

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

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

C.A./MC./RE Application No. 03/2017

Pelena Withana Arachchilage Ariyapala,
Prisoner No. J 10514
Welikada Prison,
Baseline Road, Colombo.

Petitioner.

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. Thiranagamafor the Petitioner.

NayomiWickeramasekara 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 submission 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.

As shown by the warrant of commitment marked P2, the Petitioner has been convicted and sentenced by Colombo Chief Magistrate's Court in M. C. Colombo Case No.36432/5 on 15.05.2005 for 1 year's R.I for committing a theft of a gold necklace worth Rs. 9500/=.

Furthermore, the learned Magistrate has enforced 35 years of suspended sentences of imprisonment imposed previously in 15 cases.

Details of the enforced suspended sentences are given below:

Case No.	Sentence
Colombo C.M.C. case No. 69431/2	2 Years' R. I
Colombo C.M.C. Case No. 69432/2	2 years' R.I.
Colombo C.M.C. Case No. 69433/2	2 Year's R.I.
Colombo C.M.C. Case No. 69435/2	2 Years' R. I
Colombo C.M.C. Case No. 69437/2	2 Years' R.I.
Colombo C.M.C. Case No. 69438/2	2 Years' R. I
Colombo C.M.C. Case No. 70365/2	2 Years' R. I
Colombo C.M.C. Case No. 71577/2	2 Years' R. I
Colombo C.M.C. Case No. 69822/3	3 Year's R. I
Colombo C.M.C. Case No. 69823/3	3 Year's R.I.
Colombo C.M.C. Case No. 69825/3	3 Years' R.I.
Colombo C.M.C. Case No.69826	3 Year's R.I.
Colombo C.M.C. Case No. 69827/3	3 Year's R. I
Colombo C.M.C. Case No. 69828/3	3 Years' R. I
MaligakandaM.C. Case No. B750/2	1 Years' R.I.

*R. I – Rigorous Imprisonment

This court observes that the document annexed to the copy of the warrant of commitment is not properly photocopied to contain the full contents. The above table was prepared using the copy of the warrant of commitment and its annexure marked P2 and the paragraph 6 of the petition.

In his petition, the Petitioner starts 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:

- a) A Magistrate's Court is not bound to mechanically enforce suspended sentences imposed on the same day in several cases.
- b) Section 303(13) of the Criminal Procedure Code has given courts a wide discretion to deal with an offender judiciously instead of mechanically enforcing suspended sentences.

- c) Mechanical enforcement of such suspended sentences is manifestly illegal where the suspended sentences have been imposed in respect of offences for which a person cannot be convicted and sentenced.

The Petitioner has filed only the warrant of commitment relating to aforesaid caseno. 36432/5 to substantiate his case. Signing of a warrant of commitment by a judge is a ministerial act. In fact, what is expected to be revised by this application is the sentencing order in the aforementioned case no.36432/5 that enforced the suspended sentences. The Petitioner neither has tendered relevant sentencing order in case no. 36435/5 nor the sentencing orders of cases where those suspended sentences were inflicted with this application.

The Petitioner has not submitted for the consideration of this court any of the mitigatory grounds placed before the learned Magistrate before the learned magistrate made his sentencing order. Neither has the Petitioner tendered any of the charge sheets related to any of the cases he has referred to in this application.

The Petitioner in paragraph 8 of his petition states that the case records of these cases are not available and only evidence available is the warrant of commitment marked P2. If the case records are not available it is useless to issue notices to produce the records. On the other hand, the delay on the part of the Petitioner in filing this application would have caused the difficulty in getting the necessary documents to be produced in this court.

The Petitioner's allegation is that without using the wide discretion given in section 303(13) the learned Magistrate has mechanically enforced the suspended sentences. The Petitioner has not placed before this court sufficient material to show that relevant learned Magistrate has enforced suspended sentences mechanically. The Petitioner should have marked with this petition the relevant proceedings before the learned Magistrate. He should have shown this court the facts that were available to the learned Magistrate to act differently. On the other hand, it is clear from the application itself that the Petitioner had been convicted on many occasions indicating that he had been habitually engaging in committing crimes. Therefore, I do not think that there are sufficient materials placed before this court to show that the learned Magistrate should have acted leniently.

The counsel for the Petitioner refers to section 303(2) of the Criminal Procedure Code and argues that court shall not make an order suspending a sentence if the

term of imprisonment imposed or the aggregate terms of imprisonment where the offender is convicted of more than one offence in the same proceedings exceeds two years. This applies for the imposition of suspended sentences but not for the enforcement of already imposed suspended sentences. On the other hand, the aggregate sentence of two years contemplated therein has to be in the same proceedings but not in different cases. Here in this instance the suspended sentences which were imposed belong to 15 separate proceedings. However, this court observes that there had been suspended 3 years' rigorous imprisonment imposed in each of the following cases.

- Colombo C.M.C. Case No. 69822/3
- Colombo C.M.C. Case No. 69823/3
- Colombo C.M.C. Case No. 69825/3
- Colombo C.M.C. Case No. 69826
- Colombo C.M.C. Case No. 69827/3
- Colombo C.M.C. Case No. 69828/3

The proceedings of the above cases are not available for perusal by this court to see how or why the suspension of 3 years' rigorous imprisonments were imposed but as per section 303(2) (d) of the Criminal Procedure Code a court shall not suspend a term of imprisonment that exceeds 2 years. Therefore, learned magistrates should have enforced such terms of imprisonments on the day they were imposed and now after getting the benefit of suspension, the Petitioner should not be allowed to say that only 2 years' rigorous imprisonment can be enforced out of the term of each 3 years' rigorous imprisonment.

For the forgoing reason this court does not wish to use its discretion to revise sentences contained in the warrant to commitment marked with this application.

Hence this application is dismissed.

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E.A.G.A. Amarasekera, J

I agree.

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A.H.M.D. Nawaz, J