

**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.

The Democratic Socialist
Republic of Sri Lanka.

Court of Appeal Case No.
HCC/0015/18

Complainant

High Court of Jaffna
Case No. HC/2178/2017

Vs.

Kandiah Shanmuganpillai.

Accused

AND NOW BETWEEN

Kandiah Shanmuganpillai.

Accused-Appellant

Vs.

Hon. Attorney – General,
Attorney General’s Department,
Colombo 12.

Respondent

BEFORE : MENAKA WIJESUNDERA, J
WICKUM A. KALUARACHCHI, J

COUNSEL : Shyamal A. Collure with A.P. Jayaweera and P.S.
Amarasingha for Accused - Appellant.
Hiranjan Peiris, D.S.G. for the Respondent

ARGUED ON : 04.04.2024

DECIDED ON : 08.05.2024

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Jaffna for committing the offence of grave sexual abuse of a girl below the age of 16 years between the period from 01st of November 2009 and 26th of December 2010 in Sinnamadu, Kayts an offence punishable under Section 365B(2)(b) of the Penal Code as amended.

After trial, the accused-appellant was convicted by the Judgment dated 21.02.2018 and sentenced to rigorous imprisonment of 10 years and imposed a fine of Rs.10,000/- which carries a default sentence of one-month rigorous imprisonment. In addition, the accused-appellant was ordered to pay a compensation of Rs.1,000,000/- which carries a default sentence of 2 years rigorous imprisonment. This appeal is preferred against the said conviction and sentence.

Prior to the hearing, written submissions were filed on behalf of both parties. At the hearing of the appeal, the learned Counsel for the accused-appellant and the learned Senior Deputy Solicitor General for the respondent made oral submissions.

In brief, the prosecution case is as follows:

At the time of the incident the victim (PW-1) was a 9 years old girl who was studying at Sinnamadu Roman Catholic School. The accused-appellant was the principal of the school. She had been asked by the appellant to come and sweep the principal's office around 7.00 - 7.30 a.m. in the morning. When PW-1 went to the office room, the appellant had closed the door of the office and sexually abused her.

Among the other grounds of appeal, the learned Counsel for the appellant raised a ground of appeal that the charge is defective and thus the conviction cannot stand. The learned Counsel for the appellant and the learned Senior DSG for the respondent agreed to determine the said legal issue first.

The learned Counsel for the appellant contended that the time of the offence has not been specified in the charge instead a period of time more than one year has been mentioned in the charge, therefore, the accused-appellant is unable to understand the charge against him and the accused-appellant is unable to defend himself. The learned Counsel also pointed out that according to the charge, the Penal Section stated in the charge has been brought by the amendment No. 29 of 1998 but no such Penal Section has been introduced by the said amendment. The learned Senior DSG considered the fact that the time period specified in the charge exceeds one year and it is wrong.

Section 165 (1) of the Code of Criminal Procedure Act states that the time and place of the alleged offence must be mentioned in a charge. Sections 165 (1) and 165 (2) read as follows:

165(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.

Section 165 (1) of the Code of Criminal Procedure Act states that the time of the alleged offence must be specified in the charge. Section 165 (2) permits to specify a period of time of the alleged offence to be specified only with regard to the offences of criminal breach of trust and dishonest misappropriation. However, it is specifically stated in the said section that even for the aforesaid two offences, the first and last dates of the time period shall not exceed one year. There is no specific provision in the Code of Criminal Procedure Act to specify a period of time for other offences except criminal breach of trust and misappropriation. When it is mentioned that even for the charges of criminal breach of trust and misappropriation, the period of time should not exceed one year, undoubtedly, a period exceeding one year could not be specified in a charge pertaining to other offences.

It has been held in ***W. E. De Zylva, v. The Queen- 66 NLR 92*** that even in a charge of Criminal Breach of Trust, if the time period exceeds one year, the charge is defective and illegal. In this case, the accused was charged for committing criminal breach of trust between the 7th day of January 1959 and the 8th day of January 1960. It was held that the charge, by taking in a period in excess of one year, was defective in that it contravened the provisions of section 168 (2) of the Criminal Procedure Code. **Such a charge is illegal and not merely irregular.** [Emphasis added]

In the case at hand, the period of time specified in the charge is from 1st of November 2009 to 26th of December 2010. Hence, it is obvious that the charge in the instant case is defective and illegal. Conviction based on an illegal charge cannot be allowed to stand. It is to be noted that in the case of ***Zahir V. Cooray - 42 NLR 263***, it was found that, the manner of cheating set out in the charge did not in law constitute the offence. Therefore, it was held that the charge would be insufficient to sustain a conviction although a sufficient manner of cheating has been proved.

Hence, it is evident that if the charge is illegal, the accused cannot be convicted on such illegal charge even if there is sufficient evidence to prove the charge that was intended to be brought against the accused but was not properly set out. As the charge in the instant action is illegal as described previously, there is no necessity to consider the other matters relating to this appeal because conviction based on an illegal charge cannot be allowed to stand.

Accordingly, the Judgment dated 21.02.2018, the conviction and the sentence imposed on the accused-appellant are set aside. The accused-appellant is acquitted.

The appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL