# WIJAYARATHNA VS. ATTORNEY GENERAL

COURT OF APPEAL
RANJIT SILVA, J.
SISIRA DE ABREW, J.
CA PHC APN 246/2004
HC COLOMBO 876/97
NOVEMBER 28, 2007

***Penal Code - Section 403 - Cheating - Section 403 - Tried in absentia - Has the accused a right of appeal? Could he also move by way of revision? Criminal Procedure Code Section 241, guilty of contumacious conduct? Decision made without jurisdiction - Nullity?***

The petitioner was indicted in the High Court on two indictments on counts of cheating. He was tried in absentia. Evidence was led in only one case, and in the other case, without leading evidence, but by adopting the evidence in the earlier case the High Court convicted the petitioner - on the basis that the witnesses were the same in both cases. The petitioner appealed against the judgment and also moved in revision. The petitioner succeeded - in one appeal and the application in revision was withdrawn and a retiral ordered. The other appeal was dismissed on technical grounds. The petitioner sought to challenge the conviction and sentence by way of revision.

**Held**

(1) Even an accused who had absconded during the trial has a right of appeal.

(2) An accused who had absconded has no right to invoke the revisionary jurisdiction of the Court. Discretionary remedy by way of revision will not be available to a person who was guilty of contumacious conduct.

(3) Although the conduct is totally reprehensible and cannot be condoned nevertheless Appellate Court is justified in exercising its revisionary powers if the decision had been wholly without jurisdiction which renders the decision a nullity.

Per Ranjith Silva, J.

> "Whether the evidence led in the case was sufficient to prove the fact is a matter that should be agitated in a property constituted appeal and not in revision, even in appeal findings on facts are not lightly disturbed by an appellate Court unless there is a substantial reason to do so."

**APPLICATION** in revision from a judgment of the High Court of Colombo.

**Cases referred to:**

(1) *Sidharman de Silva vs. AG* - 1986 - 1 Sri LR 9

(2) *Suddage Gamini Rajapakse vs. State* - CA 30/98

(3) *AG vs. Podi Singho* - 51 NLR 385

(4) *Camilas Ignatious vs. OIC Uhana Police Station* - CA 90/89 MC Amparai 2857

(5) *Opatha Mudiyanselage Nimal Perera vs. AG* - CA 532/97 - CAM 21.10.1998 - HC Kandy 1239/92

(6) *M. S. M. Misbah vs. E. P. Hafeela* - CALR 1986 Vol. 1 - 633

(7) *Fradd vs. Brown & Company* - 20 NLR 282

(8) *Alwis vs. Piyasena* - 1983 - 1 Sri LR 119

*Neranjan Jayasinghe* for petitioner.

*Dappula de Livera* DSG for respondents.

*Cur.adv.vult*

November 28th 2007

**RANJIT SILVA, J.**

The Petitioner was indicted in the High Court of Colombo on two indictment bearing No. HC 8766/97 and HC 8767/97 on counts of cheating under section 403 of the Penal Code. The Petitioner, as he absconded, was tried in absentia. Evidence was lead in case bearing No. 8767/97 and the learned High Court Judge delivered his judgment convicting the petitioner in that case on 03.09.2003. In case No. 8766/97 without

leading evidence the learned High Court Judge convicted the Petitioner and sentenced him to imprisonment merely adopting the evidence lead in case No. 8767, on the footing that the witnesses were the same in both cases. Aggrieved by the said convictions and sentences in the two cases the petitioner appealed against the said judgment and also moved in revision to have the said convictions and sentences set aside. The relevant appeals were appeals bearing No. CA. 215/2003 and CA. 216/2003 respectively. The relevant revision applications are CA (PHC) APN 245/2004 and C.A. (PHC) APN 246/2004, respectively.

Both revision applications bearing No. CA (PHC) APN 246/04 and CA(PHC) APN. 246/04 which are amalgamated, are now before us for our consideration.

Mr. Jayasinghe moves to withdraw the application in CA/(PHC) APN 245/04 (Revision) unconditionally, in view of the fact that they have succeeded in the connected appeal CA. 215/2003 that was taken against the judgment, in case bearing No. 8766/97.

This is a matter where the petitioner had not faced trial and was tried in absentia. After trial the petitioner was convicted and sentenced. The accused had absconded for nearly 5 years and after he was convicted and sentenced, was arrested nearly one year after the date of conviction. Thereafter the accused appealed against the said judgment. Appeal with regard to C.A. 215/2003 was allowed and a retrial ordered. But the appeal bearing No: C.A. 216/03 was dismissed due to the fact that the appeal was taken out of time. Also we find that the accused in the said two cases had moved in revision and the two numbers are C.A. (PHC) APN 245/04 and C.A. (PHC) APN 246/04. Counsel appearing for the accused-petitioner withdrew the revision application bearing

No: C.A. (PHC) APN 245/04 as the connected appeal was allowed and a retrial ordered in that case. Now what is remaining before us is C.A. (PHC) APN 246/04 application for revision made by the petitioner, challenging the conviction and sentence in case bearing No. 8767/97. The related appeal was CA. 216/2003.

The petitioner had absconded from courts for nearly 5 years and the case proceeded to trial in absentia and the accused was convicted after trial. Later on after one year of the conviction, the accused was arrested by the Police and was produced before the High Court. After the arrest the accused preferred the appeals and the two revision applications. The revision applications have been made after two months of his arrest.

Appeal being a statutory right the accused was entitled to appeal, provided he appealed in time. Even an accused who had absconded during the trial has a right to appeal provided he complies with the Supreme Court Rules and the other provisions of the law and makes the appeal in time. It was held in *Sudharman de Silva vs. Attorney General*[1] that an accused person who absconded at the trial has a right to appeal, as the right to appeal is a statutory right granted. But in that case at page 14, it was held that, it was not the position where the remedy sought by the accused is a discretionary remedy. (by way of revision). We would like to refer to the *Cursus Curiae* dealing with this aspect of the law. In *Suddage Gamini Rajapakse vs. The State*[2] Kulathilaka, J. held that; "An accused who had absconded has no right to invoke the revisionary jurisdiction of the court." He held further that the discretionary remedy by way of revision will not be available to a person who was guilty of

contumacious conduct. In *A.G. vs. Podisingho*[3] it was held that "the revisionary power of the Court cannot be invoked by an accused who is guilty of contumacious conduct" In *Camilas Ignatious vs. O.I.C. of Uhana Police Station* [4] Justice Ismail came to the same conclusion and held that the revisionary powers cannot be invoked by an accused who absconded at the trial and the *ratio decidendi* in that case was reiterated in *Opatha Mudiyanselage Nimal Perera vs. A.G.*[5] by Justice Niniyan Jayasuriya. According to the *Cursus Curiae* a person who by his contumacious conduct placed himself beyond the reach of the law treating the original courts and there authority with contempt, should not be allowed the invoke the reversionary jurisdiction of the appellate Courts, particularly the Court of Appeal. A person who had resorted to conduct himself in order to delay, circumvent and subvert justice should not be pardoned or his actions condoned and relief granted to him by way of revision. A Court of Justice should not allow such a person to even make any submissions on the merits of the case. In this case, we can see an added feature which is a very significant factor that should be taken into consideration namely, the fact that after his arrest the accused - petitioner had not opted to exercise his right to make an application under section 241 of the Criminal Procedure Code to have the conviction and sentence set aside and to have the matter restored to the roll. This fact indicates that he had no valid reasons or justifiable reasons, for that matter, any reasons whatsoever to adduce before the High Court, in order to justify his absence. In other words, the accused by keeping silent and not exercising his rights under section 241 of the Criminal Procedure Code has impliedly admitted that he had no cause to show and that, he was guilty of contumacious conduct.

The learned Counsel argued that despite delay and despite contumacious conduct on the part of the petitioner, if there is grave injustice that has occasioned, this Court must intervene in the matter to rectify the injustice caused to the petitioner. Although this Court was not bound to go into the merits of the case still due to inquisitiveness, questioned the Counsel as to what the substantial injustice that was caused to the appellant. In response Counsel stated to Court that, the prosecution failed to prove that the petitioner committed the alleged offence with a dishonest intention. This is entirely a question of fact which will eventually lead to a question of law but it is not a pure question of law and therefore, we conclude that this is not a reason for us to deviate from the *Cursus Curiae* laid down in the cases above referred to.

Although the conduct attributed to the petitioner is totally reprehensible and cannot be condoned nevertheless this Court is justified exercising its revisionary powers if the decision had been made wholly without jurisdiction which renders the decision a nullity. (*Vide M.S.M. Mishbah vs. E. P. Hefeela*[6])

In the instant case the petitioner does not even suggest that the judgement of the High Court Judge is perverse or manifestly erroneous or that it is exfacie wrong or that the decision is a nullity. The petitioner merely states that the dishonest intention was not proved.

That was a fact the prosecution had to prove in the main case. Whether the evidence lead in the case was sufficient to prove that fact is a matter that should be agitated in a properly constituted appeal and not in revision. Even in appeal findings on facts are not lightly disturbed by an appellate Court unless there is a substantial reason to do so. (*Vide Fraad vs. Brown & Company*[7] *Alwis vs. Piyasena*[8].

Where the trial against the petitioner was held in absentia and an application in revision is filed by the petitioner after more than one year from the date of conviction and sentence, and two months after his arrest are matters that must be considered in limine before the court decides to hear the petitioner on the merits of his application for revision. Before he could pass the gate way to relief his aforesaid contumacious conduct and undue delay in filing the application for revision must be considered and a determination made upon those matters before he is heard on the merits of the application.

In this case we find that the petitioner has not offered any explanation whatsoever as to his contumacious conduct or the undue delay in presenting this application for revision. In fact the petitioner even failed to make an application to the relevant High Court under section 241 of the Criminal Procedure Code let alone explaining his contumacious conduct.

For the reasons adumbrated on the facts and the law, we dismiss this application for revision. Application for revision CA (PHC) APN 246/04 is dismissed.

**SISIRA DE ABREW, J** - I agree.

*application dismissed.*