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

In the matter of an application for Revision and/or restitutio-in-integrum under and in terms of Article 138 (1) of the Constitution.

CA RII Application No: CA/RII/25/22

HC of Colombo No: HC/2462/2005

Democratic Socialist Republic of Sri Lanka

Vs.

1. Jayasekara Mudiyanselage Gamini Jayasekara *alias*
   Jayasekara Gamini Wasantha

2. Jayasekara Mudiyanselage Priyanka Pushpa Kumara Jayasekara

Accused

AND NOW BETWEEN

Jayasekara Mudiyanselage Gamini
Jayasekara *alias*
Jayasekara Gamini Wasantha
Via Rosata 18,
00012 Guidonia (Rome).

1st Accused-Petitioner

Vs.

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

Respondent

Before: **D.N. Samarakoon, J.**
B. Sasi Mahendran, J.

Counsel: Asthika Devendra with Kaneel Maddumage for the 1st Accused-Petitioner
Shanil Kularatne, SDSG for the Respondent

Argued On : 14.12.2022

Written Submissions On : 27.01.2023 (by the 1st Accused-Petitioner)

Decided On : 03.02.2023

B. Sasi Mahendran, J.

The 1st Accused-Petitioner (hereinafter referred to as "the Petitioner") prays for this Court to exercise its revisionary and/or restitutionary jurisdiction conferred by Article 138(1) of the Constitution to, *inter alia*, revise and/or set aside the order dated 13th March 2007 ("**X6**") by which the learned High Court Judge directed the case bearing No. HC. 2462/2005 against the Petitioner to be tried in his absence under Section 241(1)(b) of the Code of Criminal Procedure Act; to revise and/or set aside the judgment ("**X14**") and sentence ("**X15**") dated 10th November 2016; to set aside the all the warrants issued on the Petitioner.

The Petitioner, a Sri Lankan citizen residing in Italy on a 'Foreigners' Permit of Stay' ("P3"), avers that he was not aware of the case that had been instituted against him

and the conviction and sentence thereof until he was arrested in the Madrid Airport on the 4th of October 2022 pursuant to an international warrant issued against him in Case bearing No. HC 2462/2005. It is also averred that he, through his son, retained the services of an Attorney-at-Law who then obtained a certified copy of the case record and informed him of his predicament. He then moved to set aside or vacate the judgment and sentence under Section 241(3) of the Code of Criminal Procedure Act, however, the learned High Court Judge dispensed with that application on the ground that the said Section can only be invoked if an Accused personally attends, and that it cannot be invoked through his pleader. It is then that this application for revision and/or restitution was filed.

The factual background to this application will be set out first.

The Petitioner was indicted before the High Court of Colombo on the 28th of May 2005 ("X1") along with the 2nd Accused (his sister) for the offence of cheating, punishable under Section 403 of the Penal Code. A perusal of the case record ("X") amply demonstrates that the Petitioner was neither arrested nor produced before a Magistrate under a "B" Report. There are no sureties on record. On the 14th of February 2006, the 2nd Accused was served with the indictment and was enlarged on bail. The Journal Entry of that date notes that the Petitioner was abroad and that a warrant was issued on the Petitioner (vide "X3" on page 20 of the brief). As the Petitioner was not in the country, the learned High Court Judge decided on the 4th of July 2006 to take steps under Section 241(1) of the Code of Criminal Procedure Act to inquire into the matter of commencing the trial in the Petitioner's absence (vide "X5" on page 22 of the brief). At the said inquiry, the Petitioner's younger brother, the Grama Niladharis of the Madurugala and Wekanda Grama Niladhari Divisions, and an officer attached to the Criminal Investigation Department gave evidence. The learned High Court Judge by order dated 13th March 2007 ("**X6**" on page 37 of the Brief) fixed the case for trial in absentia under Section 241(1)(b) on the ground that the Petitioner had absconded prior to serving the indictment. Thereafter, the matter proceeded to trial and, consequently, the Petitioner was found guilty by judgment dated 10th November 2016 and sentenced (pages 228 to 231 of the brief). An open warrant was issued on the Petitioner.

Once the Petitioner was arrested in Madrid and he retained an Attorney-at-Law in Sri Lanka to inquire into the matter, an application was filed on the Petitioner's behalf under Section 241(3)(b) of the Code of Criminal Procedure Act to have the conviction and sentence set aside, and for him to be tried de novo. The learned High Court Judge, by an

Order dated 28th October 2022 ("**P5**"), refused this application. As alluded to above, it was the learned High Court Judge's contention that Section 241(3) required the personal attendance of the Accused himself.

Although the revision of the order "**P5**" has not been prayed for specifically, we observe that there was no necessity to do so. This is because the initial decision to try the case against him in absentia, as explained below, was a nullity. It is trite law that if that decision is a nullity then every proceeding which is founded on it is also bad. We wish to make an observation on the order "**P5**". In the light of the scheme of the Code of Criminal Procedure Act, there is a discretion conferred on the High Court Judge to determine whether the personal attendance of the accused can be dispensed with, if the accused makes an application seeking the same. In the facts of the instant case, the learned High Court Judge does not appear to have exercised that discretion. Although the High Court Judge recognises the fact that the Accused could not fly back, and thus appear personally, because he was in foreign custody, as submitted by his lawyer, the learned Judge has rigidly insisted on personal attendance. The circumstances of the case being such, that discretion should have been exercised in his favour and an application through his lawyer should have been allowed.

The dictum of his Lordship Sharvananda C.J. in Sudharman De Silva v. The Attorney General [1986] 1 SLR 9 (at p. 14) is worth pondering on:

"If the legislature permits an accused who jumps bail with impunity and absconds from the trial against him to be defended by an attorney-at-law at such trial and gives its sanction to such a trial, it can only be on the basis that even an absconding accused is entitled to the fundamental right of being heard by an attorney-at-law at a fair trial."

We are of the view that this is a case in which the learned High Court Judge could have exercised his discretion under Section 241(3) and permitted the Petitioner's Attorney-at-Law to appear on his behalf.

Section 241 of the Code of Criminal Procedure Act reads:

(1) Anything to the contrary in this Code notwithstanding the trial of any person on indictment with or without a jury may commence and proceed or continue in his absence if the court is satisfied-

(a) that the indictment has been served on such person and that-

(i) he is absconding or has left the Island; or

(ii) he is unable to attend or remain in court by reason of illness and has consented to the commencement or continuance of the trial in his absence; or

(iii) he is unable to attend or remain in court by reason of illness and in the opinion of the Judge prejudice will not be caused to him by the commencement or continuance of the trial in his absence; or

(iv) by reason of his conduct in court, he is obstructing or impeding the progress of the trial; or

(b) that such person is absconding or has left the Island and it has not been possible to serve indictment on him.

(2) The commencement or continuance of a trial under this section, shall not be deemed or construed to affect or prejudice the right of such person to be defended by an attorney-at-law at such trial.

(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

(4) The provisions of subsection (3) shall not apply if the accused person had been defended by an attorney-at-law at the trial during his absence.

The test of deciding whether to commence or proceed in absentia, as deduced from an analysis of case law, suggests that the Court must have "concrete and cogent evidence". (Vide Samarasekera Mudiyanselage Priyantha Peiris v. the Attorney General CA Case No. 52/2012 decided on 28.07.2015)

We are of the view that there was no basis to conclude that the Petitioner had absconded or left the island to avoid this case. We cannot agree that the Petitioner had absconded due to the case because, among other reasons, the Petitioner was unaware of the case against him, and as per the evidence he had left for Italy in the year 1979. According to the officer of the Criminal Investigation Department who gave evidence, the

Petitioner had left the country in 1979 (vide page 35 of the brief - proceedings dated 13th March 2007).

In the facts of the instant case, the Petitioner cannot and could not be deemed to have "absconded". We are of the view that without being notified or produced before any Court it would be unreasonable to expect the Petitioner to be aware of such a case pending against him, or that one was going to be instituted. When we perused the record, we did not see any statement recorded of his either, which shows that he was not aware of the case. The Petitioner has not averred anything to the contrary. If, however, there is evidence, which is not forthcoming in the instant application, that the Petitioner was aware or evidence to show that it was reasonable in all the circumstances for him to have known, then an inference can be drawn that he was absconding to avoid the trial.

The facts of this case certainly qualify as an exceptional circumstance that shocks the conscience of this Court and warrants an exercise of revision. Given our conclusion that there was no basis to commence the trial in absentia, it is in the interests of justice that we set aside the order dated 13th March 2007 ("**X6**") by which the learned High Court Judge directed the case to be tried in the Petitioner's absence under Section 241(1)(b) of the Code of Criminal Procedure Act, the judgment ("**X14**") and sentence ("**X15**") dated 10th November 2016, and all warrants issued on the Petitioner, and consequent orders, including "P5" dated 28th October 2022.

We order trial de novo. We remit the matter back to the High Court for trial de novo against the 1st Accused (the Petitioner) namely Jayasekara Mudiyanselage Gamini Jayasekara *alias* Jayasekara Gamini Wasantha.

The Registrar is directed to remit the record back to the High Court of Colombo, along with this judgement.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL