IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Application for Appeal for Appeal under and in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Complainant

Vs

Nassar Mohommed Hussain

Accused

Court of Appeal Case No:
CA/HCC/0045/2023

High Court Hambantota Case No:
HC 86/2001

AND NOW BETWEEN

Nassar Mohommed Hussain

Accused – Appellant

Vs

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

Respondent

Before	:	**Hon. P Kumaratnam, J.**
		Hon. Pradeep Hettiarachchi, J.
Counsel	:	Ershan Ariyaratnam for the Accused-Appellant
		Maheshika De Silva, DSG for the Respondent
Argued on	:	22-05-2025
Decided on	:	18.07.2025

Pradeep Hettiarachchi, J

JUDGMENT

Background to the Case

1. This Appeal was submitted by the Accused-Appellant Nassar Mohammed Hussein (hereinafter referred to as "the Appellant") through the chief jailor of Angunakolapelassa Prison challenging the conviction and the sentence imposed on him by the High Court of Hambanthota.

2. The Appellant and one Mathagadeera Don Chathuranga (hereinafter referred to as "the 2nd Accused") were indicted before the High Court of Hambanthota for committing the offence of grave sexual abuse on Pradeep Maduranga Jayasuriya on or around 09-11-1998.

3. The Indictment was served on both Accused on 20-11-2001. Thereafter, the learned High Court Judge imposed Rs. 5000/= cash bail and Rs. 50,000/- surety bail with two sureties residing in the Kataragama Police Division for each Accused. He also ordered the Accused persons to submit a certificate from the Divisional Secretary to verify the residence of the sureties. The Court, having granted time till 13-12-2001 to comply with the bail conditions, released the Accused persons.

4. However, the Appellant had absconded and had been issued warrants on several occasions. As the Appellant continued to abscond, the learned High Court Judge took steps under section 241 of the Code of Criminal Procedure Code Act No. 15 of 1979 (as amended) (hereinafter referred to as "CCPA") and after having an inquiry, ordered to proceed the trial *in absentia* against the Appellant.

5. In the meantime, the 2nd Accused pleaded guilty to a lesser offence under section 345 of the Penal Code (as amended) and was sentenced to a 24 months' imprisonment suspended for 5 years. Additionally, a fine of Rs. 3500/= was imposed on the 2nd Accused.

6. After the trial against the Appellant was concluded under section 241 of the CCPA, on 27-07-2005, the learned High Court Judge imposed a 10-year rigorous imprisonment

against the Appellant. Furthermore, he was imposed a fine of Rs. 5000/= and a default sentence of 12 months if the Appellant fails to pay the aforesaid fine.

7. On 20-10-2022, the Appellant was arrested and produced before the Court and a Counsel was assigned on his behalf. Thereafter, on 10-11-2022, the Assigned Counsel, in his oral submissions stated that there are several grounds of defense that the Defense could have taken and that there are contradictions that could have been highlighted in the Prosecution's case.

8. The Assigned Counsel also submitted that there is no possibility of filing an appeal at that belated stage but moved for a trial de novo under section 241(3)(b) of the CCPA.

9. It had been the contention of the learned State Counsel that none of the matters stated above on behalf of the Appellant were *bona fide* reasons to absent himself from the Court and she brought to the attention of the Court that no oral or documentary evidence has been adduced to satisfy the Court that the Appellant's absence from the Court was *bona fide*.

10. The learned High Court Judge by his Order dated 10-11-2022, refused the Application made by the Assigned Counsel for a *trial de novo* and ordered to give effect to the sentence imposed on the Appellant.

11. Being aggrieved by the Judgment dated 27-05-2005, the Appellant submitted a Petition of Appeal dated 23-11-2022, via the chief jailor of Angunakolapelassa Prison challenging the conviction and the sentence.

12. The learned DSG raised a preliminary objection regarding the Appellant's delay in filing the Petition of Appeal.

Is the Petition of Appeal filed by the Appellant is out of time and therefore should be dismissed *in limine*?

13. Section 331 (1) of the CCPA sets out the procedure to be followed when presenting a petition of appeal or a leave to appeal from the High Court to the Court of Appeal. Section 331 (1) reads as;

> *331 (1) An appeal under this Chapter may be lodged by presenting a petition of appeal or application for leave to appeal to the Registrar of the High Court within*

fourteen days from the date when the conviction, sentence or order sought to be appealed against was pronounced:

Provided that a person in prison may lodge an appeal by stating within the time aforesaid to the jailer of the prison in which he is for the time being confined his desire to appeal and the grounds therefor and it shall thereupon be the duty of such jailer to prepare a petition of appeal and lodge it with the High Court where the conviction, sentence or order sought to be appealed against was pronounced.

14. In the case ***of Atham Kandu Fouzer v The Honorable Attorney General*** CA 158/2013 (CA Minutes 07-06-2022), Gurusinghe J, held that, in terms of section 331 of the CCPA, the petition of appeal has to be lodged with the Registrar of the High Court within fourteen days from the date when the conviction, sentence or order sought to be appealed against was pronounced.

15. Furthermore, in ***Haramanis Appuhamy v Inspector of Police, Bandaragama***, 66 NLR 526, Sri Skandarajah J. held that *"where an accused is convicted and sentenced, the time within which an appeal should be preferred must be 5 computed from the date on which the reasons for the decisions are given and not from the date of conviction and sentence."*

16. Following the dictum of ***Haramanis Appuhamy***, in ***Solicitor General v Nadarajah Muthurajah*** 79 NLR 63 Pathirana J. held that *"the period of the time within which an appeal should be referred must be calculated from the date on which the reasons of the decisions are given and not from the date of which the verdict was entered."*

17. In the instant case, it is important to note that the reasons for the decision and the conviction had been given on 27-07-2005. The Petition of Appeal was filed at the Registry of Hambanthota High Court on 24-11-2022, more than 17 years after the reasons for the decision were given. Therefore, this Appeal is clearly out of time. Therefore, I am inclined to uphold the preliminary objection raised by the Prosecution.

18. The learned Counsel for the Appellant also submitted that if this Court were to hold that Petition of Appeal is out of time, it would not preclude the Appellant from inviting this Court to exercise the inherent revisionary powers of this Court in terms of section 364 of the CCPA. It was further submitted that the powers of revision of this Court are wide enough to embrace a case where an appeal was refused.

19. However, in a long line of cases, this Court has consistently held that the power of revision is not a right of an aggrieved party but lies with the discretion of the Court and that the conduct of the Petitioner is a relevant consideration when exercising such discretionary powers. The Courts have refused to exercise its revisionary powers when the Petitioner is guilty of contumacious conduct.

20. For instance, in the case of ***Sudarman De Silva v Attorney General*** [1986] 1 Sri LR 09, it was held that, *"Contumacious conduct on the part of the applicant is a relevant consideration when the exercise of discretion in his favour is involved, but not when he asserts his statutory right to appeal and is not asking for the favour of any permission ... "*

21. Also in the case of ***Padmasiri v Attorney General*** [2012] 1 Sri LR 24, it was held, *"....if we allow this application it would amount to condescending or, the court lending its hands to a person who is guilty of contumacious conduct and thereby assisting him"*

22. In the case of ***S.M.A.A. Priyantha Jayakody v OIC, Police station, Mawarala and Another*** CA/PHC/119/2004, A.W.A. Salam, J(P/CA) citing with approval the case of ***Camillus Ignatious vs OIC, Uhana Police Station*** CA (Rev) 907/89 *and* ***Opatha Mudiyanselage Nimal Perera vs A.G*** – CA (Rev) 532/97 held as follows;

> *"Camillus Ignatious vs OIC, Uhana Police Station (Rev) CA 907/89, M.C. Ampara 2587. It was held that a mere delay of 4 months in filing a Revision Application was fatal to the prosecution of the Revision Application. Opatha Mudiyanselage Nimal Perera vs A.G – CAC Rev) 532/97 -Kandy HC 1239/92, where His Lordship Justice F.N.D. Jayasuriya stated that "These matters must be considered in limine before the court decides to hear Petitioner on the merit of his application before he could pass the gateway to relief his aforesaid contumacious conduct and his unreasonable and undue delay in filing application mu.st be considered and determination made upon these matters before he is heard on the merit of the application."*

23. Also in ***Rajapakse v The State*** [2001] 2 Sri LR 161, it was held that;

> *" ... When considering this issue this Court must necessarily have regard to the contumacious conduct of the accused in jumping bail and thereafter conducted himself in such a manner to circumvent and subvert the process of the law and judicial institutions. In addition if this Court were to act in revision the party must come before Court without unreasonable delay. In the instant case there is a delay of 13 months ..."*

24. In the present case, the Appellant has preferred the Petition of Appeal to this Court after 17 years from the date of the Judgment and therefore there is inordinate and undue delay in lodging this Appeal. It appears that this delay had been caused mainly due to the fact that the Appellant was absconding the law enforcement authorities. In other words, the delay could be attributed to the contumacious conduct of the Appellant.

25. It is also pertinent to note that the Appellant had been served the Indictment on 20-11-2001 and was well aware of the case pending against him. However, the Appellant had been absconding for almost 17 years until he was arrested and produced before the Court. Therefore, it cannot be reasonably inferred that the Appellant's absence was due to his ignorance of the case against him.

26. Given the undue delay and the contumacious conduct of the Appellant, this Court is not inclined to exercise its revisionary powers to revise the Judgment of the learned High Court Judge dated 27-07-2005.

27. Moreover, the learned Counsel for the Appellant submitted that there was no evidence before the learned High Court Judge to proceed under section 241 of the CCPA.

28. However, the learned High Court Judge has conducted an inquiry prior to have the trial *in absentia* against the Appellant on 27-11-2002.

29. It is important to note that, at the said inquiry, a police constable attached to Katharagama Police Station named Herath Mudiyanselage Sampath Hasitha Bandara Herath who was assigned with the task of executing the warrants, had given evidence stating that the whereabouts of the Appellant could not be found despite his best efforts and that he had inquired from the Grama Niladari and the chief prelate of the temple in the relevant area that the Appellant was residing, about his whereabouts, but to no avail.

30. Therefore, it is quite clear that it was after holding a proper inquiry that the learned High Court Judge has decided to hold the trial *in absentia* against the Appellant.

31. In ***Gunasiri and Others and Albara Dura Ananda v The State*** [1990] 2 Sri LR 265 it was held *inter alia* that:

> *When an accused keeps away from Court deliberately, without attending the trial, it is not necessary to hold a second inquiry before the trial commences, where the Court has already satisfied itself after inquiry, that the accused is absconding.*

32. Furthermore, it is important to note that, in terms of section 241(3) (b) of the CCPA, for a judge to make an order for a *trial de novo*, the judge has to be first satisfied that the accused's absence from the Court is *bona fide*. However, no oral or documentary evidence has been adduced by the Assigned Counsel to satisfy the Court that the Appellant's absence from the Court was *bona fide*. Mere making an application to the Court under section 241(3) (b) for a *trial de novo*, without adducing any evidence to satisfy the Court that the Appellant's absence from the Court is *bona fide*, will not satisfy the requirements of section 241(3) (b).

33. In the aforesaid circumstances, I see no reason to interfere with the findings of the learned High Court Judge of Hambanthota dated 27-07-2005. Accordingly, the Appeal is dismissed.

Judge of the Court of Appeal

Hon. P. Kumararatnam,J (CA)

I agree,

Judge of the Court of Appeal