

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an application for
Revision in terms of Article 138 of
the Constitution.

CA.(PHC) APN. NO. 101/2011
HC. Colombo No. HCRA 166/2010
M.C. Mt, Lavinia No. 50024.

Samantha Marina Nirmalene De
Soyza,
XA1, G4, Edmonton Residencies,
Baseline Road, Kirulapone.

(Presently at the Welikada Prison)

Accused-Petitioner-Petitioner

-Vs-

1. Officer-in-Charge, (Unit 2),
Colombo Fraud Investigation
Bureau, No.5, Dharmarama
Mawatha, Wellawatte.

Complainant-Respondent-
Respondent

2. The Honourable Attorney-
General,
Department of the Attorney-
General, Colombo-12.

Respondent-Respondent

Before: **Sisira de Abrew, J &**
Chitrasiri, J

Counsel: Asthika Devendra with Anjana Rathnasiri for the
Petitioner.
S. de Silva SSC for the Respondent.

Argued &

Decided on: **25.01.2012**

Sisira de Abrew, J

Heard both counsel in support of their respective cases. This is a Petition to revise the order of the learned High Court Judge dated 03.03.2011.

The accused-petitioner in this case was charged in the Magistrate's Court under section 25 of the Debt Recovery Act and section 386 of the Penal Code.

The accused did not plead guilty to the charges in the Magistrate's Court. On 04.12.2009. A settlement was entered to the effect that the entire amount of Rs. 2 million would be paid by the accused-Petitioner by way of installments within 01 year. The accused-petitioner could not pay the installments as agreed. On the day that the settlement was entered the learned Magistrate made an order to the effect that if the amount agreed by the accused-petitioner is not paid, she would be sentenced to 06 months Rigorous Imprisonment in respect of each charge. Therefore according to the Magistrate's order the aggregate term of imprisonment that she has to serve is 02 years. After paying certain installments as agreed, he moved in the High Court to revise the learned Magistrate's order dated 04.12.2009. The learned High Court Judge, after examining the facts of the case observed, that the order made by the learned Magistrate was not legal. She however, made an order to the effect that the accused-petitioner should pay the balance amount of Rs. 16,25,000/- (16 lakhs 25 thousand) within a period of 18 months by way of monthly installment of Rs. 90,000/-. In default of installment of Rs. 90,000/-, the accused-petitioner was sentenced to a period of 06 months imprisonment. Thus in default of the said amount (Rs. 2 million) total jail term that the accused has to serve is 9 years. According to the Magistrate's Order total jail term in default of Rs. 2 million is two years.

We note that the learned Magistrate imposed a jail sentence on the accused-petitioner without the accused-petitioner pleading guilty to the charges. Further the learned Magistrate convicted the accused without him being found guilty or without a plea of guilt being tendered by the accused. For the learned Magistrate to enter a conviction either the accused must be found guilty or the accused must plead guilty to the charge. In the present case any one of the above matters has not taken place.

We therefore hold that the order made by the learned Magistrate on 04.12.2009 is wrong. The learned High Court Judge in her order dated 03.03.2011 after observing that the learned Magistrate's order was not legal, directed the accused to pay balance amount and imposed a default sentence. If the order of the Magistrate was not legal it was the duty of the learned High Court Judge to have it set aside. We therefore note that the learned High Court Judge's order too is wrong. We therefore set aside both orders of the learned Magistrate dated 04.12.2009 and the High Court Judge's order dated 03.03.2011.

Both counsel bring to the notice of Court that the learned Magistrate in compliance with the learned High Court Judge's order has sentenced the

accused-petitioner to a period of 06 months Imprisonment in respect of non-payment of each installment of Rs. 90,000/-

Since we set aside the order of the learned High Court Judge dated 03.03.2011, all subsequent orders made by the learned Magistrate in compliance with the learned High Court Judge's order should be set aside.

We set aside all subsequent orders which were made by the learned Magistrate in compliance with the order of the learned High Court Judge.

Learned Senior State Counsel submits that he can't support both orders of the learned Magistrate and the learned High Court Judge. Learned counsel for the accused-petitioner at this stage agrees to send the case back for re-trial.

Considering all these matters , we direct the learned Magistrate to re-try the accused on the charges filed in the Magistrate's Court.

*Petition allowed. Orders of the Learned Magistrate and the High Court
Judge set aside.*

Judge of the Court of Appeal

Chitrasiri, J

I agree.

Judge of the Court of Appeal

Kpm/-