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**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA**

Nirosh Amantha Amadoru

(Currently Languishing At Welikada  
Prison)

Court of Appeal case no :-  
CA (PHC) APN -128/15

**Accused -Petitioner-Petitioner**

**Vs.**

High Court Colombo case no:-  
HCRA 99/2013

Hon. Attorney General

M. C. Fort case no:-  
88475/2009

**Complainant-Respondant -  
Respondent**

**Before** : H.C.J.Madawala J.  
: L.T.B. Dehideniya J.

**Counsel** : Teny Fernando for the Accused Petitioner Appellant.  
: Varunika Hettige SSC for the Complainant Respondent  
Respondent.

**Argued on** : 25.07.2016

**Written submissions filed on** 01.08.2016 and 08.08.2016

**Decided on** : 23.11.2016

**L.T.B. Dehideniya J.**

The Accused Petitioner (hereinafter sometimes called and referred to as the Petitioner) was charged in the Magistrate court of Fort on following

charges;

- I. Petitioner drew a cheque for a amount of Rs. 14,10,000/= knowing that there are no funds or not sufficient funds in the bank to honour such cheque; an offence punishable under section 25 (1) (D) of the Debt recovery (Special Provisions) act No 2 of 1990,
- II. Petitioner drew a cheque for a amount of Rs. 10,00,000/= knowing that there are no funds or not sufficient funds in the bank to honour such cheque; an offence punishable under section 25 (1) (D) of the Debt recovery (Special Provisions) act No 2 of 1990.
- III. Petitioner misappropriated a sum of Rs. 24,10,000/= which is an offence punishable under section 391 of the Penal code.

Learned Magistrate after concluding the trial against the petitioner in absentia found him guilty for the all charges contained in the charge sheet and entered the conviction on 31/07/2012.

Following the conviction Learned Magistrate imposed sentences on 01/09/2012 as follows;

- I. For the 1<sup>st</sup> count 1 year rigorous imprisonment and a fine of Rs. 141,000/= in default 6 months simple imprisonment.
- II. For the 2<sup>nd</sup> count 1 year rigorous imprisonment and a fine of Rs. 100,000/= and in default 6 months simple imprisonment.
- III. For the 3<sup>rd</sup> count 1 year rigorous imprisonment and a fine of Rs. 1000/= and in default 2 months simple imprisonment.

Subsequent to the conviction passed by the Learned Magistrate, the petitioner was arrested and produced before the court on 13/02/2013, and Learned Magistrate directed the sentence to be implemented.

Petitioner being aggrieved by the sentence imposed by the Learned Magistrate invoked the Appellate Jurisdiction of the High Court of Western Province. Learned High Court Judge imposed following sentences;

- I. 1<sup>st</sup> count 8 months rigorous imprisonment and suspended for 10 years. A fine of Rs. 1,41,000/= in default of 1 year imprisonment. Compensation of Rs. 800,000/= payable to Aitken Spence company in default 2 years imprisonment.
- II. 2<sup>nd</sup> count 8 months rigorous imprisonment and suspended for 10 years. A fine of Rs. 100,000/= in default of 1 year imprisonment. Compensation of Rs. 800,000/= payable to Aitken Spence company in default 2 years imprisonment.
111. 3<sup>rd</sup> count 8 months rigorous imprisonment and suspended for 10 years. A fine of Rs. 1000/= in default of 1 month imprisonment. Compensation of Rs. 800,000/= payable to Aitken Spence company in default 2 years imprisonment.

Being aggrieved by the said order of the learned High Court Judge the Accused Petitioner appealed to this Court stating that the learned High court Judge has failed to consider the fact that there is no provision in the Debt Recovery Act No 2 of 1990 as amended by Act No 04 of 1994, to impose a compensation on a convict but learned High Court Judge has erroneously imposed a compensation and a default sentence which is contrary to the established Law. At the argument he contended that the Appellant has already spent more than 3 years in the prison and he has completed the original sentence imposed by the learned Magistrate. The Counsel moved to set aside the judgment of the High Court and to implement the original sentence passed by the learned Magistrate.

The learned SSC argued that this being an economic crime, Court has to be

mindful about the effect on the country's economy and the Appellant's attitude of selecting the sentence favourable to him. The Counsel argued that the Court can impose compensation in a fit case using the inherent power of the Court.

It is not in dispute that the section 25 of the Debt Recovery Special Provisions Act No.2 of 1990 there is no provision to include an order to pay the compensation.

The section reads;

25. (1) Any person who"

- (a) draws, a cheque knowing that there are no funds or not sufficient funds in the bank to honour such cheque ; or
- (b) makes an order to a banker to pay a sum of money which payment is not made by reason of there being no obligation on such banker to make payment or by reason of the payment having been countermanded; or
- (c) gives an authority to an institution to pay a sum of money to itself, in payment of a debt or loan or any part thereof owed to such institution, from, and out of an account maintained or funds deposited, by such person with such institution and such institution is unable to make such payment to itself by reason of such person not placing adequate funds in such account or by reason of the funds deposited having been withdrawn by reason of such person countermanding the authority given or by reason of any one or more of such reasons ; or
- (d) having accepted on inland bill dishonours it by non - payment, shall be guilty of an offence under this Act and shall on conviction by a

*Magistrate after summary trial be liable to punishment with imprisonment of either description for a term which may extend to one year or with fine of ten thousand rupees or ten per centum of the full value of the cheque, order, authority or inland bill in respect of which the offence is committed, whichever is higher, or with both such fine and imprisonment,*

The provisions of the Debt Recovery Act does not provide for the payment of compensation. It has created a criminal offence punishable with a jail term and a fine. The maximum jail term is one year and the maximum fine is Rs. 10,000.00 or 10% of the value whichever is higher. Payment of compensation to the victim of the crime did not include in to the section. As the learned SSC submitted, these are economic crimes and the commercial issues of the parties were left to the Civil Court by the legislature and the criminal offence was created to prevent using bills or cheque without adequate funds.

The Criminal Procedure Code provided a mechanism to pay compensation to the victims of a crime. Section 17 (4) of the Code provides that;

*(4) Whenever any person is convicted of any offence or where the court holds the charge to be proved but proceeds to deal with the offender without convicting him, the court may order the person convicted or against whom the court holds the charge to be proved to pay within such time or in such installments as the court may direct, Such sum by way of compensation to any person affected by the offence as to the court shall seem fit.*

This is also not without a limit. The Legislature has limited the amount that can

be ordered by a Magistrate to Rs. 100000.00. The sub section (7) of the Code reads;

*(7) When the compensation ordered is by a Magistrate's Court, such compensation shall not exceed one hundred thousand rupees to each aggrieved party, notwithstanding that such amount is in excess of the amount a Magistrate may normally impose as fine.*

Earlier the amount was limited to Rs. 500.00 but in 2005 by Act No. 14 it was increased to the present amount. Ordering a convict to pay compensation with a default sentence in addition to the sentence prescribed under the law for the offence, is an order affecting his personal liberty. Therefore the Judge has to be mindful of all the circumstances such as the nature of the offence, the punishment imposed, the ability to pay, the availability of a civil action and the capacity of the complainant to go for a civil action when ordering the convict to pay the compensation. The compensation should not be ordered as a speedy way of recovering the damage sustained by the complainant.

In the present case the total amount involved is Rs. 2,410,000.00. The learned High Court Judge ordered the Appellant to pay Rs. 800,000.00 for each count totaling Rs. 2,400,000.00 as compensation to the complainant, making this action an easy and speedy way of collecting the total amount of money involved in this action with the condition that if the money is not paid the Appellant will be incarcerated on Government expense.

The learned High Court Judge was sitting in appeal on judgment of a Magistrate Court. What an Appellate Court can do in an appeal is defined in the Criminal Procedure Code. Under proviso to the section 328 of the Code the

Court sitting in appeal cannot exceed maximum punishment that would have given by the original Court. The section reads;

328. At the hearing of the appeal the court may if it considers that there is no sufficient ground for interfering dismiss the appeal or may –

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made or that the accused be re-tried or committed for trial as the case may be or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction -

(i) reverse the verdict and sentence and acquit or discharge the accused or order him to be re tried by a court of competent jurisdiction or committed for trial, or

(ii) alter the verdict maintaining the sentence, or with or without altering the verdict increase or reduce the amount of the sentence or the nature thereof;

(c) in an appeal from any other order, alter or reverse such order;

*Provided always that the sentence awarded on an appeal shall not exceed the sentence which might have been awarded by the court of first instance. (Emphasis added)*

The original Court was the Magistrate Court where the Appellant was convicted and sentenced. The learned High Court Judge was sitting in appeal. Therefore the High Court cannot exceed the maximum compensation that

might have been awarded. Under section 17 (7) of the Criminal Procedure Code the maximum compensation that can be awarded is Rs. 100000.00. The learned High Court Judge cannot exceed that amount in appeal.

The maximum jail term that can be imposed under section 25 of the Debt Recovery Act is one year. The 1<sup>st</sup> and 2<sup>nd</sup> charges were framed against the Appellant under this section. The learned High Court Judge ordered to pay Rs. 800,000.00 on each count as compensation with a default term of two years imprisonment. Is it reasonable to impose a default sentence exceeding the maximum jail term for nonpayment of compensation? My view is that it is not reasonable.

The Criminal Procedure Code provides for imposing a term of imprisonment in default of payment of fines. The section 291 of the Code provides that;

291. (1) Where any fine is imposed under the authority of any law for the time being in force, then in the absence of any express provision relating to such fine in such law contained the provisions following shall apply, that is to say: -

(a) .....

(b) in every case of an offence punishable with imprisonment as well as fine in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with fine only in which the offender is sentenced to a fine, the court passing the sentence may in its discretion direct by the sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment



shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence;

(c) .....

(d) the term for which the court directs the offender to be *imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment* which is the maximum fixed for the offence if the offence be punishable with imprisonment as well as fine ; (Emphasis added)

In the present case the maximum term of imprisonment fixed for the 1<sup>st</sup> and 2<sup>nd</sup> counts is one year. Under these circumstances ordering a default term of two years imprisonment for nonpayment of compensation cannot be justified in any way.

Under these circumstances; we set aside the judgment of the learned High Court Judge. We order to implement the sentence passed by the learned Magistrate.

Judge of the Court of Appeal

**H.C.J.Madawala J.**

I agree.

Judge of the Court of Appeal