

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

In the matter of an Appeal under
Article 154P (6) of the Constitution of
the Democratic Socialist Republic of
Sri Lanka.

Officer in Charge,
Police Station,
Wellawatta.

Complainant

Vs.

C.A. Case No: **CA (PHC) 07/2013**

P.H.C. Colombo Case No:
HCRA 163/2012

M.C. Wellawatta Case No: **54060**

Carder Mohideen Mohamed Nasar,
No. 15, 46th Lane,
Wellawatta.

Accused

AND BETWEEN

Carder Mohideen Mohamed Nasar,
No. 15, 46th Lane,
Wellawatta.

Accused-Petitioner

Vs.

Officer in Charge,
Police Station,
Wellawatta.

Complainant-Respondent

The Attorney General
Attorney-General's Department,
Colombo 12.

Respondent

AND NOW BETWEEN

Carder Mohideen Mohamed Nasar,
No. 15, 46th Lane,
Wellawatta.

**Accused-Petitioner-
Appellant**

Vs.

Officer in Charge,
Police Station,
Wellawatta.

**Complainant-Respondent-
Respondent**

The Attorney General
Attorney-General's Department,
Colombo 12.

Respondent-Respondent

BEFORE : K. K. Wickremasinghe, J.
Mahinda Samayawardhena, J.

COUNSEL : Shanaka Ranasinghe, PC with AAL
Sandamali Pieris and AAL Nisith
Abey Suriya for the Accused-Petitioner-
Appellant

Nayomi Wickremasekara, SSC for the
Respondent-Respondents

ARGUED ON : 21.03.2019

WRITTEN SUBMISSIONS : The Accused-Petitioner-Appellant – On
22.05.2019
The Respondent-Respondents – On
31.05.2019 & 28.08.2018

DECIDED ON : 10.10.2019

K.K.WICKREMASINGHE, J.

The Accused-Petitioner-Appellant has filed this revision application seeking to revise the order of the Learned High Court Judge of Provincial High Court of Western province holden in Colombo dated 01.02.2013 in case No. HCRA 163/2012 and seeking to revise the order of the Learned Magistrate of Mt. Lavinia dated 12.10.2012 in case No. 54060.

Facts of the case:

The accused-petitioner-appellant (hereinafter referred to as the ‘appellant’) was charged in the Magistrate’s Court of Mt. Lavinia under case No. 54060, for an

offence punishable under the Primary Courts Procedure Act. The charge was read over to the appellant in open court and the appellant pleaded not guilty. Accordingly, a trial commenced and proceeded against the appellant. The appellant raised a preliminary objection stating that the Learned Magistrate had no jurisdiction since the appellant moved in revision to the High Court under case No. HCRA 58/2010. On 03.02.2011, the Learned Magistrate made an order overruling the said preliminary objection. In the said order, the Learned Magistrate had reproduced the charge and included penal section i.e. Section 73 of the Primary Courts Procedure Act, in the said charge. At the trial, the prosecution led evidence of PW 02, 03 and 05 and all the witnesses were cross-examined on behalf of the appellant.

At the conclusion of the prosecution case, the Learned Counsel for the appellant made an application in terms of section 186 of the Code of Criminal Procedure Act, to acquit or discharge the appellant since the charge sheet did not contain a penal section. The prosecution sought permission of Court to amend the charge and the Learned Magistrate allowed the same. The appellant preferred an application for revision against the said order of the Learned Magistrate. The Learned High Court Judge of Colombo refused to issue notice on the respondent and dismissed the said revision application. Being aggrieved by the said dismissal, the appellant preferred this appeal.

The Learned President's Counsel for the appellant contended that the judgment of the Learned High Court Judge is contrary to law and is against the principles of law.

At this juncture, it is imperative to look into relevant sections in the Code of Criminal Procedure Act (hereinafter referred to as the 'CCPA'), on framing

charges and amending charges. As per section 164 of CCPA, there are certain components that need to be mentioned in a charge. Section 164(4) states that law and section of the law, under which the offence said to have been committed is punishable, shall be mentioned in the charge. The Learned President's Counsel for appellant argued that this requirement in section 164 (4) is mandatory. However, as per section 166 of CCPA, any error in stating either the offence or the particulars required to be stated in the charge and any omission to state the offence or those particulars shall not be regarded at any stage of the case as material, unless the accused was misled by such error or omission. There are several case laws decided on this question which I wish to refer to at this stage.

In the case of **Jayarathne Banda V. Attorney General (1997) 3 Sri LR 210**, it was held that,

"...The defence the accused-appellant had taken was a simple denial of the commission of the crime. There is nothing in the petition of appeal to indicate that due to the mistake in the indictment the accused-appellant was misled and thereby caused prejudice to his defence. In the circumstances it is not difficult for us to conclude that the presence or absence of the 'error' could not have made any difference to the general conduct of the defence and therefore cannot be regarded as a material error in terms of Section 166 of the Code..."

In Molagoda v. Gunaratne (39 NLR 226) Counsel for the accused-appellant sought to elevate the question of the wrong Gazette in the charge to a fundamental defect of procedure. He contended that an omission to frame a charge in accordance with the provisions of the Criminal Procedure Code was an omission to frame a charge at all. This argument was rejected by the

Supreme Court which held that a breach of a specific rule of law in the Code was curable by the application of Section 425 of the Old Criminal Procedure Code (which is equivalent to section 436 of the present Code) if the breach had not caused a failure of justice..."

In the case of **Nandesena V. IP, Ragala (1961) 66 NLR 300**, it was held that,

"...There is an obvious error in respect of the section charged, for the section should be section 68 (8) and not 69 (8), but that error is one which I am satisfied, has not occasioned a failure of justice. Applying section 425 of the Criminal Procedure Code I hold that the accused is not entitled to claim an acquittal on that account..."

In the case of **D.R.M. Pandithakoralge V. V.K. Selvanayagam (56 NLR 143)**, it was held that,

"There can be no doubt that the accused was in no way misled by the mistake as regards the date in the plaint. In the case of William Edward James (17 CAR 116) it was held that a mistaken date in an indictment, unless the date is of the essence of the offence or the accused is prejudiced, need not be formally amended..."

In the case of **R.T. Wilbert and 3 others V. Newman (75 NLR 138)**, it was held that,

"However, a charge which is bad for duplicity is not necessarily fatal to the conviction if it has not caused prejudice to the accused and is curable under section 425 of the Criminal Procedure Code..."

In the case of **Weerasinghe V. Samy Chettiyar (43 NLR 190)**, it was held that,

“...It is true that the attention of the appellant was not directed to the fact that he committed an offence under this particular section of the law. On the other hand, I do not think that he has been prejudiced in any way by such failure to direct his attention to the right section. I think the case is met by section 171 of the Criminal Procedure Code...”

The Learned SSC for the complainant-respondent-respondent and the respondent-respondent (hereinafter referred to as the ‘respondents’) submitted several decided cases including the following;

- 1. Pieris V. Gunasekara [17 NLR 476]**
- 2. Meera Natchiya V. Marikar [41 NLR 319]**
- 3. Wickramasinghe V. Chandradasa [67 NLR 550]**

In the case of **Meera Natchiya**, it was held that,

“...I think a reference in the charge to the name of the offence as specified in the Code was sufficient to give the appellant notice of the matter with which he was charged. In the circumstances of this case, moreover, the omission to state the proper particulars was not material inasmuch as the accused could not be said to have been misled by such omission...”

In the case of **H.P.D. Nimal Ranasinghe V. OIC, Police, Hettipola [SC Appeal 149/2017]**, it was held that,

“The question that must be decided is whether any prejudice was caused to the accused-appellant as a result of the said defect in the charge sheet or whether he was misled by the said defect. It has to be noted here that the accused-appellant, at the trial, had not taken up an objection to the charge sheet on the basis of the said defect. In this connection judicial decision in

the case of Wickramasinghe Vs Chandradasa 67 NLR 550 is important. Justice Sri Skanda Rajah in the said case observed the following facts.

“Where in a report made to Court under Section 148(1)(b) of the Criminal Procedure Code, the Penal Provision was mentioned but, in the charge sheet from which the accused was charged, the penal section was not mentioned.”

His Lordship held as follows;

“The omission to mention in a charge sheet the penal section is not a fatal irregularity if the accused has not been misled by such omission. In such a case Section 171 of the Criminal Procedure Code is applicable.”

Some of these cases were decided under the previous Criminal Procedure Code No. 15 of 1898. Therefore, it is imperative to note that section 166 of the Code of Criminal Procedure Act 15 of 1979 is equivalent to section 171 of the previous code whereas section 436 of the Code of Criminal Procedure Act is equivalent to section 425 of the Previous Code.

In light of above, it is manifestly clear that mere absence of the penal section would not be regarded as a fatal error unless the appellant was misled or grave prejudice was caused due to such omission. I observe that in the instant appeal, the charge contains the particulars such as the date of offence, the place of offence and a lengthy description of the offence committed. I think the charge is descriptive enough to give the appellant of notice as to, for what he is being charged. Therefore, I am of the view that no prejudice had been caused to the appellant by mere omission of the penal section.

The Learned President's Counsel for the appellant contended that the Learned High Court Judge failed to analyze that the Learned Magistrate erred in law by permitting the prosecution to amend the defective charge and it is the duty of a Magistrate to frame charge and not of the prosecution. The Learned President's Counsel further argued that the Learned High Court Judge erred in law by ordering that the appellant had a burden to point out to the Magistrate about the defect of the charge. The cases of **Abdul Sameem V. The Bribery Commissioner (1991) 1 SLR 76** and **David Perera V. Attorney General and another** (case reference or a copy of the case was not submitted) were cited in support of this contention.

In answer to the said contention, the Learned SSC for the respondents submitted that under section 167 of the CCPA, any court may alter any indictment or charge at any time before judgment is pronounced, or in the case of trials before the High Court by a jury, before the verdict of the jury is returned.

I observe that in the case of Abdul Sameem (supra), the issue of failure to frame a charge sheet by the Learned Magistrate was discussed. In the case of Abdul Sameem, a written report was filed by the Bribery Commissioner, that the accused had committed two offences under the Bribery Act and the Magistrate adopted the said report by placing a seal. Therefore, there had been a total failure to frame a charge by the Learned Magistrate. In the instant case before us, the Learned Magistrate duly framed the charge, complying with section 182 (1). Therefore, I do not find that the Abdul sameem case to be supportive of the contention made by the Learned President's Counsel. Since the Magistrate is empowered to amend a charge, prior to delivering the judgment, allowing the prosecution to make necessary amendment did not cause any injustice or prejudice. Even though the charge was physically amended by the prosecution, it was under the authority and

order of the Learned Magistrate. Therefore, there is no prejudice caused to the appellant and further, there is no irregularity or illegality in the said order.

In the case of **H. G. Sujith Priyantha V. OIC, Police station, Poddala and others [CA (PHC) 157/2012]**, it was held that,

"In this instance, the claim of the appellant who is not an accused in the case had been made after the two accused were found guilty on their own plea. Therefore, it is understood that the Court was not in a position to consider the validity of the charge sheet at that belated point of time..."

Moreover, in the event this court makes a determination on the issue as to the defects in the charge sheet at this late stage, it may lead to raise questions as to the conviction of the accused as well. Such a position is illogical and certainly it will lead to absurdity. Such an absurdity should not be allowed to prevail before the eyes of the law..."

In the aforesaid case of **Jayaratne Banda (supra)**, it was further held that,

"...Had the objection to the indictment been taken at the trial it would have been open to Court to have acted under Section 167 of the Code of Criminal Procedure Act to amend the indictment. Senior Counsel for the appellant too conceded that it was open for the prosecution to have amended the indictment at any stage before the close of the prosecution case..."

In the case of **A.K.K. Rasika Amarasinghe V. Attorney General and another [SC Appeal 140/2010]**, it was held that,

"The Accused-Appellant has not raised an objection to the charge at the trial. In the first place we note that at page 97, the Accused-Appellant has admitted that he knows about the charge. As I pointed out earlier the Accused-Appellant has failed to raise any objections to the charge at the

trial. In this regard I rely on the judgment of the Court of Criminal Appeal in 45 NLR page 82 in King V. Kitchilan wherein the Court of Criminal appeal held as follows:

“The proper time at which an objection of the nature should be taken is before the accused has pleaded”

It is well settled law that if a charge sheet is defective, objection to the charge sheet must be raised at the very inception.”

Accordingly, I am of the view that the appellant should have raised his objection with regard to the charge at the commencement of the trial. Even though the appellant did not have a burden to point out to the Magistrate any defect in the charge sheet, it is trite law that an objection to charge should be raised as early as possible.

Therefore, not raising any objection shall be regarded as a waiver on the part of the appellant since it is implied that he clearly understood the charge. The appellant had pleaded not guilty and stood for trial. The Learned Counsel for the appellant, in the Magistrate's Court, had raised a preliminary objection once, but did not object to the charge sheet. The Learned Magistrate in the order, with regard to the said preliminary objection, had reproduced the charge and mentioned section 73 of the Primary Courts Procedure Act. Even the police plaint contained the relevant penal section. It appears that the absence of the penal section in the charge was a typographical error. Considering all these facts, I am of the view that the appellant did not raise any objection to the charge even though he had ample opportunity to do so. Therefore, he should not be allowed to throw technical objections at the procedure in order to delay the court proceedings.

Considering above, I see no reason to interfere with the orders of the Learned Magistrate and the Learned High Court Judge since both orders were made well within law. Therefore, I affirm the same.

The appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. Jayaratne Banda V. Attorney General (1997) 3 Sri LR 210
2. Nandesena V. IP, Ragala (1961) 66 NLR 300
3. D.R.M. Pandithakoralge V. V.K. Selvanayagam (56 NLR 143)
4. R.T. Wilbert and 3 others V. Newman (75 NLR 138)
5. Weerasinghe V. Samy Chettiyar (43 NLR 190)
6. Meera Natchiya V. Marikar [41 NLR 319]
7. H.P.D. Nimal Ranasinghe V. OIC, Police, Hettipola [SC Appeal 149/2017]
8. H. G. Sujith Priyantha V. OIC, Police station, Poddala and others [CA (PHC) 157/2012]
9. A.K.K. Rasika Amarasinghe V. Attorney General and another [SC Appeal 140/2010]