

1963 Present : T. S. Fernando, J., and Abeyesundere, J.

W. E. DE ZYLVA, Appellant, and THE QUEEN, Respondent

*S. C. 28 of 1962—D. C. (Criminal) Colombo,
N 2087/39676 D*

Criminal breach of trust—Indictment—Effect of charge taking in a period in excess of one year—Illegality—Penal Code, s. 391—Criminal Procedure Code, s. 168 (2).

The accused was charged with having committed criminal breach of trust “between the 7th day of January 1959 and the 8th day of January 1960”.

Held, that the charge, by taking in a period in excess of one year, was defective in that it contravened the provisions of section 168 (2) of the Criminal Procedure Code. Such a charge is illegal and not merely irregular.

APPEAL from a judgment of the District Court, Colombo.

Colvin R. de Silva, with *K. Jayasekera* and *N. M. S. Jayawickrama*, for the accused-appellant.

P. Colin-Thome, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 24, 1963. T. S. FERNANDO, J.—

The charge contained in the indictment laid against the appellant was as follows :

“That between the 7th day of January, 1959 and 8th day of January 1960 at Maradana, in the division of Colombo, within the jurisdiction of this Court, you did while being employed in the capacity of a servant, to wit ; Store Keeper in C. C. Wakefield & Company Limited, Colombo, commit criminal breach of trust of 178 (forty five gallons) and 18 gallons drums of oil valued at Rs. 32,787·92, entrusted to you in your capacity as such servant, and that you have thereby committed an offence punishable under Section 391 of the Penal Code.”

Before the appellant was called upon to plead to this charge in the District Court, counsel for him contended that the charge was defective in that it had been framed in violation of section 168 (2) of the Criminal Procedure Code. The learned trial judge overruled counsel's objection to the validity of the charge on the ground that it is devoid of merit, recorded the appellant's plea of not guilty, proceeded with the trial and convicted the appellant.

The same objection based on the illegality of the charge in the indictment has been pressed before us in appeal and it becomes necessary to examine the provisions of section 168 (2) of the Criminal Procedure Code. That sub-section removed certain difficulties that confronted a prosecution in a case where there were several misappropriations of money or items of other movable property spread over a period of time, but the meaning of the proviso to the sub-section has always to be remembered. The period in respect of which misappropriations of movable property may be so lumped together cannot exceed one year.

The facts of the case have not been examined by us. The objection taken relates to the charge, viz. to the charge as framed. Section 168 (2) which permits the joinder of more than one act of misappropriation relates solely to the framing of the charge. When the proviso to the sub-section enacts that the time included between the first and last of *such dates* shall not exceed one year, the reference is, no doubt, to the expression "dates" in the main body of that sub-section. That reference is obviously to the dates to be specified in the charge to be framed. In whichever way one calculates a year, the expression "between the 7th day of January 1959 and the 8th day of January 1960" takes in a period in excess of one year. Accordingly, it is difficult to resist the conclusion that the trial proceeded on a charge framed in violation of the provisions of the Code in respect of the framing of charges. Such a charge is illegal and not merely irregular. As was stated by Lord Halsbury, L.C., in the case of *Subrahmania Ayyar v. The King-Emperor*¹, it is not possible "to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment." No valid trial could have taken place on an illegal charge, and we are therefore compelled to quash the conviction and sentence and to direct that the appellant be discharged. To prevent avoidable argument in the future, I would say that the quashing by us of the conviction of the appellant in the circumstances I have indicated above does not have the effect of an acquittal on the charge laid in the indictment.

ABEYESUNDERE, J.—I agree.

Conviction quashed.

¹ *I. L. R. 25 Madras 97.*