

**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
Criminal Procedure Code Act No.
15 of 1979.**

The Attorney General of the Democratic
Socialist Republic of Sri Lanka.

Complainant

**Court of Appeal
Case No. 47/2014**

Vs,
Egambaram Balachandran
Accused

And Now Between

Egambaram Balachandran
Accused-Appellant

**High Court of Kandy
Case No. 315/2005**

Vs,
The Attorney General of the Democratic
Socialist Republic of Sri Lanka

Complainant-Respondent

**Before : S. Thurairaja PC, J &
A.L. Shiran Gooneratne J**

**Counsel : M. Tenny Fernando Attorney-at-Law for the Accused-Appellant
Anoopa de Silva SSC for the Complainant-Respondent**

**Written Submissions : Accused-Appellant – 22nd June 2018
Complainant-Respondent – 21st June 2018**

Argued on : 26th July 2018

Judgment on : 09th August 2018

Judgment

S. Thurai Raja, PC. J

Egambaram Balachandran was the 1st Accused at the High Court Kandy in Case No. 315/2005. He was indicted together with his wife Palanimuththu Dhanalechchami for committing the murder of Sigaram Kadiragama-thambi. Indictment was served on the 1st Accused-Appellant (hereinafter sometimes referred to as the "Appellant") on 10th of March 2006, where both of them have opted to have a trial before the judge without a jury. The Counsel who represented the Appellant and the 2nd accused informed the Court that he wish to make a representation to the Attorney General to reduce the charge of murder to culpable homicide not amounting to murder. Thereafter the case was called on several occasions, the Counsel made same submission and sought time. On the 26th November 2010 the Learned Trial Judge had decided to take up this case for trial. The Appellant and the 2nd Accused were present in Court. When the matter taken up for trial in the afternoon, the Appellant disappeared, only his wife, the 2nd Accused was present in Court. The Learned Trial Judge proceeded under Section 241, held inquiries and convinced that, he can proceed without the Appellant. Accordingly, the trial commenced on the 26th of July 2011. Trial proceeded and the judgment was delivered on the 8th of February 2012.

The Appellant was found guilty and sentenced to death. The 2nd Accused was acquitted. An open warrant was issued against the Appellant and he was apprehended after two years namely 21st of February 2014.

Thereafter an inquiry held under Section 241(3) to set aside the conviction and the sentence. After the inquiry the Learned Trial Judge had refused the application. Being aggrieved with the said order the Appellant had preferred this appeal to this Court.

The Learned Senior State Counsel who appears for the Respondent Attorney General takes up preliminary objections namely the appeal is out of time and it cannot be maintained.

The Counsel for the Appellant concedes the fact that it is out of time and pleads with the Court to convert this appeal to a revision application.

This is a case of murder where the Appellant and his wife were the accused persons. As discussed above, the Appellant who was present before the Magistrate Court and High Court decided to be away from the Courts. On the relevant day he was in Court in the morning when the case was taken up he took to his heels. Thereafter he never surrendered himself to his bail.

The conduct of the Appellant is unacceptable and unpardonable. It appears that he had taken the law into his hands. By showing mercy we, the Court disrespecting the faithful law abiding citizens and also encouraging the law breakers.

In **CA 81/2003 HC Kalutara Case 31/98** decided on 22/10/2007 reported in page 247 of the Appellate Court Judgments (unreported) 2007 Volume II, where his Lordship Justice Ranjith Silva held,

"when an accuse against whom sentence has already been passed, is arrested and brought before the High Court it is not necessary to pronounce the sentence once again....."

His Lordship further held:

"Section 241(3) indicates the existence of a conviction and sentence lawfully passed. Therefore, we find that if the Accused-Appellant was successful in his application under Section 241, the case would have been re-opened and the trial would have commenced de novo and the accused would have all his rights including the right of appeal., but as his application under Section 241 was rejected, he had no right of appeal against the conviction and sentence already pronounced because it was out of time."

His Lordship Justice Ranjith Silva further held in **CA 81/2003 HC Kalutara Case 31/98** decided on 22/10/2007 reported in page 247 of the Appellate Court Judgments (unreported) 2007 Volume II, as follows:

"... to permit the Accused to take advantage of his own contumacious conduct and grant him a special right of appeal after the appeasable period is not only anachronistic but also absurd."

The Respondent deems it pertinent to draw Your Lordship's Court's attention to the dicta in **Rajapakshe vs. State** [2001 (2) SLR 161] where it was held:

"an application for revision should not be entertained save in exceptional circumstances. When considering the issue Court must necessarily have regard to the contumacious conduct of the Accused in jumping bail and thereafter his conduct in a manner to circumvent and subvert the process of the law and judicial institutions. In addition, the party should come before Court without unreasonable delay..."

In **Roberts vs. Hopwood and others** [1925 AC page 578 at page 613] in which his Lordship voiced the opinion as to the manner in which a judicial discretion should be exercised. The dictum reads as follows.

"the person in whom is vested a discretion must exercise his direction upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so- he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the cause which reasons direct. He must act reasonably."

Considering Section 331 of the Code of Criminal Procedure Act we find that the Appellant is absolutely out of time. Therefore we uphold the objection taken by Senior State Counsel, who is appearing for the Respondent Attorney General.

Considering the facts of this case, the evidence was led at the non-summary inquiry and submitted to the High Court under Section 33 of the Evidence Ordinance.

Therefore, the evidence given by Chamila Kumari before the Learned Judge of the Magistrate Court in the said Case No.242/92 N.S. is admissible under Section 33 of the evidence Ordinance.

The 6th ground of appeal urged by the Appellant is that Learned Trial Judge has misdirected herself. We carefully considered the judgment and we find that the Learned Trial Judge had carefully analysed the evidence before her and critically analysed the acceptability of the same. Thereupon she had come to her own conclusion. Considering the given circumstances we do not find there is any merit in this ground of appeal.

We carefully considered the grounds of appeal in the light of the evidence available before the trial court and the judgment and conclude that all grounds of appeal fails on its own merits.

Therefore, we dismiss the appeal and affirm the conviction.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J

I agree,

JUDGE OF THE COURT OF APPEAL