obviously lapsed.

For the reason of delay, the absence of exceptional circumstances, and the contumacious conduct of the appellant, this court is not inclined to use its discretionary power in favour of the appellant.

The appeal is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal