

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

In the matter of an application under article 138 of the  
constitution.

Ilandari Pedige Sumith Jayaweera,  
Prisoner No. D 48175  
Welikada Prison,  
Baseline Road, Colombo

**Petitioner**

C.A./MC/RE Application No. 05/2017

Vs

1. The Hon. Attorney General,  
Attorney General's Department,  
Hultsdorf, Colombo 12.
2. The Commissioner General of Prisons  
Prisons Headquarters,  
Baseline Road,  
Colombo 9.
3. The Superintendent  
Welikada Prison,  
Baseline Road,  
Colombo 9.

**Respondents.**

Before: A.H.M.D. Nawaz J.  
E.A.G.R. Amarasekara J.

Counsel: K. Tiranagama for the Petitioner.  
Nayomi Wickeramasekara SSC for the Respondent.

Decided on: 18.05.2018.

E.A.G.R. Amarasekara, J.

On 17.01.2018 parties were allowed to file written submissions with regard to this application and accordingly both the counsel for the Petitioner and the Respondents have filed their written submissions on 20.02.2018 and 26.03.2018 respectively.

Though the Petitioner has referred to a direction of the supreme Court in SC (FR) App. No. 34/ 15 – 41/15 in paragraph 1e of his petition and marked the decision of SC (FR) Appln.No 34/2015 as P1, this court observes that these proceedings were commenced with the filing of an application dated 28.04.2017 and not by forwarding of the papers of the Supreme Court case to this court by the registrar of the Supreme Court as directed by the said order. The petitioner in P1 is one Loku Vithanage Rathnapala who is not the petitioner in this case. Hence this court cannot find any direct link with the order and directions given in P1 with this application. There is no material placed before this court to show that other Supreme Court cases referred to in paragraph 1e of the petition has any direct link to this case. Thus, it is the duty of the petitioner to place the material documents before this court to substantiate his case.

The petitioner has filed this application praying inter alia to revise certain jail sentences referred to in the application which were imposed on the petitioner by the Magistrates' court of Kaduwela.

Details of the relevant convictions and sentences as per the warrants of commitment are given bellow;

Case No	Offence/count	Date of conviction/sentence	Sentence.
M.C. Kaduwela Case No. 35230	i. House breaking by night	01.10.2013/06.11.2013	Rs.1000 Fine ,6 months S.I for default of payment of fine

	<p>ii Theft of goods worth Rs. 200000/-</p> <p>iii Retention of stolen property</p>		<p>2 Years' R.I and Rs.10000/- fine, 6 months' S.I for default of payment of fine</p> <p>Rs. 500/- fine, 6 months' S.I for default of payment of fine</p> <p>(Aggregate – 2 years' R.I exclusive of default sentences)</p> <p>In addition, 6 Months' under Prevention of Crimes Ordinance.</p> <p>Suspended sentences dated 26.02.2009,25.02.2009,27.02.2009 and 27.03.2009 in following Gampaha M.C. cases were enforced with this conviction. No.21247,31249,31248, 22663</p>
<p>M.C. Kaduwela Case No.35231</p>	<p>i. House breaking</p> <p>ii Theft of goods worth Rs.182000/-</p> <p>iii Retention of stolen property</p>	<p>09.10.2013/06.11.2013</p>	<p>Rs. 1000 fine ,6 months' S.I for default of payment of fine</p> <p>2 years' R.I and Rs.1000/- fine,6 months' S.I for default of payment of fine</p> <p>Rs.500/- fine ,6 months' S.I for default of payment of fine</p>

			<p>(Aggregate – 2 years' R.I exclusive of default sentences)</p> <p>In addition, 6 Months' R.I under Prevention of Crimes Ordinance</p> <p>Suspended sentences dated 25.02.2009,27.02.2009 and 27.03.2009 imposed by Gampaha M.C were enforced</p>
M.C. Kaduwela case No.35232	<p>i. House breaking</p> <p>ii Theft of goods worth Rs. 24500/=</p>	09.10.2013/06.11.2013	<p>Rs.1000/- fine,6months' S.I for default of payment of fine</p> <p>2 years' R.I and Rs.1000/- fine, 6 months' S.I for default of payment of fine</p> <p>(Aggregate- 2 years' R.I exclusive of default sentences)</p> <p>In addition, 6 Months' R.I under the Prevention of Crimes Ordinance. Suspended sentences dated 25.02.2009,27.02.2009 and 27.03.2009 imposed by Gampaha M.C were enforced</p>

- S.I – simple Imprisonment
- R.I - Rigorous Imprisonment

This court observes that certain details given in paragraph 7 of the petition do not tally with the details in respective warrants of commitment marked P2A-P2C which details are given in the above table.

In his Petition, the petitioner begins to state his case from paragraph 4 onwards and up to paragraph 4 he has stated certain matters in general but in paragraph 9 of the petition, the petitioner states that the aforesaid sentences imposed by the aforesaid magistrate court are partly illegal, unfair or unjust for the following reasons;

- a) In the first two cases the learned magistrate has convicted and sentenced the petitioner under 3 counts – a) house breaking, b) theft, c) disposal or d) retention of stolen property
- b) In number of cases the supreme court and this court have held that theft, retention and disposal of stolen property being alternative offenses, the same person cannot be convicted and sentenced in respect of all three counts, and that he can be convicted and sentenced only in respect of one count.

The Petitioner has further said that the sentences imposed in respect of the 3<sup>rd</sup> count in aforesaid cases are illegal and it is unfair to deal with the Petitioner under the provisions of the Prevention of Crimes Ordinance as the court had decided to enforce the suspended sentences.

The Petitioner has further submitted that learned magistrates <sup>are</sup> not bound to mechanically enforce suspended sentences and section 303(13) of the Criminal Procedure Code has given courts a wide discretion to deal with an offender judiciously instead of mechanically enforcing the suspended sentences.

To substantiate his application, the petitioner has filed only the warrants of commitment relating to aforesaid cases. Signing of a warrant of commitment by a judge is a ministerial act. In fact, what are expected to be revised by this application are the sentencing orders in the aforementioned cases. The petitioner has not tendered the relevant sentencing orders with his application to enable this court to see the true contents of the sentencing orders. Neither has he tendered the relevant charge sheets to see whether the charges are related to same subject matter or different subject matters. It should be noted that sections 174, 176 and 180 of the Criminal Procedure Code allow joinder of charges under certain circumstances. For

example, section 174 allows the prosecutor to join 3 charges of the same kind committed within one year. When the charge sheets and /or sentencing orders are not available this court cannot identify whether the different counts described in a warrant of commitment belong to the same subject matter and/or to the same incident or to different subject matters and/or different incidents. For example, they may belong to same kind of offences committed within one year. Therefore, different offences described in a given marked warrant of commitment may not be alternative charges. It seems the petitioner has not tendered to this court the most relevant documents with regard to the cases he has referred to in his petition, namely the charge sheets and the sentencing orders. The petitioner in paragraph 14 of his petition states that he is unable to obtain the case records. Perhaps they may not be available now due to the delay in making this application. He has got the service of a lawyer to present this application. The Petitioner does not reveal why the lawyer could not get copies of them from the relevant magistrates' courts. If he has any difficulty in getting copies (if they are available) he could have prayed that the original case records to be called for perusal by this court but there is no such prayer in the petition.

However, a crime is an offence against the state. The state counsel while filing his written submissions for the respondents and at the conclusion of his submissions admits that there are illegalities caused by the learned Magistrate in his sentencing orders with regard to the aforesaid convictions and sentences, as the learned magistrates in aforesaid cases have convicted and sentenced the petitioner for counts of disposal of stolen property and/or retention of stolen property along with the count of theft at one trial or in one and the same case. This shows, even though this court is not given the copies of the relevant charge sheets and the sentencing orders, the state is aware of the fact that relevant learned Magistrates have convicted and sentenced the petitioner for alternative offences. The learned counsel for the Respondent too has referred to the cases of *Wimalasena Vs Inspector of Police, Hambantota*, 74 NLR 176, *The Queen Vs Wijepala* (1962) 68 NLR 344.

Though this court does not have the opportunity to peruse the relevant charge sheets and sentencing orders, since the counsel for respondent representing honourable Attorney General has admitted that there are illegalities as aforesaid, this court has to presume that convictions and sentencing for disposal of stolen property and/or retention of stolen property along with a charge of theft were done contrary to law when those charges should have been framed in the alternative. Therefore, this court vacates the convictions and the sentences with regard to retention of stolen property

and/or disposal of stolen property in the following cases while keeping the other convictions and sentences in those cases intact.

1. M.C. Kaduwela Case No.35230
2. M.C. Kaduwela Case No. 35231

In M.C. Kaduwela Case No. 35232, the Petitioner was not convicted and sentenced for retention or disposal of stolen property. Therefore, this court does not wish to make any alteration to the sentences in the warrant of commitment in case no.35232.

As per the section 14 of the Criminal Procedure Code a magistrate is competent to impose any of the following sentences;

- a) Imprisonment of either description for a term not exceeding two years.
- b) Fine not exceeding one thousand five hundred rupees.
- c) Any lawful Sentence combining any of the sentences aforesaid.

It should be also noted aforesaid section does not repeal the provisions of any enactment in force whereby special provisions of punishment are given. Section 16 (1) of the Criminal Procedure Code state as follows;

“ When a person is convicted at one trial of any two or more distinct offences the court may, subject to section 301, sentence him for such offences to the several punishments prescribed thereof which such court is competent to inflict; such punishments when consisting of imprisonments to commence, unless the court orders them or any of them to run concurrently, the one after the expiration of other in such order as the court may direct, even where the aggregate punishment for several offences is in excess of the punishment which the court is competent to inflict on convictions of one single offence: Provided that if the case is tried by a Magistrate’s Court the aggregate punishment shall not exceed twice the amount of punishment which such court in the exercise of its ordinary jurisdiction is competent to inflict.”

When aforesaid two sections are read together it is clear that a magistrate's court in its normal jurisdiction can impose 2 years' imprisonment of either description and/or a fine of Rs. 1500/- for an offence and when several offences are tried together at one trial it can impose an aggregate of 4 years' imprisonment of either description and/or fine of 3000/-. Section 15(3) and (4) of the same code provide for imprisonment for default of payment of fines. Such imprisonments in default of fines may be imposed in addition to the substantive sentences.

Inflicting additional punishment in accordance with the Prevention of Crimes Ordinance is lawful as per the section 6 of that ordinance.

The counsel for the petitioner argued that magistrates should not mechanically enforce the suspended sentences and they must judicially use the discretion given to them by section 303(13) of the Criminal Procedure Code. Without producing the proceedings of the original courts and the facts placed before the learned magistrate before sentencing this court cannot come to a conclusion that the learned magistrate did not use his discretion in a correct manner. On the other hand, there are several previous convictions indicating that the petitioner engaged in this type of offences habitually and that justifies the enforcement of suspended sentences and additional punishment under Prevention of Crimes Ordinance.

In that backdrop when this court looks at the warrants of commitments marked as P2A, P2B, and P2C as varied as aforesaid in this order, all the warrants of commitments fall within limits contemplated in the aforesaid sections.

Hence the varied punishment in the warrants of commitment will be as follows;

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	ii. Theft of goods worth Rs. 200000/-		<p>2 Years' R.I and Rs.1000/- fine, 6 months' S.I for default of payment of fine.</p> <p>(Aggregate – 2 years' R.I exclusive of default sentences)</p> <p>In addition, 6 Months' under Prevention of Crimes Ordinance.</p> <p>Suspended sentences dated 26.02.2009,25.02.2009, 27.02.2009 and 27.03.2009 in following Gampaha M.C. cases are enforced with this conviction. No.21247,31249,31248, 22663</p>
M.C. Kaduwela Case No.35231	<p>i.House breaking</p> <p>ii Theft of goods worth Rs.182000/-</p>	09.10.2013/06.11.2013	<p>Rs. 1000 fine ,6 months' S.I for default of payment of fine</p> <p>2 years' R.I and Rs.1000/- fine,6 months' S.I for default of payment of fine</p> <p>(Aggregate – 2 years' R.I exclusive of default sentences)</p> <p>In addition, 6 Months' R.I under Prevention of Crimes Ordinance</p>

			Suspended sentences dated 25.02.2009,27.02.2009 and 27.03.2009 imposed by Gampaha M.C are enforced.
M.C. Kaduwela case No.35232	i.House breaking  ii Theft of goods worth Rs. 24500/=	09.10.2013/06.11.2013	Rs.1000/- fine,6months' S.I for default of payment of fine  2 years' R.I and Rs.1000/- fine, 6 months' S.I for default of payment of fine  (Aggregate- 2 years' R.I exclusive of default sentences)  In addition, 6 Months' R.I under the Prevention of Crimes Ordinance. Suspended sentences dated 25.02.2009,27.02.2009 and 27.03.2009 imposed by Gampaha M.C are enforced

▪R. I- Rigorous Imprisonment

▪ S.I- Simple Imprisonment

- The endorsements made by the learned magistrate subjecting the petitioner to rehabilitation during imprisonment as well as to police observation for two years after the imprisonment remain.

The Registrar is directed to inform the prison authorities and the relevant magistrate's courts of the variations done by this order and the relevant warrants of commitment have to be understood subject to the variations done by this order.

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E.A.G.R. Amarasekera, J

I agree.

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A.H.M.D. Nawaz, J.