1951 *Present:* **Pulle J.**

ARNOLIS APPU *et al.*, Appellants *and* ESWARAPATHAM (Police Sergeant), Respondent

S. C. 1215-1216—M. C. Nuwara Eliya, 6,559

Sentence—Detention till rising of Court—Cannot be regarded as imprisonment—Criminal Procedure Code, s. 15A—Payment of Fines (Courts of Summary Jurisdiction) Ordinance, ss. 2, 3, 4.

The accused were, after a summary trial, convicted of house-breaking and sentenced to detention until the rising of the Court and to pay a fine of Rs. 1,000, in default six months' rigorous imprisonment—

Held, that the sentence of detention was not a sentence of imprisonment within the meaning of section 15A of the Criminal Procedure Code as amended by Ordinances Nos. 47 of 1938 and 59 of 1939. The Court should have, therefore, before imposing the fine, taken into consideration the means of the accused persons and complied with the provisions of the Payment of Fines (Courts of Summary Jurisdiction) Ordinance.

APPEAL from a judgment of the Magistrate's Court, Nuwara Eliya.

W. D. Gunasekera, with *H. B. White*, for the accused appellants.

N. T. D. Canekeratne, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 4, 1951. PULLE J.—

The appellants who are respectively the first and second accused were charged with four others with committing house-breaking and theft. The appellants alone were convicted after a summary trial, and each of them was sentenced on the 31st October, 1951, on the charge of house-breaking to *detention* until the rising of the Court and to pay a fine of Rs. 1,000, in default six months' rigorous imprisonment, and on the charge of theft to pay a fine of Rs. 10, in default one week's rigorous imprisonment. If the fine was paid the complainant was to receive Rs. 900. Bail was ordered in a sum of Rs. 2,000 with one surety, in the event of appeal. Bail was not furnished and the appellants were committed to prison the same day.

The only point urged against the convictions is that there has been a misjoinder of charges in that the fourth accused was charged with the dishonest retention of two of the stolen articles. I do not think there is any substance in the objection because all the six accused persons were charged jointly with house-breaking and theft and therefore the additional charge against the fourth accused arising out of the same transaction did not constitute a misjoinder.

The second point taken is that the sentences of fines, especially on the count of house-breaking, have been imposed without compliance with the provisions of the Payment of Fines (Courts of Summary Jurisdiction) Ordinance, No. 49 of 1938. For the purpose of applying section 2 of this Ordinance it must be shewn that the appellants were not sentenced to imprisonment. Now the sentence of *detention* is not a sentence of imprisonment when one has regard to section 15A of the Criminal Procedure Code (Cap. 16) as amended by Ordinances Nos. 47 of 1938 and 59 of 1939. This section prohibits the passing of a sentence of imprisonment of less than seven days. I am, therefore, of the opinion that the learned Magistrate should have, before imposing the fines, taken into consideration the means of the appellants and not fixed default terms or committed the appellants to prison without giving his mind to the matters laid down in sections 3 and 4. The manner in which the Court should apply the Ordinance is laid down by Gratiaen J., in *re Velin et al.*[1] The resulting position is that their detention in prison is illegal.

I would affirm the convictions but set aside the sentences, *pro forma*, and order that the appellants be released immediately. The record will go back to the learned Magistrate to enable him to pass sentence after complying with Ordinance No. 49 of 1938.

As the appellants have been in prison since the 31st October the learned Magistrate will in assessing the sentence take this factor into account.

Convictions affirmed.
Sentence varied.

[1] *(1951) 52 N. L. R. 337.*