

**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. 04/2017

Welisarage Laksman Nishantha Fernando
Prisoner No. O 43605
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. Tiranagama with s. Ekanayaka for the Petitioner.

Nayomi Wickeramasekara SSC for the Respondent.

Decided on: 08.06.2018

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.

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 Magistrate's court of Attanagalla.

Details of the relevant convictions and sentences as per the warrants of commitment annexed to the application are given below;

M.C Attanagalla Case No.	Offence/Count	Date of conviction/sentence	Sentence.
29851	Count (1) Robbery	15.05.2002/14.07.2010	1 Year's R. I
	Count (2) Dealing in Stolen Property		1 Year's R. I Aggregate 2 Years' R.I
29854	Count (1) Robbery	24.07.2010/17.02.2010	2 years' R. I
	Count (2) Dealing in Stolen Property		2 Years' R. I Aggregate 4 years R. I
29856	Count (1) Robbery	24.07.2002/17.02.2010	2 Years' R.I.
	Count (2) Dealing in Stolen Property		2 years' R I
29811	Count (1)- Robbery	04.09.2006/26.10.2010	2 Years' R.I and Rs.2500/=fine.6 months' R.I in default of payment of fine
	Count (2)-Dealing in Stolen Property		2 years' R.I and Rs.2500/=fine .6 Months' R.I in default of

			Payment of fine. Aggregate 4 years' R.I exclusive of default sentence
M.C. Attanagalla Case No.	Offence/Count	Date of conviction/sentence	of sentence
29813	Count (1) Robbery Count (2) Dealing in Stolen Property	24.09.2006/26.10.2010	2 Years' R.I. and Rs.2500 fine. 6 months' R.I. in default of payment of fine. 2 Years' R.I and Rs.2500/- fine. 6 months R.I in default of payment of fine. Aggregate 4years' R.I exclusive of default sentence

*R. I – Rigorous Imprisonment

*S. I – Simple Imprisonment

The above table was prepared using the copies of warrants of commitments marked P2A, P2B, P2C, P2D, and P2E annexed to 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 the aforesaid sentences imposed by the magistrate's court of Attanagalla are partly illegal for the following reasons:

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- a) In all these cases, the learned Magistrate has convicted and sentenced the Petitioner under 2 counts- a. robbery -S. 380- b. dealing in stolen property under S.395 of the Penal Code.
- b) In a number of cases in the Supreme Court and the your Lordship Court have held that, theft or robbery, retention and disposal of stolen property being alternative offences, the same person cannot be convicted and sentenced in respect of all three counts, and he can be convicted and sentenced only in respect one count.” (sic)

He further states that he cannot be legally convicted and sentenced for count two in the said cases and all sentences imposed in respect of count two in the said cases are illegal sentences.

However, for the following reasons this court cannot grant reliefs as prayed for in the petition;

- a) The petitioner had filed revision applications in Gampaha High Court seeking revision of the said orders made by the learned magistrate and the said high court has dismissed the applications. (vide paragraph 8 of the petition). It must be noted that high courts now exercised the same revisionary jurisdiction once this court exercised over magistrate courts. As he has filed revision applications on the same orders previously in the High Court of Gampaha he has exhausted his remedy. His position is that his lawyers have not brought to the notice of High Court the facts averred in this petition. A party to an action cannot be given a chance to have a second bite of the same cherry. If this court allows this application it may create a bad precedent to allow a party who fails to present his case properly file another application.

- b) The petitioner could have appealed to the Supreme Court against the judgment of the High Court but he does not reveal whether he used that right or if not why. When he does not explain his failure to use his right of appeal this court shall not use its extra ordinary jurisdiction to rectify the alleged harms. If one sleep over his rights this court need not use its extra ordinary jurisdiction to grant reliefs.

- c) Once the High court confirms the magistrate court orders they become orders of the High Court. There is no prayer in the petition to revise the orders of the High Court.

For the forgoing reason this court does not wish to use its discretion to revise sentences contained in the warrants of 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