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

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

The Democratic Socialist Republic of Sri Lanka

Complainant

CA Case No: CA/HCC/263/16

HC of Nuwara Eliya Case No:
HC 40/2010

Vs.

1. Edirisinghe Peruma Arachchilage Sanjeewa Nishantha alias Kasthuri
2. Raluwe Don Iran Chaminda alias Sujith
3. Madawala Mudiyanselage Udaya Shantha Bandara
4. Halielle Gedara Buddhika Samapriya Samapriya Samarajeewa
5. Kadar Anwar Nasleen alias Bai
6. Rannethithige Hendri Jayasena
7. Thuwan Mohomad Faruk

Accused

AND NOW BETWEEN

Raluwe Don Iran Chaminda alias Sujith

Accused- Appellant

Vs.

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

Respondent

Before: **Menaka Wijesundera, J.**
B. Sasi Mahendran, J.

Counsel: Kalinga Indatissa, PC, Ashanti De Almeida and Naveen Jayamanne for the Accused-Appellant
Janaka Bandara, DSG for the State

Written Submissions: 27.07.2021(by the Accused-Appellant)
16.08.2021 and 08.06.2023(by the Respondent)

Argued On : 25.05.2023

Order On : 28.06.2023

B. Sasi Mahendran, J.

This is an appeal filed by the 2nd Accused-Appellant (hereinafter referred to as "the Accused") against an Order of the learned High Court Judge of Nuwara Eliya dated 9th August 2016 in terms of Section 241(3) of the Criminal Procedure Code refusing his application to set aside the conviction and sentence and for the Accused to be tried *de novo*. The Petition of Appeal dated 18th August 2018 prays for setting aside the substantive conviction (the Accused was convicted of counts 1 to 8 in the indictment by judgment dated 15th July 2014) or, in the alternative, an imposition of a lenient sentence. It must be noted that this Petition does not seek to revise or set aside the Order of the learned High Court Judge made in terms of Section 241(3). The learned High Court Judge refused the same on the basis that the Accused was not able to demonstrate that his absence from the trial was bona fide.

The learned Counsel for the Respondent raised a preliminary objection on the maintainability of this appeal, specifically that the Accused has in effect appealed the substantive conviction, which is now out of time (conviction date is 15th July 2014), having not sought to revise the Order of the learned High Court Judge in terms of Section 241(3). As such, the question this Court is grappling with is whether the Accused is entitled to appeal the substantive conviction in the absence of a prayer to set aside the Order made in terms of Section 241(3) (if there is such a right of appeal) or an application by way of revision to set aside the Order in terms of Section 241(3) which was made on 9th of August 2016.

According to Section 241(3) of the Criminal Procedure Code, after the conclusion of the trial of an Accused person in his absence if he appears before Court and satisfies the Court that his absence at the trial was bona fide the Court shall set aside the conviction and sentence and order that the Accused be tried *de novo*. If the Accused is unsuccessful the initial conviction and sentence stand unchallenged.

To support his stance that the Accused is entitled to an unconditional right of appeal the learned President's Counsel for the Petitioner strongly relied on several judgments of the Supreme Court which expound the sanctity of the right of appeal. One of which is the notable judgment of Sudharman v. Attorney General [1986] 1 SLR 9. In the said judgment his Lordship Sharvananda C.J. contended that an Accused is not estopped by his contumacious conduct from invoking the statutorily conferred right to appeal against a sentence and conviction. In what appears to be an interesting exchange with the Counsel for the Respondent their Lordships had posed the question, "what was the distinct advantage which an absconding accused had over persons who respected the law and presented themselves for trial". In response to which, their Lordships observed, "he [Counsel for the Respondent] was hard put to demonstrate such advantage. He had to concede that, on the other hand, an accused who presents himself for trial will definitely be at an advantage in that he will be able to cross-examine prosecution witnesses and himself give evidence and call witnesses in his support."

Their Lordships held (at p. 13):

"Section 14 of the Judicature Act has specifically endowed an accused who is convicted with a substantive right namely, a right of appeal and **this right of appeal cannot be taken away from him, on the ground that he had been acting contumaciously or in defiance of the law**. When the legislature has vested in the accused an absolute right of appeal "as a matter of right" it is not open to a court to qualify or condition that right on the ground that "An appeal as a matter of right can be available only to a person who obeys the law and its sanctions and not to any person who has defied and acted in contempt of it." The Court of Appeal has taken the view that to recognise such a "right in the appellant can only have the effect of bringing the law and the institutions of justice into ridicule and contempt." [emphasis added]

In a more recent judgment, H.K. Sumanasena v. Mallawarchchige Kanishka Gunawadhana SC Appeal No. 201/2014 S.C. Minute 15.03.2018, his Lordship Aluwihare P.C. J. analyzing the provisions of the International Covenant on Civil and Political Rights Act No. 56 of 2007 (ICCPR Act), specifically Section 4(2), explained that the said Section stipulates that every person convicted of a criminal offence under any matter shall have the right of appeal to a higher court against such conviction and any sentence imposed. His Lordship further observed (at p. 8):

"In instances where no right of appeal is conferred by a statute, a party aggrieved, could invoke the revisionary jurisdiction to have a decision of an original court reviewed and our courts have always recognized revisionary jurisdiction in such instances. The provision embodied in Section 4 (2) of the ICCPR Act has now expanded the scope (of jurisdiction) to appeals in the case of all criminal offences. While the expansion of the appellate jurisdiction by virtue of section 4 (2) of the ICCPR Act relates exclusively to criminal cases, concomitantly, it must be stated, that Section 4 (2) of the ICCPR Act has no application whatsoever to civil cases."

Contrary to the stance of the Accused, the learned Counsel for the Respondent heavily contended that as long as the Order of the learned High Court Judge in terms of Section 241(3) is not revised or set aside there is a barrier in the Accused's path to invoke this Court's appellate jurisdiction. Learned Counsel relied on the judgment of N. Arumugam v. T. Kumaraswamy [2000] BLR 55. His Lordship Wigneswaran J. in the Court of Appeal observed that in terms of the Civil Procedure Code a Defendant who does not participate in the trial must first purge his default in terms of Section 86 if he is to get into the case legitimately. The Court observed (at p.58):

"The learned President's Counsel argued that only if a judgment is entered in favour of the Plaintiff against a Defendant on his default that the Defendant is expected to purge his default. This is not so. The defendant having failed to file his answer in terms of Section 84 is deemed to be in default. To be in default means that

the Defendant had neglected to do what the law required. His neglect has nothing to do with the judgment being given in favour of the Plaintiff or against him. **His primary duty is to Court to have his default purged**. **Only on his default being purged would the Defendant have a right of audience before Court**." [emphasis added]

It is a well-established principle of law that an appeal is a continuation of proceedings from the original court. Although both Sudharman (supra) and Arumugam (supra) appear to be diametrically opposed to each other, the one common ground is this principle.

In Sudharman (supra), his Lordship Sharvananda C.J. held (at p. 13):

"An appeal is not a fresh suit but is only a continuation of the original proceedings and a stage in that suit itself".

In Arumugam (supra) this Court citing Justice Soertz in De Silva v. Edward 30 CLW 81 and 82 observed (at p. 57):

"**the effect of a right of appeal is the limitation of one jurisdiction and the extension of the jurisdiction to another**." **What this means is that the status of parties do not change on appeal**. When the original Court had been clothed with the jurisdiction to grant permission to participate or to be excluded from proceedings, it is that Court which has the right to make such an order." [emphasis added]

As such, this appeal cannot be looked at as a fresh suit.

An Accused is not compelled to avail the benefit of the provisions of Section 241(3). It is in the interests of and in furtherance of the sacred right of a fair trial that the legislature has been merciful to permit an Accused who has been absent from trial (provided his absence was bona fide) the ability to purge that default. Thus,

whether an Accused seeks to reopen proceedings in terms of Section 241(3) is their choice. If the Accused does not opt to do so, there is nothing preventing the Accused from directly appealing the substantive conviction as well, as clearly opined in the aforementioned judgment of Sudharman (provided, however, that the appeal is filed on time).

If, however, an Accused does submit himself to the jurisdiction of the Court in terms of Section 241(3) then it is incumbent upon him to satisfy Court that his absence was bona fide. His failure to so satisfy would result in the substantive conviction standing as it is. If his application under Section 241(3) is rejected he would be out of time to challenge the substantive conviction and sentence (vide CA Appeal No. 81/2003 CA Minutes 22.10.2007 reported in (2007) ACJ 181).

If he is able to so satisfy Court then he is entitled to the privilege of leading evidence and cross-examining witnesses, which is less burdensome than having to convince a judge sitting in appeal of his innocence (if he is convicted). That is an incentive legislature has offered for an Accused (whose absence was genuine and not to circumvent the law) to purge his default. Further, in an appeal, unlike in the reopening of proceedings in terms of Section 241(3), the presumption of innocence is lost. As her Ladyship Shiranee Tilakawardena J. noted in Attorney General v. Letchchemi [2006] BLR 16 at 17, "..the presumption of innocence that inures in favour of those suspected or accused or connected with the commission of an offence, ceases to operate after conviction by a Court of competent jurisdiction. Indeed, after conviction the burden shifts to the accused."

In the instant matter, the Accused tried to reopen proceedings and purge the default. The learned High Court Judge has not held in his favour. The resulting position is that his substantive conviction stands valid. There was no attempt to revise or appeal this Order or any challenge to the learned High Court Judge's

findings. In the Petition of Appeal dated 18th August 2016 what is prayed for is, reproduced verbatim, as follows:

> "1. ගරු මහාධිකරණය මගින් පමුණුවන ලද දඩුවම් නියෝගය ඉවත්කොට නිවැරදි කරුවෙකු බවට තීන්දුවක් ලබාගැනීම.
>
> 2. නියම කරනු ලැබ ඇති දඩුවමේ සහනදායී වෙනසක් ඇතිකර ගැනීම.
>
> 3. ගරු අභියාචනාධිකරණයට හැගෙන වෙනත් සහනයක් ලබා ගැනීම."

Thus, it is seen that there is nothing prayed for to set aside or vacate the Order made in terms of Section 241(3) agitating that the learned High Court Judge was wrong to conclude that his absence was not bona fide. Instead, what is sought is the wiping out of the substantive conviction or a lenient sentence. In the facts of the present case, the absence of such a challenge leads us to believe that the application made under Section 241(3) was made for the purpose of trying to take a second bite of the cherry by circumventing the time limit within which an appeal must be lodged; time which the Accused is clearly out of.

This is not a devaluation of the right of appeal of the Accused. Indeed, the value of such a right has been reiterated and its significance dealt with in many judgments of this Court and the Supreme Court. For instance, her Ladyship Shiranee Thilakawardane J. in Gunasekara v. Attorney General [2012] BLR 215 held (at p. 217):

"It is important to note the right of appeal is a fundamental human right enshrined by domestic and international law."

Her Ladyship citing Section 4(2) of the ICCPR Act observed (at p. 217):

"[Section 4(2)] states that every person convicted of a criminal offence under any written law shall have the right to appeal to a Higher Court against such conviction any sentence imposed and therefore as of right a convicted person has a right to have that conviction and sentence reviewed by a higher forum. Perhaps some irregularity in procedure may deprive the Appellants of the opportunity to file his appeal within the time prescribed by law. But the right to review is a recognised substantive right."

Thus, the right of appeal, although as the nomenclature suggests is claimed as of "right", there are certain procedural steps that must be complied with to enjoy the benefit of this right. One imperative procedural requirement is the time requirement. An application cannot be made under Section 241(3) merely for the purpose of circumventing the strict requirement of Section 331(1) of the Criminal Procedure Code, and indirectly claiming a right of appeal. The absence of a challenge to the Order of the learned High Court Judge which has disbelieved the version of the Accused appears, *ex facie* from the two Petitions of Appeal which have sought identical relief that, to have been filed for the purpose of circumventing the time bar. The benefit conferred on an Accused who was absent from a trial because of bona fide reasons cannot be taken advantage of by an Accused that has failed in the bona fide test to circumvent a well established and a well honoured time limit.

We are of the view that the Accused filed the application in terms of Section 241(3) for the purpose of circumventing this imperative time limit for filing an appeal.

We were also invited to exercise our ample revisionary jurisdiction to set aside or revise the substantive conviction. However, the absence of a challenge to the learned High Court Judge's finding that his absence from the trial was not bona fide, a finding that remains uncontroverted; an absence of any explanation from the Accused as to the reason such finding was not challenged; and an absence of any evidence to controvert such finding before this forum leads us to the inescapable

conclusion that the discretionary revisionary jurisdiction must not be exercised in favour of the Accused.

As observed by his Lordship Sharvananda C.J. Sudharman (supra) at p. 14, "Contumacious conduct on the part of the applicant is a relevant consideration when the exercise of a discretion in his favour is involved". Citing this dictum, his Lordship Janak De Silva J. in Rankothpedige Harindra Prasad v. Attorney General CA PHC APN 81/2015 CA Minutes 26.01.2018 concluded (at p. 6), "… the Accused, who by his contumacious conduct placed himself beyond the reach of the law in treating the original courts and their authority with contempt, should not be allowed to invoke the revisionary jurisdiction of the Court of Appeal."

Additionally, our conclusion is buttressed by the absence of any exceptional circumstances pleaded, which is the threshold requirement for this discretionary jurisdiction to be invoked.

We, therefore, uphold the preliminary objection raised by the learned Counsel for the Respondent. This appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL