

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

In the matter of an appeal under and in terms of the Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with section 331 of the Criminal Procedure Code and Section 19(B) of the High Courts of the Provinces (Special Provisions) Act No. 19 of 1990.

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

**Complainant**

**Court of Appeal  
Case No. CA/188/2015**

**Vs,**

Kamburawela Kankanamalage Dayarathne  
alias "Chuti mama"

**Accused**

**And Now Between**

Kamburawela Kankanamalage Dayarathne  
alias "Chuti mama"

**Accused-Appellant**

**High Court Polonnaruwa  
Case No. 29/13**

**Vs,**

The Attorney General of the Democratic Socialist Republic of Sri Lanka

**Complainant-Respondent**

**Before : S. Devika de L. Tennekoon, J &  
S. Thurairaja PC, J**

**Counsel : Amila Palliyage with Sandeepani Wijesooriya and  
Nihara Randeniya for the Accused-Appellant  
Shanaka Wijesinghe DSG for the Complainant- Respondent**

**Judgment on : 22<sup>nd</sup> September 2017**

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## Judgment

### **S.Thurairaja PC, J**

When this matter was taken up for argument the accused appellant raises two grounds of appeal.

Counsels for the accused appellant and the respondent argued and filed their written submission on a subsequent date.

- a. Prosecution has failed to prove that the offence was committed during the time period stipulated in the indictment. Therefore, there was no charge to answer by the accused.
- b. The learned trial judge has rejected the evidence of the defence on a wrong premise.

As per the evidence, the prosecution's case in brief is summarised as follows:

The virtual complainant was an 11-year-old girl at the alleged time of incidence. The accused who was a relative had touched her breast and involved in intra-crural sexual activity. Somewhere in January 2012 she had told this to Mala Damayanthi, a neighbour and brought to the notice of the Gramasevaka and finally the complaint was made to the police.

The prosecution led the evidence of the virtual complainant and 9 other witnesses.

The virtual complainant gave evidence and was subjected to cross examination. She narrates that during the school holidays she went to Chuti mama's house which is situated close to her house, there the accused had touched her chest while she was watching the tv. There after she had gone away. Subsequently when she went to the house of the accused on the following day around about 8 o'clock the accused had taken her to the room, removed her cloths and his cloths, made her to lie on the bed and got onto her and kept his male organ on her vagina and involved in intracrural sexual activity.

It is pertinent to note that the prosecutrix had not given a clear date or period; she only said that this had happened during the school holidays in 2011. On several occasions, she says that this had happened 1 month prior to the date of the complaint. This takes us to December 2011 because the complaint was made on the 27<sup>th</sup> January 2012. On another occasion during the examination in chief she says her holidays are in festival month. Normally the month of April is known as the festival month because of the Sinhala and Tamil New Year as it is celebrated during that month. At this juncture, I wish to state that it is common knowledge in Sri Lanka that there are three long school vacations given to local government schools during the months of April, August and December respectively. Normally these vacations last for about 2 to 4 weeks each.

The victim was examined by the Judicial Medical Officer (JMO). The JMO had given comprehensive medical legal report and gave evidence at the High Court. There he states that he spoke to the victim and received the short history from her. She had told that this incident had happened during the December school vacation (MLR-P2). He confirms this while giving evidence during the trial proceedings. On a very early occasion the state counsel had suggested that this had happened during the month of August 2011 and she had answered affirmatively. Unfortunately, on the same day she has failed to identify the month or date. As per the indictment, the Honourable Attorney General had clearly stated the period of the alleged offence, that is between 1<sup>st</sup> August 2011 to 31<sup>st</sup> August 2011. So the burden is on the prosecutor to prove that the offence stated in the indictment had occurred during this time period.

It is prudent to see the relevant legal provision which in this situation would be Section 165 of the Code of Criminal Procedure Act which 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 manner of committing offence must be stated.*

*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.*

The learned DSG takes up the position that the accused appellant never suggested or questioned on this ground of appeal at the time of trial, therefore the appellant was

never misled or prejudiced and he cites **D.R.M. Pandithakoralalage (excise inspector) and V.K.Selvanayaga 56 NLR 143** and quotes as follows:

*"it was held that a mistaken date in an indictment is not a material error unless the date is of essence of the offence or if the accused is prejudiced."*

The case cited above is not directly relevant to the issue before us.

When I peruse the proceedings, I find that the counsel for the accused even the state counsel was trying to prove the date or period of the alleged offence. This shows that the date of offence is very material for the accused to face a charge.

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 the 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 defence of alibi he cannot do so because 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."*

His lordship refers to the case of **Rohana Vs, Senaratna 72 NLR 370**, where Tennakoon, J stated the following,

*"where a person is charged with having committed criminal breach of trust in respect of certain sum of money on a particular day, it is sufficient for him to show that there is no evidence that he misappropriated any money on that day. Disbelief of evidence given by him at the trial that on a subsequent date, he gave the money to the person whom it was due is not a valid reason for convicting him."*

The learned DSG had failed to provide material to the court that the accused appellant is given clear information of the date/period during the trial.

Considering all the proceedings during the trial oral submissions and written submissions of both counsels I find that the accused appellant is not informed of the date/period of the offence. Therefore, the accused appellant had no charge to answer.

There is no necessity after deciding the first ground of appeal to make a decision on the second ground of appeal. Hence, I make no order on the second ground of appeal.

Since the accused appellant was not provided the mandatory requirement stated in Section 165 of the Code of Criminal Procedure Act No. 15 of 1979 as amended, I conclude that there is no fair trial awarded to the accused appellant. Therefore, I allow the appeal and acquit the appellant.

**Appeal allowed and the Accused Appellant acquitted.**

**JUDGE OF THE COURT OF APPEAL**

**S. Devika de L. Tennekoon, J**  
I agree,

**JUDGE OF THE COURT OF APPEAL**