

SUDHARMAN DE SILVA

v.

THE ATTORNEY-GENERAL

SUPREME COURT.

SHARVANANDA, C.J., ATUKORALE, J. AND TAMBIAH, J.

S. C. APPEAL NO. 45/85.

S. C. (L A) No. 48/83.

H. C. COLOMBO No. 583/78.

AUGUST 5, 1985.

*Criminal Procedure – Appeal – Right of appeal – Is it available to an accused who has jumped bail and absconded at the trial ? – Section 14 of the Judicature Act.*

Held –.

Section 14 of the Judicature Act has specifically endowed an accused who is convicted with a substantive 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. Contumacious conduct on the part of an accused is relevant only where the exercise of a discretion vested in the court is involved. Here the right of appeal is statutory and can be asserted as of right by the accused although he had jumped bail and was absconding at the trial.

**Cases referred to :**

- (1) *A. G. v. Sillem (1864) 10 H.L. Cases 704.*
- (2) *Colonial Sugar Refining Co. v. Irving [1905] A.C. 369.*
- (3) *Robert Edward Wynyard [1972] Criminal Appeal Reports 413, 421.*

APPEAL from the judgment of the Court of Appeal in *Sudharman de Silva and Another v. the Attorney-General* reported in [1985] 2 Sri L. R. 12.

*Mrs. M. Muttetuwegama, with Miss S. de Silva, for accused-appellant.*  
*D. P. Kumarasinghe, S.S.C. for State.*

*Cur. adv. vult.*

September 9, 1985.

**SHARVANANDA, C. J.**

This is an appeal against the order of the Court of Appeal, rejecting the appellant's appeal to that court.

This appellant who was the 2nd accused-appellant, along with two other accused, appealed to the Court of Appeal from their conviction and sentence, on charges of conspiracy to commit robbery of the People's Bank at Gangodawila, and of having with other accused committed robbery of a sum of Rs. 634,315.66 from the Manager of the People's Bank, at Gangodawila, abetment and robbery of car No. 3 Sri 5609. The appellant was found guilty on all counts and sentenced to a term of 7 years R.I. on each count, the sentences to run concurrently. When the appeal came up for hearing before the Court of Appeal, preliminary objection was raised by State Counsel that the appellant could not be heard in appeal as he had absconded from the trial and the trial against him had proceeded in absentia with the trial of the other accused who were present and represented at the trial, and had not made any application to the High Court under section 241 of the Criminal Procedure Code and shown that his absence was for bona fide reasons. State Counsel stated that the appellant had not sought to reopen the trial at the High Court and therefore he could not be heard in appeal. The appellant had been absconding at all relevant times, even at the time of the hearing of his appeal in the Court of Appeal. It was the contention of State Counsel that it would be farcical and contemptuous of the law to allow the accused-appellant under such circumstances to be heard in the Court of Appeal while he was still absconding. Counsel for the appellant

contended that as the accused-appellant had plainly absconded and had no bona fide reason to establish to the satisfaction of the High Court, applying to that court to reopen the case under section 241 of the Criminal Procedure Code, served no purpose and submitted that irrespective of his conduct, the appellant was "as of right" entitled to appeal to the Court of Appeal under section 14(b) of the Judicature Act No. 2 of 1978, from his conviction and sentence and that the preliminary objection was misconceived.

The Court of Appeal held that the conduct of the appellant in jumping bail and absconding up to date was clearly designed to circumvent and subvert the law and the institutions of justice and therefore he could not invoke the right of appeal "as a matter of right", as contended by his Counsel and accordingly upheld the preliminary objection of State Counsel and rejected the appeal of the appellant. The appellant has preferred this appeal from the rejection.

The appellant along with others was arraigned on indictment on several charges contained in the indictment as mentioned above. Indictment was served on all the accused including the appellant on 29.5.1978. Thereafter the appellant had absconded and a warrant was issued against him and though the surety was noticed to produce him he failed to do so and part of the security was confiscated. The appellant has since then been absconding. Trial commenced without a jury against all the accused on 16.10.1980. The appellant along with fourth accused was absconding and not present and was unrepresented at the trial. The trial was concluded on 29.10.1980 and judgment delivered on 7.11.80. The appellant was found guilty on three counts and sentenced to a term of 7 years R.I. on each count, sentences to run concurrently. The fact that the appellant absconded after service of indictment is admitted. As it is the fact that the appellant had not thought fit to surrender to the High Court during the pendency of the trial or after conclusion thereof or sought to reopen the proceedings under section 241 of the Criminal Procedure Code, Counsel for the appellant conceded that the appellant had no bona fide reason for absconding. Notwithstanding the fact that he was absconding, he had through his Attorney-at-Law filed a petition of appeal to the Court of Appeal within the stipulated time. Counsel for the appellant also admitted that the conduct of the accused in jumping bail after indictment was served and in absconding ever since was in no way defensible.

Counsel however urged before us that the appellant had "as of right", a statutory right of appeal against his conviction and sentence and that the right of appeal was not dependent on the exercise of any discretion in his favour by the Court of Appeal and that the Court of Appeal had on irrelevant considerations denied him the right of appeal, which the law has vested him with. Counsel submitted that the Court of Appeal had fallen into error in denying the appellant his right of appeal which he was entitled to by virtue of the provisions of the Judicature Act No. 2 of 1978. In order to determine the validity of counsel's contention, it is necessary to examine the language of the relevant provisions relating to the appellate jurisdiction of the Court of Appeal.

Article 138 (1) of the Constitution spells the appellate jurisdiction of the Court of Appeal. It provides –

"The Court of Appeal shall have and exercise, subject to the provisions of the Constitution or any law, an appellate jurisdiction for the correction of all errors of fact or law which shall be committed by any court of First instance . . . . ."

Section 14 (b) of the Judicature Act No. 2 of 1978 provides –

"Any person who stands convicted of any offence by the High Court may appeal therefrom to the Court of Appeal –

- (b) in a case tried without a jury, *as of right, from any conviction or sentence* except in the case where –
  - (i) the accused has pleaded guilty ; or
  - (ii) the sentence is for a period of imprisonment . . . . .

Provided that in every such case there shall be an appeal on a question of law or where the accused has pleaded guilty on the question of sentence only."

This section gives a right of appeal to any person who stands convicted of any offence by the High Court. It draws no distinction between a person who appeared at the trial and a person who was absent at the trial, whether he was absconding or not to be competent to appeal. A right of appeal–

"is the right of moving a superior court and invoking its aid and interposition to redress the error of the court below 'It seems absurd to denominate this paramount right, part of the practice of the inferior tribunal' –*per Westbury, L. C., in A. G. v. Sillem*–(1).

“A right of appeal is a matter of substance and not of procedure” – *Colonial Sugar Refining Co. v. Erving* (2).

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

A right is an interest which is recognised and protected by law. As it is recognised by law a person who is vested with a right is entitled to exercise it and enforce it. The legislature provides for what is necessary in the interests of the public, and the courts must obey and enforce all statutes. However unjust or absurd the results be, a statute must be given effect to and if the statute endows a convicted person with a right of appeal, a court is bound by the statute and will have to recognise that right and give effect to it, however repugnant the conduct of that person be and however undeserving such person be of any rights.

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.”

A legal right unless the statute has made its exercise dependent on the prior performance of a legal duty may be asserted or claimed irrespective of such performance. But the exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations. Article 28 of the Constitution may be a desirable aspiration and prescription for good citizenship but cannot constrict the content or ambit of legal rights. An absconding accused may be penalised otherwise but his rights cannot be taken away for that default.

The Court of Appeal has endorsed and applied the following observation of Roskill, C. J. in the case of *Robert Edward Wynyard* (3) :

“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 application therefore is refused.”

In my view this quotation was appropriate in the context in which it was uttered, namely where an application to court was made for the exercise of a discretion i.e. extension of time within which to apply for leave to appeal, in favour of the applicant. Contumacious conduct on the part of the applicant is a relevant consideration when the exercise of a 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. This meaningful distinction has been lost sight of by the Court of Appeal.

The Court of Appeal has referred to the argument of Counsel for the State that if the contention of the present appellant is upheld a accused person would be encouraged to act with gross disregard and contempt of the original courts of justice, would jump bail with impunity and abscond from the trial against him, and would have a distinct advantage over persons who respected the law and observed its commands and presented themselves for trial and it would bring the entire administration of justice into disrepute. This argument of State Counsel loses much of its force and validity when the rationale of section 241 (2) of the Code of Criminal Procedure Act No. 15 of 1979 which provides that the commencement or continuance of a trial under section 241 (1) “shall not be deemed or considered to affect or prejudice the right of an absconding accused to be defended by an attorney-at-law in such trial,” is appreciated in this context. If the legislature permits an accused who jumps bail with impunity and absconds from the trial against him to be defended by an attorney-at-law at such trial and gives its sanction to such a trial, it can only be on the basis that even an absconding accused is entitled to the fundamental right of being heard by an attorney-at-law at a fair trial. An appeal is a continuation of the trial and hence, it is not illogical for such accused even though absconding to be given the benefit of an appeal and being represented at the hearing of his appeal by his

Attorney-at-Law. In any event, a court cannot question the wisdom of a legal provision and disregard it. When State Counsel was asked in relation to his above argument what was the distinct advantage which an absconding accused had over persons who respected the law and presented themselves for trial, he 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.

In my view the considerations which weighed with the Court of Appeal in rejecting the appeal of the appellant were not relevant and out of place when he was appealing "as of right" and not with leave of the Court of Appeal. A fugitive from justice is also entitled to his rights and however repellent be the idea that he could invoke the law for which he has scant regard, yet his legal rights will have to be respected and recognised. Since section 14 of the Judicature Act contains no limitation that it applies only to accused who appeared at the trial by himself or by his Attorney-at-Law, it is not open for a court to read words of limitation where the words are clear and unambiguous. It is the court's duty to ensure that the statutory right of a person is not lost to him except in strict accordance with the statute. The first duty of a judge is to administer justice according to law, the law which is established for us by an Act of Parliament. The judges in their anxiety to uphold the dignity of courts should not fail to do justice according to enacted law. Dislike of the effect of a statutory provision does not justify departing from its plain language. In my view the preliminary objection of State Counsel was *misconceived and is untenable*.

I allow the appeal and remit the case to the Court of Appeal with the direction for it to hear the appeal of the appellant to it.

ATUKORALE, J. – I agree.

TAMBIAH, J. – I agree.

*Appeal allowed.*

*Case sent back to Court of Appeal for hearing of Appeal.*