JAYARATNE BANDA

v.

ATTORNEY-GENERAL

COURT OF APPEAL.
GUNASEKERA, J. (P/CA).
DE SILVA, J.
C.A. NO. 83/93.
H.C. ANURADHAPURA 563/93.
JUNE 3, JULY 4 AND AUGUST 1, 1997.

Code of Criminal Procedure – Murder – Public Security Ordinance – Section 4 – Emergency Regulation 24(1)67, 24(1) (b) – Section 32 Penal Code – Sections 164, 165, 166,167, Sections 436, 456(A) – Code of Criminal Procedure – Constitution Article 155(2) (3) – Failure to specify the correct gazette notification – Does it result in a Miscarriage of Justice? – Requisites of a charge.

The accused-appellant was indicted with having committed murder on 7.5.88 with two others, an offence punishable under Emergency Regulation (ER) 24(1)67 published in Gazette (Extraordinary) of 20.6.1989 bearing No. 53/7 read with Section 32 Penal Code; and was convicted.

On appeal, the question arose as to whether there was a proper indictment before Court to convict the accused-appellant as the offence has been committed on 7.05.88, but the gazette mentioned in the indictment was dated 20.6.1989.

Held:

(1) The offence can be clearly identified as that created by the identical regulation No. 24(1) b in severals ER's as well, right throughout the period notwithstanding the fact that different gazettes have been issued to cover different periods of time.

(2) Examining Section 4 Public Security Ordinance, Article 155(2), 155(3) of the Constitution, it would be safely concluded that the offence with which the accused was charged was in existence and known to the law at all times of the commission of the act

***Per* de Silva J.,**

"A mere irregularity may or may not result in a miscarriage of justice, but a fundamental defect such as the complete absence of a charge is placed on a

different footing, such a defect is deemed to cause a miscarriage of justice in the sense of a mistrial due to sound reasons of policy."

(2) The indictment in issue is in conformity with every requirement imposed by the code except for the error in the date of the Gazette Notification. Had the objection to the indictment been taken at the trial it would have been open to court to have acted under Section 167 of the Code of Criminal Procedure Act to amend the indictment. Thus the failure to give the correct particulars of the gazette has caused no prejudice to the accused-appellant.

APPEAL from the High Court of Anuradhapura.

Cases referred to:

1. *Abdul v. Bribery Commissioner* – 1991 – 1 SLR 76.
2. *Molagoda v. Gunaratne* – 39 NLR 226.
3. *Om Prakash v. State of Uttara Pradesh* – 1960 Criminal Law Journal 544.
4. *King v. Punchi Banda.*
5. *Queen v. Alpin Singho* – 60 NLR 45.

D. W. Abeykoon P.C. with *Dr. Ranjith Fernando* and *Ms Chandrika Morawaka* for accused-appellant.

Kapila Waidyaratne, S.S.C. for Attorney-General.

Cur. adv. vult.

September 12, 1997.
J. A. N DE SILVA, J.

The accused-appellant was indicted in the High Court of Anuradhapura with having committed murder by causing the death of Dewagiri Mudiyanselage Premaratne together with two others named Chandare and Asoka on 7/05/1988, an offence punishable under the Emergency Regulation 24(1)67 published in Gazette (Extraordinary) dated 20th June 1989 bearing No: 53/7 read with Section 32 of the Penal Code.

The Trial had been before a Judge of the High Court and the after the conclusion of the case the accused-appellant had been convicted of the said charge on 26/8/1993 and sentenced to life imprisonment.

It is to be noted that even though the names of two others were mentioned in the indictment no evidence of their complicity in the crime had transpired at all in the Case.

The case for the prosecution was that on the 7th of May 1988 around 7.30 p.m. deceased Dewagiri had been playing cards with his three children, seated on a bed. At that stage the accused-appellant had entered the house from the front door and fired at the deceased who sustained injuries on the back of the chest and he had succumbed to his injuries immediately.

To establish the above facts the prosecution had led the evidence of two eye witnesses namely the wife of the deceased P. Punchimahattaya and the daughter of the deceased Dewagiri Mudiyanselage Nirmala Kumari.

Both of them had identified the accused-appellant by his nickname as "Pokuta". The second witness Nirmala Kumari had made a complaint the next morning to the army personnel at the Meegaswewa Camp who in turn had informed the Medirigiriya Police as the incident had occurred within the jurisdiction of that Police Station.

The incident had taken place during the J. V. P. terror period and due to this reason the family members had not been able to remove the wounded person to a hospital or inform the Police soon after the incident. The Police Officer Dewapriya who conducted the investigations testified to the fact that after the incident accused-appellant could not be arrested as he had absconded for a period of 3 months. Dr. Atapattu who conducted the post mortem examination had also given evidence for the prosecution.

At the conclusion of the prosecution case no evidence had been led on behalf of the defence except for a dock statement of the accused-appellant where he denied the incident.

At the hearing of this appeal the Senior Counsel for the appellant submitted that the two prosecution witnesses had contradicted each

other and it is therefore unsafe to act on this contradictory evidence. The daughter Nirmala Kumari had stated that she did not see the accused shooting and did not hear the gun shot. Counsel submitted that the evidence of this Witness sheds a doubt on the prosecution version that the accused-appellant was the person who shot at the deceased and the benefit of that doubt should have been given to the accused-appellant. He further stated that in the indictment forwarded by the Attorney-General there are two other names mentioned as accused and the prosecution could not explain why their names were included and what acts they had committed. In these circumstances Counsel submitted that there is a doubt with regard to the evidence of the so called eye witnesses. The Counsel contended that some others other than the accused could have fired the shot and in these circumstances it was incumbent on the prosecution to prove that the accused-appellant shared a common murderous intention to bring home liability against the appellant.

It is to be noted that witness Nirmala Kumari had stated in her evidence that she saw the accused-appellant armed with a gun. At the time of the incident she had been a 17 year old girl. She had been playing cards with the deceased father and her younger sisters when suddenly her father was shot and she may not have observed all the things that happened around her at that moment due to the shock.

However the wife of the deceased P. Punchimahattya had stated that she saw the accused-appellant coming into the house armed with a gun and firing at the deceased. She had identified the accused-appellant as she had been living in the same Village for 20 years since her marriage. There is no reason for us to disbelieve the wife as her evidence is supported by the medical evidence.

According to the medical evidence the shot had been fired from a very close range i.e. from about 2-3 yards. If it is 2-3 yards from deceased's body the shooting had taken place inside the house and who ever shot had come inside the house to shoot. The wife of the deceased had said that she was seated on the ground facing the door and therefore she had every opportunity to see the full incident

and she had positively identified the accused-appellant as the person who shot.

At the trial the defence has suggested that these witnesses had falsely implicated the accused-appellant because the Army and Police wanted them to do so. We are unable to agree with this. The accused-appellant had been identified by his nickname and according to the wife of the deceased she knew him only by that name and his real name was not known to her. As suggested by the defence if there was a Police and Army 'touch up' there was no difficulty for the interested parties to give the real name of the assailant to the mouth of the witness. Since the medical evidence corroborated the evidence of witness Punchimahattaya there is no reason for us to reject the evidence of this witness.

After the appeal was argued and the judgment was reserved we found that an incorrect Gazette notification had been specified in the indictment. The offence was alleged to have been committed on the 7th of May 1988 and the Gazette mentioned in the indictment was No. 53/7 dated 20th June 1989. At that stage we invited the parties to file written submissions on the question whether there was a proper indictment before the Court to convict the accused-appellant. Both parties filed their respective written submissions on the 1st of August 1979.

The Senior Counsel for the defence had submitted that the particular regulation under which the appellant was charged came into force after the incident and very much later. i.e. in 1989 and therefore at the time of the commission of the offence there was no offence known under the Emergency regulations and the indictment that had been presented offended the general principles against retrospective operation of penal legislation.

The Senior State Counsel in his submissions contended that the accused-appellant was not indicted in respect of an offence which did not amount to an offence at the time it was committed. He pointed out that the self-same act was an offence in terms of regulation 24 (1) (B) of the Regulations dated 18/4/1988 which was produced marked 'X' at the appeal stage.

• It is significant to note that the offence can be clearly identified as that created by the identical regulation number viz (1) (b) in several Emergency Regulations as well, right throughout the period notwithstanding the fact that different gazettes have been issued to cover different periods of time.

In support of the above contention the learned Senior State Counsel relied on Section 4 of the Public Security Ordinance which states thus:

"The expiry or revocation of any proclamation shall not affect or be deemed to have affected".

(a) The past operation of anything duly done or supposed to be done under part 11 of this Ordinance while that part was in operation,
(b) Any offence committed or any right liability or penalty acquired or incurred while that part was in operation,
(c) The institution, maintenance or enforcement of any action proceeding or remedy under that part in respect of any such offence, right liability or penalty.

It is also relevant to note articles 155 (2) and 155 (3) of the Constitution.

Article 155 (2) of the Constitution reads as follows:–

"The power to make emergency regulations under Public Security Ordinance or the law for the time being in force relating to Public Security shall include the power to make regulations having the legal effect of over-riding amending and suspending the operation of the provisions of any of law except the provisions of the Constitution".

Article 155 (2) of the Constitution reads as follows:–

"The Provisions of any law relating to Public Security empowering the President to make emergency regulations which have the legal

effect of over-riding, amending or suspending the operation of the provisions of any law shall come into operation except upon making of a proclamation under such law bringing such provisions into operation".

From the above, one could safely conclude that the offence with which the accused was charged was in existence and known to law at all times of the commission of the act.

The next question to be considered is whether the accused-appellant was misled by the failure to specify the correct Gazette Notification and thereby resulted in a miscarriage of Justice.

Section 166 of the Code of Criminal Procedure Code Act No. 15 of 1979 states that "any error in stating either the offence or the particulars required to be stated in a charge and any omission to state the offence or other particulars, shall not be regarded at any stage of the case as material, unless the accused misled by such error or omission".

The requisites of a charge are set out in Section 164 and 165 of the Code of Criminal Procedure Act. The purpose underlying these two Sections is clear. The accussed-appellant must be well appraised of the charge against him in order to defend himself against it. If the mistake in the charge induces a certain belief in the accused, which affects the proper conduct of his defence that could be regarded as a material object.

The three illustrations to Section 166 provide clear indications as to its scope. Illustration(1) relates to a failure to set out the *mens rea* of the offence. Illustration (b) relates to a failure to comply with Section 165(3). In both cases the ultimate test to be applied is the direct effect of the conduct of the defence. This is further clarrified by illustration (c). In the present appeal can the defence be heard to say that had the correct date and number of the gazette was specified in the indictment, the defence would have been different.

In the instant case the charge levelled against the accused-appellant was that he committed the murder of Dewagiri Premaratne

on the 7th of May 1988. He had been defended by an Attorney-at-Law at the Trial. The defence the accused-appellant had taken was a simple denial of the commission of the crime. There is nothing in the petition of appeal to indicate that due to the mistake in the indictment the accused-appellant was misled and thereby caused prejudice to his defence.

In the circumstances it is not difficult for us to conclude that the presence or absence of the 'error' could not have made any difference to the general conduct of the defence and therefore cannot be regarded as a material error in terms of Section 166 of the Code.

The Senior State Counsel submitted that the 'error' in the indictment was curable and had not caused any substantial miscarriage of justice to the accused-appellant and contended that Sections 436 of the Code of Criminal Procedure Act No. 15 of 1979 and Section 456 A of Amended Act No. 52 of 1980 would be operative in these circumstances.

It is to be observed that Section 436 and 456 A have no application to a fundamental defect of procedure. See *Abdul v. Bribery Commissioner*[1].

A mere irregularity may or may not result in a miscarriage of justice, but a fundamental defect such as the complete absence of a charge is placed on a different footing. Such a defect is deemed to cause a miscarraige of justice in the sense of a mistrial due to sound reasons of policy.

In *Molagoda v. Gunaratne*[2] Counsel for the accused-appellant sought to elevate the question of the wrong Gazette in the charge to a fundamental defect of procedure. He contended that an omission to frame a charge in accordance with the provisions of the Criminal Procedure Code was an omission to frame a charge at all.

This argument was rejected by the Supreme Court which held that a breach of a specific rule of law in the Code was curable by the

application of Section 425 of the Old Criminal Procedure Code (which is equivalent to section 436 of the present Code) if the breach had not caused a failure of justice.

In an Indian Case *Om Prakash v. State of Uttara Pradesh*[3] the accused was charged and convicted under Section 165A of the Penal Code of India – High Court finding that Section 165A was not enacted when the offence was committed, altered the conviction to one under Section 161/109 of the Penal Code. It was held that the error in the charge was not material when no objection was raised at any earlier stage and no prejudice had been suggested or could be found.

The indictment in issue is in conformity with every requirement imposed by the Code except for the error in the date of the Gazette notification. Had the objection to the indictment been taken at the trial it would have been open to Court to have acted under Section 167 of the Code of Criminal Procedure Act to amend the indictment. Senior Counsel for the appellant too conceded that is was open for the prosecution to have amended the indictment at any stage before the close of the prosecution case.

Having considered the submission of the Learned Counsel for the appellant and the Learned Senior State Counsel and examined the provisions of law and the decisions cited we hold that the failure to give the correct particulars of the Gazette has caused no prejudice to the accused-appellant.

We note with regret that callousness in which this indictment had been drafted and signed. Senior Officers of the Attorney-General's Department who man special units should be more careful in placing their signatures to indictments specially when the law permits only an officer of a particular designation should sign the indictment.

The relevant gazette that is applicable to the accused-appellant Extraordinary gazette of the Democratic Socialist Republic of Sri Lanka No. 502/3 of 18th April 1988. The relevant regulation is 24 (1)

(b) of the said Gazette. The material portion of that regulations reads thus "shall be liable to suffer death or imprisonment for life". The Supreme Court in *King v. Punchi Banda*[4] has construed the above words as enabling the Trial Judge to impose a term of imprisonment short of life imprisonment. The above view had been confirmed by the Court of Criminal Appeal in *Queen v. Alpin Singho*[5].

The Inspector of Police Dewapriya who conducted the investigations into this case has stated in his evidence that the accused-appellant had absconded after the incident and that he was taken into custody on 20.8.1989 at Nuwara Eliya. We find that the accused-appellant had been kept in detention thereafter and never been enlarged on bail. After conviction on 26.8.1993 he is in remand custody pending the decision of this appeal.

We have taken the above matters into consideration and are of the view that the ends of justice would be satisfied if a lesser sentence is imposed. Accordingly we set aside the sentence of life imprisonment imposed on the appellant and sentence him to a term of eight years from today. Subject to the above variation this appeal is dismissed.

GUNASEKERA, J. (P/CA) – I agree.

Appeal dismissed.