

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

In the matter of an application for
Revision in terms of Article 138 of
the Constitution of the Democratic
Socialist Republic of Sri Lanka.

Court of Appeal
Application No:
CA (PHC) APN 0082/2023

The Democratic Socialist Republic
of Sri Lanka

Complainant

Vs.

High Court of Ampara
No. HC/AMP/2247/22

Kirinde Ariyadamma Thero alias
Ihala Thanthrige Ariyadasa
Sri Subodharama Viharaya
Mahawanwela.

Accused

AND NOW BETWEEN

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

Complainant-Petitioner

Vs.

Kirinde Ariyadamma Thero alias
Ihala Thanthrige Ariyadasa
Sri Subodharama Viharaya
Mahawanwela.

Accused-Respondent

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Maheshika Silva, DSG for the**
Petitioner.
Nalin Laduwahetty, PC with Ranjith
Samarasekera for the Respondent.

SUPPORTED ON : **19/07/2023.**

DECIDED ON : **08/11/2024.**

JUDGMENT

P. Kumararatnam, J.

This is an application in Revision preferred by the Complainant-Petitioner (Hereinafter referred to as the Petitioner) challenging the order of the Learned High Court Judge of Ampara dated 23.05.2023. In the impugned order the Learned High Court Judge discharged the Accused-Respondent (Hereinafter referred to as the Respondent) of the 2nd and 3rd charges in the indictment and directed the Prosecution to

amend the 1st charge by including a specific date of offence in the 1st charge.

The Respondent was indicted in the High Court of Ampara in case bearing No. HC/AMP/2247/2023. The indictment contained the three charges given below:

1. That, between period of 1st of November 2019 and 27th of December 2019 at Dehiattakandiya, the Accused-Respondent (hereinafter referred to as the “Accused”) committed the offence of Grave Sexual Abuse on Rampati Dewayalage Sakila Sandeepana Sandakalum alias Dehiattakandiye Sunanda Thero by inserting the penis of the Accused in to the mouth of Rampati Dewayalage Sakila Sandeepana Sandakalum alias Dehiattakandiye Sunanda Thero, who was below the age of 16 years which is an offence punishable in terms of Section 365B 2 (b) of the Penal Code amended by Act No. 22 of 1995 and Act No 29 of 1998 of the Penal Code,
2. That, at a time other than the time of commission of the offence in the 1st charge, which falls within the time period of 01st of November 2019 and 27th of December 2019, at Dehiattakandiya, the Accused committed the offence of Grave Sexual Abuse on Rampati Dewayalage Sakila Sandeepana Sandakalum alias Dehiattakandiye Sunanda Thero by inserting the penis of the Accused in to the mouth of Rampati Dewayalage Sakila Sandeepana Sandakalum alias Dehiattakandiye Sunanda Thero, who was below the age of 16 years which is an offence punishable in terms of Section 365B 2 (b) of the Penal Code amended by Act No. 22 of 1995 and Act No 29 of 1998 of the Penal Code,
3. That, at a time other than the times of commission of the offences in the 1st & 2nd charges which falls within the time period of 01st of November 2019 and 27th of December 2019, at an instance that doesn't fall within the first and second charges at Dehiattakandiya, the Accused committed the offence of Grave

Sexual Abuse on Rampati Dewayalage Sakila Sandeepana Sandakalum alias Dehiattakandiye Sunanda Thero by inserting the penis of the Accused in to the mouth of Rampati Dewayalage Sakila Sandeepana Sandakalum alias Dehiattakandiye Sunanda Thero, who was below the age of 16 years which is an offence punishable in terms of Section 365B 2 (b) of the Penal Code amended by Act No. 22 of 1995 and Act No 29 of 1998 of the Penal Code.

On 28.09.2022, the indictment was served on the Respondent and the matter was fixed for Pre-Trial conference on 01.03.2023. At the Pre-trial conference the defence Counsel took up a preliminary objection regarding the time period mentioned in the three charges in the indictment. The basis on which the preliminary objection raised was that the failure to specify an exact date relating to the charges had deprived the Respondent of a fair trial as the opportunity of taking up a defence of *alibi* in the future was adversely affected by not specifying a date in the charges. The Petitioner had filled written submission by way of response to the said preliminary objection.

The Learned High Court Judge by his order dated 23.05.2023, discharged the Respondent of the 2nd and 3rd charges in the indictment and directed the prosecution to amend the 1st charges by including a specific date of offence in the 1st charge.

Being aggrieved by the order of the Learned High Court judge of Ampara dated 23.05.2023, the Petitioner praying this Court to set aside the said order and request this Court to substitute with a lawful order considering following exceptional grounds urged.

- 1) The Learned High Coury Judge has erred in law by failing to consider that the period specified in the indictment is in compliance with sections 165, 166 and 174 of the Code of

Criminal Procedure Act No 15 of 1979 as amended and with the decided case law of the appellate courts of Sri Lanka.

- 2) The Learned High Court Judge has misdirected himself in law by discharging the Accused-Respondent from counts 2 and 3 at the pre-trial stage depriving the victim of a fair trial.
- 3) The Learned High Court Judge erred in law by entertaining an erroneous interpretation of the concept of fair trial by arriving at the conclusion that unless an exact date is specified in a case of child abuse, a child victim is not even entitled to have the case taken up for trial.
- 4) The Learned High Court Judge erred in law by failing to consider that his decision to discharge the Accused Respondent at a Pre - Trial Conference deprived the opportunity for the prosecution to act in terms of section 167 of the Code of Criminal Procedure Act No. 15 of 1979 based on the evidence of Prosecution witnesses.
- 5) The decision of the Learned Trial Judge to discharge the Accused Respondent from counts 2 and 3 of the indictment prior to consideration of any evidence of the Prosecution was, premature, unlawful, arbitrary, unreasonable, and capricious.
- 6) The Learned High Court Judge misdirected himself on the purpose of a Pre- Trial conference as well as on the nature & extent of powers conferred on the High Court Judge at a Pre-Trial conference by directing the Prosecution to amend the 1st charge by inserting a specific date of offence.

The background of the case briefly as follows:

The victim in this case was 13-year-old male child entered into priesthood (Samanera) attached to the Sri Subhodarama Privena in Mahawanawella. The Respondent was the Chief Priest of the temple under whose care the victim was during the period specified in the indictment. The victim was subjected to a medical check-up and was diagnosed to be depressed due to continues sexual abuse.

The preliminary objection regarding the time frame mentioned in the indictment was taken up by the Respondent before the trial the trial proper started. Hence, it is very clear that the said preliminary objection was taken up by the Respondent at the Pre-Trial Conference.

The Amendment to the Code of Criminal Procedure by Act No.22 of 2022 stipulates the procedures relating to holding of Pre-Trial Conference in Criminal matters. One of the purposes under Section 195A (3) (c) of the Code of Criminal Procedure Act is “providing an opportunity to the accused to give advance notice of his mitigatory or exculpatory defence and that of an *alibi* as specified in Section 126A of Code of Criminal Procedure Act No.15 of 1979.

The object of a Pre-Trial Conference is to identify clearly the issues in dispute so as to facilitate expeditious disposal of cases through proper case management. Further it provides an opportunity for the defence and the prosecution to present their case before the Learned High Court.

Under this context, the Learned High Court is not entitled to direct the prosecution to effect any amendment to the indictment or discharge Accused from the case. This is a clear intervention to the prosecutorial discretion of the Attorney General.

In this case the Learned High Court Judge not only discharged the Accused from 2nd and 3rd charges, but also directed the prosecution to amend the 1st charge in the indictment by including a specific date of the offence in the 1st charge. By doing so, the Larned High Court Judge switched on to the inquisitorial system where he played an expanded role.

Section 165 (1) of the Code of Criminal Procedure states:

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.

Upon perusal of the above Section nowhere it mentioned that the prosecution must specify the date of offence in the indictment.

In **Director General of Commission to Investigate Allegation of Bribery or Corruption v. Punchi Banda and another** CA (PHC) APN No. 142/2014 decided on 12.09.2017 the held that:

“There is no provision in law which makes it mandatory for the prosecution to specify a particular date as a date of offence in a charge. In other wards it is legally permissible for the prosecution to have a time period, instead of specified date, as the time of offence in a charge. Of course, such information provided by the prosecution must be reasonably sufficient to give notice of the matter to the accused.”

In **M.G.Premadasa v. The Attorney General** CA 261/2009 decided on 26.05.2014, the Court held that:

“On the question of vagueness of the incident regarding the date of the incident and the reference made therein to the period, we cannot see any prejudice being caused to the accused party, on the aspect since it was not an incident but the alleged acts had been committed on several dates, which shows repetition and continuation of acts.”

In **R v Dossi** 13 Cr.App.R.158 the Court held that:

“That a date specified in an indictment is not a material matter unless it is essential part of the alleged offence, the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. Amendment of the indictment is unnecessary, although it will be good practice to do so. Provided that there was a prejudice, where it is clear on the evidence that if the offence was committed on the day other than that specified.”

Section 166 of the Code of Criminal Procedure Act states:

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.

As the matters discussed above could be decided only during the trial, directing the prosecution to amend indictment, and discharging the Respondent from 2nd and 3rd charges are clear misdirection. The Learned High Court is not empowered to make such direction to the prosecution during the Pre-Trial stage.

The Petitioner, further submitted that although the Respondent had raised the defence of *alibi* during the Pre-Trial Conference, he had not raised the same at the stage of investigation.

Section 126A (1) of the Code of Criminal Procedure Act states:

No person shall be entitled during a trial on indictment in the High Court, to adduce evidence in support of the defence of an alibi, unless he has —

(a) stated such fact to the police at the time of his making his statement during the investigation; or

(b) stated such fact at any time during the preliminary inquiry; or

(c) raised such defence, after indictment has been served, with notice to the Attorney General at any time prior to fourteen days of the date of commencement of the trial:

Provided however, the Court may, if it is of opinion that the accused has adduced reasons which are sufficient to show why he delayed to raise the defence of alibi within the period set out above, permit the accused at any time thereafter but prior to the conclusion of the case for the prosecution, to raise the defence of alibi.

As per the section mentioned above, in this case the Respondent could adduce evidence in support of the defence of *alibi* after giving 14 days' notice prior to the date of commencement of the trial.

Hence, it clear that the *alibi* defence could only be considered during the trial and not as a preliminary objection at the Pre-Trial stage. The Learned High Court Judge, failing to take the above legal provision pertaining to *alibi* had come to a wrong decision by upholding the preliminary objection raised at the Pre-trial stage.

Due to above mentioned reasons, I set aside the order dated 23.05.2023 pronounced by the Learned High Court Judge Ampara, discharging the Respondent from the 2nd and 3rd charge of the indictment. The Learned High Court Judge is hereby directed to proceed with the trial on the original indictment containing all the counts, unless Hon. Attorney General moves to amend the indictment.

Hence, the revision application is allowed.

The Registrar of this Court is directed to send this Judgment to the High Court of Ampara forthwith for necessary compliance.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL