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

In the matter of an application for revision in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/PHC/APN 0149/22

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT

HC Panadura

Case No: HC/2090/2006

Vs.

Valahasuriya Kelum Udaya Kumara

ACCUSED

AND NOW

Valahasuriya Kelum Udaya Kumara

Presently at Welikada Prison

ACCUSED-PETITIONER

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Shavindra Fernando, P.C. with S. Wijendra for the Accused-Petitioner

: Ridma Kuruwita, S.C. for the Respondent

Argued on : 07-06-2023

Decided on : 28-07-2023

Sampath B. Abayakoon, J.

This is an application in revision invoking the discretionary revisionary jurisdiction of this Court by the accused petitioner (hereinafter referred to as the accused) on the basis of being aggrieved by the two orders and the conviction and the sentence pronounced in the High Court of Panadura Case No 2090/2006, where he was indicted by the complainant-respondent for having committed an offence punishable in terms of the Poisons Opium and Dangerous Drugs Ordinance.

In his petition, the accused is seeking to set aside the following orders and the conviction and the sentence pronounced in the above-mentioned case.

(1) Set aside the order of the High Court of Panadura Case No-HC 2090/2006 dated 7th December 2012, wherein, the learned High Court Judge declared the trial be continued *in absentia.*

(2) Set aside the conviction and the sentence imposed on the accused by the judgment dated 12th March 2015 of the same case, and acquit and discharge him or in the alternative order a re-trial.

(3) Set aside the order dated 9th November 2002, where the learned High Court Judge of Panadura refused the application made by the accused in terms of section 241(3) of the Code of Criminal Procedure Act.

The accused was indicted before the High Court of Panadura for having in his possession 1.08 grams of diacetylmorphine (Heroin), on 1st March 2004, which is a prohibited drug in terms of the Poisons Opium and Dangerous Drugs Ordinance, and thereby committing an offence punishable in terms of the Ordinance.

When the indictment was filed before the High Court, the accused was on bail and has failed to appear before the High Court as the summons could not be served on him at the address he has provided as his residential address. A warrant of arrest has also been issued against him.

Accordingly, the learned High Court Judge of Panadura has decided to act in terms of section 241(1) of the Code of Criminal Procedure Act.

At the inquiry held in that regard, the prosecution has called the officer who was assigned to execute warrants at the Police Narcotic Bureau to give evidence. The said officer, in his evidence, has stated that he made several attempts to arrest the accused and went in search of him several times to his given address, but failed in his endeavor.

He has found that the address that has been provided by the accused to the Court, namely, No-232, Bodhi Rajapura Road, Werahera, was in the occupation of a person called M.Thushara Nilantha. The said Nilantha has informed the witness that the father of the accused sold the property to him 8 months ago and the family left the area, but he is unaware of their present whereabouts. The statement Marked X-01 has been recorded from him. Thereafter, the witness has met the Grama Niladari of the area and recorded a statement from him as well,

where he too has confirmed the earlier position, and he was also unaware of the whereabouts of the accused. (The statement marked X-02 at the inquiry).

The witness has gone looking for the two sureties who stood surety for the accused before the Magistrate Court when he was granted bail. The 1st surety, Gamini Gunasekara was no longer living at the address provided by him to the Court and the house was closed. The neighbours have informed that the house is not occupied by him anyone. He has recorded a statement from the 2nd surety, namely, Deniye Vasantha Udaya Kumara Fernando and a statement from his brother as well. (The statements marked X-03 and X-04 respectively). They too have confirmed that the whereabouts of the accused was unknown to them.

Based on the above evidence, the learned High Court Judge of Panadura being satisfied that the accused is absconding the Court and it has not been possible to arrest him, has decided to proceeded with the trial in his absence.

The relevant section 241(1)(b) of the Code of Criminal Procedure Act considered by the learned High Court Judge reads as follows;

> **241(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 in his absence if the Court is satisfied-**
>
> > **(b) That such person is absconding or has left the island and it has not been possible to serve indictment on him.**

After trial, the accused was found guilty as charged, and he was sentenced to 20 years rigorous imprisonment by the conviction and the sentence dated 12-03-2015, and an open warrant has been issued against him.

The accused had been apprehended and produced before the Court on 28th October 2022, and the Counsel who represented the accused had made an application in terms of section 241(3) of the Code of Criminal Procedure Act to purge default. The application has been dismissed.

The relevant section 241(3) reads as follows;

> **241(3) where in the course of or after the conclusion of the trial of an accused person under paragraph (a) of subsection (1) or under paragraph (b) of that subsection he appears before the 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 the Court shall be read to him and an opportunity afforded to him to cross-examine the witness who gave such evidence; and**
>
> **(b) Where the trial has been concluded, the Court shall set aside the conviction and the sentence, if any, and order the accused be tried *de novo*.**

At the hearing of this application, it was the contention of the learned President's Counsel that the initial determination made in terms of section 241(1) of the Code of Criminal Procedure Code by the learned High Court Judge was wrong, and without a proper basis. It was his position that there was no evidence before the Court to determine that the accused was absconding the Court on purpose, as the case record bears testimony that the summons for him to appear before the High Court has not been served. It was also his position that the learned High Court Judge should not have decided to act on the evidence of only one witness in this instance.

It is well settled law that it is the quality of the evidence that matters and not the quantity, in determining a matter before a Court of law.

The relevant section 134 of the Evidence Ordinance reads thus;

> **134. No particular number of witnesses shall in any case be required for the proof of any fact.**

In terms of section 241(1)(b), the Court has to satisfy that the accused is absconding and it has not been possible to serve the indictment on him.

Towards substantiating this, the prosecution has led the evidence of the officer who was assigned with the execution of the warrant issued against the petitioner. He has given clear evidence before the Court that in the process of executing the warrant, he went the address of the accused and found that the accused and the members of his family were no longer living in the given address, when he was arrested for the offence and later released on bail. He has recorded a statement from the new occupier of the house and from the Grama Niladari of the area in order to find out the whereabouts of the accused, but had been unsuccessful. The officer has gone looking for the sureties who stood surety for the accused and had recorded a statement from the only surety who could be found and of another person for the same purpose.

Since it is obvious that no summons can be served on a person who has left the address he was living, and provided to the Court as his address, and without informing his new whereabout to any, I do not find any reasons to disagree with the learned trial judge's conclusion that the accused was absconding the Court. It is the considered view of the Court that the learned High Court Judge has correctly determined to proceed with the trial and pronounced the judgment based on the evidence placed before the Court.

Once the accused was arrested and produced before the Court, as he has been sentenced to a jail term, it was imperative on the accused in terms of section 241(3) to establish that his absence from the Court was due to *bona fide* reasons.

On 28-10-2022 the learned Counsel who represented the accused has moved to make an application before the Court in terms of section 241(3) of the Code of Criminal Procedure Act, which has been allowed.

It was only the Counsel for the accused who has made submissions before the Court and the accused has not given evidence to substantiate his position in the Court. No witnesses have been called on his behalf either. It appears that the

learned Counsel for the accused has relied on the journal entries of the Magistrate Court B report filed by the police in this regard, and the subsequent dates where the case was called before the Magistrate Court before the case record was sent to the High Court upon the receipt of the indictment.

It had been his submission that the accused had appeared before the Magistrate Court on all the given dates. When the case was called before the Learned Magistrate on 14-012-2005, the next date given had been the 17-03-2006. However, since the record has been called for by the High Court after the indictment was received, the Magistrate Court case record has been sent to the High Court on 30-01-2006. It had been the position of the learned Counsel for the accused that since there was no indication that the case was called on the date given to the accused to appear before the Magistrate Court, namely, 17-03-2006, he had no way of knowing the next date or the fact that he has to appear before the High Court on summons.

The learned Counsel has found fault with the procedure adopted in the 241(1) inquiry, on the basis that only one witness has been called before the determination was made by the learned High Court Judge in that regard.

As I have already decided on the determination of the learned High Court Judge at the 241(1) inquiry, I will now proceed to consider whether the learned High Court Judge of Panadura has decided the 241(3) application in accordance with the relevant law.

As considered earlier, it was the accused who has to satisfy the Court that his absence from the Court was *bona fide*.

It is abundantly clear from the order dated 09-11-2022 of the learned High Court Judge of Panadura, that the necessary facts mentioned and the relevant legal requirement has been well considered by the learned High Court Judge.

Initially, the accused had obtained bail in this matter from the relevant High Court as the allegation against him was that he had in his possession five grams

of a dangerous drug suspected to be Heroin. It should have been well within his knowledge that he will have to face charges either in the Magistrate Court or in the High Court depending on the report of the Government Analyst. That was the very reason why he had to appear before the Magistrate Court over several dates after he was released on bail. If the case was not duly called on the 17-03-2006 as claimed by the accused, it was his duty to inquire in that regard as he would have been the person affected.

As correctly viewed by the learned High Court Judge, the accused has never taken up the position that he went to the Court on the 17th of March, which was his duty as a law-abiding citizen, and the case was not called on that day and the steps he took in that regard. It is the view of the Court that it was imperative on the accused to explain his conduct in order to establish his *bona fides* to the Court.

The accused had admitted that his father sold the house they were living three weeks before the last calling date of the case before the Magistrate Court. (The copy of the deed submitted to the Court marked A-01) This confirms the statement marked X-01 made by the purchaser of the house and that of the Grama Niladari of the area marked X-02 at the 241(1) inquiry, as correctly determined by the learned High Court Judge at the 241(3) inquiry. This establishes the fact that the whereabouts of the accused was not known to the relevant authorities, which was the reason for not serving summons on the accused.

As observed by the learned High Court Judge even for the persons who stood surety for the accused, his whereabouts were unknown. One surety has been sentenced to a jail term because of his failure to pay the fine imposed on him for his failure to honour the bail bond executed by him.

It is therefore clear that the accused's absence from the Court was not due to *bona fide* reasons. After changing his place of living, he may have thought that it will serve well for him. Not only he has evaded the Court, but has put the

persons who came forward to stand surety for him in a difficult position and they had been forced to pay for the actions of the accused. The learned High Court Judge of Panadura in his well thought of order has considered all the possibilities the actions the accused should have taken, if his not coming to the Court was bona fide, given the mentioned facts and the circumstances.

I am of the view that based on the journal entries of the Magistrate Court case record, a story had been developed to suit the circumstances, which has been correctly identified by the learned High Court Judge.

For the reasons considered as above, I find no reason to interfere with the order of the learned High Court Judge pronounced in terms of section 241(3) of the Code of Criminal Procedure Act, and the order dated 07-12-2012 pronounced in terms of section 241(1) of the Act.

I find no reasons to interfere with the conviction and the sentence dated 12-03-2015, as the conviction has been reached on the evidence presented to the Court and the sentence pronounced considering the facts and the circumstances.

The application is, therefore, dismissed for want of any merit.

The Registrar of the Court is directed to forward this judgment to the relevant High Court for information.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal