

Muhammad Nazirul Azmi Bin Masdi

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 8 of 2024)**

Haji Abdullah Soefri bin POKSM DSP Haji Abidin, JC

28th October 2024

*Outraging Modesty – Possession of obscene photographs of child – whether charge is defective
– Appeal – Dismissed*

Mr Hj Mohammad Daud Ismail (M/S Daud Ismail and Company) for the Appellant.

PO Hjh Siti Muízzah Binti Hj Sabli for the Public Prosecutor/Respondent

Cases cited:

Anuar Bin Ghazali v Public Prosecutor [2021] 9 MLJ 409

Mathivanan Mahathevan v Public Prosecutor [2017] MLHRU 1012 1

Public Prosecutor v Margarita B Cruz [1987] 2 MLRH 228

Mas Haini Mohd Zaini v Public Prosecutor [2022] MLHRU 134

Chen Soon Thien v Public Prosecutor [HACM No. 32 of 2017]

RULING

Hj Abdullah Soefri, JC:

INTRODUCTION

On 29th February 2024 in the Magistrate’s Court, the Appellant was charged as follows:

Amended 1st Charge

That you, sometime between June 2023 until 24th January 2024, in Brunei Darussalam, did have in your possession obscene photographs of a child, to wit, a photo of Miss X (Female, 15 years old,

D.O.B 23/5/2008) stored in your Samsung Galaxy A12 Phone and you have thereby committed an offence punishable under section 293A of the Penal Code, Chapter 22.

Additional 2nd charge

That you, sometime between October and November 2023, in Brunei Darussalam, did use criminal force onto one Miss X (Female, 15 years old, D.O.B 23/5/2008), to wit, by groping and licking her breast and rubbing her genital area, intending thereby to outrage or knowing it to be likely that you will thereby outrage the modesty of the said Miss X, and you have thereby committed an offence punishable under section 354 of the Penal Code, Chapter 22.

Additional 3rd charge

That you, sometime in January 2024, at the vicinity of house addressed No. 21-D, Kg Sungai Kebun in Brunei Darussalam, did use criminal force onto one Miss X (Female, 15 years old, D.O.B 23/5/2008), to wit, by groping her breast and rubbing her genital area, intending thereby to outrage or knowing it to be likely that you will thereby outrage the modesty of the said Miss X, and you have thereby committed an offence punishable under section 354 of the Penal Code, Chapter 22.

GROUND OF APPEAL

The Appellant as stated in the Notice of Appeal, appeals from the decision of the Magistrate Court rendered on the 14th May 2024 in which the Court ruled that the Amended 1st and Additional 3rd charges were not defective but the Additional 2nd charge was defective, yet the prosecution informed to pursue the said Additional 2nd defective charge without any amended as ordered by the Court.

The grounds of appeal as set out in the Petition of Appeal are as follows:

- a. That the Magistrate has erred in law in not directing the Prosecution to amend the 2nd Additional Charge to state the actual location of the offence after ruling that the charge is defective, where the Prosecution is requested to include the required location in the charge. Despite the ruling, the Prosecution have maintained the Additional 2nd Charge without any amendment. This undermines the fairness of the process.
- b. That the Magistrate has erred in law in allowing the Prosecution to proceed on the acknowledged defective Additional 2nd Charge which violates the Appellant's right of fair trial and due process as provided under Section 153 (c) of the Criminal Procedure Code. Such error warrants intervention of this Appellate Court to dismiss the defective charge to proceed.

- c. That the Magistrate has erred in law in allowing the prosecution to proceed despite recognizing the defect in the Additional 2nd Charge and despite explicitly ordering the Prosecution to amend the Additional 2nd Charge.
- d. The Appellant has suffered and continues to suffer prejudice as a result of being prosecuted under the said Additional 2nd Defective Charge, therefore, affects the ability to mount an effective defence.
- e. In view of the decision of the Prosecution to maintain the Additional 2nd Charge without any amendment, the said Charge is defective and should be dropped.
- f. The Magistrate has erred in law in finding the 1st Charge and the Additional 3rd Charge are sufficiently particularized when in fact that the requirements under Section 153(1) Criminal Procedure Code have not been strictly complied.

APPELLANT SUBMISSION

The Appellant's grounds of appeal have been supported by the Appellant's submission. It is submitted that the Prosecution's failure to state the actual date, time and place of the offence in the charge is a clear contravention of section 153(1) of the Criminal Procedure Code. The defective charge can lead to a miscarriage of justice if it causes prejudice to the accused. It is further submitted that the Magistrate's failure to direct the Prosecution to amend the Additional 2nd Charge, instead of merely a request to amend which violates the Appellant's right to a fair trial and due process under **Section 153(1) of the Criminal Procedure Code** which provides as follows:

"Particulars as to time, place and person

153. (1) The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged."

The Appellant further submits that the omission of crucial details such as the place of the offence has prejudiced the Appellant by hindering the preparation of a coherent and effective defence. The Appellant cited several cases in support of the above views amongst others, which are as follows, **Anuar Bin Ghazali v Public Prosecutor [2021] 9 MLJ 409**, **Mathivanan Mahathevan v Public Prosecutor [2017] MLHRU 1012 1** and **Public Prosecutor v Margarita B Cruz [1987] 2 MLRH 228**.

The Appellant added in their submission that *“from the Notes of Proceedings, it is evident that the Prosecution, despite being given sufficient caution, chose to proceed with the defective charge. The Prosecution’s acknowledgement, “Yes, Your Honour,” indicates their decision to proceed without the necessary amendments.”*

The Appellant submits in paragraphs 5.35 to 5.37 amongst others that *“the inability to raise a defence of alibi without the knowledge of the date and time of the alleged offence is highly prejudicial to the appellant”*.

The Appellant submitted that the Amended 1st Charge and the additional 3rd Charge are not well particularized as they failed to discern the particulars mandated by Section 153(1) of the Criminal Procedure Code for the 1st Amended Charge and the Additional 3rd Charge did not provide the date and time of the alleged offence and the omissions in both charges has made both charges fundamentally defective.

RESPONDENT SUBMISSION

The Respondent in their submissions are as follows:

As to the 2nd Charge, the learned Magistrate did not in any way rule that the charge is defective as claimed by the Appellant.

“In respect to the additional 2nd Charge, it concerns the offence of outraging modesty. The defense took issue that no specific dates, time and place were particularised in the charge. Although the court finds that the specific time period provided by the charge is sufficient, section 153(1) of the Criminal Procedure Code does provide the need to state the place where the alleged offence took place. Unless it can be justified at this stage to proceed with the charge as it is, the court hereby request that the prosecution to amend the charge to include the required location concerned.”

Based on this, the Respondent submitted that the Chief Magistrate did not make any ruling that the 2nd Charge is defective. It is submitted that *“The fact she still allows the Prosecution to proceed with justification goes to show that the Charge is still acceptable in law.”* It is further submitted that the term ‘defective’ by the Appellant is misleading.

The Chief Magistrate did request for the Prosecution to amend the 2nd Charge as can be seen in the Notes of Proceedings;

“Unless it can be justified at this stage to proceed with the charge as it is, the court hereby request that the prosecution to amend the charge to include the required location concerned.”

The Respondent submitted that it is a mere request because the Chief Magistrate knew that it is orderly that these charges were framed according to the information obtained during the investigation. The Chief Magistrate made reference to the ***Mas Haini Mohd Zaini v Public Prosecutor*** where it was stated “... When drafting a charge, it will be based on the evidence that the prosecution has obtained from the investigations conducted.”

The Respondent submitted that the charges were framed based on the victim’s memory and this is not unusual. In ***Chen Soon Thien v Public Prosecutor*** it was stated that;

“It is normal practice to specify the date and time of the offence on account of the victim’s memory and recollection of it. The event had happened sometime ago and it is expected that specific details of routine in nature may be difficult to recall.”

The respondent submitted that the particulars that are required in Section 153 (1) of the Criminal Procedure Code are met in the 2nd Charge; in which the range of month which states “sometime between October and November 2023” as well as the location “*in Brunei Darussalam*” were not omitted. These facts cannot be said to mislead the Appellant.

In ***Chen’s case (supra)*** the learned judge states as follows:

“It is fundamental in drafting a charge that it must state the offence with which the accused is charge. If the law which creates the offence gives it any specific name as was in this case ‘outraging modesty’, the offence may be described by the name only. Apart for the requirement of time and place of the alleged offence and against whom the offence was committed, there is no requirement there must be specific and particularized in the charges as is stated by the operative word “if any” in Section 153(1) of the same. Suffice that it generally states a particular period of time and place of the alleged offence to give him, notices of when the same allegedly occurred.”

The respondent states that the Prosecution has the power to amend or alter charges at any time before judgment as provide for under **Section 158** of the same;

“(1) Any Court may alter or add to any charge at any time before judgment is pronounced or, in the case of trials with the aid of assessors, before the opinions of the assessors are expressed.”

With this provision and the Chief Magistrate remarks, the Respondent submits that it is not wrong in law for the Prosecution to proceed with the charges as it is at this juncture; as the Prosecution has the power to amend or alter charges at any time before judgment. It was further submitted that the ground of the Appellant’s inability to prepare the defence is not a valid ground as the law permits parties to make amendments any time before judgment. The defence has the right to recall any witness, if the need arises if an amendment is made to the charge mid trial.

As to the 1st and the additional 3rd charge, the Respondent submits that as for the 1st charge that no particulars were omitted as required under section 153. The range of time and location that were framed were not unusual to be drafted as such and therefore the 1st charge is not defective.

As to the 3rd Additional charge, it is submitted that the particulars in the said charge are sufficient to give the Appellant notice of the offence as required under section 153 of the Criminal Procedure Code and it is not defective.

CONCLUSION

I will deal with the Amended 1st and the 3rd Additional charge first. The question is whether the Magistrate has made an error in finding that these two charges were not defective.

Having had assessed all the submissions from both the Appellant and the Respondent and also having had analysed the decision of the Magistrate, I agree with the Magistrate that the charges contain the essential ingredients of the offence. The particulars of the date [months], place and the type of offence and the victim are set out in the charge and are reasonably sufficient to give the appellant notice of the matter with which he was charged and it does not mislead the Appellant and it does not prejudice the Appellant's ability to mount an effective defence. The particulars are based on the available information at that time. As it was stated in ***Chen Soon Thien v Public Prosecutor***:

"It is normal practice to specify date and time of the offence on account of the victim's memory and recollection of it. The event had happened some time ago and it is expected that specific details of routine in nature may be difficult to recall."

I disagree with the Appellant's submission that these charges *"are not well particularized as they failed to discern the particulars mandated by Section 153(1) of the Criminal Procedure Code for the 1st Amended Charge and the Additional 3rd Charge did not provide the date and time of the alleged offence and the omissions in both charges has made both charges fundamentally defective."*

As for the Amended 1st Charge and Additional 3rd Charge the Chief Magistrate is correct in her findings that these two charges are not defective and I dismiss the appeal.

Now I will deal with the Additional 2nd Charge.

The Appellant in his earlier submission in his conclusion in **paragraph 9** states;

“...The Prosecution’s failure to amend defective charges, despite judicial recognition, contravenes legal principles and compromises trial fairness. Proceeding with defective charges undermines judicial integrity and sets a dangerous precedent, signaling that court orders can be disregarded, eroding the rule of law.”

In the Appellant’s reply submission in **paragraph 23**:

“...the prosecution’s failure to amend the charge despite the clear indication from the Honourable Court that such an amendment was necessary has significantly prejudiced the Appellant’s ability to mount an effective defense. The Honourable Court’s request to amend the charge reflects a recognition that the charge, in its current form, is ambiguous and fails to meet the necessary legal standards as prescribed under Section 153 (1) of the Criminal Procedure Code.”

The difference from the Appellant’s first submission and the subsequent submission that I have highlighted above is that the word ‘defective’ was not present in the subsequent submission.

After reading the Notes of Proceedings, I could not find any findings made by the Chief Magistrate that the 2nd Charge is defective. The Chief Magistrate states as follows:

“In respect to the additional 2nd Charge, it concerns the offence of outraging modesty. The defense took issue that no specific dates, time and place were particularised in the charge. Although the court finds that the specific time period provided by the charge is sufficient, section 153(1) of the Criminal Procedure Code does provide the need to state the place where the alleged offense took place. Unless it can be justified at this stage to proceed with the charge as it is, the court hereby request that the prosecution to amend the charge to include the required location concerned.”

From the above, it is clear that the Magistrate did not make any finding that the Charge is defective and she cited the case of **Mas Haini Mohd Zaini v Public Prosecutor** where it was stated *“... When drafting a charge, it will be based on the evidence that the prosecution has obtained from the investigations conducted.”*

The Additional 2nd charge as it stands did specify the date [month], the place, the victim and the offence and these particulars are based on the available information at that time. Section 153 did states ‘if any’ and I agree with the Respondent when they cited **Chen’s case** which stated as follows:

“It is fundamental in drafting a charge that it must state the offence with which the accused is charged. If the law which creates the offence gives it any specific name as was in this case ‘outraging modesty’, the offence maybe described by the name only. Apart for the requirement of time and place of the alleged offence and against whom the offence was committed, there is no requirement there must be specific and particularized in the charges as is stated by the

operative word “if any” in Section 153(1) of the same. Suffice that it generally states a particular period of time and place of the alleged offence to give him, notices of when the same allegedly occurred.”

Having had said all the above I am satisfied that the 2nd Additional Charge is not defective and the particulars of the date [month], place and the type of offence and the victim are set out in the charge and are reasonably sufficient to give the appellant notice of the matter with which he was charged and it does not mislead the Appellant and it does not prejudice the Appellant’s ability to mount an effective defense. The particulars are based on the available information at that time. I dismiss the Appellant appeal on the Additional 2nd Charge.

Section 158 of the Criminal Procedure Code provides that:

“(1) Any Court may alter or add to any charge at any time before judgment is pronounced or, in the case of trials with the aid of assessors, before the opinions of the assessors are expressed.”

Appeal is dismissed.

HAJI ABDULLAH SOEFRI BIN POKSM DSP HAJI ABIDIN
Judicial Commissioner