

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

In the matter of an Appeal preferred under and in terms of Article 154 P (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka in respect of an order made by the High Court of Matara in HCRA 123/2016 on 10th December 2018.

Vidanapathirana Dhammika,
Authorised Officer under the Food Act
and Public Health Inspector,
Makadura

Complainant

Vs.

Court of Appeal Application
No: **CA/PHC/238/2018**

High Court of Matara
No: **HCRA 123/16**

Magistrate's Court of
Deiyandara
No :**07998**

A.B Mauri Lanka (Pvt) Ltd,
No.124,
Templers Road,
Mount Lavinia.

Accused

AND IN BETWEEN

A.B Mauri Lanka (Pvt) Ltd,
No.124,
Templers Road,
Mount Lavinia.

Accused-Petitioner

Vs.

1. Vidanapathiranage
Dhammika,
Authorised Officer Under the
Food Act and Public Health
Inspector,
Makadura

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

Respondents

AND NOW IN BETWEEN

A.B Mauri Lanka (Pvt) Ltd,
No.124,
Templers Road,
Mount Lavinia.

Accused Petitioner Appellant

Vs.

Vidanapathiranage Dhammika,
Authorised Officer under the Food Act
and Public Health Inspector,
Makadura

**Complainant – 1st Respondent –
Respondent**

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

2nd Respondent – Respondent

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : Kalinga Indatissa, PC with Rashmini
Indatissa, Razana Salin, Natasha
Mohideen and Ravindu Jayakody for the
Appellant.

Ridma Kruwita SC for the Respondents

Argued on : 10.11.2022

Decided on : 15.12.2022

Iddawala – J

This is an appeal against the order dated 10.12.2018, delivered by the Provincial High Court of the Southern Province holden in Matara which acted in revision and affirmed the order dated 20.01.2016, delivered by the learned Magistrate of Deiyandara, in case no. 07998, where the preliminary objections put forth by the appellant were disallowed and the matter was fixed for trial.

Therefore, the President's Counsel for appellant seeks to set aside the aforesaid order dated 10.12.2018 of the High Court of Matara by submitting the following averments before this Court:

1. The action instituted against the appellant is contrary to Article 13 (6) of the Constitution.
2. That the Charge Sheet is defective and does not conform to the requirements set out in the Code of Criminal Procedure Act no.15 of 1979
3. No prima facie case was established against the appellant.

The facts of the case are briefly as follows. The appellant is alleged to have sold two packets of Pinnacle Margarine without listing the food additives contained therein, contrary to Regulation 4(2)(a) of the Food (Labelling and Advertising) Regulations 2005 Extraordinary Gazette Notification No. 1376/9 dated 19th January 2005, which in turn also amounts to an offence under Section 3 (1) of the Food Act. Consequently, the learned Magistrate on 02.05.2014 read out the charge sheet to the, appellant. However, the appellant pleaded not guilty to the charges.

At this juncture, it is pertinent to reproduce the Regulation which the appellant failed to comply with.

Regulation 4 (2)(a) of the Extraordinary Gazette Notification No. 1376/9 dated 19th January 2005 reads as follows:

“The following declaration shall be made on any panel in any one or more of the three languages-

- a) *Any permitted food additive’s name or INS number **as prescribed by regulations** made under the Act;*” (emphasis added)

Accordingly, the names of the permitted food additives must be declared on the package in either Sinhala, Tamil or English. However, the appellant’s major contention is the maintainability of the action due to the defects in the charge sheet and the improper application of the law.

Regulation 4 (2)(a) of the Gazette Notification No. 1376/9 does not indicate a list of the permitted additives, albeit the law requires the declaration of food additives on the package. This lacuna of the law was corrected by implementing the Extraordinary Gazette 1795/51 dated 01st of February 2013, where Regulation 10 delineated a list of the permitted food additives, which was published consequent to the Extraordinary Gazette implemented in 2005.

As per Regulation 1 of the Extraordinary Gazette 1795/51 dated 01.02.2013, the said regulation comes into force on the 1st of July 2014. Therefore, the alleged offence of the appellant has been committed prior to the enforcement of the said regulation as the offence took place on the 22nd January of 2014. Thus, the preliminary objection of the learned President's Counsel appearing for the appellant is that the offence has been charged under the Extraordinary Gazette No. 1376/9 dated 19th January 2005, which did not promulgate a list of permitted food additives. Therefore, the President's Counsel further contends that, even though the Gazette Notification of 2005 creates a requirement to label the food packages, the mandatory requirement of declaring the permitted food additives cannot be fulfilled, unless read with the consequent regulation 10 of the Gazette Notification dated in 2013.

The charges against the appellant have been framed by the Magistrate Court of Deiyandara, for acting in contravention of the Extraordinary Gazette no 1376/9 dated 19th January 2005, which is incomplete till the subsequent publication of the Gazette Notification of 2013 and as the said regulations did not come into operation until after the commission of the alleged offence by the appellant, the question of retrospective effect of laws become the pivotal point of this instant matter.

Article 13 (6) of the Constitution stipulates that:

No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.

Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Therefore, as per the above constitutional provision, the retrospective application of the law is restricted and strictly remitted to such crimes which are recognized as criminal, even in the absence of a corresponding law at the commission of the offence, by the general principles of law recognized by the community of nations.

The above contention promulgated under Article 13 (6) of the Constitution was further affirmed in the Supreme Court determination on Bill titled “*Offences Against Aircraft Act*” by His Lordship Chief Justice N.D.M. Samarakoon and four other Justices of the Supreme Court of Sri Lanka in **S.D. NO.2 OF 1982 P/Parl/22**, where it was determined that

“The offences referred to in the Bill are all criminal according to the general principles of law recognized by the community of Nations, Part II of the Bill is sought to be made retrospective from July 3, 1978. Such retrospective operation is permitted by the provisions of Article 13 of the Constitution. We are, therefore, of opinion that the provisions of the Bill are not inconsistent with the constitution.” (emphasis added)

Nonetheless, under Article 75 of the Constitution, the Parliament has the power to make laws which do bear retrospective effect and furthermore under Article 76, it is further held that:

76 (1).....

(2).....

(3) *It shall not be a contravention of the provisions of Paragraph (1) of this Article for Parliament to make any law containing any provision empowering any person or body to make **subordinate legislation** for prescribed purposes including the power:*

(a) to appoint a date on which any law or any part thereof shall come into effect or cease to have effect.

(b).....

..... (emphasis added)

Hence, accordingly the Constitution has vested the power of making retrospective laws as well as the power of determination of the date of operation of laws, on the Parliament.

However, according to the Constitutional provision under Article 13 (6), such laws shall not hinder a person from being entitled to the protection guaranteed by the Constitution itself, especially in light of laws which do not constitute an offence at the time of commission of the said offence unless otherwise prescribed through general principles of law recognized by the community of nations.

According to the Section 32 of the Food Act No 26 Oe 1980 as amended 20 of 1991 and 29 of 2011 the Minister may make regulations in respect of matters required by this Act. Section 32(2) further states-

“2) Every regulation made by the Minister shall be published in the Gazette and shall come into operation on the date of publication or on such later date as may be specified in the regulation”. (emphasis added)

Therefore, the appellant cannot be charged under the Extraordinary Gazette Notification of 2013 as it has no retrospective application of the law, as the offence was committed prior to the enforcement of the said Regulation in 2014 on the 1st of July. In the case of **Edirisinghe Vs Cassim S.I. Police** {1945} 46 N.L.R. 334, *“Where the accused was charged for contravening a Defence (Control of Textiles) Regulation, which was not to come into force until such date as was fixed by the Governor and notified in the Gazette, but no reference was made, either in the charge or in the evidence, to the Gazette which brought the Regulation into force- Held, that the Court could take judicial notice of the date on which the Regulation came into operation.*

The learned President’s Counsel for the appellant further avers that, due to the framing of charges under the Gazette notification of 2005 which is incomplete, the charges framed by the learned Magistrate of Deiyandara is bad in law and cannot be maintained due to the lack of conformity to Section 164 of the Code of Criminal Procedure Act no.15 of 1979 (CCPA).

Section 164 of the CCPA requires the fulfilment of the criteria set out therein. However, in the instant matter, the appellant avers that subsection (5) of the said provision has not been fulfilled.

Section 164 (5) reads as follows:

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

Hence, due to the lack of indication of both the Extraordinary Gazette no.1376/9 and Extraordinary Gazette No.1795/51, and framing the charges under the Extraordinary Gazette No. 1376/9 alone, it results in non-compliance of Section 164 of the CCPA. Therefore, this Court is of the opinion that the learned Magistrate has erred in law in framing charges under the Extraordinary Gazette No. 1376/9, which cannot be maintained without the subsequent enactment of the Extraordinary Gazette No.1795/51 of 2013. The learned President's Counsel submits the case of **Carolis Appu Vs Assistant Government Agent Haputhale** 46 NLR 262 to buttress his argument. Where it held that transport of kurakkan (*Finger Millet*) without a permit is made an offence by the amendment to the Defence (Purchases of Foodstuffs) Regulation 1942 and no reference is made in the charge to the Gazette in which the amending regulation was published the failure to refer to such Gazette was fatal to the conviction.

In this regard, this Court reflects upon the case of **Abdul Sameen Vs Bribery Commissioner 1991 1 SLR 76**, which states as follows:

“Furthermore, whilst appreciating the pressures on time and the large volume of work the Magistrate Court are called upon to handle, it nevertheless is important that rights of an accused person are safeguarded and that he be brought to trial according to accepted fundamental principles of criminal procedure.” (emphasis added)

Accordingly, this Court is of the observation that the Magistrate has a duty to examine whether the requirements set out in the CCPA has been fulfilled to frame charges and to scrutinize whether the charge drafted by the complainant respondent (PHI) has fulfilled the requirements to file the charge sheet. Thus, due to the erroneous charge sheet and since there is no offence committed by the appellant, at the time of the enforced Extraordinary Gazette of 2013, the charges framed by the learned

Magistrate cannot be maintained. *Magistrates usually do not frame charges themselves in every case but accepts the draft charge which is tendered by prosecuting party. Yet in law, it is the charge framed by the Magistrate from the time it is accepted. (See CA PHC 108/2010 CA minute dated 26.08.2014).*

Therefore, as the requirements stated therein have not been fulfilled, this Court observes that the charge sheet is bad in law and the learned Magistrate has erred in law in drafting the charges. Hence, this Court is of the view that the learned High Court Judge has erroneously concluded the order dated 10.12.2018, by affirming the order dated 20.01.2016 of the learned Magistrate. Hence, this Court sets aside both the orders of the High Court of Matara and the Magistrate Court of Deiyandara.

Appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL