

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.

Kobbegala Udagama Gedera Devayalage Sanjeewa
Thusitha Kumara,
Prisoner No. R 49031
Welikada Prison,
Baseline Road, Colombo

Petitioner

C.A./MC/RE Application No. 6/2017

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 with S. Ekanayaka for the Petitioner.

Nayomi Wickeramasekara SSC for the Respondent.

Decided on: 25.05.2018.

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 submission 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' courts of Minuwangoda and Pilessa.

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. Minuwangoda Case No. 40619	<p>i. House breaking by night-</p> <p>ii Theft of goods worth Rs. 857000/-</p> <p>iii Disposal of Stolen Property</p> <p>iv Retention of stolen property</p>	11.11.2013/09.12.2013	<p>2 Years' R.I</p> <p>2 Years' R.I</p> <p>1 Year's R.I</p> <p>1 year's R.I</p> <p>(Aggregate – 6 years' R.I)</p>
M.C. Pilessa Case No.61474/PC	<p>i. House breaking by night -</p> <p>ii Theft of goods worth Rs. 40000/-</p> <p>iii Disposal of stolen property</p>	04.04.2014/04.04.2014	<p>-----</p> <p>1 Year's R.I and Rs.1500/- fine. 1 Month's S.I in default of payment of fine</p> <p>1 Year's R.I and Rs.1500/-fine. 1 Month's S.I in default of payment of</p>

			<p>fine. Rs.50000/- compensation. 6 month's S.I in default of payment of compensation.</p> <p>(Aggregate – 2 years' R.I exclusive of default sentences)</p>
M.C. Pilessa case No.66228/ PC	<p>i. House breaking by night</p> <p>ii Theft of goods worth Rs. 23850/-</p> <p>iii Disposal of stolen property</p>	19.05.2014/30.06.2014	<p>-----</p> <p>18 months' R.I Rs.1500/- fine. 1 Month's S.I in default of payment of fine.</p> <p>6 months' R.I Rs.1500/-fine. 1Month's S.I in default of payment of fine.</p> <p>Rs.45000/- compensation. 4 Month's S.I in default of payment of compensation.</p>

			(Aggregate- 2 years R.I exclusive of default sentences)
M.C. Pilessa case No. 62492/PC	<p>i. House breaking by night</p> <p>ii Theft of goods worth Rs. 12000/-</p>	11.06.2014/30.06.2014	<p>-----</p> <p>2 Years' R.I Rs.1500/- fine. 1 Month's S.I in default of payment of fine. Rs.20000/- Compensation. 4 Month's S.I in default of payment of Compensation.</p> <p>(Aggregate – 2 Years R.I. exclusive of default sentences)</p>

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

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

10 of the petition, the petitioner states that the aforesaid sentences imposed by the aforesaid magistrates' courts are partly illegal for the following reasons;

- a) In each of the said cases the relevant learned magistrate has convicted and sentenced the petitioner under 2 or 3 counts – a) house breaking, b) theft, c) disposal or d) retention of stolen property
- b) In M.C. Minuwangoda case the petitioner has been convicted and sentenced for 4 counts of house breaking, theft, retention of stolen property and disposal of stolen property.
- c) In the same case the petitioner has been sentenced to 6 years exceeding the jurisdiction of the Magistrate's court.
- d) 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 in paragraph 11 of his petition further tries to bring to the notice of this court that the sentences imposed in respect of certain offences are illegal as they are alternative offences. In paragraph 12, the petitioner states that there is no provision for ordering an accused in a theft case to pay compensation in respect of a theft committed and the default sentence for non-payment of compensation is illegal.

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 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 13 of his petition states that he is unable to obtain the case records and only evidence available is the warrants of commitment. The Petitioner has got the service of a lawyer to present this application. The Petitioner does not reveal why the lawyer could not get copies of the proceedings 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 Magistrates in their sentencing orders with regard to some of the aforesaid convictions and sentences, as the learned magistrates have convicted and sentenced the petitioner for theft, disposal of stolen property and/or retention of stolen property at one trial or on 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 conviction and sentences in those cases intact.

1. M.C. Minuwangoda Case No. 40619
2. M.C. Pilessa Case No. 61474
3. M.C. Pilessa Case No. 66228/PC

In M.C. Pilessa Case No. 62492/PC, though the Petitioner was convicted and sentenced for theft he was not convicted for separate counts on disposal of stolen property and/or retention of stolen property along with the charge of theft. Therefore, this court does not wish to make any alteration to the sentences that inflicted direct imprisonment in that case namely M.C.Pilessa Case No. 62492/PC.

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 punishment prescribed therefor 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. As per section 17(4)(6)(7) of the Criminal Procedure Code Magistrates have jurisdiction to order compensation up to Rs.100000/- and recover them as if it were a fine. Therefore, this court cannot find any illegality in ordering compensation in cases no.61474,66228/PC, and 62492/PC.

In that backdrop when this court looks at the warrants of commitment marked as P2, P3A, P3B, and P3C as varied as aforesaid in this order, all the warrants of commitments fall within limits contemplated in the aforesaid sections.

Hence this court varies the punishment in the warrants of commitments in the following manner.

Case No	Offence/count	Date of conviction/sentence	Sentence.
M.C. Muwanga Case No. 40619	i. House breaking by night- ii Theft of goods worth Rs. 857000/-	11.11.2013/09.12.2013	2 Years' R.I 2 Years' R.I (Aggregate – 4 years' R.I)
M.C. Pilessa Case No.61474/PC	i. House breaking by night -	04.04.2014/04.04.2014	-----

	ii Theft of goods worth Rs. 40000/-		1 Year's R.I and Rs.1500/- fine. 1 Month's S.I in default of payment of fine Rs.50000/- compensation. 6 month's S.I in default of payment of compensation. (Aggregate – 1 year's R.I exclusive of default sentences)
M.C. Pilessa case No. 66228/ PC	i. House breaking by night ii Theft of goods worth Rs. 23850/-	19.05.2014/30.06.2014	----- 18 months' R.I Rs.1500/- fine. 1 Month's S.I in default of payment of fine. Rs.45000/- compensation. 4 Month's S.I in default of payment of compensation.

			(Aggregate- 18Months' R.I exclusive of default sentences)
M.C. Pilessa case No. 62492/PC	<p>i. House breaking by night</p> <p>ii Theft of goods worth Rs. 12000/-</p>	11.06.2014/30.06.2014	<p>-----</p> <p>2 Years' R.I Rs.1500/- fine. 1 Month's S.I in default of payment of fine. Rs.20000/- Compensation. 4 Month's S.I in default of payment of Compensation.</p> <p>(Aggregate – 2 Years R.I. exclusive of default sentences)</p>

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

The Register is directed to inform the prison authorities and the relevant magistrates' courts of the variations done by this order and the relevant warrants of commitments have to be understood subject to the variations done by this order.

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E.A.G.R. Amaraskera, J

I agree.

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