

SIYAMBALAGASTENNA
v.
O.I.C. CRIMES, POLICE STATION, KANDY

SUPREME COURT

G. P. S. DE SILVA, CJ

PERERA, J. AND

SHIRANI BANDARANAYAKE, J.

S.C. APPEAL NO. 146/96

H.C. KANDY APPEAL NO. 150/92

M.C. KANDY NO. 59492

9TH OCTOBER, 1997.

Penal code – Criminal Breach of Trust – S. 392 of the code – Alteration of charge – S. 167 of the Code of Criminal Procedure Act.

The accused who was charged with criminal breach of trust of a sum of Rs. 11,065.65 was convicted by the Magistrate of that offence, but in respect of a sum of only Rs. 1,063.95.

Held:

The Magistrate did not "alter" the charge within the meaning of S. 167 of the Code of Criminal Procedure Act.

APPEAL from the judgment of the High Court, Kandy.

A. S. M. Perera, PC with D. R. Ashok and M. S. Janaki *Siyambalagastenna* for the accused-appellant.

Dappula de Livera, SSC for the complainant-respondent.

Cur. adv. vult..

27th October, 1997

G. P. S. DE SILVA, CJ

The charges preferred against the appellant in the Magistrate's Court were as follows:

- (1) Criminal Breach of Trust of a sum of Rs. 11,065/65 whilst being the Manager of the Kandyan Art Association during the period 1.4.76 to 31.12.76, an offence punishable under section 392 of the Penal Code.
- (2) At the time and place aforesaid, failed to pay the telephone bills for May, June and July amounting to a sum of Rs. 663/95 and made a false entry in respect of the payment, an offence punishable under section 467 of the Penal Code.

After trial, the appellant was acquitted on charge No. (2); on charge No. (1) he was convicted of having committed criminal breach of trust of a sum of *only Rs.1,063/95*. The principal submission advanced on behalf of the appellant was that the Magistrate "altered" charge No. (1) which alleged criminal breach of trust of a sum of Rs. 11,065/65, inasmuch as he convicted the appellant of criminal breach of trust of only Rs. 1,063/95; that the Magistrate having "altered" the charge in his judgment failed to comply with the mandatory provisions of section 167 of the Code of Criminal Procedure Act; such failure, it was contended, vitiated the conviction.

On an examination of the evidence at the conclusion of the trial, the Magistrate found that the appellant has committed criminal breach of trust of a *lesser* sum of money than the amount stated in the charge. The penal section under which he was convicted was the same as the section alleged in the charge; all other particulars such as the

time and place of the offence were the same, except that the quantum of money in respect of which the offence was committed was *less* than what was stated in the charge. On a consideration of these facts, I am of the view that the Magistrate did not "alter" the charge within the meaning of section 167 (1) of the Code of Criminal Procedure Act. The appellant was convicted of the same charge, the only difference being that the offence was committed in respect of a lesser sum of money than what was set out in the charge.

In this connection it is not without significance that section 178 (1) of the code would have permitted the Magistrate to have convicted the appellant of an offence under section 389, (if the facts warranted such conviction) although he was charged with an offence under section 392 of the Penal Code. Illustration (a) to section 178 of the Code makes this position very clear. But in the instant case even the penal section remained unaltered. I accordingly hold that there was no "alteration" of the charge within the meaning of the section 167 of the code.

For these reasons the conviction and sentence are affirmed and the appeal is dismissed.

PERERA, J. – I agree.

BANDARANAYAKE, J. – I agree.

Appeal dismissed.