

SC.Appeal No. 82/2016.

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

In the matter of an application for Special Leave to Appeal
in terms of Article 127 read with Article 128 of the
Constitution of the Democratic Socialist Republic of Sri
Lanka.

SC.Appeal No. 82/2016.

SC(SPL) LA.Application No. 101/2015

High Court Colombo Case:- HCMCA 20/2014

Magistrate Court Colombo Case No. 28028/03

- 1) Manohar Aranraj,
No.49, Sri Bhodhiraja Road,
Amor Street,
Colombo-12.
- 2) Mahalingam Gopinath,
No.59/36, 5th Lane,
St.Benedicts Road,
Kotahena,
Colombo-13.

Sureties-Appellants-Petitioners

-Vs-

- 1) Officer-in-Charge,
(Unit 07)
Colombo Fraud Investigation Bureau,
Colombo-06.

Complaint-Respondent-Respondent

1. Hon. Attorney-General
Attorney-General's Department,
Colombo-12.

Respondent-Respondent

- 3) Pushparaja Gokulam,
1st Floor,
Super market,
Kotahena.

Accused-Respondent-Respondent

Before: **Sisira J.de Abrew, J**

 Nalin Perera, J &

 Vijith K.Malalgoda, PC, J

Counsel: Amila Palliyage with Ms. Sandeepani Wijesooriya and Nihara
 Randeniya for the Sureties-Appellants-Petitioners-Appellants.

 Sanjeeva Dissanayake SSC for the Respondents.

Argued &
Decided on: 21.09.2017

Sisira J.de Abrew, J

Heard both counsel in support of their respective cases. The appellants in this case signed a bail bond for Rs. 02 millions (each appellant signed a bond for Rs. One million) to produce the accused on each and every day that the case is called. The accused did not appear

in Court and the learned Magistrate issued warrants on the accused and the sureties and after inquiry the learned Magistrate made an order dated 28.11.2013 to forfeit the money stated in the bail bond. Since they failed to pay the said amount, the Magistrate made an order to recover the said amount, as a fine. In default of the fine he sentenced the sureties to 06 months Simple Imprisonment.

Being aggrieved by the said order of the learned Magistrate dated 28.11.2013, the appellants appealed to the High Court and the learned High Court Judge by order dated 15.05.2015 dismissed the appeal.

Being aggrieved by the said order of the High Court Judge, the appellants have appealed to this Court. When a surety is produced before a Magistrate for failure to produce the suspect or the Accused he must act under section 422(2) of the Criminal Procedure Code which reads as follows:- “ *If sufficient cause is not shown, and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the moveable or immovable property belonging to such person* ” . The most important question that must be decided in this case is whether the learned Magistrate has acted under section 422(2) of the Criminal Procedure Code. Both parties admit that the learned Magistrate has failed to act under section 422(2) of the Criminal Procedure Code (CPC).

The Magistrate is empowered to act under section 422(4) of the CPC, only after he complied with section 422(2) of the CPC. Section 422(4) reads as follows:- “ *If such penalty be not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable by order of the Court which issued the warrant to simple imprisonment for a*

term which may extend to 06 months ". As I observed earlier the learned Magistrate has failed to comply with section 422(2) of the Criminal Procedure Code. He has failed to give reason for not complying with section 422(2) of the Criminal Procedure Code. In my view if a Court intends to make an order under section 422(4) of the CPC, the said Court should first act under section 422(1),(2) of the CPC. A Court cannot act under section 422(4) of the CPC without acting under section 422(1),(2) of the CPC. This view is supported by the Judicial decision in ***De Silva Vs S.I. Police- Kandy 63 C.L.W. Page 109*** wherein Supreme Court held as follows:- “ *The order of forfeiture should be set aside as the learned Magistrate had failed to comply with the provisions of section 411(1) and (4) of the Criminal Procedure Code. He should have recorded the grounds of proof that the bond had been forfeited and it is only if the penalty cannot be recovered by attachment and sale that he could have imposed the sentence on him for imprisonment.*” Section 411(4) of the old Criminal Procedure has been reproduced as section 422(4) of the CPC. As I observed earlier, the learned Magistrate had failed to comply with section 422(1),(2) of the Criminal Procedure Code. Therefore he could not have acted under section 422(4) of the CPC. It appears that the learned Magistrate was too quick in sentencing the appellants.

We therefore hold that the order of forfeiting money stated in the bail bond, imposing the fine and sentencing the appellants (sureties) to six months simple imprisonment is clearly wrong. We therefore set aside the order of the learned Magistrate dated 28.11.2013. If the learned Magistrate's order is wrong, the order of the High Court Judge refusing to set aside the said order of the Magistrate is also wrong. The learned High Court Judge has failed to consider the said provisions of the Criminal Procedure Code. We therefore set aside the order of the learned High Court Judge dated 15.05.2015.

The learned Magistrate is hereby directed to act under section 422 of the Criminal Procedure Code in order to recover the amount stated in the bail bonds from each surety.

Appeal is allowed. Both orders of the Magistrate and the High Court Judge are set aside. The Registrar of this Court is directed to communicate this order to the Magistrate's Court and the High Court forthwith.

JUDGE OF THE SUPREME COURT

Nalin Perera, J

I agree.

JUDGE OF THE SUPREME COURT

Vijith K.Malalgoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT

kpm/-