SUDHARMAN DE SILVA AND ANOTHER
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL.
ABEYWARDENE, J., SIVA SELLIAH, J. AND JAMEEL, J.
C.A. 57/81–H. C. COLOMBO CASE No. 583/78.
MARCH 4 AND 7, 1985.

Criminal Law – Right of Appeal – Accused absconding and tried and convicted in absentia – Application under s. 331 of the Code of Criminal Procedure Act – Judicature Act, Section 14 (b).

On a preliminary objection to the entertainment of an appeal from an accused person who was absconding and was tried and convicted in absentia –

Held –

An accused person who absconds and is unrepresented at the trial and does not participate in it cannot exercise the right of appeal granted to an accused person under s. 14(*b*) of the Judicature Act. Rights cannot exist in a watertight compartment independently of duties which are enjoined by law.

Per Siva Selliah, J. :

"In construing rights this court cannot throw into jeopardy the entire fabric and administration of law and justice, nor can it condone or encourage accused persons who choose to be fugitives from justice seeking to invoke the law only when it suits their advantage. Fundamental concepts and duties must be preserved at all costs and one such fundamental concept is that the appellant must submit to the law and the courts and not abscond from them. Rights cannot be separated from duties enjoined by the law as to do so would lead to a disruption of the Rule of Law and the Administration of Justice."

Case referred to :

(1) *Robert Edward Wynyard Jones (1972) Criminal Appeal Reports 413.*

APPEAL from the High Court of Colombo.

Dr. Colvin R. de Silva with *Miss Saumya de Silva* for first appellant *R. Sudharman de Silva* (2nd accused).

Mrs. M. Muttetuwegama for 6th accused-appellant.

D. P. Kumarasinghe, Senior State Counsel for Attorney-General

Cur. adv. vult.

May 3, 1985.

SIVA SELLIAH, J.

This is an appeal by the 2nd, 4th and 6th accused–appellants Sudharman de Silva, N. R. Dharmatillake and K. S. Alwis from their conviction and sentence on charges of conspiracy to commit robbery of the People's Bank at Gangodawila in February 1976, of having on 11.2.76 with the other accused committed robbery of a sum of Rs. 634,315.66 from the Manager of the People's Bank of Gangodawila, abetment, and robbery of car No. 3 Sri 5609. The 2nd and 4th accused were found guilty on all counts and sentenced to terms of 7 years r.i. on each count, the sentences to run concurrently. The 4th accused has, since filing of the appeal, withdrawn his appeal on 27.7.81.

A preliminary objection was raised by learned Senior State Counsel that the 2nd accused could not be heard in appeal as he had absconded from the trial and the trial against him and the 4th accused had proceeded in absentia along with the trial of the other accused who were present and represented at the trial and as he had not made application before the High Court under section 241 of the Criminal Procedure Code and shown that his absence was for bona fide reasons, and had not sought to set aside the conviction and sentence or re-open the trial in that Court, he could not be heard in appeal. The 2nd accused it must be mentioned is still absconding and it was the contention of the learned State Counsel that it would be farcical and contemptuous of the law to enable this accused under such circumstances to be heard in this court while he was still absconding.

The learned counsel for 2nd accused contended on the other hand that as these accused had plainly absconded and had no bona fide reason to establish to the satisfaction of the High Court it served no purpose in going to that forum to re-open the case but contended strenuously that under section 14 (*b*) of the Judicature Act, No. 2 of 1978 any person who stood convicted of any offence by the High Court may appeal from such conviction or sentences as of right. It was his contention accordingly that as this was unambiguous, the accused has the right of appeal 'as of right' and could not be denied a hearing.

The following facts are undisputed :

The 2nd and 4th accused were arraigned on indictment with the other accused on the charges contained in the indictment as mentioned above. Indictment was served on all the accused (including the 2nd and 4th accused) on 29.3.78 and thereafter the 2nd and 4th accused have absconded and warrants were issued against them and their sureties were noticed to produce them but failed to do so and part of their securities were confiscated. The 2nd and 4th accused have since then been absconding and trial commenced on 16.10.80 against the other accused on which date 1st accused had pleaded guilty to counts 1 and 2 and 3rd accused to counts 1, 2 and 4 and the trial proceeded against the 5th and 6th accused who were present and represented by counsel and against the 2nd and 4th accused who were absconding and not present and were unrepresented. The trial was concluded on 29.10.80 and judgment delivered on 7.11.80 by which (as far as is material for this appeal) 2nd accused was found guilty on counts 1, 2 and 4 and sentenced to a term of 7 years r.i. on each count, the sentences to run concurrently. The fact that the 2nd and 4th accused absconded after the service of indictment, up to date, is conceded by the learned counsel as is the fact that the 2nd accused had not thought it fit to surrender to the High Court either during the pendency of the trial or after conviction or sought to re-open the trial ; it was also conceded by counsel for 2nd accused that he had no bona fide reason for absconding and hence made no application to the High Court to set aside the conviction and sentence and re-open the case against him. It is also conceded that notwithstanding the fact he was absconding he had through an attorney-at-law filed a petition of appeal within the stipulated time. The learned counsel for the appellant stated that the conduct of the accused in jumping bail after indictment was served and in absconding ever since was in no way defensible but that however defiant of the

law or contemptuous of the court such conduct was, he could be punished for that, but that did not in any way debar the accused from the right of appeal to the Court of Appeal which was a matter of right under section 14(*b*) of the Judicature Act referred to earlier. This then is the crux of the problem.

The learned State Counsel has strenuously and forcefully contended that if the contention of learned counsel is upheld, accused persons would be encouraged to act with gross disregard and contempt of original courts of justice, would jump bail with impunity and abscond from the trial against them, and would have a distinct advantage over persons who respected the law and observed its commands and presented themselves for trial and that it would bring the entire administration of justice into disrepute. That this is so is quite manifest and needs no endorsement from this court. In the instant case, apart from jumping bail and absconding ever since service of indictment up to date, it is also evident that the appeal to set aside the conviction and sentence has been filed on behalf of the 2nd and 4th accused by their attorney-at-law within 2 weeks. It thus appears that the appellants' conduct is naturally contumacious of the law and the institution of justice which they have been openly daring and defying with impunity and at the same time without surrendering themselves even at this stage they seek to heighten such conduct by filing a petition of appeal, as well, while absconding. I am quite unable to agree with the contention of the learned counsel for accused that they can be charged for such conduct independently – I do not see how persons who have so successfully placed themselves beyond the reach of the law for so long after jumping bail and whose very sureties have been unable to produce them and have been dealt with, can be brought to book for being defiant of the process of the law. The learned counsel for State quoted the case of *Robert Edward Wynyard Jones* (1).

That was a case where the accused had absconded from the trial and fled to Denmark and after conviction and application for leave for appeal filed by his solicitors was refused as they had no authority to do so ; later after he was extradited from Denmark application was filed for extension of time for leave to appeal but this was also refused. While no doubt the facts of that case can be distinguished, the thinking of the court is expressed at p. 421 where Roskill C.J. stated

"to grant this application at this stage would, in the view of this court, be to put a premium on prisoners jumping bail ; it may even have the effect of encouraging others to do so. It might also have as a side effect, increasing the reluctance of a court in a very long trial to grant bail lest the applicant's conduct be repeated by others. To put a premium on jumping bail is something which this court is not for one moment prepared to countenance . . . . the applicant has brought this entirely on his own head, and he must now take the consequences."

The contention of the learned counsel for the 2nd accused appellant was that appeal was a matter of right and not a matter of discretion and therefore as the language in section 14 (*b*) of the Judicature Act referred to above was plain and unambiguous this court cannot place any other construction but must enforce that right of the accused. It does indeed appear to be strange that the 2nd accused appellant who has failed in his elementary and basic duty of attending court and being present at the trial and had jumped bail and had violated the law at every stage and acted in defiance and disregard of the law, should be heard to say that his rights which he says the law gives him should be enforced to his benefit. Even though he was absconding and chose to be absent from the trial and even though the law afforded him the right under section 241 of the Criminal Procedure Code Act to be represented at his trial by an attorney-at-law notwithstanding his absence, he did not choose such right but not having in any way participated at the trial or tried to demonstrate his innocence now chooses to cavil at the trial proceedings. It is my considered view that rights cannot exist in a watertight compartment independently of duties which are enjoined by the law. In construing rights this court cannot throw into jeopardy the entire fabric and administration of law and justice, nor can it condone or encourage accused persons who choose to be fugitives from justice seeking to invoke the law only when it suits their advantage. Fundamental concepts and duties must be preserved at all costs and one such fundamental concept is that the appellant must submit to the law and the courts and not abscond from them. Rights cannot be separated from duties enjoined by the law as to do so would lead to a disruption of the Rule of Law and the Administration of Justice. I feel fortified in the view and interpretation I take on this matter by recourse to the provision of the Constitution of Sri Lanka which in article 28 declares that "the exercise and enjoyment

of rights and freedoms is inseparable from the performance of duties and obligations and accordingly it is the duty of every person in Sri Lanka–

"(*a*) to uphold and defend the constitution and the law" (*b* – *c*) . . . . . .

The conduct of the 2nd accused in this case in jumping bail and absconding up to date is clearly designed to subvert and circumvent law and the institutions of justice and therefore in my view he cannot invoke the right of appeal "as a matter of right" as contended by his counsel. I am of the view that appeal "as a matter of right" can be available only to any person who obeys the law and its sanctions and not to any person who has defied it and acted in contempt of it. To hold otherwise can only have the effect of bringing the law and the institutions of justice into ridicule and contempt. I accordingly uphold the preliminary objection of the learned Senior State Counsel, and reject the appeal of the 2nd accused. The Registrar to list the appeal of the 6th accused K. S. Alwis for hearing in June 1985.

ABEYWARDANE, J. – I agree.

JAMEEL, J. – I agree.

Preliminary objection upheld.