

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an Appeal under
Section 331 of the Code of
Criminal Procedure Act No. 15 of
1979.

Court of Appeal Case No: **CA /**
HCC / 0109 / 2022

The Democratic Socialist Republic
of Sri Lanka.

Complainant

High Court of Badulla Case No: **HC**
96 /2018

Vs.

RathnayakeMudiyanelageKaruna
dasa alias Hinni

Accused

AND NOW BETWEEN

RathnayakeMudiyanselageKaruna
dasa alias Hinni.

Accused – Appellant

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Respondent

Before: Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel: RozanaSalih for the Accused – Appellant.

UdaraKarunathilake, S.C. for the State.

Argued on: 20.03.2023

Decided on: 23.05.2023

MENAKAWIJESUNDERA J.

The instant appeal has been lodged to set aside the judgment dated 22.5.2022 of the High Court of Badulla.

The accused appellant in the instant matter was indicted for three counts under section 365B(2) of the penal code and the appellant had pleaded not guilty to the indictment and upon concluding the trial the learned trial judge had convicted the appellant for the first and the second charges.

The prosecution had led the evidence of the victim the mother of the victim the doctor and the investigative officers.

The grounds of appeal had been,

1) The indictment being contrary to section 165 of the Code of Criminal Procedure Code, (hereinafter referred to as the CPC)

2) The appellant being denied a fair trial,

3) The evidence of PW1 not being considered fairly,

4) The dock statement being rejected for the wrong reasons.

According to the narration of the victim he had been born on 8.6.2001 and had studied up to the 11th grade, and he says that he was sexually abused by the appellant on his birthday month which is the month of June and the date is the 8th but he does not speak to the year. But according to him this had taken place on four occasions. But he had not told any person but the appellant himself had sent anonymous letters to his school when he had not been a willing partner, stating that he was of bad character and the health teacher had asked him and he had admitted and the teacher had told the mother and then the victim and the mother had complained to the police in the month of August in 2016, which means after a lapse of four months. He had further said in evidence that he had been remunerated by the appellant.

He had further said that he was examined by a doctor but to the doctor he had not told anything according to him. But the doctor speaks of a case history. The alleged letter sent by the appellant to the school had been lengthily referred to by the appellant but the letter had not been marked in evidence and the teacher who had received the letter had not been called to give evidence by the prosecution which this Court sees as lacuna in the case of the prosecution.

The defense had suggested to him that he had been asking for money from the appellant, the victim had not denied the transfer of money between the two parties, therefore the question arises as to the creditworthiness of the witness.

The doctor who had examined the victim had given evidence and according to her the victim had been examined and the history recorded on 8.6.2016 but according to the victim as mentioned above he had not given a case history to the doctor hence there is a contradiction between the doctor and the victim but according to the doctor the first incident had taken place on 2016.6.8 but whereas according to the indictment the period referred to begins in 2015 .6.8 to 2016.8.6 which again is contrary to medical evidence and other evidence it runs more than to 12 months which is contrary to provisions in the CPC.

The mother who had been called to give evidence also refers to the date of the incident as being on 8.6.2016 and not in 2015, and the mother says that she noticed a difference in the behavior of the victim and then she questioned him but according to the victim it is the teacher who had told her about the incident, which creates a yet another discrepancy in the prosecution evidence.

The prosecution has led the evidence of the investigative officers and had closed the case for the prosecution.

The defense had been called and the appellant had made a dock statement and he had denied the whole allegation and he had said that an incident in the nature of the allegation could not have happened in his house because it is always frequented by his children. He had said that he had been falsely implicated because there had been an issue with the victim's mother regarding some water supply. The trial judge had rejected the dock statement on the basis that it only substantiates the version of the prosecution.

The main ground of appeal by the appellant is that the charge in the indictment is in violation of section 165 of the CPC. The said section is as below,

“The charge shall contain such particulars as to the time and place of the alleged offence and as to the person against whom and as to the thing in respect of which it was committed are reasonably sufficient to give the accused notice of the matter with which he is charged with and to show that the offence is not prescribed”.

Therefore from the above it is very clear that the particulars in the charge is very important for the accused to understand the charge which has been levelled against him and the specific time is also very important for another additional reason as for the accused person to understand that the offence with which he has been charged with is **not prescribed, and** when a time period is given the accused is unable to do that and anyway if he takes up the defense of an alibi he is unable to do so when he does not know the exact date on which he had been charged with. But of course, the CPC has made one exception under subsection 2 of section 165 in which the time and the quantity can be stated in gross sums in offences of criminal breach of trust and criminal misappropriation. But in the instant matter it is a sexual offence and the definite date is important for the accused to formulate his defense.

The trial judge had justified the instant matter by quoting section 174 of the CPC which this Court is of the opinion that it has no bearing for the instant matter because it refers to matters in which charges can be joined which has been committed within the span of one year and to be tried in one indictment.

The instant position has been discussed well in the judgment by Thurauraja J in the case of **Kamburawela Kankanamlage Dayaratne Vs AG CA-188-2015** decided on 22.9.2017 in which it has been decided 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.

This stance was confirmed and affirmed over and over again by Superior Courts even the Privy Council.

In the case of Attorney General Vs. Viraj Aponso and Others S.C. 24/2008, the Supreme Court had given a guideline for a fair trial. Reading the guidelines, it is clear that it is the responsibility of the prosecutor 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 this case if the accused wants to take up a defense of alibi he cannot there is no date or time given. That takes the prosecution for not fulfilling the fundamental obligation namely fair trial. In **R.H.M.S. Premathunga alias Ananda Vs. Attorney General CA 01/2013** decided on 31/01/2014 where Sisira J de Abrew, J held,

“.....is to give sufficient opportunity to the accused to answer the charge and ensure a fair trial.” ”

But in the case of **CA-WRIT-410-2020** decided on 23.3.2023 Lafar J had taken a contrary view in a similar matter where he had said that “in the

instant case, there are no material/strong *prima facie* evidence to show that the particulars as to the “time” of the offence – given as a date range, have caused any prejudice to the Petitioner.”

In the instant matter we are of the opinion that the indictment not being specific on its date of offence has deprived the appellants right for a fair trial as per the judgment of Justice Thurairaja mentioned above. Furthermore, we note that the time period mentioned in the indictment is more than one year which is in violation of section 174(1) of the CPC which reads as follows,

“174. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from first to the last of such offences he may be charged with and tried at one trial for any number of them not exceeding three, and in trials before the High Court such charges may be included in one and the same indictment.”

Furthermore section 165 of the CPC has mentioned very clearly that one of the purposes of stating the time is for the accused to know that the offence he has been charged with is not prescribed.

Hence in the instant indictment the time period has been specified to be from 2015 .6.8. to 2016.8.9 which had never been corrected at any stage of the trial which in the opinion of this Court is a clear violation of section 174(1) of the CPC. The learned trial judge had tried to justify the same quoting the evidence, but the charge in the indictment has to be specific and clear for the accused to formulate his defense or else as stated in the Constitution it is a denial of his right to a fair trial.

As such we hold that there is definitely merit in the first ground of appeal by the appellant which is sufficient to set aside the impugned judgment. Be that as it may when Court considers the evidence in entirety there are many discrepancies which go to the root of the case which definitely creates a reasonable doubt in the case for the prosecution. As such there is more than one reason to set aside the impugned judgement and allow the impugned appeal.

As such the instant appeal is allowed.

Judge of the Court of Appeal.

I agree.

B. Sasi Mahendran J.

Judge of the Court of Appeal.