1931

Present : **Maartensz A.J.**

RAJAPAKSE *v.* SILVA.

184—*P. C. Colombo*, 23,874.

Charge—Particulars to vague—Period of time at which offence ws committed—Irregularity—Criminal Procedure.

The accused was charged with causing hurt to a girl by beating her with a cane during the month of January, but the evidence tended to establish that she had similarly caused hurt during a course of seven months.

Held, that the conviction was irregular as the evidence was not confined to the point of time specified in the charge.

APPEAL from a conviction by the Police Magistrate of Colombo.

H. V. Perera (with him *de Jong*), for accused, appellant.

May 13, 1931. MAARTENSZ A.J.—

The accused-appellant in this case, a Sinhalese lady, was charged (1) with causing hurt to a servant girl about 10 years old named Lizzie Nona " on or about the month of January, 1931 ", by burning her with a candle, and (2) with causing hurt to the girl by beating her with a stick and a cane at the same time and place. She was acquitted on the first count and convicted on the second and sentenced to three months' rigorous imprisonment.

The facts of the case are as follows :— The girl was placed in the accused's employ about July or August, 1930. On February 5, 1931, her mother went to take her back, and on her request being refused informed the police at the Pettah. A police constable was sent with the mother and after some demur the child was given up. The police constable took the child and mother to the Police Station. After he had made an entry— I take it that the child has been restored to her mother—the woman complained that the child had been assaulted and burnt. Lizzie Nona then made a statement to the effect that the accused caned her even for a simple mistake and burnt her mouth with a candle. She was examined by the Judicial Medical Officer the same day. He found circular contusions on various parts of her body, a circular ulcer on the left side of the roof of the mouth, and 37 longitudinal scars on the face, chest, back, buttocks, and thighs.

The girl's evidence is that the scar on her mouth was caused by a lighted candle being forced into her mouth. She enlarged on this by saying that it was relit and put into her mouth five or six times and that the wax fell upwards. This was her evidence on February 13. There can be no doubt that this is a gross falsehood, for if a lighted candle had been introduced into her mouth in the way described by her she would not have escaped with a single ulcer, nor could the

ulcer have been caused by the hot wax of the candle, for the ulcer was in the roof of the mouth and the wax could not possibly have dripped upwards.

Apart from the inherent improbability of the story there is the fact that on the first day she gave evidence, on February 10, she said that the injury to her mouth was caused by medicine she had applied for a toothache, and the doctor was of opinion that the ulcer might have been caused by a drop of creosote.

The Magistrate very rightly came to the conclusion that the accused should not be convicted on this evidence on the charge of having burnt Lizzie Nona, and acquitted her.

As regards the second charge on which she was convicted it was contended that the accused had been prejudiced by the vague charge framed by the Magistrate and by the admission in evidence of hurt caused to Lizzie Nona by caning her during the whole period she was in the accused's employ, which, it was argued prejudiced the Magistrate against the accused. In support of this contention I was referred to two cases.

In the first case, *Inspector of Police, Ambalangoda v. Fernando* [1], the accused was charged with selling rice at his boutique on July 7, 1919, at Rs. 35 per bag in contravention of the order of the Deputy Food Controller fixing the price at Rs. 22·27. The charge did not specify a particular sale nor did it give the name of any purchaser. The prosecution adduced evidence of five sales at the accused's boutique on the day in question at the rate of Rs. 35 per bag. It was held that the failure to specify a particular sale was in effect a joinder of an indefinite number of charges and such joinder was irregular as only three offences of the same kind committed in the course of the year could legally be joined in one charge. A similar decision was arrived at in the case of *Tikiri Duraya v. Hinni Appuhamy* [2].

[1] (1919) 6 *C. W. R.* 296.
[2] (1920) 7 *C. W. R.* 170.

In this case, no doubt, it would have been difficult, if not impossible, to frame definite charges owing to the canings being spread over a period of seven months and the inability of the girl, owing to her age, to give particulars regarding the dates on which she was caned. But the charge was limited to hurt caused in the month of January and the evidence should have been limited to what was done to the girl during that period. The injuries which were most probably caused by a cane were those described by the doctor as longitudinal scars. He has not however stated how many of these scars were on the face and chest. Judging by his evidence there was only one on the face and one on the chest, for he said the mark by the eye may be the result of a scratch and the one on the chest may be the result of a contusion or a lacerated wound. However that may be, it is impossible to say from the evidence that the woman had caned the child on the face and chest—parts of the body on which the cane should not be used even in the case of moderate chastisement.

Speaking of the injuries generally the doctor said that some of the scars were recent and some not so recent, but he has not given evidence that any of these scars were the result of caning in the month of January. He was not asked whether the longitudinal scars indicated more than moderate chastisement. He said, however, that he could not say that the girl was given more than two or three cuts at a time. On the evidence of the girl it is impossible to say how many of these scars were due to canings by the accused and how many were due to her being beaten by the accused's children. She told her mother that the children beat her and everyone beat her. She said in her evidence that the children used to strike her for slight things and that a boy called James used to beat her. She went back on that evidence and said that she was taught to say that her mouth was not burnt, that medicine was

put as a toothache cure and that James used to beat her.

The Magistrate was of opinion that two points appeared distinctly from Lizzie Nona's evidence, one of them being that attempts had been made by the accused or some one on her behalf to render the case abortive by training her to give a different story on different dates. The girl did no doubt give different stories on different dates, but her evidence that the accused on February 12 asked her to change her story by promising her Rs. 50 and a new saree is entirely negatived by the evidence of P. C. Rajapakse. The girl was taken to the Police Station on February 5, where she made her complaint that she had been assaulted and burnt, and from that time she had been in the custody of her mother, and neither the accused nor anybody else had the opportunity of teaching the girl a story. Nor am I able to agree with the Magistrate on the other point—that she has been the victim of intense illtreatment by this accused merely from the fact of the scars on her body in the absence of any evidence that these scars were the result of any cruel or immoderate chastisement.

As regards one of the injuries, the one on her shoulder described as 4 in the diagram—this diagram is not in the record—she admitted that she got it when lighting crackers for the children. The doctor in his evidence stated that injuries numbers 1, 2, 4, and 6 could have been caused by a cane, but injuries 1, 2, and 4 are described as contusions so many inches in diameter, and I find some difficulty in understanding how a circular contusion could be caused by a cane.

The use of the expression " diameter " certainly suggests circular injuries. At least one of them, according to the girl's evidence, was not caused by a cane but by crackers. The accused admitted that she did chastise the girl moderately when necessary, and it is clear from the evidence of the accused's witnesses that the girl did not at any time appear to be suffering from immoderate chastisement. It is also, I think, evident that the complaint about the canings was made because the accused stopped the girl's pay for two months and she was removed without notice.

I have very carefully considered the evidence in this case, as the learned Magistrate has come to such a strong conclusion against the accused, but I am unable to agree with him that the girl had been the victim of intense illtreatment. As I have pointed out, no attempt was made to prove by the evidence of the doctor that the scars were undoubtedly the result of the use of the cane and were caused by immoderate chastisement.

Apart from the weakness of the evidence I must uphold the legal objection that the evidence was not confined to what took place in January and that as a matter of fact there is no evidence that the accused caned the girl in that month.

I accordingly set aside the conviction of the accused and acquit her.

Set aside.