

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

In the matter of an application for
mandates in the nature of writ of *Certiorari*
under and in terms of Article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

CASE NO: CA/WRIT/410/2020

Sepala Francis Perera
No. 69/10, Galle Road,
Kalutara South,
Kalutara.

PETITIONER

VS.

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

RESPONDENTS

Before: **M. T. MOHAMMED LAFFAR, J.**

Counsel: Kalinga Indatissa, P.C., with Samantha
Premachandra for the Petitioner.

Dilan Ratnayake, S.D.S.G., for the Respondent –
Attorney General.

Supported on: 09.12.2021

Written Submissions on:

13.01.2022 (by the Petitioner).
19.01.2022 (by the Respondent).

Decided on: 23.03.2022

**ORDER PERTAINING TO THE ISSUANCE OF NOTICE ON THE
RESPONDENT**

MOHAMMED LAFFAR, J.

The Petitioner has filed this application dated 21.10.2020, seeking a writ of *Certiorari* to quash the indictment (marked “P5”) filed by the Respondent pending in Kalutara High Court Case No: 38/2020.

When supporting this application, the learned President’s Counsel for the Petitioner was mainly contended that the indictment in the aforesaid case is illegal, unlawful and bad in law, due to the reason that the Respondent has failed to specify a precise time period and date on which the two alleged offences specified in the indictment were committed.

An application for judicial review at the stage of notice demands that a court seized of an application for notice should consider whether the case is suitable for full investigation at a hearing at which all parties have been given notice. Vide *R v. Secretary of State for Home Department exp Begum (1990) COD 107*, *Premalal Jayasekera v. Thushara Upuldeniya and 2 Others C.A (Writ) Application No. 295/2020, CA Minutes of 07.09.2020*.

Accordingly, in this Order, this Court considers the question of whether the application for notice relates to a matter that ought to be resolved after full argument.

The Petitioner in his petition states that both charges included in the indictment alleges that the offences (Grave Sexual Abuse) were committed during the period of 01.01.2011 to 31.12.2011. The Petitioner further states that according to section 165 of the Code of Criminal Procedure Act, No. 15 of 1979 (hereinafter referred to as the “Code”), a charge shall contain such particulars as to the time and place of the alleged offence and further that the details should

reasonably be sufficient to give the accused (i.e., the Petitioner) notice of what he is charged of, and to show that the offence is not prescribed.

In this matrix, it is essential to consider the relevant provisions of the Code. Section 165 of the Code reads 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.

It was submitted by the learned President's Counsel for the Petitioner that *the reason the Prosecutor has to inform the time, place and the offence clearly to the person who is charged, is because such information are fundamental for an accused to formulate his defence.*

The learned Senior Deputy Solicitor General for the Attorney General, however, in his written submission dated 19.01.2022, inviting the Court to consider the literal meaning of section 165(1) of the Code, submitted the followings:

- 1. The words of section 165(1) speak of particular of "time" to be given as opposed to a "date".*

2. *The intention of the legislature is very clear that it is not a “date” but a “time” that needs to be specified in a charge or indictment.*
3. *All statutory illustrations explaining section 165 of the Code refers to “a time” and “place” and never to a “date”. This makes it absolutely clear that it is not required by law to give a specific date but a time.*
4. *Even where an exception to the general rule is made under section 165(2) with regard to specific offences of Criminal Misappropriation and Criminal Breach of Trust, the legislature provides for a time period instead of a date.*
5. *The intent of the Legislature is very clear that it’s a time range needs be specified and never a date. In practice, most of the indictments which states the words “on or about the (date)”. A fair percentage of the indictment gives a time range.*
6. *Therefore, the law does not require the specification of a particular date. What the law requires is stated without ambiguity are particulars as to time, for two main purposes:*
 - (a) To show that the offence is not prescribed*
 - (b) To give sufficient disclosure of the offence to the accused.*

The learned President’s Counsel for the Petitioner further submitted that it is only under section 165(2) of the Code that a period of time that can go up to a year can be specified on an indictment. This was according to the statutory provision restricted to a period of one year and also limited to the specific offences of Criminal Misappropriation and Criminal Breach of Trust only.

However, the learned Senior Deputy Solicitor General for the Respondent submitted that, in the instant case, where the indictment relates to two specific counts of Grave Sexual abuse in

which the law only requires that particulars as to time as are sufficient as to give the accused notice of the crime and to show that the offence is not prescribed need to be given. He further submitted that *there was no express provision made by the Legislature with regard to how the “time” should be restricted to one year (which would only apply to offences specified under section 165(2) of the Code) for other Penal Code offences.* Therefore, it was further contended by the learned Senior Deputy Solicitor General that *with regard to the offence of Grave Sexual Abuse there is no statutory restriction how particulars of time should be stated in an indictment.* Thus, the learned Senior Deputy Solicitor General for the Respondent also contended that *when a charge gives a time range instead of a specific date there is no violation of any legal condition.* As such, the learned Senior Deputy Solicitor General for the Respondent finally took up the position that *the indictment in the instant case is prima facie a legal and maintainable indictment in law and it is not subject to the writ jurisdiction of this Court.*

It is true that an indictment is a crucial document which provides a formal notice to an accused, on what basis and manner he or she is going to be charged. Thus, it is always vital that an indictment should contain all such particulars reasonably and particularly. If such reasonable particulars were not given or such particulars are erroneous, then there is a possibility that the accused may be misled by such error or omission.

Section 166 of the Code provides thus,

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.

When any such errors are visible in an indictment the Court may alter any *indictment or charge at any time before judgment is pronounced*. Section 167 of Code provides that,

(1) Any court may alter any indictment or charge at any time before judgment is pronounced or, in the case of trials before the High Court by a jury, before the verdict of the jury is resumed.

(2) Every such alteration shall be read and explained to the accused.

(3) The substitution of One charge for another in an indictment or the addition of a new charge to an indictment and in a Magistrate's Court the substitution of one charge for another or the addition of a new charge shall be deemed to be an alteration of such indictment or charge within the meaning of this section.

In *Pandithakoralege v. Selvanayagam (1954) 56 NLR 143* it was held that even a mistaken date in an indictment is not a material error unless the date is of the essence of the offence, or the accused is prejudiced. Swan, J at page 144 observed that,

In the case of William Edward James (17 Criminal Appeal Reports 116) it was held that a mistaken date in an indictment, unless the date is of the essence of the offence or the accused is prejudiced, need not be formally amended. In the course of his judgement dismissing the appeal the Lord Chief Justice referred to the judgement of Atkin J. in the case of Dossi (87 L.J.K.B. 1024) where it was held that from time immemorial a date specified in an indictment has never been considered a material matter unless time was of the essence of the offence.

Therefore, as correctly pointed out by the learned Senior Deputy Solicitor General, in the instant case, there are no material/strong *prima facie* evidence to show that the particulars as to the “time” of the offences – given as a date range, have caused any prejudice to the Petitioner. Furthermore, upon the available material before me, I am unable to examine any issue to the effect that the Attorney

General has exercised his Prosecutorial Discretion upon unreasonable grounds and in an arbitrary and capricious manner. If the Attorney General carried out his discretion objectively, it is unlikely that a court of law exercising jurisdiction to judicial review, would intervene with the decision merely because it disagrees with the decision it arrived at.

Moreover, as mentioned hereinbefore, if there are any serious objections as to the contents of the indictment and the trial procedure, the Petitioner has the liberty to take such objections before the relevant High Court under the Code of Criminal Procedure Act. As such, in my view, if the Petitioner has an alternative remedy for the alleged grievances in the Original Court (High Court), he cannot invoke the writ jurisdiction of this Court and has to pursue the alternative remedy.

In such circumstances, I view that the grounds relied by the Petitioner are devoid of merits and thus, I see this case is not suitable for full investigation at a hearing at which all parties have been given notice.

Accordingly, I refuse to issue notice on the Respondent and dismiss the application without costs.

Notice refused.

JUDGE OF THE COURT OF APPEAL