

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

In the matter of an Appeal in terms of
Section 331 of the Code of Criminal
Procedure Act No. 15 of 1979 read with
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

Court of Appeal No:
CA/HCC/0007/2024

The Democratic Socialist Republic of Sri
Lanka

Complainant

High Court of Kurunegala
Case No: HC/155/2022

Vs.

Baiya Dewayalage Sugathapala *alias*
Sugathe Seeya

Accused

AND NOW BETWEEN

Baiya Dewayalage Sugathapala *alias*
Sugathe Seeya

Accused – Appellant

Vs.

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

Complainant- Respondent

Before : Menaka Wijesundera J.
Wickum A. Kaluarachchi J.

Counsel : Dharshana Kuruppu with Tharushi Gamage and
Sahan Weerasinghe for the accused-appellant.
Jayalakshi De Silva, S.S.C. for the Respondent.

Argued on : 01.08.2024

Decided on : 10.09.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgement dated 27th of September 2023, by the High court of Kurunegala.

The accused-appellant has been indicted for 2 counts of grave sexual abuse within the period of 01/04/2014 to 16/10/2014.

The accused-appellant has pleaded not guilty and the prosecution has led the evidence of the victim, corroborative evidence of the family members, doctor and the police. Upon the conclusion of the prosecution case, the accused-appellant had made a statement from the dock and the wife of the accused had given evidence in favour of the appellant. Thereafter, the learned trial judge has convicted the accused-appellant for the first charge and acquitted him of the second.

The appellant being aggrieved by the said conviction and sentence has filed the instant appeal.

The main grounds of appeal raised by the counsel for the appellant were as below,

1. A specific date of offence had not been proved by the prosecution.
2. The accused-appellant had been given an undue burden to prove his innocence.
3. Contradictions has not been considered by the trial judge
4. The judgement is contrary to Section 283 of Code of Criminal Procedure Act.

The story of the prosecution relies mainly on the evidence of the victim. The victim does not state of a specific date of offence, but she has said that the

incident took place when she was in the 8th grade and that she complained to the police after three weeks from the incident, which has been 17/10/2014. Therefore, the prosecution has based its time period to be between 1/4/2014-16/10/2014.

Her evidence is that the appellant had been a known elderly person and she had been having a boyfriend, with whom she had not been able to communicate during the alleged period. Therefore, she had asked for money from the appellant to buy a phone card in order to communicate with the boyfriend. The appellant had said that he will give the money only if she concedes to the sexual act which he is supposed to have committed. Thereafter, she had been taken to a lonely spot and the appellant had sexually abused her. She had not immediately told anyone but her grandmother had seen her using a phone and had questioned her. Then she had told the grandmother as to how she had come to be in possession of the phone. Then the grandmother had told the father and the father had taken her to the police. This witness has been lengthily cross-examined and it has been suggested to her, that her father and the appellant were angry with each other. It has to be noted that in examination-in-chief, she had said that from the accused, she had only asked for money but later on that money had developed into a phone.

The father and grandmother had corroborated the victim's story.

The police had received the 1st complaint on 17-10-2014 and the investigation had commenced.

The doctor had examined her on 17-10-2014 and the history given to him had also been the same as the evidence-in-chief.

Upon the conclusion of the prosecution case, the appellant had made a statement from the dock and he had denied the whole incident but had said that he was implicated falsely because of the land dispute between the appellant and the victim's family.

The wife of the appellant had corroborated the dock statement of the appellant.

The first ground of appeal raised by the counsel for the appellant is that a specific date of offence has not been proved by the prosecution.

Section 165(1) of the Code of Criminal Procedure Act has specified that particulars as to time, place and persons should be mentioned. Section 165 of the Code of Criminal Procedure Act states as follows,

(1) The charge shall contain such particulars as to the time and place of the alleged offence and as to the person (if any) against whom and as to the thing (if any) in respect of which it was committed as are reasonably

sufficient to give the accused notice of the matter with which he is charged and to show that the offence is not prescribed.

- (2) *When the accused is charged with criminal breach of trust or dishonest misappropriation of movable property, it shall be sufficient to specify the gross sum or, as the case may be, the gross quantity in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 174:*

Provided that the time included between the first and last of such dates shall not exceed one year.

- (3) *When the nature of the case is such that the particulars mentioned in section 164 and the preceding subsections of this section do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.*

Therefore, with regards to the above section, every charge must contain the **time** and **place** of the alleged offence to give the accused notice of the matter of which he is charged with.

But if the accused is charged with criminal breach of trust or dishonest misappropriation of movable property it must be sufficient to mention the period (**dates**) in which the offences were alleged to have been committed without specifying a particular or exact date. But the instant offence is not of Criminal breach of trust or dishonest misappropriation of movable property. Therefore, it is important for the accused person to know a specific date to frame his defence.

This position has been lengthily discussed in the case of **Kamburawela Kankanamalage Dayarathne alias “Chuti mama” v The Attorney General**, CA 188/2015 decided on 22nd September 2017 by his Lordship S. Thirairaja PC, J, in which it has been stated that, “As per our constitution the accused is entitled for a fair trial, especially when there is a criminal prosecution the charge which includes the time and the place should be clearly informed to the accused, together with the relevant law.”

In the said judgement, the case of **Attorney General v Viraj Aponso and Others** S.C 24/2008, is quoted in which the Supreme Court has laid down guidelines for a fair trial and the said guidelines clearly stipulate that, *“It is clear, that it is the responsibility of the prosecution to inform the time, place and the offence clearly to the person who is charged. It is fundamental for the accused-appellant to formulate his defence.”*

In the same judgement quoted above, it is further stated that, *“If the accused wants to take up the defence of alibi, he cannot do so because there is no date or time given.”*

It has gone onto quote the case of **R.H.M.S Premathunga alias Ananda v Attorney General** CA 01/2013 decided on 31/01/2014 where Sisira J. De Abrew, J held that, *“.....is to give sufficient opportunity to the accused to answer the charge and ensure a fair trial.”*

The parallel section to 165 of our Code of Criminal Procedure Act is Section 212 of the Indian Code of Criminal Procedure, where the same ingredients of Section 165 of our code has been stated.

In the Indian case of **A.N Mukergi v State** A.I.R 1969 All 489 at page 496 and **Ram Asrey v State of U.P** 1982 A.L.J 1138, it has been stated that, *“The charge to state the offence and contain particulars as to the time and place of the alleged offence and the person against whom it was committed, is important.”*

The Indian Code of Criminal Procedure Section 212(2) is particularly similar to our Section 165(2), where an exception has been made with regards to offences of criminal breach of trust and dishonest misappropriation, where it is not required to state the exact time or date of the offence.

It has been held in the Indian case of **Sukhdev v State of M.P** 1995(2) Crimes 336 at pg 337 that, *“Time of the commission of offence is of great significance..... counsel for the complainant fairly conceded that there is substantial defect in the framing of the charge when the timing has been misquoted.”*

Therefore, in the instant matter the appellant has been charged for the period of 01-04-2014 to 16-10-2014 as per 165 (1) of the Code of Criminal Procedure, there is no specific time or a date given by the prosecution for the appellant to formulate his defence which denies a fair trial. Therefore, considering all the proceedings during the trial, the oral and written submissions of both parties, I find that the accused-appellant was never given a specific date/period of the offence as per the provisions of the Code of Criminal Procedure. Hence it is the opinion of this court that the appellant did not have a charge to answer.

Furthermore, considering the evidence of the victim, it is very obvious that the victim had not been able to state at least the specific period of which the offence is supposed to have been committed. The prosecution has calculated the period of offence by the date in the police statement and the victim saying that the offence took place three weeks prior to the date of the statement.

It has been suggested to PW-01 that she made a statement to the police on 17.10.2014 (page 57 of the appeal brief. PW-01 also stated that the incident took place about three weeks prior to the date that she made a statement to the police. Even if, the incident took place six weeks prior to the date of the police statement, the incident should have taken place within the month of September in the year 2014. However, when PW-01 gave the history to the doctor who examined her on 17.10.2014, she stated that the incident had taken place prior to the August vacation. Therefore, the periods stated by PW-01 to the doctor and in giving evidence in court are totally contradictory. According to her evidence in court, the offence should have been committed definitely after the August school vacation. This vital contradiction seriously affects the credibility of PW-01's story.

According to the prosecution, as the victim cannot remember the exact date of the offence, a period has been specified in the charge. The said period extends to more than six months. When PW-01 stated to the doctor about the period that the incident took place, she had not stated how many dates, how many weeks or how many months prior to the August vacation, the incident took place. Dates in January, February, and March 2014 are also the dates prior to the August vacation. The accused-appellant had been charged for committing the offence of "grave sexual abuse" within the period of 01 April 2014 to 16 October 2014. Therefore, the prosecution has not established beyond a reasonable doubt that the alleged offence had been committed during the lengthy period specified in the charge apart from the aforesaid vital contradiction regarding the period of offence. When the prosecution has not established that the accused committed the offence during the period specified in the charge, it cannot be concluded that the charge has been proved beyond a reasonable doubt against the accused-appellant.

Hence, the question arises whether the prosecution can frame its charges on vague and contradictory evidence and if so, it denies a fair trial to the appellant.

Therefore, it is the opinion of this Court that the time period specified in the indictment has been drafted on a wrong premise and violating the provisions of the Code of Criminal Procedure Act, and if that is so the accused-appellant did not have a charge to answer.

Hence, considering the other grounds of appeal does not serve any purpose. Therefore, there is no order with regard to grounds number 2, 3 and 4, raised by the learned counsel for the appellant.

As such, it is the opinion of this court that the prosecution framing the charge within a period has denied the appellants right to be able to formulate his defense and further more framing the charge within a period on vague evidence also denies a fair trial to the appellant.

Therefore, I conclude that there was no fair trial awarded to the accused-appellant. I'm surprised that the trial judge has failed to observe this, nevertheless justice to the accused-appellant should be done even at this later stage.

As such, for the reasons stated above, the instant appeal is allowed and the accused-appellant is acquitted of the charge in the indictment.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal